# NEW RELIGIOUS MOVEMENTS AND THE NEED FOR GREATER CLARITY OF "RELIGION" UNDER TITLE VII

*Kevin Farrell*[*]

## I. INTRODUCTION

The history of religious acceptance in the United States has been complicated from the very beginning. While the vast land of the New World fostered expansive religious freedoms not found in Europe, the same cannot be said for religious tolerance,[1] specifically tolerance of dissenting and minority religions.[2] Since that time, Roman Catholics, Jews, Jesuits, Masons, Mormons, Muslims, Jehovah's Witnesses and so-called "cult" sects like Scientologists, Hare Krishnas and members of the Unification Church have felt the sting of harassment and discrimination in this country.[3] The prevalence of religious bigotry in American history is such that Professor Harvey Cox observed, "[I]t seems Americans are never really happy unless there is some unfamiliar religious group to abuse."[4]

Legislators sought to curtail this abuse in employment decisions when they included religion among the protected classifications of the landmark 1964 Civil Rights Act. Title VII of the Civil Rights Act prohibits employer discrimination on grounds

---

[*] J.D. Candidate 2017, Rutgers Law School. Many thanks to Dominic Giova for his comments and advice, and my family, for everything else.

[1] *See* 2 CHRISTOPHER F. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION 22 (1989) (noting that religious pluralism in colonial America was extensive not due to tolerance so much as it was to space, when nonconformists could simply move away from disapproving others).

[2] As Harvey Cox, retired Professor of Divinity at Harvard University, commented:

> Despite all the elegant rhetoric about the Pilgrim fathers and the smiling exchanges at interfaith banquets, America has not set an exemplary record in the area of religious freedom. The English Calvinists who settled in Plymouth and Massachusetts Bay did not come to found a society where spiritual liberty would reign supreme. They came to found a theocracy . . . . Unpopular and unconventional religious beliefs and practices were not only unwelcome, they were not tolerated.

DAVID G. BROMLEY & ANSON D. SHUPE, JR., STRANGE GODS: THE GREAT AMERICAN CULT SCARE xi (1st ed. 1981).

[3] *Id*.

[4] *Id*.

of race, color, sex, and national origin, as well as religion.[5] Title VII cases alleging religious discrimination present a unique challenge for the Courts. As one Court has observed, "[a] person's religion is not like his sex or race—something obvious at a glance."[6] Unlike the other protected classes, which are defined by immutable characteristics such as one's race or national origin, religion stands apart due to its inherent changeability. As such, religious discrimination claims require the Court to adjudicate who is entitled to this protection. Generally, this requires an inquiry into whether an employee's religious practice or belief is the sort of "religion" or "religious belief" Congress intended to protect under Title VII. Such inquiries are complicated by Title VII's broad definition of "religion." [7] The Equal Employment Opportunity Commission (EEOC) has provided guidelines on religious discrimination that define religious practices to include much more than traditional religious observance.[8] The language of Title VII and the EEOC guidelines could lead to the reasonable conclusion

---

[5] It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2012).

[6] Reed v. Great Lakes Cos., 330 F.3d 931, 935–36 (7th Cir. 2003).

[7] 42 U.S.C. § 2000e(j).

[8] In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

29 C.F.R. § 1605.1 (1967).

that an employee may practice religion in a unique way and still be protected from discrimination. However, the actual jurisprudence in this area is not so straightforward. Further complicating matters is the Supreme Court's refusal to adopt a definitive test to guide inquiries into what constitutes "religion" and "religious beliefs" under Title VII.

This lack of well-defined boundaries is especially burdensome on employers faced with the increasingly difficult task of understanding their legal duty to accommodate the religious practices of their employees. Under Title VII, an employer must accommodate religious exercise "unless [the] employer demonstrates that he is unable to reasonably accommodate employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[9] Under current jurisprudence however, an employer may be required to accommodate an employee's white supremacist beliefs,[10] but not the same beliefs when they grow out of an employee's membership in the Ku Klux Klan (KKK).[11] An employer may similarly be required to treat an employee's Wiccan[12] or even atheist[13] beliefs as "religious" and entitled to protection under Title VII.

Adding to this already complicated landscape is the increased growth of "new religious movements" (NRMs).[14] NRMs encompass sects, cults,[15] and a wide array of other innovative groups.[16] NRMs are typified by their passionate religious converts,

---

[9] 42 U.S.C. § 2000e(j).

[10] *See* Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1024–25 (E.D. Wis. 2002) (holding that plaintiff's belief in the World Church of the Creator, which espoused white supremacy as a central tenet, was "religious").

[11] *See* Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1027–28 (E.D. Va. 1973) (holding that the KKK is a political, not religious, organization and therefore plaintiff's beliefs were not entitled to Title VII protection).

[12] Van Koten v. Family Health Mgmt., 955 F. Supp. 898, 902 (N.D. Ill. 1997).

[13] Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003).

[14] GEORGE RITZER, INTRODUCTION TO SOCIOLOGY 650 (2013).

[15] *See id.* The term "cult" has fallen out of favor with scholars because it has come to be so strongly associated in the popular imagination and mainstream press with notorious and dangerous groups like Charles Manson's "family," which murdered several people in Southern California in 1969, and Jim Jones' People's Temple and its 1979 mass suicide involving over 900 followers. *Id.* Sociologists originally used the term "cult" to distinguish new, innovative, small religious groups that were not previously associated with any established religious organization, from "sects," which are religious groups that break off from an established religion in order to reinvigorate the original beliefs and practices of that organization. *Id.*

[16] *Id.*

charismatic leaders, their attractiveness to an atypical segment of the population, their distrust of others, and being prone to rapid fundamental changes.[17]

This note will examine the past consequences and the future ramifications of the broad definition "religion" under Title VII. Section II will survey the legislative and jurisprudence history of how "religion" has been defined by Congress, Courts and the EEOC under Title VII. Section III will look at how these definitions have been applied by Courts. Section IV will look at recent cases to highlight the unique challenge religious accommodation poses to employers. Section V will examine new religious movements over the past forty-five years in the United States and consider the implications of their continued expansion for employers. Section VI will examine the extensive set of factors to consider in determining whether a given set of beliefs was a religion developed by the Tenth Circuit in *United States v. Myers*, and argue that the Supreme Court should adopt this test as the law of the land in order to create greater certainty and consistency in religious accommodation litigation.

## II. WHAT WE TALK ABOUT WHEN WE TALK ABOUT DEFINING "RELIGION"

Considering the prominence of freedom of religion in American history, it may be surprising how little consideration was paid to religion as one of Title VII's protected classifications when the Civil Rights Act of 1964 was passed.[18] In fact, upon signing the bill on July 2, 1964, President Lyndon Johnson's remarks focused exclusively on race, while making no mention of religion.[19]

However, there has been a dearth of Supreme Court opinions defining "religion" in constitutional terms. The first significant case

---

[17] RITZER, *supra* note 14 at 650.

[18] No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title.

42 U.S.C. § 2000e-5(g).

[19] Lyndon B. Johnson, Remarks upon Signing the Civil Rights Bill (July 2, 1964), http://millercenter.org/president/speeches/speech-3525.

to do so was *Davis v. Beason*,[20] where the Court announced "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[21] Forty years later this traditional, theistic conception of religion was affirmed in *United States v. Macintosh*,[22] where the Court added the "essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[23]

This view of religion was challenged by Judge Learned Hand in his influential opinion in *United States v. Kauten*.[24] There, Hand challenged the supreme being dominant construction of religion, arguing that religion is defined by our relationship with other humans and with the universe.[25] This view would find favor with the Supreme Court in *United States v. Ballard*,[26] where the Court stated:

> Men may believe what they cannot prove. They may not be put to the proof of their religions doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[27]

The first modern opinion of significance on the issue came in *Torcaso v. Watkins*.[28] The Court found that Torcaso, the appointed Notary Public of Maryland, could not be required to profess that he believed in God as a condition of holding the office.[29] Furthermore, the Court recognized, in a footnote, non-theistic-based beliefs like "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others" as religions.[30] Thereafter, the Supreme Court would wrestle with the definition and scope of religious beliefs in the context of conscientious objectors seeking exemption from military training

---

[20] 133 U.S. 333 (1890).
[21] *Id.* at 342.
[22] 283 U.S. 605 (1931).
[23] *Id*. at 633–34.
[24] 133 F.2d 703 (2d Cir. 1943).
[25] *Id.* at 708.
[26] 322 U.S. 78 (1944).
[27] *Id.* at 86–87.
[28] 367 U.S. 488 (1961).
[29] *Id.* at 489.
[30] *Id.* at 495 n.11.

and service in the armed forces in *United States v. Seeger*[31] and *Welsh v. United States*.[32]

In *Seeger*, the Court announced a new test for defining religion broadly, widening the spectrum of beliefs that could be considered "religious."[33] In interpreting section 6(j) of the Universal Military Training and Service Act, the Court stated the Act "exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form." [34] The Court had to determine the constitutionality of section 6(j), which defined the term "religious training and belief" as "'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.'" [35] The Court felt that Congress did not intend a narrow interpretation of "Supreme Being" as meaning the traditional notion of God, concluding that "using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."[36]

The Court's test for whether a person's beliefs were religious under section 6(j) "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[37] This formulation was created to reflect "the ever-broadening understanding of the modern religious community."[38]

Later, in *Welsh*, the Court further expanded the definition of religion.[39] They stated that "deeply and sincerely" held beliefs of a "purely ethical or moral" character occupied "'a place parallel to that filled . . . by God in traditionally religious persons."[40] Essentially, the Court held, the content of beliefs is more important than the

---

[31] 380 U.S. 163 (1965).
[32] 398 U.S. 333 (1970).
[33] *Seeger*, 380 U.S. at 164–65.
[34] *Id.*
[35] *Id.* at 165.
[36] *Id.*
[37] *Id.* at 166.
[38] *Id.* at 180.
[39] Welsh v. United States, 398 U.S. 333 (1970).
[40] *Id.* at 340.

form that they take. As such, sincerely held moral or ethical beliefs are the functional, and legal, equivalents of religious beliefs. Following *Welsh*, Congress amended Title VII in 1972 as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[41]

This new language reflected the *Welsh* "functional equivalent" belief test, and placed a burden on employers to accommodate these beliefs and practices absent a showing that such accommodations would create undue hardship.

In adopting 29 C.F.R. § 1605.1 in 2008, the EEOC provided further interpretive guidelines stating:

> [T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.…The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.[42]

## III. INTERPRETING "RELIGION" IN TITLE VII LITIGATION

As originally enacted, Title VII of the Civil Rights Act of 1964 prohibited employers from discriminating against an employee (or potential employee) on the basis of religion, but did not include a duty to accommodate religious practices.[43] Despite this, the EEOC interpreted the protection against religious discrimination to include an affirmative requirement of religious accommodation.[44] In the wake of multiple federal court decisions that found in favor of

[41] 42 U.S.C. § 2000e(j) (1972).
[42] 29 C.F.R. § 1605.1 (2008).
[43] 42 U.S.C. § 2000e (1991).
[44] 29 C.F.R. § 1605.1 (1967); 29 C.F.R. § 1605.1 (1968).

employers who failed to accommodate an employee's religious beliefs,[45] Congress amended Title VII to include the language found in Section 701(j) after several federal courts issued opinions finding no discrimination when the employer failed to accommodate the employee's religious beliefs.[46] Specifically, Congress took issue with the position that an employer's action was not discriminatory as long as it was based on a uniformly applied, religion-neutral rule or working condition, which did not conflict with an employee's religion.[47]

A. *Malnak v. Yogi*

While "religion" has been interpreted broadly after *Welsh* and the 1972 amendment to Title VII, Courts have struggled to develop a streamlined test for determining what constitutes a religion under Title VII. In 1979, Judge Arlin M. Adams of the Third Circuit Court of Appeals filed a concurring opinion in *Malnak v. Yogi*,[48] which would be extremely influential in the evolution of how federal courts endeavor to define religion.[49] In *Malnak*, the court was tasked with deciding "whether the district court erred in determining that the teaching of a course called the Science of Creative Intelligence Transcendental Meditation (SCI/TM) in the New Jersey public high schools . . . constituted an establishment of religion in violation of the first amendment . . . ."[50] In a *per curiam* decision, the Circuit affirmed the district court's finding that "SCI/TM was religious activity for purposes of the establishment clause and that the teaching of SCI/TM in public schools is prohibited by the first amendment."[51] The majority opinion cited approvingly the district court's consultation of Supreme Court decisions that interpreted the religion clauses of the First Amendment.[52]

---

[45] *See* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); *see also* Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972).
[46] 118 Cong. Rec. 706–13 (1972).
[47] *See id.*; *Dewey*, 429 F.2d at 336; *Riley*, 464 F.2d at 1116.
[48] 592 F.2d 197 (3d Cir. 1979).
[49] Though only a concurring opinion, Adams' test was later adopted by the Third, Eighth, Ninth, and Tenth Circuits. Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 59 (2002).
[50] *Malnak*, 592 F.2d at 197–98.
[51] *Id.* at 198.
[52] *Id.* at 199. The decisions examined by the district court were: *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Epperson v. Arkansas*, 393 U.S.

While concurring in the opinion, Judge Adams felt that the appeal raised "a novel and important question that may not be disposed of simply on the basis of past precedent."[53] Dividing the precedent cases in four thematic categories,[54] his analysis of them "reveals as many differences as similarities."[55] Citing *Seeger*, *Welsh*, and particularly *Tarcaso*'s expansive language,[56] Adams declares that the traditional theistic interpretation of religion is "no longer sustainable."[57] He explains that, highlighting the example found in *Founding Church of Scientology v. United States*,[58] modern cases taking this view tend to find non-traditional belief systems to be religions by analogy, rather than looking at "exactly what indicia are to be looked to in making such an analogy and justifying it."[59] Adams addressed this problem by distilling three key, non-exhaustive indicia of traditional religions' core components.[60]

The first of Adams' key indicia is the nature of the ideas.[61] This is a content-based inquiry into whether the subject matter contemplated in the set of beliefs is consistent with the assertion that they are religious beliefs.[62] The critical aspect of this analysis

---

97 (1968); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Education*, 330 U.S. 1 (1947); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *Id.*

[53] *Id.* at 200 (Adams, J., concurring).

[54] Judge Adams' four categories are: (1) cases announcing the traditional definition of religion; (2) cases dealing with prayers recited in school; (3) cases involving the conscientious objector exemption to the selective service laws; and (4) cases touching on the newer constitutional definition of religion. *Id.* at 201.

[55] *Malnak*, 592 F.2d at 201–207.

[56] Adams highlights *Torcaso*'s statement that neither the state nor the federal government "can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 206 (quoting *Torcaso*, 367 U.S. at 495). He additionally points to what he calls "an instructive footnote" from that opinion, which states, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* (quoting *Torcaso*, 367 U.S. at 495 n.11).

[57] *Id.* at 207.

[58] 409 F.2d 1146 (D.C. Cir. 1969). There, the Circuit accepted Scientology to be legally entitled to tax-exempt status as a religion because the content and comprehensiveness of its ideas were comparable to other religions, in that it provides followers with a "general account of man and his nature comparable in scope, if not in content, to those of some recognized religions." *Id.* at 1160.

[59] *Malnak*, 592 F.2d at 207.

[60] *Id.* at 208.

[61] *Id.*

[62] *Id.*

is the "ultimate" ideas[63] contemplated by the set of beliefs.[64] Adams is careful to note that it is not the place of the court to question whether the beliefs are true or false. Instead, he suggests that ultimate ideas that are essentially scientific, moral or patriotic, rather than "religious" in nature, are not sufficient.[65]

The comprehensiveness of the belief system, the second indicia, is important to the consideration of its ultimate ideas.[66] Adams uses the analogy of scientific teachings in a public school to distinguish between comprehensive ideas which are religious and those that are merely comprehensive.[67] Scientific teachings, he says, involve many ultimate concerns, but they are unlikely to offer a "systematic series of answers," which would resemble a religion.[68]

The third indicia urged for consideration is the presence of any "formal, external, or surface signs that may be analogized to accepted religions."[69] Among the, again non-exhaustive, signs Adams lists for this element are "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays," and other constructs that analogize with those in traditional religions.[70] Adams finds these elements to be indicative of a set of beliefs' religious character and of how they serve a religious function in a believer's life.[71]

B. *Africa v. Pennsylvania*

Not long after *Malnak*, Judge Adams further refined these ideas in his majority opinion in *Africa v. Pennsylvania*.[72] Frank Africa was a Pennsylvania prisoner claiming to be a "Naturalist Minister" for the MOVE organization.[73] Africa claimed that to eat anything other than raw foods violated his "religion."[74] In *Africa*, he

---

[63] "[Q]uestions having to do with, among other things, life and death, right and wrong, and good and evil." Africa v. Pennsylvania, 662 F.2d 1025, 1033 (3d Cir. 1981).
[64] *Malnak*, 592 F.2d at 208.
[65] *Id.* at 208–09.
[66] *Id.*
[67] *Id.* at 209.
[68] *Id.*
[69] *Id.*
[70] *Malnak*, 592 F.2d at 209.
[71] *Id.* at 210.
[72] 662 F.2d 1025 (3d Cir. 1981).
[73] *Id.* at 1025.
[74] *Id.*

appealed a district court ruling that the state government was not required to provide him with a special raw foods diet under the religion clauses of the First Amendment.[75]

According to Adams, it was the duty of the court "to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things."[76] Essentially, step one is the *Seeger* test and step two is the *Malnak* formulation. While the court found that Africa's beliefs were sincerely held, they failed to meet the *Malnak* "ultimate" ideas standard.[77] "Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much less places any emphasis upon, what might be classified as a fundamental concern."[78] The opinion goes on to cite MOVE's lack of analogous features to other religions that furnish his practice with moral necessity or requirement: no position on morality or the meaning of life; no supreme being or all-encompassing force; and no guiding set of principles, like those seen in the Koran, the Ten Commandments, the New Testament Gospels, or Hinduism's Veda.[79] As such, the court could not analogize MOVE to traditional theologies.[80]
The court further noted that Africa's views seemed more personal[81] and social[82], rather than spiritual or religious.[83]

The court believed that stretching the Constitutional contemplation of religion to include such a belief system would be overbroad, and at odds with the Supreme Court's decision in *Wisconsin v. Yoder*.[84] In *Yoder*, the Court concluded that Wisconsin could not enforce a state law requiring Amish families to send their children to school beyond the eighth grade, because there was uncontested evidence that the policy was inconsistent with their religion.[85] The Court researched the history and customs of the

[75] *Id.*
[76] *Id.* at 1030.
[77] *Id.* at 1033.
[78] *Id.*
[79] *Africa*, 662 F.2d at 1033.
[80] *Id.*
[81] Africa believed that eating raw food was healthy and free from harmful pollutants.
[82] Africa claimed MOVE to be a "revolutionary" organization that could not accept existing regimes.
[83] *Africa*, 662 F.2d at 1033–34.
[84] *Id.* at 1034.
[85] Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972).

Amish people and their religious teachings and practices.[86] According to the Chief Justice:

> (I)f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[87]

Accordingly, The *Africa* court concluded, "it is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however 'ultimate' their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately."[88]

C. *United States v. Meyers*

In *United States v. Meyers*,[89] the Tenth Circuit was tasked with deciding whether David Meyers, having been convicted for his role in a conspiracy to sell four pounds of marijuana, was entitled to religious freedom protections under the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA).[90] After filing several motions asserting his religious freedoms, a hearing was granted to consider Meyers' religious freedom defense.[91] At the hearing, "Meyers testified that he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth."[92]

Noting the low threshold for establish the religious nature of beliefs, the district court built upon *Africa*'s inquiry by considering the following factors:

---

[86] *Id.* at 215–218.
[87] *Id.* at 216
[88] *Africa*, 662 F.2d at 1034.
[89] 95 F.3d 1475 (10th Cir. 1996).
[90] 42 U.S.C. §§ 2000bb–2000bb–4, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).
[91] *Meyers*, 95 F.3d at 1479.
[92] *Id.*

1. *Ultimate Ideas*: Religious beliefs often address fundamental questions about life, purpose, and death. . . . These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.
2. *Metaphysical Beliefs*: Religious beliefs often are "metaphysical," that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.
3. *Moral or Ethical System*: . . . [A] particular manner of acting, or way of life, that is "moral" or "ethical." In other words, these beliefs often describe certain acts in normative terms, such as "right and wrong," "good and evil," or "just and unjust." The beliefs then proscribe those acts that are "wrong," "evil," or "unjust." A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.
4. *Comprehensiveness of Beliefs*: . . . More often than not, such beliefs provide . . . an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. . . .
5. *Accoutrements of Religion*: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is "religious":
a. *Founder, Prophet, or Teacher*: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.
b. *Important Writings*: Most religions embrace seminal, elemental, fundamental, or sacred writings. These writing often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.

> c. *Gathering Places*: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.
> d. *Keepers of Knowledge*: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.
> e. *Ceremonies and Rituals*: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.
> f. *Structure or Organization*: Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers, clergy, sages, priests, etc.
> g. *Holidays*: As is etymologically evident, many religions celebrate, observe, or mark "holy," sacred, or important days, weeks, or months.
> h. *Diet or Fasting*: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.
> i. *Appearance and Clothing*: Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear.
> j. *Propagation*: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called "mission work," "witnessing," "converting," or proselytizing.[93]

[93] *Id.* at 1483–84 (quoting United States v. Meyers, 906 F. Supp. 1494, 1502-03 (D. Wyo. 1995).

The Court of Appeals commended and adopted the district court's analysis, agreeing with its holding that Meyers' beliefs more accurately reflected a personal belief or philosophy, rather than a religion.[94]

## IV. THE UNIQUE CHALLENGE OF RELIGIOUS ACCOMMODATION FOR EMPLOYERS

When initially enacted, Title VII simply stated that employers could not discriminate due to an individual's religion, but provided no guidance as to the exact contours of that duty.[95] Subsequently, in 1966, the EEOC adopted guidelines that interpreted the Act to require employers to accommodate the reasonable religious beliefs and practices of their employees, so long as "such accommodation can be made without serious inconvenience to the conduct of the business."[96] The EEOC modified these guidelines in 1967, restating the duty to accommodate the "reasonable religious needs of employees,"[97] as a duty to make "reasonable accommodations to the religious needs of employees."[98] Thus, under the 1967 guidelines, the EEOC recognized that discrimination had a broader meaning than traditional adverse treatment; treating people the same when their religious practices required them to be treated differently constituted unlawful discrimination.

### *A. Interpreting Reasonable Accommodation and Undue Burden – Dewey, Hardison and Philbrook*

The duty to accommodate was first scrutinized by the courts

---

[94] *Id.* at 1484.

[95] *See supra* note 5, stating that employers could not "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion."

[96] 29 C.F.R. § 1605.1(a)(2) (1967).

[97] *Id.*

[98] 29 C.F.R. § 1605.1(b) (1968). This alteration significantly changed the nature of a court's inquiry into such matters. With this modification, the reasonableness of the employer's accommodation would be at issue, rather than the reasonableness of the employee's religious need or belief.

in *Dewey v. Reynolds Metals Co.*[99] Robert Dewey became a member of the Faith Reformed Church ten years after going to work for Reynolds Metal Company.[100] His religious beliefs prevented him from working on Sundays, a stance that put him at odds with a collective bargaining agreement negotiated by his union stipulating that workers were required to work any overtime hours needed by the company unless they had a "substantial and justifiable reason for not working . . . ."[101] Dewey successfully avoided working on Sundays from January to August of 1966 by seeking replacements to work for him when he was scheduled to work on Sundays.[102] He was fired after several instances when he refused to work overtime on a Sunday because it conflicted with his religious beliefs.[103] Dewey subsequently brought suit against Reynolds for religious discrimination.[104]

The district court adopted the EEOC guidelines and found that Reynolds had discriminated against Dewey on the basis of religion because they failed to reasonably accommodate his religious beliefs or demonstrate undue hardship.[105] The Sixth Circuit reversed that decision, finding that the district court had improperly applied the 1967 version of EEOC guideline section 1605.1, which had been issued approximately ten months after Dewey's termination.[106] The Circuit stated that the 1966 guideline should have been applied.[107] Additionally, the Sixth Circuit held that Reynolds was not liable under the 1967 guideline because it had reasonably accommodated Dewey's religious practices by regularly permitting him to find replacements for his Sunday shifts.[108] The Supreme Court affirmed the Sixth Circuit in a *per curiam* decision.[109] Following *Dewey*, Congress amended Title VII in 1972, explicitly requiring reasonable accommodation: "[t]he term

---

[99] 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971), *superseded by statute*, 42 U.S.C. § 2000e(j) (2012), *as recognized in* Smith v. Pyro Min. Co., 827 F.2d 1081, 1087 (6th Cir. 1987).
[100] *Id.* at 329.
[101] *Id.* at 328.
[102] *Id.* at 329.
[103] *Id.*
[104] *Id.*
[105] *See generally Dewey*, 429 F.2d at 332-33 (Combs, J., dissenting) (outlining why the district court's ruling should have been affirmed).
[106] *Id.* at 329.
[107] *Id.*
[108] *Id.* at 331.
[109] 402 U.S. 689 (1971).

'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[110]

An employer's statutory duty to provide reasonable accommodations for an employee's religious practices was subsequently upheld by the Court in *Trans World Airlines, Inc. v. Hardison*,[111] and *Ansonia Board of Education v. Philbrook*.[112] In *Hardison*, the Court looked at the 1972 amendment's legislative history and determined that Congress' intent was to make it unlawful for an employer to refuse to make reasonable accommodations for the religious practices of employees, absent some sort of undue hardship.[113] As the text of the amendment failed to exactly define "reasonable accommodation,", the Court had to decide what constitutes both a "reasonable accommodation" and "undue hardship."[114] The Court held that under Title VII, an employer has satisfied its duty if it has offered to reasonably accommodate the religious beliefs of an employee in order to resolve a conflict.[115] Moreover, the Court determined that an accommodation creates an "undue hardship" whenever it results in "more than a *de minimis* cost" to the employer.[116]

The decision in *Hardison* was affirmed by the Court ten years later in *Philbrook*. In *Philbrook,* Ronald Philbrook, a school teacher, became a member of the Worldwide Church of God six years after beginning his employment.[117] The tenets of the church require members to abstain from secular employment on the church's recognized holy days, which caused Philbrook to miss approximately six schooldays each year.[118] The six days were in excess of the three days allotted for religious observance by the union's collective bargaining agreement.[119] While the employment agreement also provided employees with three days paid leave for

---

[110] Equal Employment Opportunity Act of 1972, Pub. L. 9261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (2012)).
[111] 432 U.S. 63 (1977).
[112] 479 U.S. 60 (1986).
[113] *Hardison*, 432 U.S. at 74.
[114] *Id.*
[115] *Id.* at 77.
[116] *Id.* at 84.
[117] *Philbrook*, 479 U.S. at 62.
[118] *Id.* at 62-63.
[119] *Id.* at 63.

"necessary personal business," those days could not be used for purposes that were not otherwise specified in the contract.[120] When the school board rejected a proposal by Philbrook to allow him to use his three personal days for religious observance, he filed suit.[121]

The Court upheld the *Hardison* configuration of "reasonable accommodation," finding in favor of the school board.[122] The decision clarified that the employer is merely obligated to reasonably accommodate the employee's religious beliefs, not to accept any accommodation proposal offered by the employee absent a showing of undue hardship.[123] As the employer had already offered the employee a reasonable accommodation, it was under no obligation under Title VII to accommodate further, nor was there a need for an inquiry into whether the employee's proposal would cause the employer undue hardship.[124]

While the decisions in *Hardison* and *Philbrook* mark the legal contours of religious accommodation and undue hardship, the accommodation issues facing employers go well beyond schedule conflicts. Physical appearance, objections to work duties and religious conduct while on the job are among the frequently litigated religious accommodation issues.

1. Religious Garb - Reasonable Accommodation and Undue Hardship

For instance, in *Killebrew v. Local Union 1683 of American Federation of State, County, Municipal Employees*, a female employee brought suit against her union for religious discrimination.[125] The employee, Fannie Killebrew, a systems leader at the Water Company, read a Biblical passage in Deuteronomy that she believed forbid her from wearing masculine clothing.[126] Despite numerous objections and warnings from the Water Company that wearing a dress created safety risks,[127]

---

[120] *Id.* at 65. Therefore, an employee could not use his personal business days for religious observance, since the contract already granted three days leave for religious observance.
[121] *Id.*
[122] *Id.* at 68.
[123] *Philbrook*, 479 U.S. at 68.
[124] *Id.* at 68–69.
[125] 651 F. Supp. 95 (W.D. Ky. 1986).
[126] *Id.* at 96.
[127] For reasons of safety and practicality, the Water Company insisted that the employee wear trousers, overalls, or a jumpsuit to work. *Id.* at 96-97.

Killebrew insisted on wearing a dress to work rather than the jumpsuit worn by other employees.[128] After several days of being sent home for wearing a dress, Killebrew was terminated.[129]

Killebrew's union filed a grievance on her behalf, and a shop steward at the Water Company told the company that Killebrew was amenable to switching jobs to one where she could wear ladies clothing.[130] The company offered four categories of jobs with which she could switch, but there were no openings for any of them.[131] In order for the union to meet the accommodation offered by the company, it would have had to find another union member willing to trade positions with Killebrew, or bump a member from a job in favor of Killebrew[132] The union polled its membership at the Water Company that was in those four categories of positions offered by the company, but found no one willing to switch.[133] As bumping another employee would generate a grievance, the union elected to instead attempted to broker a compromise in the form of a tailored skirt that would meet the company's safety requirements.[134] The company remained unconvinced that the tailored skirt would not pose a safety hazard.[135] The union next represented Killebrew in an arbitration hearing, arguing that the company lacked just cause to terminate Killebrew under their collective bargaining agreement. [136] The arbitrator found in favor of the company, concluding that Killebrew had previously recognized the reasonableness of wearing the jumpsuit, and that her change in beliefs had created an impasse which forced the company to fire her.[137]

The employee brought suit against the union, claiming its actions prevented a reasonable accommodation by the company.[138] Relying on guidance from *Hardison* and *Philbrook*, the court found that the weight of the evidence did not indicate that the union had purposely acted or refused to act so as to prevent or obstruct a

[128] *Id.* at 97.
[129] *Id.*
[130] *Id.*
[131] *Killebrew*, 651 F. Supp. at 97.
[132] *Id.* at 97.
[133] *Id.* at 99.
[134] *Id.* at 98.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 97.

reasonable accommodation offered by the company.[139] In order for the union to facilitate the offered accommodation it would have had to violate its collective bargaining agreement by bumping another union employee from their position in favor or Killebrew.[140] Under *Hardison*, the duty to accommodate does not take precedence over a collective bargaining agreement.[141] As such, the court was satisfied that the union's efforts to find a workable accommodation on Killebrew's behalf had satisfied the duties imposed on it under Title VII.

The court in *Wilson v U.S. West Communications* affirmed the ruling of the district court that an employer had reasonably accommodated an employee (Wilson) who insisted on wearing a graphic anti-abortion button.[142] Wilson, a devout Roman Catholic, caused disruptions at work by wearing a two-inch button showing a picture of an eighteen to twenty-month fetus along with the words, "Stop Abortion," and, "They're Forgetting Someone."[143] Wilson wore the button at all times other than when she was sleeping or bathing, stating that she believed that if she removed the button it would compromise her religious vow and that she would lose her soul.[144] After many complaints, Wilson met with supervisors, also Roman Catholics with anti-abortion beliefs, who asked her to cease wearing the button because of the effect it was having on the workplace.[145] Wilson objected to the suggestion, citing the fact that the company did not have a dress code and that she was not breaking any rules.[146]

The company then presented three options to Wilson: (1) wear the button only in her cubicle, removing it whenever she needed to leave her cubicle to move around the office; (2) cover the button while at work; or (3) wear an anti-abortion button that did not have a graphic image on it.[147] Wilson again refused, saying that removing or covering the button would break her promise to God to be a "living witness."[148] Following a meeting with a union rep in which the accommodations were reiterated and consequences for not accepting them discussed, Wilson was sent home several times

---

[139] *Id.* at 100.
[140] *Id.* at 100-01.
[141] *Id.* at 101.
[142] 58 F.3d 1337, 1342 (8th Cir. 1995).
[143] *Id.* at 1339.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Wilson*, 58 F.3d at 1339.

for continuing to wear the button and was ultimately fired for excessive unexcused absences.[149] Wilson brought suit claiming her firing constituted religious discrimination.[150] The Eighth Circuit upheld the lower court's decision that the company offered Wilson a reasonable accommodation.[151] The Circuit agreed with the factual finding that the record demonstrated that Wilson's religious vow did not require her to be a "living witness."[152] As such, the accommodation offered was reasonable in that would allow Wilson to honor her vow to wear the button, while also being respectful of her fellow workers' views and the workplace as a whole.[153]

In *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*,[154] the Supreme Court recently overturned a Tenth Circuit decision finding that Abercrombie & Fitch (Abercrombie) had not committed an act of religious discrimination in violation of Title VII when it refused to hire a Muslim woman who wore a hijab because the applicant never requested a religious accommodation and, thus, notice was lacking.[155] While the Tenth Circuit focused on the notice issue, the Court rejected this method of inquiry and instead concentrated on motive.[156]

Samantha Elauf applied for a position at an Abercrombie retail store.[157] At the interview with the store's assistant manager, Elauf wore a headscarf.[158] The assistant manager assumed that Elauf was a Muslim, but this was not discussed during the interview.[159] Elauf knew the type of clothing Abercrombie sold and expected that she would be required to wear such clothing if she was hired.[160] Abercrombie stores have a dress code, termed a "Look

[149] *Id.* at 1339–40.
[150] *Id.* at 1340.
[151] *Id.* at 1340-42.
[152] *Id.* at 1341.
[153] *Id.* at 1341–42.
[154] (*Abercrombie II*), 135 S. Ct. 2028 (2015).
[155] *Id.* at 2031.
[156] *Id.*
[157] Equal Employ't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc. (*Abercrombie I*) , 731 F.3d 1106, 1112 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
[158] *Id.*
[159] *Id.*
[160] *Id.*

Policy,"[161] which applies to all sales floor employees.[162] Without discussing the issue with Elauf during the interview, the assistant manager was concerned that the headscarf was a "cap" that would violate Abercrombie's "Look Policy."[163] The assistant manager took the issue to the store manager and the district manager, telling them that she assumed that Elauf wore the headscarf for religious reasons.[164] The Abercrombie managers decided that Elauf's religious headscarf would violate the "Look Policy," accordingly deciding not to hire Elauf.[165] Elauf was told by a friend who worked at the store that she was not hired due to the headscarf.[166]

The EEOC filed suit on Elauf's behalf against Abercrombie for religious discrimination and failure to accommodate her religious beliefs in violation of Title VII.[167] The Tenth Circuit reversed a district court grant of summary judgment for the EEOC, finding that the EEOC failed to prove that Elauf provided notice to Abercrombie that her religious beliefs conflicted with the company's "Look Policy."[168] In reversing the Tenth Circuit decision, the Supreme Court noted that Title VII does not include a notice requirement, and that

> [m]otive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.[169]

The Court further stated that "the motive requirement itself is not

---

[161] Abercrombie's "Look Policy" mandates that employees working in certain parts of the store wear clothing that is consistent with the type of clothing that Abercrombie sells. *Id.* Importantly here, the policy forbids employees from wearing black clothing and "caps." *Id.*
[162] *Abercrombie I*, 731 F.3d at 1112.
[163] *Id.* at 1113–14.
[164] *Id.* at 1114.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Abercrombie I*, 731 F.3d at 1122.
[169] Abercrombie II, 135 S. Ct. 2028, 2033 (2015).

met unless the employer at least suspects that the practice in question is a religious practice—*i.e.*, that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice." [170] The Court found it critical that Abercrombie's managers that made the decision to not hire Elauf knew—or at least suspected—that Ms. Elauf wore her headscarf for religious reasons, and their decision to not hire Elauf was motivated by that suspicion because the religious headscarf would violate the "Look Policy."[171]

A similar case against Abercrombie in California produced similar results, but focused on undue hardship. [172] There, the Northern District of California rejected Abercrombie's assertion that granting a religious accommodation to allow a stockroom employee (Khan) to wear a hijab would cause an undue hardship because the company failed to prove their claim.[173] Khan, a devout Muslim, wore a hijab to her Abercrombie interview and was hired.[174] During the time of her employment at Abercrombie, she participated in the Muslim practice of wearing a hijab when in public or in the presence of males outside of her immediate family.[175] Khan was hired for a different position than the one that Elauf had been seeking.[176] Whereas Elauf's prospective job was on the sales floor, Khan was hired for a stockroom position.[177] Her primary job responsibilities were preparing clothes received in shipments for the sales floor.[178] She wore a hijab at work from October 2009 until February 2010 without incident,[179] and her supervisors permitted her to do so as long as the headscarf conformed with company colors.[180]

In early February 2010, a district manager visiting Khan's store noted that her hijab violated the company "Look Policy."[181] A

---

[170] *Id.* n.3.
[171] *Id.*
[172] U.S. Equal Employ't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc. (*Abercrombie III*), 966 F. Supp. 2d 949 (N.D. Cal. 2013).
[173] *Id.* at 965.
[174] *Id.* at 954–55.
[175] *Id.* at 954.
[176] *Id.* at 955.
[177] *Id.*
[178] *Abercrombie III*, 966 F. Supp. 2d at 955.
[179] *Id.* During this span of time, Khan was never told by her supervisors that she was not in compliance with the company's "Look Policy."
[180] *Id.*
[181] *Id.* at 955.

company human resources manager contacted Khan, and asked if she could remove the hijab, to which Khan responded that she could not because of her religious beliefs.[182] Khan was subsequently suspended with pay while the company investigated the issue.[183] When Khan returned to the store, she was once again asked by the human resources manager if she could remove the hijab, and Khan once again stated that her religious beliefs prevented her from doing so, leading to her termination.[184] The EEOC subsequently filed suit for religious discrimination on Khan's behalf.[185]

At trial, Abercrombie argued that it had produced sufficient evidence to survive a motion for summary judgment on its undue hardship defense.[186] In support of this argument, Abercrombie noted that it was not necessary to show actual economic harm to prove undue hardship.[187] However, the court found Abercrombie's proffered evidence—testimony of employees attesting to their beliefs, based on their personal experiences, that Abercrombie's Look Policy is important to the success of the brand and that deviations from the policy would have a negative impact—to be unpersuasive.[188] While noting that a showing of actual economic harm was not required, the court stated that Abercrombie would have to show that the accommodation would have "more than a de minimis impact on coworkers" in order to prove undue hardship.[189]

By contrast, in *Webb v. City of Philadelphia*, the Third Circuit held that the city would suffer undue hardship if forced to accommodate a police officer who wanted to wear religious garb over her uniform.[190] Kimberlie Webb, a practicing Muslim, was hired by the City of Philadelphia as a police officer in 1995.[191] In February 2003, Webb requested permission from her commanding officer to wear a traditional Muslim headscarf while in uniform and on duty.[192] The headscarf would not cover her face or ears, but would cover her head.[193] The Department denied her request, citing

---

[182] *Id.*
[183] *Id.*
[184] *Abercrombie III*, 966 F. Supp. 2d at 955.
[185] *Id.* at 957.
[186] *Id.* at 962.
[187] *Id.*
[188] *Id.* at 963-64.
[189] *Id.* at 963.
[190] 562 F.3d 256, 258-64 (3d Cir. 2009).
[191] *Id.* at 258.
[192] *Id.*
[193] *Id.*

Philadelphia Police Department Directive 78, which prescribed the approved police uniforms and equipment.[194] Directive 78 did not authorize the wearing of religious symbols or garb as part of the uniform.[195]

Webb subsequently filed a religious discrimination complaint with the EEOC and the Pennsylvania Human Relations Commission.[196] While the EEOC matter was pending, Webb came to work wearing her headscarf and refused to remove it, subsequently being sent home for violating Directive 78.[197] The next two days played out the same way, with Webb coming to work in her headscarf, refusing to remove, and being sent home.[198] Webb was then informed that any further violations could result in disciplinary actions, and she thereafter ceased wearing the headscarf to work.[199] Nevertheless, insubordination charges were later brought against Webb, and she received a temporary thirteen-day suspension.[200] Webb subsequently brought charges for, among other things, religious discrimination under Title VII against the City of Philadelphia.[201]

At the trial, the city's stated rationale for Directive 78 was that "it is critically important to promote the image of a disciplined, identifiable and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias."[202] The Third Circuit found the testimony persuasive, holding that the city's reasons for refusing the accommodation were sufficient to satisfy *Hardison*'s "more than de minimis cost" of undue burden standard.[203]

---

[194] *Id.*
[195] *Id.*
[196] *Webb*, 562 F.3d at 258.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Webb*, 562 F.3d at 261.
[203] *Id.* at 262.

2. Religious Conflict With Job Duties - Reasonable Accommodation and Undue Hardship

In *Al-Jabery v. Conagra Foods, Inc.*,[204] a Muslim man, Al-Jabery, who worked in a meat packaging plant brought suit for religious discrimination after he was ordered to perform job duties that included handling pork.[205] Initially hired to clean machines in a ham processing plant, [206] Al-Jabery was sent to the pork processing line where he could be more closely observed after he was noted for disappearing and taking excessive breaks by supervisors.[207] He refused to report to the position, was fired, and filed a discrimination claim that he had a firmly and sincerely held religious belief that precluded him from even touching pork products.[208] The court concluded that the Al-Jabery had failed to make a prima facie case because he had not presented evidence that he had informed ConAgra that his religion forbid him from handling pork. [209] However, the court said that even if Al-Jabery had established a prima facie case, ConAgra successfully demonstrated that accommodating Al-Jabery would have caused undue hardship.[210] The court explained, "Plainly put, a ham plant cannot be efficiently run by catering to the idiosyncratic desires of a Muslim worker not to touch the plant's main product."[211]

In *Noesen v. Medical Staffing Network, Inc.*,[212] Noesen, a Roman Catholic Wal-Mart pharmacist, refused to participate in distributing contraceptives or answering any customer questions about contraceptives on religious grounds.[213] Wal-Mart offered to accommodate him by allowing Noesen to signal to a coworker who would step in for him if a customer needed assistance with contraceptives, but that, due to the high volume of calls received by the pharmacy, Noesen would have to help customers calling regarding contraceptives.[214] Noesen refused to follow the procedure

---

[204] No. 4:06CV3157, 2007 U.S. Dist. LEXIS 79080 (D. Neb. Oct. 24, 2007).
[205] *Id.* at *3, *12.
[206] *Id.* at *3.
[207] *Id.* at *8–10.
[208] *Id.* at *1.
[209] *Id.* at *11–12.
[210] *Al-Jabery*, 2007 U.S. Dist. LEXIS 79080, at *15-16.
[211] *Id.* at *16.
[212] 232 F. App'x 581 (7th Cir. 2007).
[213] *Id.* at 582.
[214] *Id.* at 583.

and was fired.[215] Noesen claimed denial of a reasonable religious accommodation, asserting that he should be excused from even participating in the administrative transfer of a contraceptive prescription to a coworker.[216] The court ruled in favor of Wal-Mart, holding that shifting all phone and counter service duties to other co-workers was an undue hardship.[217]

3. Religious Conduct at the Workplace - Reasonable Accommodation and Undue Hardship

In *Equal Employment Opportunity Commission v. Serrano's Mexican Restaurants, LLC*, [218] a restaurant adopted a code of conduct prohibiting managers from socializing with staff outside of the workplace, which was intended to prevent sexual harassment and avoid unfair treatment of employees.[219] A general manager who led a Bible study group outside of work, which three of her subordinates attended, was discharged for violating the code's restrictions after failed attempts to negotiate an accommodation.[220] The jury found that the employer had offered her an accommodation (transferring to another restaurant) that would have eliminated the conflict but which she declined to accept.[221]

In *Grossman v. South Shore Public School District*,[222] the court ruled that the school district was permitted to terminate guidance counselor Grossman for her proselytizing conduct, even if her actions were motivated by her religious beliefs.[223] On multiple occasions when students approached Grossman for guidance at school, she asked them to join her in prayer.[224] She also threw away school pamphlets instructing on the use of condoms and replaced them with pamphlets advocating sexual abstinence.[225] The court ruled that there was not sufficient evidence to support her claim that she was terminated solely on the basis of her religious views,

---

[215] *Id.* at 583–84.
[216] *Id.* at 584.
[217] *Id.* at 584–85.
[218] No. CV-02-1608-PHX-FJM, 2007 U.S. Dist. LEXIS 14548 (D. Ariz. Feb. 14, 2007).
[219] *Id.* at *1–2.
[220] *Id.* at *2.
[221] *Id.* at *19.
[222] 507 F.3d 1097 (7th Cir. 2007).
[223] *Id.* at 1100.
[224] *Id.* at 1098.
[225] *Id.* at 1099.

as opposed to her conduct, which the school district was entitled to prohibit.[226]

In *Piggee v. Carl Sandburg College*,[227] Piggee, a community college cosmetology instructor, brought an action under 42 U.S.C. § 1983 alleging violation of her First Amendment rights when she was directed to refrain from injecting her religious, social, and sexual beliefs into her classroom instruction, and her employment contract was subsequently not renewed.[228] Piggee was reprimanded after slipping two religious pamphlets condemning homosexuality into the smock of a gay student during clinical instruction time, telling him to read the materials and invited him to discuss them with her later. [229] After the student complained to the school's administration, the college notified Piggee in writing that her conduct was deemed inappropriate and in violation of the school's anti-harassment policy.[230] The court affirmed summary judgment for the college, holding that the Piggee's First Amendment rights were trumped by the college's interest in their instructors staying on message while conducting class.[231]

## V. NEW RELIGIOUS MOVEMENTS AND THE CHALLENGES OF ACCOMMODATION

New Religious Movements (NRMs) in the United States experienced exponential growth in the late 1960s and early 1970s,[232] and their expansion continues today.[233] These movements cover a wide spectrum of sects, running the gamut from "cults" to accepted but non-traditional groups like Mormons and Scientologists to, predominantly, off-shoots of established religions.[234] The rise of new religious and spiritual movements

---

[226] *Id.* at 1100.
[227] 464 F.3d 667 (7th Cir. 2006).
[228] *Id.* at 669.
[229] *Id.* at 668.
[230] *Id.*
[231] *Id.* at 672.
[232] J. Gordon Melton, *How New is New? The Flowering of the "New" Religious Consciousness Since 1965*, *in* THE FUTURE OF NEW RELIGIOUS MOVEMENTS, 4 (David G. Bromley and Phillip E. Hammond eds., 1987).
[233] 6 RELIGIONS OF THE WORLD: A COMPREHENSIVE ENCYCLOPEDIA OF BELIEFS AND PRACTICES 3002 (J. Gordon Melton and Martin Baumann eds., 2 ed. 2010) (stating that the number of followers of new religions has grew from 560,000 in 1970 to 1,600,000 in 2010, and estimating that figure to rise to 2 million by 2020)
[234] JOHN A. SALIBA, UNDERSTANDING NEW RELIGIOUS MOVEMENTS xii-xiii (1st ed. 1995).

defies simple explanation, and they spring from complex circumstances of religious and cultural life.[235] Their philosophies and practices, which frequently fall outside of the norms of the Judeo-Christian tradition and Western culture in general, are often obscure, confusing, and challenging to outsiders.[236] Practitioners of such non-traditional belief systems and lifestyles can be seen as dangerous threats to established ways of life.[237] This is especially true as these movements are often covered in the mainstream media in connection with scandalous and/or dramatic stories that reinforce the notion that strange practices and bizarre occurrences are typical within these groups.[238] The cult bias engendered by such coverage is evident in the way these groups are treated by the legal system.

### *A. The Development of New Religious Movements in the United States*

The 1960s saw an explosion of new religious movements in America. In that decade, consciousness-expanding techniques like encounter groups, primal therapy, and Gestalt achieved mainstream awareness.[239] This desire for self-realization resulted in increased interest in Eastern meditative religions and membership in a variety of non-traditional Christian groups.[240] Prominent NRMs to emerge during this period were the Unification Church (popularly known as "the Moonies"), The Way

---

[235] JOHN A. SALIBA, UNDERSTANDING NEW RELIGIOUS MOVEMENTS vii (1st ed. 1995).
[236] *Id.*
[237] *Id.*
[238] *See* ELISABETH ARWECK, RESEARCHING NEW RELIGIOUS MOVEMENTS 1 (2006) (highlighting the intense media coverage of the Jonestown tragedy of 1978, the violent standoff at David Koresh's Branch Davidian compound in 1993, the mass suicides of the members of the Heaven's Gate sect in 1997, and the Scientology membership of celebrities such as Tom Cruise and John Travolta).
[239] FLO CONWAY & JIM SIEGELMAN, SNAPPING: AMERICA'S EPIDEMIC OF SUDDEN PERSONALITY CHANGE 13-14 (1978).
[240] *Id.* at 14. *See also* Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 127 (2003) (discussing how major shifts in diversity and politicization, practice, and the nature of religion during this time period impacted the growth and expansion of NRMs).

International, the International Society for Krishna Consciousness, the Divine Light Mission, and the Children of God.[241]

Academics treated this explosion of NRMs as representing something distinct from prior cycles of religious innovation; not only did these new religions represent radical theological departures from Christian tradition, but they also attracted believers from the middle class.[242] Most NRMs are offshoots of established religions.[243] These offshoots tend to viewed by those in dominant religions as outsiders—"not just different, but unacceptably different."[244] This view is at the root of how these movements are often labeled as cults.[245]

Due to the diversity of NRMs, they resist easy classification.[246] Significant differences exist among their doctrines, goals, practices, and lifestyles exist among them.[247] While most NRMs in the United States are derived from Christianity,[248] the influx of Eastern religions that do not follow typical Western/European church models also add to the diversity of NRMs.[249]

---

[241] THE OXFORD HANDBOOK OF NEW RELIGIOUS MOVEMENTS 4 (James R. Lewis ed., 2003).
[242] *Id.*
[243] J. Gordon Melton, *An Introduction to New Religious Movements*, *in* THE OXFORD HANDBOOK OF NEW RELIGIOUS MOVEMENTS, *supra* note 243, at 16, 23.
[244] *Id.* at 25.
[245] *Id.*
[246] Saliba, *supra* note 235 at 21.
[247] *Id.*; *see also* J. Gordon Melton, The Rise of the Study of New Religions (1999), http://www.cesnur.org/testi/bryn/br_melton.htm ("Like older religions, New Religions may be culture-affirming or culture-denying. New Religions vary from the strongly hierarchical to the anarchic. Some New Religions subordinate women while others champion women's rights. Some NRMs are family oriented, other undermine the family at every turn. Some groups emphasize spiritual practices, other reject any need for them. Some groups are involved in making social policy, others want nothing to do with outsiders or secular social structures. Some groups are middle class and upwardly mobile, other [sic] reject any materialistic acquisitions. . . . New Religions come in all varieties. They choose their basic perspective from one of the various existing religions, they create a conscious synthesis of two or more traditions, or, on very rare occasions, they propose an original religious myth. New Religions adopt a variety of different organizational models from the dictatorial to the loosely democratic, and all shade in between. They will often change through the first generation as the group grows, and theology matures, and as the transition to the second generation begins.").
[248] Melton, *supra* note 247.
[249] Saliba, *supra* note 235 at 21.

Leading American religious scholar J. Gordon Melton's comprehensive grouping of world religions into twenty-two family groups is a useful tool for examining the diversity of NRMs.[250] Most North American NRMs can be placed into one of eight different family groups identified by Melton: the Pentecostal family, where the religious life of members revolves around the seeking and receiving gifts such as speaking in tongues, healing, prophecy, wisdom, and the discernment of spirits from the Holy Spirit[251]; the Communal family, where members share a communal lifestyle, often run by a strong leader and exhibiting a system of social control, economic self-sufficiency and separation from the outside world[252]; the Christian Science–Metaphysical family, where members follow a religious philosophy that emphasizes individualism and practice meditations and affirmations[253]; the Spiritualist, Psychic, and New Age family, a complex amalgamation of Western and Eastern religious beliefs and practices that stresses the power of mystical experiences[254]; the Ancient Wisdom family, where members believe in a body of hidden wisdom that has been passed through the ages by special teachers who have mastered it[255]; the Magic family, where members believe that the occult and forces of nature can be controlled or manipulated through the acquisition of ancient wisdom and use of esoteric rituals[256]; the Eastern and Middle Eastern families, encompassing Judaism and Islam (Middle Eastern) and Hinduism, Buddhism, and other relatively minor East Asian religions[257]; and various New Unclassifiable Religious Groups, which are often formed by blending elements of the thought systems listed above.[258] The wide array of belief systems demonstrates the breath of the potential challenge of employer accommodation created by NRMs. Furthermore, the lack of unity among NRMs increases the likelihood that they will subject to ridicule and discrimination visited upon minority religions throughout American history.[259]

---

[250] J. GORDON MELTON, THE ENCYCLOPEDIA OF AMERICAN RELIGIONS (1993).
[251] Saliba, *supra* note 235, at 21.
[252] *Id.* at 22.
[253] *Id.*
[254] *Id.* at 23–24.
[255] *Id.* at 24.
[256] *Id.* at 25.
[257] Saliba, *supra* note 235, at 26.
[258] *Id.* at 28.
[259] JOHN T. BIERMANS, THE ODYSSEY OF NEW RELIGIOUS MOVEMENTS 7-14 (1986).

The Unification Church illustrates the public's negative perception of religions labeled cults. The Unification Church was founded in Seoul, Korea, in 1954 by Reverend Sun Myung Moon, a Korean industrialist.[260] Members of the church were dubbed "Moonies" in reference to Reverend Moon's name.[261] The Unification Church and Reverend Moon were often seen as controversial due to their unusual or bizarre practices and ideas.[262] The church's recruiting process on college campuses was seen as overly zealous and forceful by followers of mainstream religions.[263] Recruiters would accost students and invite them to dinners at houses shared by church members.[264]

In *Molko v. Holy Spirit Assn.*, ex-members of the church alleged that recruiters used deceptive practices such as brainwashing and coercive persuasion to convince members to join.[265] Noting that the concept of brainwashing is a subject of some dispute, the California Court of Appeals nevertheless found that the allegations at least raised an issue of material fact sufficient to survive summary judgment.[266] Such events gave rise to a public perception of the Unification Church members as being under mind control and of Reverend Moon as a dangerous empire builder.[267] However, the view of the Unification Church as a danger to society has never jibed with the actual political activities of the group.[268]

A 2010 study by the Association of Religion Data Archives showed startling growth amongst many NRMs in the ten years since the previous report.[269] Among the biggest gainers in congregation population were the Allegheny Wesleyan Methodist Connection, Vineyard USA, The Missionary Church, International Pentecostal Holiness Church, Assemblies of God, Old Order River Brethren, and the Church of God of Prophecy.[270] The practices and customs of these groups are unknown to most Americans and

---

[260] *Id.* at 1.
[261] Saliba, *supra* note 235, at 31.
[262] Biermans, *supra* note 259, at 1.
[263] Saliba, *supra* note 235, at 14.
[264] *Id.*
[265] 46 Cal. 3d 1092, 762 P.2d 46 (1988); BIERMANS, *supra* note 261, at 146.
[266] *Id.*
[267] Biermans, *supra* note 259, at 1.
[268] Saliba, *supra* note 235, at 31.
[269] *U.S. Membership Report*, ASS'N OF RELIGION DATA ARCHIVES, http://www.thearda.com/rcms2010/r/u/rcms2010_99_us_rate_2000_ON.asp (last visited Feb. 18, 2016).
[270] *Id.*

employers. Such growth demands greater legal clarification with regards to the practices that are entitled to Title VII protection.

## VI. ADOPT THE MEYERS TEST AS A FEDERAL STANDARD

The Tenth Circuit developed an extensive set of factors to consider in determining whether a given set of beliefs was a religion in *United States v. Meyers*.[271] The *Meyers* court extensively surveyed modern cases that wrestled with the question of how to define "religion."[272] Based on those cases, *Meyers*' district court devised a five factor test, with accompanying sub-factors, for determining if a belief system was a religion.[273]

Adopting the *Meyers* factor test would bring much needed clarity and guidance to this area of the law. The five-factor inquiry would allow courts to be flexible and responsive to new religions, while also subjecting them to a level of scrutiny that would prevent abuse of the broad religious protections provided by Title VII. These

---

[271] United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996).

[272] United States v. Meyers, 906 F. Supp. 1494, 1501 (D. Wyo. 1995); *see* United States v. Kauten, 133 F.2d 703, 708 (2nd Cir. 1943) (stating that religion is unnecessary to define because "the content of the term is found in history of the human race and is incapable of compression into a few words"); Fellowship of Humanity v. Cty. of Alameda, 315 P.2d 394, 401 (Cal. Dist. Ct. App. 1957) (citing definitions of religion from various dictionaries); United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968) (determining whether a religion is valid requires a case-by-case analysis); Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (holding that Scientology is a religion because it is incorporated as a religion in the District of Columbia, it has licensed ministers, and its "fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions"); Remmers v. Brewer, 361 F. Supp. 537, 540 (S.D. Iowa 1973) (laying out that the definition of religion must be broad enough and given wide latitude so that state approval or social acceptance does not become a prerequisite to practice of a religion recognized by the First Amendment); Stevens v. Berger, 428 F. Supp. 896, 899-905 (E.D.N.Y. 1977) (discussing religious beliefs and the exercise of those beliefs); Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981) (holding that a particular belief will be considered a religion, and hence entitled to first amendment protection, if the "beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things"); Church of the Chosen People v. United States, 548 F. Supp. 1247, 1252-53 (D. Minn. 1982) (discussing different definitions of religion); United States v. Sun Myung Moon, 718 F.2d 1210, 1227 (2d Cir. 1983) (defining religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine"); Jacques v. Hilton, 569 F. Supp. 730, 734 (D.N.J. 1983) (holding that self-determination of one's own beliefs cannot constitute religion).

[273] *Infra* Section III.C.

factors speak to core of what has served as our basic legal understanding of "religion," while also providing the flexibility of inquiry necessary to take each set of facts as a unique situation. Furthermore, having a universal factor would give employers and employees better tools with which to understand how the law of religious accommodation operates under Title VII. As such, employers are more likely to understand how to comport their behavior within the law, and employees are more likely to understand the legal boundaries of religious-based accommodations they are entitled to. Making the outcomes of the remaining disputes that will inevitably arise more predictable will positively impact judicial economy and eliminate many wasteful claims.

## VII. CONCLUSION

By adopting the *Meyers* inquiry as the law of the land, the Supreme Court would create, for the first time, a uniform test to be applied in all Circuits for what qualifies as a religion under Title VII. While every inquiry is by nature going to be highly fact specific, a uniform test will create a unified body of case law. This will allow employers and employees to both have a greater understanding of the law and a better knowledge base to help them predict the outcome of cases. This superior knowledge base and understanding of the law would hopefully result in fewer violations and therefore fewer claims. As such, it has the potential to benefit employers, employees and judicial economy.