DRESS CODE AND RELIGIOUS ACCOMMODATIONS THROUGH THE LENSE OF EEOC V. KROGER

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INTRODUCTION

Lawson began working for Kroger ten years ago at the deli department, where she worked until her termination two years ago.[1] Lawson's co-worker Rickerd began her employment with Kroger goods around the same time as a cashier and file maintenance clerk, and she worked in these positions until her termination two years ago.[2] Both Rickerd and Lawson believe in the literal interpretation of the Bible holding that homosexuality is a sin.[3] A few years ago, Kroger Supermarket instituted changes to its dress code, one of which required all employees to wear a new apron with a new logo, a rainbow heart embroidered on the top left portion of the bib.[4] Lawson and Rickerd have a good faith belief that the new logo represented support for and endorsement of the LGBT community.[5]

Although Lawson and Rickerd personally held no animosity toward the individuals who comprise the LGBT community, the practices of that community violated their sincerely held religious belief.[6] Lawson and Rickerd believed wearing the logo showed an advocacy of the community, which they could not do.[7] On multiple occasions Lawson and Rickerd approached the store manager and orally requested to wear their name tag over the heart logo or replace

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[1] *See* Complaint at 3, EEOC v. Kroger Co., No. 20-1099 (E.D. Ark. Sept. 14, 2020), ECF No. 1.

[2] *Id.* at 8.

[3] *Id.* at 3-8.

[4] *Id.*

[5] *Id.* at 4-8.

[6] *See* Complaint at 4-8, EEOC v. Kroger Co., No. 20-1099-LPR (E.D. Ark. Sept. 14, 2020), ECF No. 1.

[7] *Id.*

the apron as an accommodation to their sincerely held religious belief.[8] Then the employees provided a written request to Kroger's human resources contact to cover the logo with their name tag as an accommodation to the sincerely held religious beliefs.[9] Both employees either refused to wear the apron at all or wore the apron with their name tag over the logo.[10] Rickerd and Lawson's accommodation request were not granted while repeatedly disciplining both employees for violating its dress code. Each time the employees verbally or in writing requested a reasonable accommodation for their sincerely held religious belief, Kroger disciplined them.[11] At the same time Kroger did not discipline other employees in the workplace who did not request a religious accommodation but simply declined to wear the new apron or who covered the heart logo, in violation of Kroger's dress code.[12] Kroger discharged Rickerd, then age 57, and Lawson, then age 72, for repeated violations of its dress code.[13]

Employers are encouraged to create an inclusive community and run the risk of a Title VII suit if they fail to grant a religious accommodation or treat employees equitably. Thus, employers generally do not doubt their commitment to branding as an inclusive company. Regardless of the risks of stigmatizing employees who are provided accommodations or losing the trust of all employees, employers generally brand how they like on uniforms. The standard to prove undue hardship for religious accommodation claims have not been high, and only require an employer to show more than a de minimis cost to refuse an accommodation. Thus, employees like Rickerd and Lawson may be left without redress.[14] I argue that courts should be sympathetic to employees seeking a dress code religious accommodation, because employers have various and more effective ways of branding. I offer three recommendations for how employers can recalibrate their uniform branding approach and thus why courts should scrutinize employers: 1. Employers can use attachments to their uniform, 2. brand elsewhere like volunteer and social events or 3. be vocal through technology and donations. With these options

[8] *Id.* at 4-9.
[9] *Id.* at 4-10.
[10] *See* Complaint at 4-9, EEOC v. Kroger Co., No. 20-1099 (E.D. Ark. Sept. 14, 2020), ECF No. 1.
[11] *Id.* at 4-9.
[12] *Id.* at 7-12.
[13] *Id.* at 4-9.
[14] *See* Brown v. Polk Cnty., 61 F.3d 650, 652 (8th Cir. 1995).

available, employers do not sacrifice any efforts to socially brand in their company, thus courts should be skeptical of any denial of dress code accommodations.

Part I examines the current conflict between religious employees, employer initiatives and other protected employees like the LGBT community. Further Part I will discuss Title VII and the undue hardship standard, while briefly discussing some subtle differences between the private and public sector. Part II analyzes the guidance that is provided by the department of labor and the EEOC regarding dress code. Part III explores the religious employees' perspective and an analysis most courts ignore in a Title VII religious discrimination claim. Part VI will provide recommendations for employers to socially brand to avoid stigmatizing employees that may exercise this accommodation. Part VI will further explain why case law does not favor employers defending a Title VII claim based off branding and why the de minimis standard should not allow employers to prevail when employees seek a dress code religious accommodation.

I. TITLE VII AND REASONABLE ACCOMMODATION

Title VII prohibits "invidious, overt discrimination in employment based on religion".[15] However, employers for years have implemented policies that protect LGTB employees and voice those initiatives through branding. Naturally, as Kroger learned, the contrasting ideas create friction between employers and employees.[16] Surprisingly, as enacted in 1964, the legislative history of Title VII provides little insight into the reason why Congress included religion among the prohibited criteria in 42 U.S.C. § 2000e-2(a).[17] Nonetheless, the basis of religion is consistent with the basic concepts of religious freedom embodied in the First Amendment of the Constitution.[18] Over time the duty not to discriminate on religious grounds morphed into an obligation on the part of the employer to

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15 *See, e.g.*, Shapolia v. Los Alamos Nat'l Lab'y, 992 F.2d 1033 (10th Cir. 1993); *see also* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW CASES AND MATERIALS 403 (9th ed. 2020).

16 *See* Complaint at 4-9, EEOC v. Kroger Co., No. 20-1099 (E.D. Ark Sept. 14, 2020), ECF No. 1.

17 42 U.S.C. § 2000e-2(a) (1991).

18 *See* MARIA L. ONTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW 574 (2020).

make reasonable accommodations to the religious needs of employees where such accommodations could be made without undue hardship on the conduct of the employer's business.[19]

A. Court Analysis

To establish a prima facie case of religious discrimination, the employee must show he or she: (1) " hold[s] a sincere religious belief that conflicts with a job requirement; (2) informed [the] employer of the conflict; and (3) was disciplined for failing to comply with the conflicting requirement". [20]Once all factors are established, the burden shifts to the employer to show they either made a good-faith effort to reasonably accommodate the religious belief, or such an accommodation would work an undue hardship upon the employer and its business.[21] An undue hardship is established when the accommodation would "bear more than a de minimis cost" to the employer.[22]

When looking at a Title VII claim for religion "much of the case law, focuses on the duty of reasonable accommodation."[23] Noting that the "precise reach"[24] of the employer's duty to accommodate its employees' religious beliefs is not clear, the court in *Brown v. Polk*, concluded that the issue must be resolved on a case-by-case basis.[25]

Accordingly, the *Brown v. Polk* court summarized some of the rules on undue hardship that were recognized : (1)"The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship."[26]; (2) De minimis cost, moreover, "entails not only monetary concerns, but also the employer's burden in conducting its business."[27]; (3) asserted hardships, furthermore, must

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19 *Id.*

20 Webb v. City of Philadelphia, 562 F.3d 256, 259 (3d Cir. 2009) (citing Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 224 (3d Cir. 2000)).

21 *Id.* at 259.

22 Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)*; see also* ONTIVEROS ET AL., *supra* note 18, at 574.

23 *See* ONTIVEROS ET AL., *supra* note 18, at 576-580.

24 *Brown*, 61 F.3d at 655.

25 *Id.*

26 *See* Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994); *see also* Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 144 (5th Cir. 1982).

27 *See* Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir. 1995); *see also* United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 887 (1990) [hereinafter *BOE of Phila.*].

be "real [rather] than speculative, or hypothetical"[28], "merely conceivable,"[29] or "hypothetical,". ; (4) An employer "stands on weak ground when advancing hypothetical hardships in a factual vacuum."[30]; (5)"undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."[31]; and (6) "undue hardship requires more than proof of some fellow-worker's grumbling…. [a]n employer … would have to show … actual imposition on co-workers or disruption of the work routine.[32]

B. Public Employees

Like the private sector, Title VII religious accommodation claims can arise in the public sector,[33] however in addition to Title VII public employees can allege constitutional rights under the Free Exercise Clause. *Polk v. Brown* affirmed *U.S v. Board of Education's* holding that "any religious activities of employees that can be accommodated without undue hardship to the governmental employers are also protected by the First Amendment."[34] Thus, if a governmental employer has violated Title VII, "it has also violated the guarantees of the First Amendment."[35] Yet the Supreme Court often refuses to make constitutional precedents "when claims can be decided on non-constitutional grounds."[36]

However, because employees can make constitutional claims under the Free Exercise Clause, the Religious Freedom Restoration can be triggered. The *Boerne v. Flores* court held that RFRA claims or defenses, are now generally only available for employees of the federal

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28 *See* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981); *see also* Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989); Smith v. Pyro Min. Co., 827 F.2d 1081, 1086 (6th Cir. 1987); Brown v. Gen. Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979).

29 *Brown*, 61 F.3d at 655.

30 Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992).

31 *See* Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978); *see also* Draper v. United States Pipe & Foundry Co., 57 F.2d 515, 520 (6th Cir. 1975).

32 *Brown*, 61 F.3d at 655 (8th Cir. 1995).

33 *See Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/religious-garb-and-grooming-workplace-rights-and-responsibilities#_ftnref3.

34 *Brown*, 61 F.3d 655; *see BOE of Phila.*, 911 F.2d at 887.

35 *Brown*, 61 F.3d 655.

36 *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979).

government.[37] *Employment Division v. Smith,* a seminal RFRA case, involved a dispute where employees were fired by a drug rehabilitation organization after ingesting peyote for sacramental purposes.[38] *Smith* upheld the law that banned all of peyote which burdened the employees, who were religious practicing members of a Native American Church.[39] The Court concluded that the Oregon law banning ingestion of peyote was constitutional because, while the law did burden religious practice, it was not specifically aimed at promoting or restricting religious beliefs.[40] The modern approach developed in *Smith* demonstrates that the government has a bit of leeway to regulate religious activities if the rules themselves are of general applicability and no particular religion is being targeted.[41]

C. Employer Goals to Enhance Diversity and Inclusion

Legislation along with executive orders at the federal, state, and local level prohibit workplace discrimination against lesbian, gay, bisexual, and transgender employees. These protections coupled with laws prohibiting discrimination in employment because of religion raise complex issues for employers.[42] As recent as 2020, the Supreme Court held in *Bostock v. Clayton County* that an employer "who fires an individual employee merely for being gay or transgender"[43] violates Title VII of the Civil Rights Act of 1964. [44]

Considering these recent changes, discrimination against LGBT employees is now often included in employer diversity training or education programs, if not done so prior. Accordingly,, an increasing number of private employers now include discussion about sexual orientation and gender identity in their diversity awareness

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37 *See In re* Young, 141 F.3d 854 (8th Cir. 1998).

38 Empl. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

39 *Id.*

40 *Id.*

41 *See The Free Exercise Clause,* LAWSHELF (2021) https://lawshelf.com/shortvideoscontentview/the-free-exercise-clause/.

42 *See, e.g.*, Molly E. Whitman, *The Intersection of Religion and Sexual Orientation in the Workplace: Unequal Protections, Equal Employees*, 65 SMU L. REV. 713 (2012) (examining the conflict for employers when faced with choosing between protecting an employee's religious beliefs which are covered by Title VII and an employee's sexual orientation which historically has not been covered by Title VII.).

43 Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

44 *Id.*

programs, raising concerns for employees who hold strong religious beliefs regarding homosexuality.[45]

Employers thus often work hard to enhance diversity and inclusion goals. Most companies believe that the reward lies with an acquisition of a diverse workforce, which in sum better equips an employer to compete. Employers will continue to spend millions on branding their selves as inclusive, but such commitment becomes complex when faced with the requests of religious accommodations like Lawson and Rickerd.[46]

Saying that employers have put some efforts to foster inclusivity in their workforce is an understatement. For example, Kroger Co.'s Chairman supports the notion of bolstering inclusivity and has gone to "great lengths to do so."[47] Similarly, after the George Floyd shooting, where the Black Lives Matter Movement became prevalent, "as a demonstration of [their] commitment to being part of the solution, and as a first step toward being a catalyst for change, [Kroger] [] establish[ed] a $5 million fund to support the advancement of racial equity and justice."[48] The investment earmarked within The Kroger Co. Foundation, for improving diversity, equity and inclusion.[49] Additionally, Kroger ranked fourth on The Wall Street Journal's list of the top twenty most diverse Fortune 500 companies.[50]

Kroger's push for inclusivity has become one of the forefronts for their success and recognition recently, particularly in the work it

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45 *See* ONTIVEROS ET AL., *supra* note 18, at 615-16 ; *see also* for contrasting perspectives on accommodating the clash in American society between religious freedom and LGBT civil rights, Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006); *see also* George W. Dent, Jr., *Civil Rights for Whom? Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553 (2007).

46 *See* Complaint at 4, EEOC v. Kroger Co., No. 20-1099 (E.D. Ark. Sept. 14, 2020), ECF No. 1.

47 *See* Rodney McMullen, *A Message from Rodney McMullen, Chairman/CEO, Kroger Co.,* KROGER CO. (June 5, 2020) https://www.thekrogerco.com/wp-content/uploads/2020/10/June-2020_A-Message-from-Rodney-McMullen-The-Kroger-Co.s-Chairman-CEO.pdf.

48 *Id.*

49 *Id.*

50 *See* Gina Acosta, *Walmart, Kroger Earn Top Scores on Corporate Equality*, PROGRESSIVE GROCER (Jan. 21, 2020), https://progressivegrocer.com/walmart-kroger-earn-top-scores-corporate-equality#:~:text=Kroger%20ranked%2013th%20on%20Omnikal's,most%20diverse%20Fortune%20500%20companies.

has done with the LGBT community.[51] Among the benefits now offered by Kroger are; an associate resource group, providing an uplifting community for LGBT employees and allies, same-sex partner benefits and transgender-inclusive health care.[52] Kroger partners with the National Gay and Lesbian Chamber of Commerce to create and enhance partnerships with LGBT suppliers.[53] Kroger achieved Billion Dollar Roundtable status for reaching more than one billion dollars in spend with certified minority- and women-owned suppliers.[54] Furthermore, Kroger ranked thirteenth on Omnikal's 2019 Omni50 list, which recognizes America's top 50 corporate and government buyers of products and services from inclusive and diverse suppliers. [55]

Multiple organizations have taken the same approach as Kroger to push inclusiveness in their workplace. As recent as June 2018 Unisys "approved an updated Inclusion & Diversity framework"[56]. The framework was brought in to "engage associates"[57] in their philosophy from the ground up.[58] Unisys bolstered its diversity team and continues to take steps to embrace employees of all backgrounds. [59]

Additionally, as recent as August 2020, twelve new companies bolstered their diversity programs.[60] For example, Invitae "created activities to support community and allyship, including launching seven employee resource groups (ERGs)" which include; woman in tech, Latinx, pride rainbow connection, peer soul support, black genetics, etc.[61] Moreover, General Motors took a stand for equality as well when it decided to donate ten million dollars to support

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51 *See id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 Katie Ebrahimi, *Looking Back at My First Few Months*, FOCUS ON U (Aug. 2018) https://www.app5.unisys.com/library/cmsmail/18-0037/Q2/18-0037_Q2.html.

57 *Id.*

58 *Id.*

59 *Id.*

60 Dominique Fluker, *12 Companies Ramping Up Their Diversity & Inclusion Efforts - and How You Can Too,* HIRING & RECRUITING BLOG (Aug. 26, 2020), https://www.glassdoor.com/employers/blog/inspiration-for-ramping-up-diversity-inclusion-efforts/.

61 *Id.*

organizations promoting equality.[62] Millions of dollars were allocated and donated to organizations that promote diversity initiatives.[63] General Motors also commissioned an Inclusion Advisory Board, bringing both internal and external leaders together to address the systemic barriers hindering inclusivity.[64] The trend only continues from there.

Many employers believe that having a diverse work force will allow them to thrive as a company and increase productivity. According to studies conducted by MarketWatch, companies with a diverse staff are "better positioned to meet the needs of diverse customer bases, and the cash flows of diverse companies are 2.3 times higher than those of companies with more monolithic staff."[65] Additionally, diverse companies are "70% more likely to capture new markets than organizations that do not actively recruit and support talent from under-represented groups."[66] Furthermore, the McKinsey study "Why Diversity Matter" using 2017 diversity data, found that companies in the top quartile for gender diversity on their executive teams were 21 percent more likely to experience above-average profitability than companies in the fourth quartile. [67]

D. Evangelical Discomfort

On the other side of the coin, Christians like the Kroger employees have not felt the warmth of this progressive movement to combat a lack of diversity. The Tanenbaum Center for Interreligious Understanding released a 2013 study that suggests discomfort for evangelical Christians. Many of the survey results were "expected after 15 years of working across industries and with Fortune 500 companies to prevent religious bias", but others were more surprising.[68] Tanenbaum anticipated that Americans from minority

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62 *Id.*

63 *Id.*

64 *Id.*

65 Jack Myers, *Opinion: The Numbers Don't Lie: Diverse Workforces Make Businesses More Money,* MARKETWATCH (Aug. 1, 2020), https://www.marketwatch.com/story/the-numbers-dont-lie-diverse-workforces-make-companies-more-money-2020-07-30.

66 *Id.*

67 Vivian Hunt et al., *Delivering Through Diversity,* MCKINSEY & CO. (Jan. 18, 2018) https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity.

68 *What American Workers Really Think About Religion,* TANENBAUM COMBATING RELIGIOUS PREJUDICE (Mar. 2013), https://tanenbaum.org/wp-

religious and non-religious groups would experience prejudice.[69] As expected, both members of minority religions and atheists reported seeing or personally experiencing bias at work.[70] What is new is that a significant number of people from our nation's majority religious group, Christianity, are also feeling mistreated at work.[71] In 2013, nearly 6-in-10 white evangelical Protestant workers agreed that discrimination against Christians is as big a problem as discrimination against other religious minorities.[72]

Some Evangelical protestants have often reported witnessing or being a victim of religious discrimination. Among religious groups, non-Christian religious workers (49%) and white evangelical Protestants (48%) are most likely to report experiencing or witnessing non-accommodation incidents, followed by atheists (40%), Catholics (35%), and white mainline Protestants (32%).[73] Only about one in five (22%) black Protestants report that they have experienced or witnessed some form of religious non-accommodation.[74] Although both non-Christian religious workers and white evangelical Protestants report significant incidents of non-accommodation, the incidents reported are quite different. Nearly one in five (17%) non-Christian religious workers report experiencing or witnessing employees being discouraged from wearing facial hair or clothing that is part of their religious identity, compared to 2% of white evangelical Protestants.[75] However, thirty-nine percent of Evangelical Protestants are more likely to report that they or their coworkers were required to work on Sabbath observances or religious holidays, compared to approximately one-quarter of non-Christian religious workers.[76]

Additionally, evangelical protestants report having been subject to verbal abuse as employees. Roughly one in five of both non-Christian religious workers (21%) and white evangelical Protestants (16%) report incidents in which coworkers made jokes about their

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content/uploads/2014/02/Tanenbaums-2013-Survey-of-American-Workers-and-Religion.pdf.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 TANENBAUM COMBATING RELIGIOUS PREJUDICE, *supra* note 68.

75 *Id.*

76 *Id.*

religious beliefs or practices.[77] Moreover, six-in-ten (60%) white evangelical Protestants agree that the mass media is hostile toward their moral and spiritual values, compared to 40% of atheists, and 27% of non-Christian religious workers.[78]

Interestingly enough, employers could benefit from having happy religious workers. Employers who adopt a proactive and accommodating religious atmosphere are likely to have more satisfied employees than those who do not.[79] Additionally, regardless of a company's size, workers whose companies offer education programs about religious diversity and flexibility for religious practice "report higher job satisfaction than workers in companies that do not."[80] Similarly, studies show that these polices result in positive job satisfaction reports if they are effectively communicated among employees.[81] The Tannenbaum survey documents that when it comes to addressing religion in the workplace, one size does not fit all.[82] A non-Christian may care more about issues around the right to display a sacred object at work or to pray during the day, while a Christian may be more concerned about taking off Sunday as the Sabbath in order to attend church.[83]

In sum, the Tanenbaum report highlights the dynamic that most employers encounter. As employers move towards a progressive or inclusive initiative, there are at least some Christian employees who feel ostracized. Of course, this one survey cannot capture the full picture of every single company, but it nonetheless shows some evidence that Christians like the Kroger employees could be experiencing hostility at work.

II. THE EEOC'S GUIDANCE

In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to "chart its own course" rather than to defer to Equal Employment Opportunity Commission ("EEOC" of

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77 *Id.*
78 *Id.*
79 TANENBAUM COMBATING RELIGIOUS PREJUDICE, *supra* note 68.
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*

"Commission") regulations and guidance interpreting these laws.[84] The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, national origin, age, disability, or genetic information.[85] Above all, courts have declined to decide what standard of deference to give the EEOC.[86]

Nonetheless, the EEOC should not be overlooked because courts have deferred to their rules when they are reasonable. For example, in *Edelman v. Lynchburg College*[87] the Court held that the EEOC rule was "not only a reasonable one, but one [the court would] adopt even if there were no formal rule and [the Court] were interpreting the statute from scratch."[88]

Throughout the years the EEOC has continued to provide dress code guidance for public and private employers to ensure that accommodations are available for all walks of faith. The EEOC explains that "Title VII protects all aspects of religious observance, practice, [or] belief, and defines religion broadly."[89] Thus, Title VII includes "not only traditional organized religions such as Christianity, Judaism, Islam, Hinduism, Buddhism, and Sikhism, but also religious beliefs that are new, uncommon . . . illogical or unreasonable to others."[90]

Accordingly, the EEOC explains that an employer that is not a religious organization (as legally defined under Title VII) cannot make employees wear religious garb or articles (such as a cross) if they object on grounds of non-belief. The EEOC sets out that Title VII applies to any practice that is motivated by a religious belief, even if

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84 Sutton v. United Air Lines, Inc., 527 U.S. 471, 513 (1999), *overturned due to legislative action* (2009) (Stevens, J., dissenting); *see* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC,* 74 FORDHAM L. REV. 1937 (2006).

85 *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2021) https://www.eeoc.gov/overview.

86 *See* Hart, *supra* note 84, at 1942.

87 535 U.S. 106 (2002).

88 *Id.* at 114. Concurring in the judgment, Justice Sandra Day O'Connor challenged the majority's refusal to address the deference question and noted that the reasoning the Court used suggested that it was applying Chevron deference. *See id.* at 121-23.

89 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.

90 *Id.*

other people may engage in the same practice for secular reasons.[91] However, if a dress or grooming practice is a personal preference, for example, where clothes is worn for fashion rather than for religious reasons, it does not come under Title VII's religion protections.[92]

Similarly, the EEOC points out that Title VII's accommodation requirement may apply to religious beliefs that are "sincerely held"[93] regardless of deviation from the commonly followed tenets of the religion. Accordingly, an individual's religious beliefs - or degree of adherence - may change over time, yet may nevertheless be sincerely held.[94] Therefore, like the "religious"[95] nature of a belief or practice, the "sincerity"[96] of an employee's stated religious belief is usually not in dispute in religious discrimination cases.[97] However, if an employer has a legitimate reason for questioning the sincerity of an employee, it may ask an applicant or employee for information reasonably needed to evaluate the request.[98]

Furthermore, the EEOC describes what a "more than de minimis"[99] cost or burden on the operation of an employer's business may look like.[100] For example, if a religious accommodation would impose more than ordinary administrative costs, it would pose an undue hardship.[101] This is a lower standard than the Americans with Disabilities Act (ADA) undue hardship defense to disability accommodations.[102]

Moreover, when a religious accommodation is provided, the employer may retain its usual dress and grooming expectations for other employees, even if they want an exception for secular reasons. For example, let us say an employee who adheres to modest dress based on her religious beliefs is hired as a front desk attendant at a

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91 *See id.*; *see also* EEOC v. Fam. Foods, Inc., No. 11-0394 (E.D.N.C. Apr. 27, 2012), ECF No. 19 (settlement of case alleging failure to accommodate long hair worn pursuant to employee's Nazirite religious beliefs).

92 Fluker, *supra* note 60.

93 *Id.*

94 *Id.*

95 *See* ONTIVEROS ET AL., *supra* note 18, at 615-18.

96 *Id.*

97 *Id.*

98 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

sports club.[103] The club manager advises the employee that the club has a dress code requiring all employees to wear white tennis shorts and a polo shirt with the facility logo.[104] The employee requests permission as a religious accommodation to wear a long white skirt with the required shirt, instead of wearing shorts.[105] Accordingly, the EEOC explains that the club should grant the request and may deny others the request who want the accommodation for secular purposes.[106]

Moreover, requiring an employee's religious garb, marking, or article of faith to be covered is not a reasonable accommodation if that would violate the employee's religious beliefs. An employer may accommodate an employee's religious dress or grooming practice by offering to have the employee cover the religious attire, if permitted by the employee's faith.[107] An example may be an employee receiving small tattoos during a religious ceremony, encircling his wrist, written in the Coptic language, which expresses servitude to a god.[108] Covering the tattoos is a reasonable accommodation so long as doing so is not a sin according to his religion.[109]

The EEOC further notes that an employer's rubric of "image"[110] to deny a requested religious accommodation may violate Title VII, or otherwise be insufficient to demonstrate an undue hardship on the operation of the business.[111] The guidance specified by the EEOC provides that "employers should ensure that front-line managers and supervisors understand that if a proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.[112] However employer actions keeping an employee out of public view because he or she is wearing

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103 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.
104 *Id.*
105 *Id.*
106 *Id.*
107 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.

religious garb [113] would not satisfy the undue hardship standard.[114] The employer is thus advised to make an exception to its dress code to let the employee wear his religious garb during front desk duty as a religious accommodation.[115] Alternatively the EEOC explains that the employer may place the employee in another assignment at the same rate of pay.[116]

Lastly, the EEOC provides procedural guidance on how employees should go about addressing their religious accommodation concerns. Employees or job applicants are advised to attempt to address concerns with management.[117] Additionally, they should keep records documenting what they experienced or witnessed, and any complaints made about the discrimination, as well as witness names, telephone numbers, and addresses.[118] If the matter is not resolved, private sector, state or local government applicants and employees may file a discrimination claim with the EEOC.[119]

The EEOC's guidance is not conclusive law, but it provides perspectives and examples that can serve both the employer and employee. From a holistic view, employers should be properly training their employees to stay in compliance with Title VII guidelines. Although a standard of deference has not been addressed by courts, EEOC guidance has been cited in the past and created law.[120] Thus, any advice provided by the EEOC should be given at least some weight.

III. STIGMATIZATION OF EMPLOYEES

What is lost in the Title VII legal analysis is the opportunity to gain perspective from the believer. Although the "sincerely held

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113 *See id.*; *see also* EEOC v. 704 HTL Operating, LLC and Investment Corporation of America, No. 11-0845 (D.N.M. Nov. 2013) (settlement on behalf of individual whom employer hired for hotel housekeeping position but then barred from working unless she removed her Muslim head scarf); *see also* EEOC v. Lawrence Transp. Sys., No. 10-0097 (W.D. Va. Aug. 2011) (settlement on behalf of applicant for storage company loading position who alleged he was not hired due to his Rastafarian dreadlocks).

114 Fluker, *supra* note 60.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 Fluker, *supra* note 60.

120 *See Sutton*, 527 U.S. at 513 (Stevens, J., dissenting).

belief"[121] prong of the Title VII prima facie showing offers insight to the trier of fact, the sole purpose of this prong is to confirm only that the belief is sincere.[122] Sincerity does not account for what religious employees could experience after gaining an accommodation nor why they choose to be different.

Unfortunately, not all troubles can be ameliorated after receiving an accommodation. As it so happens a coin sized logo could be disruptive to an employee's life. It would be easy for an employee to accept the change in uniform and continue with business per usual, however some religious employees are not that simple. Because a religious mindset offers variation, courts can benefit from taking further measures to understand a religious faith instead of spending most of the time focusing on how the accommodation creates an undue hardship. An employee's thoughts are just as helpful in determining whether an accommodation should be granted, because they provide insight into an employee's cognitive process leading to refraining from an action, and how the employee might feel if provided an accommodation.

A. Employee Perspective

Although secular employees would agree that refusing to wear a coin-sized symbol on an apron or uniform seems trivial, a religious employee would find this action to be damaging to their testimony as a believer . The Kroger employees explained that wearing the small logo supporting the LGBT community on their apron would be supporting sin according to their holy scriptures.[123] The Kroger employees could easily have cut their losses and worn the apron, however, avoiding representing sin meant more than the cost of employment.

Most courts rarely if at all delve into why a belief matters, and at most will discuss whether a "practice is religious"[124] or not. *Welsh v. United States*[125] has defined religious practices to include moral or ethical beliefs as to what is right or wrong which are sincerely held

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121 ONTIVEROS ET AL., *supra* note 18, at 577-78.

122 See *id.*: *see also* Anna E. Reed, *Faith in Title VIIL It's a Matter of Belief*, 79 LA. L. REV. 945 (2019) (arguing that instead of grappling with the definition of religion, courts ought to focus on analyzing the sincerity of the religious beliefs).

123 *See* Complaint at 3, EEOC v. Kroger Co., No. 20-1099 (E.D. Ark. Sept. 14, 2020), ECF No. 1.

124 ONTIVEROS ET AL., *supra* note 18, at 577-78.

125 398 U.S. 333 (1970).

with the strength of traditional religious views.[126] Sadly, grappling with what is religious tells us very little about whether the belief was "sincerely held"[127] or why a practice and belief matters. The why can be imperative to find a solution regardless of the extra time it may consume, and although justice prolonged may be justice not served, injustice can be harsh and discordant.

Thus, taking even a brief look to explore religious doctrine can tell you a lot about who the plaintiff is, which cannot be a waste of time. Equally, employers could benefit from understanding who their employee is, and what is most important to them. So, for this note's purpose we will consider why it may be important for religious employees like Rickerd and Lawson to remove their symbolled apron.

Firstly, the religious landscape of the United States continues to change at a rapid pace.[128] In Pew Research Center telephone surveys conducted in 2018 and 2019, 65% of American adults describe themselves as Christians when asked about their religion, down 12 percentage points over the past decade.[129] Meanwhile, the religiously unaffiliated share of the population, consisting of people who describe their religious identity as atheist, agnostic or "nothing in particular,"[130] now stands at 26%, up from 17% in 2009.[131] Both Protestantism and Catholicism are experiencing losses of population share.[132] Currently, 43% of U.S. adults identify with Protestantism, down from 51% in 2009, and one-in-five adults (20%) are Catholic, down from 23% in 2009.[133]

Representation matters for the average Christian, however what would further concern Christians is the rise of a group also known as religious "nones".[134] Self-described atheists now account for 4% of U.S. adults, up modestly but significantly from 2% in 2009; agnostics make up 5% of U.S. adults, up from 3% a decade ago; and 17% of Americans now describe their religion as "nothing in

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126 *Id.*

127 ONTIVEROS ET AL., *supra* note 18, at 577-78.

128 *Global Christianity – A Report on the Size and Distribution of the World's Christian Population*, PEW RSCH. CTR. (Dec. 19, 2011), https://www.pewforum.org/2011/12/19/global-christianity-exec/.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 PEW RSCH. CTR., *supra* note 128.

134 *Id.*

particular," up from 12% in 2009.[135] Members of non-Christian religions also have grown modestly as a share of the adult population.[136] Hence, the religion that was once a vast majority, now appears to see its numbers dwindle. Accordingly, you can infer that the representation of the Christian community in the United States could continue to drop over the years, thus endangering the strong weight Christian values once had.

Moreover, data shows that U.S church attendance is declining. Over the last decade, the share of Americans who say they attend religious services at least once or twice a month dropped by 7 percentage points, while the share who say they attend religious services less often (if at all) has risen by the same degree according to the Pew Research Center Religious Landscape studies.[137] In 2009, regular worship attenders (those who attend religious services at least once or twice a month) outnumbered those who attend services only occasionally or not at all by a 52%-to-47% margin.[138] Today those figures are reversed; more Americans now say they attend religious services a few times a year or less (54%) than say they attend at least monthly (45%).[139] Most church goers are well aware of these numbers because they see this decline every weekend, thus naturally they fear they are losing a voice in their community.

What further seems to concern Christian leaders of today is the lack of time being spent reading biblical scriptures which for advent readers must sometimes be taken literally and seriously. About a third of Americans (35%) say they read scripture at least once a week, while 45% seldom or never read scripture, according to a 2014 Religious Landscape Study.[140] In 2014, about four-in-ten Christians (42%) said reading the Bible or other religious materials is an essential part of what being Christian means to them personally.[141] An additional 37% said reading the Bible is important but not

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135 *Id.*

136 *Id.*

137 *The U.S Decline of Christianity Continues at a Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace.

138 *Id.*

139 *Id.*

140 A.W. Geiger, *5 Facts on How Americans View the Bible and Other Religious Texts*, PEW RSCH. CTR. (Apr. 14, 2017), https://www.pewresearch.org/fact-tank/2017/04/14/5-facts-on-how-americans-view-the-bible-and-other-religious-texts/.

141 *Id.*

essential to being a Christian, and 21% said reading the Bible is not an important part of their Christian identity.[142] These statistics help us understand the amount of Christians who might take a literal biblical interpretation, which to today's standards would appear harsh considering the amount of force biblical texts may have.

Younger millennials have expressed less interest in reading scriptures consistently as opposed to older Christians. Americans of the age seventeen through twenty-eight were surveyed by Pew Research in 2014.[143] The poll results revealed that only 17% of Christians in this age group read scriptures once a week.[144] Contrastingly, 33% of those of the age 30-49, 29% of the ages 50-64, and 21% of those of the ages 65 and above said they read scriptures at least once a week.[145] Accordingly, an inference can be made that older conservative employees like Rickerd (57) and Lawson (63) may approach life with a more literal biblical interpretation, as opposed to younger or up and coming Christians.

In general, regardless of denomination, all Christians follow the same bible or a similar bible. There are 109 complete translations of the Bible into English. The complete Bible has been translated into 670 different languages.[146] With many different expressions of Christianity, the Holy Bible containing the Old and New Testament is sacred to all Christians.[147]

B. How does the Bible Describe Sin?

The next logical question to ask would be what scriptures say about a certain topic. For example, the Kroger employees could refer to biblical references regarding work, symbols, or character. What these employees would find, are likely biblical texts that frown upon

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142 *Id.*

143 *Frequency of Reading Scripture*, PEW RSCH. CTR. (2021), https://www.pewforum.org/religious-landscape-study/frequency-of-reading-scripture/.

144 *Id.*

145 PEW RSCH. CTR., *supra* note 143.

146 *See* Brandon Labbree, *Are All Christian Denominations Using the Same Bible*, QUORA (Dec. 28, 2017), https://www.quora.com/Are-all-Christian-denominations-using-the-same-Bible; *see also* Bible Registry, *Idea #32: One Bible with Many Churches, Denominations and Sects*, BIBLE (Aug. 10, 2015), https://get.bible/blog/post/idea-32-one-bible-with-many-churches-denominations-and-sects.

147 BIBLE, *supra* note 146.

homosexuality, encourage firmness in their faith, and promote diligence at work. [148]

Accordingly, the Bible advises Christians to submit to their master when at work, because part of their responsibilities is to exercise due diligence and bring home the required bread for their family.[149] It says in the book of Timothy "anyone who does not provide for their relatives, and especially for their own household, has denied the faith and is worse than an unbeliever."[150] A similar instruction is provided for Christians in the book of Thessalonians where believers were quitting their jobs and expecting Jesus' second coming.[151] For those reasons Paul gave these instructions in 2 Thessalonians 3 "now such persons we command and exhort in the Lord Jesus Christ to work in quiet fashion and eat their own bread. But as for you, brethren, do not grow weary of doing good."[152]

Moreover, courage for Christian workers may sometimes include clashing with current rules or polices that clash with God's law. The book of Exodus parses out a story where two midwives risked their lives to save a baby, against a Pharoah's wishes.[153] The Hebrew midwives Shiphrah and Puah courageously defied the authority of Pharaoh by disobeying his wicked edict to kill the newborn Hebrew boys.[154] These midwives jeopardized their own safety to protect and save the life of Moses and the other baby boys.[155] Shiphrah and Puah feared God more than they feared Pharaoh, and God blessed them because of their righteous actions—actions that were motivated by their reverence for God.[156] Accordingly, a biblical reader could apply this story to any context where God's law and societal laws are at odds.

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148 *See Leviticus* 18:22, NIV; *see* 1 Timothy 5:8, NIV; *see Ephesians* 6:11, NIV; *see also* 2 Thessalonians 3:13, NIV.

149 1 *Timothy* 5:8, NIV.

150 *Id*.

151 *See* Melissa Petruzzello, *Letter of Paul to the Thessalonians*, ENCYC. BRITANNICA (Aug. 20, 2020), https://www.britannica.com/topic/letters-of-Paul-to-the-Thessalonians.

152 2 *Thessalonians* 3:6-15.

153 *See Exodus* 1:15

154 *Exodus* 1:15-21.

155 *Exodus* 1:15-21; *see also* Marg Mowczko, *6 Women who Protected and Rescued Moses*, MARG MOWCZKO (Aug. 24, 2011), https://margmowczko.com/the-women-who-protected-moses/.

156 *Exodus* 1:15-21.

Similarly, the Bible instructs readers to guard its teachings and encourages adherence. The Bible reads that God's word is "the eternal, immutable reality."[157] These scriptures go as far as suggesting that the Bible is an "infinitely more concrete reality than the material universe that surround [it]".[158] Jesus, the Christian savior, once said in the book of Matthew that "heaven and earth will pass away, but [his] words will never pass away."[159] The book of Psalms, written by David, a king of Israel, echoed similar words when he wrote "Your word, O LORD is eternal; it stands firm in the heavens."[160] According to these scriptures, biblical principles provided by these texts are paramount to a believer's life.

Furthermore, the Bible regards many misdoings against God as sin. In Hebrew "hattat", the word for sin means a missing of a standard, mark, or goal.[161] There are many sins that come up in the bible, but some sins are warned about more frequently than others.[162] For example, most Christians would agree that idolatry, homosexuality and adultery are some of those sins that angered God from the book of Genesis, all the way to new Testament books like Galatians and Corinthians.[163] Thus, these sins are viewed as provocative to God to the average Christian.

Accordingly, the ramifications for sin may not be taken lightly by a Christian employee reading biblical scriptures. In Romans 6, the penalty for disobedience is described when it says, "for the wages of

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157 Rebecca Brogan, *Artist's Reflection*, JOHN THE BAPTIST ARTWORKS (2020), https://jtbarts.com/gallery/the-word-of-god-series/heaven-and-earth-will-pass-away-but-my-words-will-never-pass-away-matthew-24-35/#:~:text=Heaven%20and%20Earth%20Will%20Pass,35)%20%E2%80%93%20John%20The%20Baptist%20Artworks&text=God's%20Word%2C%20the%20truth%2C%20will,and%20earth%20have%20passed%20away.

158 *Id*.

159 *Mathew* 24:35; *see also Luke* 16:17 (it is easier for heaven and earth to disappear than for the least stroke of a pen to drop out of the Law [God's Word]."

160 *Psalms* 119:89.

161 Daniel Doriani, *Sin*, BIBLESTUDYTOOLS (1996), https://www.biblestudytools.com/dictionary/sin/.

162 Kevin Deyoung, *Serious Sins*, TGC (Sept. 8, 2017) https://www.thegospelcoalition.org/blogs/kevin-deyoung/serious-sins/.

163 *Id*.; *see Romans* 13:13 (Let us walk properly as in the daytime, not in orgies and drunkenness, not in sexual immorality and sensuality, not in quarreling and jealousy.); *see also* 1 *Corinthians* 6:9-10 (Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the kingdom of God.).

sin is death".[164] Moreover, Sin in the bible has led to destruction of cities such as Sodom and Gomorra in Genesis chapters 18-19. This ancient city was wiped out after one hundred years of citizens partaking in sins like sexual immorality and homosexual activities.[165] Accordingly this form of justice might loom in the head of readers.

An even bigger fear for most Christians is missing out on the afterlife. Paul addressed another church in Galatians echoing the penalty for sin when he said "now the works of the flesh are evident: sexual immorality, impurity, sensuality, idolatry, …I warn you, as I warned you before, that those who do such things will not inherit the kingdom of God."[166] Respectively, most Christians would want to inherit the kingdom of heaven, hence missing out on that privilege would be devastating for a believer.[167]

Representation of sin can take unexpected stretches. For example, John Macarthur, a well revered biblical teacher in the Christian community has gone as far to point out that even the support for the Black Lives Matter organization is an endorsement to the sin of homosexuality.[168] Mr. Macarthur went on to quote BLM's guiding principles to reinforce his premise which reads BLM is "[queer affirming], transgender affirming, [by] making space for transgender siblings . . . do the work to dismantle the cis gender, and uplift transgender black folks especially transgender women."[169] According to Macarthur, such movements oppose God's design to maintain a union between men and women.[170]Accordingly, a believer

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[164] *Romans* 6:23

[165] *Genesis* 19:4-5 (Before they had gone to bed, all the men from every part of the city of Sodom — both young and old — surrounded the house. They called to Lot, 'Where are the men who came to you tonight? Bring them out to us so that we can have sex with them); *see also Genesis* 19:24 (the LORD rained down burning sulfur on Sodom and Gomorrah — from the LORD out of the heavens. Thus he overthrew those cities and the entire plain, including all those living in the cities. . . ."); *see also What is the sin of Sodom and Gomorrah?*, GOT QUESTIONS (2021), https://www.gotquestions.org/Sodom-and-Gomorrah.html

[166] *Galatians* 5:19-21 ESV.

[167] *Id.*

[168] PleadForGrace, *John Macarthur - Should Christians be Involved with Black Lives Matter Movement*, YOUTUBE (July 18, 2020), https://www.youtube.com/watch?v=ZkVrYk2eFtQ.

[169] *See id.*; *see also Guiding Principles*, BLACK LIVES MATTER LA (2020), https://www.blmla.org/guiding-principles.

[170] PleadForGrace, *supra* note 168.

seeking an accommodation to remove a Black Lives Matter symbol from an apron, now seems possible.

In sum, biblical scriptures define sin explicitly and explain the consequences for remaining sinful, which is difficult to walk away from to a reader. Thus, when you look at Rickerd and Lawson's case who believe in the interpretation of the Bible, their decision to not wear a rainbow logo would be an obligation to them, according to biblical scriptures. These are biblical truths they believe will warrant confrontation when time for judgment. Theoretically, any association to principles that are contrary to these teachings could keep a believer outside the kingdom of heaven, which is the ultimate penalty for any Christian.

IV. RECOMMENDATIONS AND POTENTIAL IMPACT

The law slants slightly in favor of employers when it comes to religious accommodation claims because of the de minimis standard that the courts have adopted. As the EEOC points out, religious accommodations do not require the same strict burden for defendants that the ADA requires.[171]Accordingly, employees are left wondering whether they should request an accommodation in fear of failing in court, retaliation, stigmatization, or termination.

I argue that the di minimis standard should not allow employers to escape liability for religious dress code accommodations because employers have other options to brand that are less invasive. First, employers can become more neutral with their dress code policies and brand at volunteer or social events to show their support for groups that have suffered such as the LGBT community. Second, employers can be more subtle with uniform by using pins, hats, or attachments that are not strung onto uniforms to voice a company opinion. Third, employers can be consistent in informing their employees the measures they are taking to create a workplace that does not discriminate against any group. (newsletters, emails to keep people in the loop, etc.)

A. Undue Hardship and De Minimis

Employers should not benefit from the undue hardship defense for dress code accommodations because any benefit would be inconsistent with the protections granted under Title VII. Under Title

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171 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.

VII, "to require [an employer] to bear more than a de minimis cost is an undue hardship."[172] De minimis cost, entails not only monetary concerns, but also an "employer's burden in conducting its business."[173] Most employers carry the incentive to promote inclusivity with social branding, however this type of branding excludes and forces religious employees to find accommodations that they would not seek if the dress code were neutral. Because of employers' wealth of branding techniques that do not require symbolism or branding on uniform, employers cannot face a burden in conducting their business.

First, branding a certain way does not eliminate an essential function for most employers. "The circumstances under which an [] accommodation may cause undue hardship, must be made in the particular factual context of each case."[174] However, some courts have already agreed that exempting a religious employee from a "look policy"[175] would not cause an employer to suffer more than a de minimis hardship. In *EEOC v. Abercrombie & Fitch Stores*[176]*, Inc.* an employee of a clothing store converted to a religion that prohibited the wearing of clothing that conformed to the store's dress code, and rejected accommodations proffered by Abercrombie.[177] Therefore, she was forced to resign and file a Title VII claim.[178] The court held that Abercrombie failed to meet their burden of demonstrating they would have suffered more than a de minimis hardship, reasoning that hardships must be real rather than "speculative, conceivable, or hypothetical."[179] Thus, exempting religious employees from dress code branding does not create an undue hardship.

Next, employers generally invite conflicts with religious employees when branding to promote a cause that is against religious principles, thus they should eliminate the conflict. Courts have agreed that "[w]hile a reasonable accommodation need not always eliminate the religion-work conflict,"[180] there may be many situations in which

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172 EEOC v. Abercrombie & Fitch Stores, Inc., No. 4:08CV1470 JCH, 2009 U.S. Dist. LEXIS 99546, at *9 (E.D. Mo. Oct. 26, 2009) [hereinafter *Abercrombie*].

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *Abercrombie*, 2009 U.S. Dist. LEXIS 99546, at *9.

178 *Id.*

179 *Id.*

180 EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1008 (D. Ariz. 2006).

the only reasonable accommodation is to eliminate the religious conflict altogether.[181] In *EEOC v. Alamo Rent-A-Car, LLC* the employer's proposal failed to accommodate a religious conflict and thus was not a reasonable accommodation.[182] Employers who brand on uniform and subject religious employees to adverse action without providing alternatives ultimately force employees to choose between a sincere way of life and financial security. Additionally, employers have many options to brand effectively like social media, events, or donations, thus by not doing so they unnecessarily invite conflict that they can easily remedy. Accordingly, employers who brand on dress code should be providing alternatives or exempting employees to ameliorate the conflict.

Lastly, an employer unwilling to accommodate a religious employee's attire cannot show that their losses would be more than monetary. Courts have been clear that a de minimis cost "entails not only monetary concerns, but also the employer's burden in conducting its business."[183] In *Cloutier v. Costco Wholesale*[184] the employer's ultimate decision not to accommodate an employee was acceptable because the employer already offered to bandage the piercings as exposure would eliminate Costco's professional appearance.[185] Employers that brand on uniforms to share their political or social views however are not losing their ability to conduct their business or losing professionalism because social branding is likely a social stance that does not convey professionalism. Additionally, most retailers or companies rely on a good or service's effectiveness to conduct business, not a uniform policy to show quality. At most employers will lose a small following because of lack of endorsement for that community, but nothing more.

Above all, employers do not suffer an undue hardship when socially branding on uniforms because uniform branding does not convey professionalism or preclude employers from carrying their operations. Most religious employees would like to continue working effectively and should not be placed in a position from choosing between a tenant of their faith and financial stability. Thus, employers should not have a defense to stand on if they refuse to

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181 *Id.*
182 *Id.* at 1013.
183 *Abercrombie*, 2009 U.S. Dist. LEXIS 99546, at *9.
184 Cloutier v. Costco Wholesale, 311 F. Supp. 2d 190, 202 (D. Mass. 2004).
185 *Id.*

exempt or accommodate religious employers that do not agree with their social branding.

B. Provide Optional Attachments to Uniform

Employers do not need to alter uniforms to make inclusive or political statements because they have the subtle option of using pins, hats, or attachments that are not strung onto uniforms. Uniformity is vital for many employers, to portray an image that represents the company.[186] This goal to provide a positive identity is respectful but should not come at the expense of ostracizing a religious group that is meant to be protected. Employers can easily maintain uniformity and voice inclusivity or political stances, by providing attire that may be detached and not invasive to any employee.

When you work for major retailers, the company will have a strict dress code for cashiers, as well as for other store employees.[187] Big box retail stores may provide a t-shirt for their employees or may require employees to wear a shirt of a specific color. The retailer may allow some choice in pants, or skirts for women, and footwear.[188] Employee attire may be a combination of pre-determined colors, in addition to designation styles.[189] Thus, many employers might seek to portray their endorsements and support for current causes because of the consistent interaction between frontline employees with customers.

By contrast, secular and religious employees do not respond kindly to strict dress codes. Generally, employees do not want to look the same throughout, however companies still hold that dress codes are imperative because they reflect the image of the company. A study showed that one in three workers would rather show up to work and wear what they want as opposed to receiving a $5000 raise.[190] If this is true for the average worker, how much truer could it be for a worker who adheres to religious practices or the tenants of their faith to avoid moral conflict. Studies show that employees that are proud of their

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186 *See* Kelley v. Johnson*,* 425 U.S. 238 (1976).

187 Alison Doyle, *What to Wear at Work,* BALANCE CAREERS, https://www.thebalancecareers.com/what-to-wear-to-work-for-a-retail-job-2064241.

188 *Id.*

189 *Id.*

190 Jennifer Liu, *1-in-3 Workers Would Rather Have a Casual Dress Code Than an Extra $5000 in Pay*, CNBC: MAKE IT (Aug. 30, 2019, 9:45 AM), https://www.cnbc.com/2019/08/30/1-in-3-workers-would-rather-have-a-casual-dress-code-than-an-extra-5k.html.

uniform are less likely to leave their occupation. [191] Hence, employers have a motive to have a uniform that is comfortable for all.

Additionally, the employer must balance the needs of the customer. Some of the biggest frustrations for customers is walking into a retail store and not being able to tell who the employees are and are not. [192] A study found that customers preferred employees in uniform regardless of whether it was just a nametag.[193] Hence this consideration must be factored in as well.

Thus, providing nametag designs, stickers, or pins are a viable option because they still provide the opportunity that uniforms do to display a message to enhance the customer experience. Name tags, pins and badges help maintain a professional image and increases the potential of a more personalized experience for a customer.[194] For example, an employer could have its base uniform such as khakis and a blue short, while providing a customized pin or nametag showing that the company was founded in a customer's hometown or supports a cause the employee cares deeply about .[195] Of course, not all employees may use the pins, begging the question of cost effectiveness. However, the problem is remedied by asking employees how much to order, akin to asking about uniforms and sizes. Hence pins, nametags, or buttons could accomplish the same goal a customized uniform would.

Moreover, customers would still be able to locate employees in a retail store for the sake of uniformity and be cost effective. In general uniform satisfaction is achieved when a nametag or a way to distinguish the employee from a customer is present.[196] An employer could effectively promote uniformity or professionalism with just a few colors, and still get the valued employee or customer satisfaction with minimal expenses in clothing.[197] Furthermore, the average button with a design costs one dollar and fifty cents, while some

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191 *Id.*

192 Matthew Hudson, *Are Uniforms in Retail Good or Bad,* RETAIL SMALL BUSINESS (Mar. 5, 2019), https://www.thebalancesmb.com/retail-uniforms-good-or-bad-2889981.

193 *Id.*

194 Amber Bailey, Creative Tips for Custom Name Tags, NAME TAG WIZARD BLOG (Apr. 24, 2018), https://www.nametagwizard.com/blog/2018/04/24/improving-customer-staff-relations/.

195 *Id.*

196 *Alamo*, 432 F. Supp. 2d at 1008.

197 Hudson, *supra* note 192.

customized uniforms can cost up to forty dollars.[198] Although these now become separate costs, most companies already have nametag expenses, hence a customization cost for employees who want it would be all that is necessary. Thus, buttons or pins could be cost-effective and still provide uniformity for a company.

Furthermore, employees will less likely request a reasonable accommodation because they can choose to attach or detach the symbol from their uniform. In *Baker v. Home Depot*[199] and many years prior, the courts widely held that an accommodation did not qualify as reasonable unless the employee's religious belief or practice was "completely accommodated".[200] However, more recently, in *Patterson v. Walgreen Co.*[201] courts of appeals, have found that accommodations could be reasonable even if they are incomplete.[202] Nonetheless, regardless of the *Patterson*[203] court's inconsistencies, an effort must still be made to accommodate a religious employee. Accordingly, pins and buttons provide that accommodation because the clothes would remain neutral, and a political tag is easy to make optional to the employee.

Moreover, with pins or buttons, religious employees would not feel excluded or pressured to request a religious accommodation. The drafter's intent in creating a protection for religious employees under Title VII was to "preserve diversity of religious beliefs and

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198 *See Prices,* WACKY BUTTONS (Mar. 21, 2021), https://www.wackybuttons.com/prices.php?gclid=Cj0KCQjw0oCDBhCPARIsAII3C_F_LSfrG1pj9W3KLmHYCD0xcn-C83XpFjOSO44_hms_Xw-igfkDfncaAuhQEALw_wcB#.; *Dickies Lightweight Industrial Work Shirt*, CUSTOM INK, https://www.customink.com/products/workwear-uniforms/work-shirts/dickies-lightweight-industrial-work-shirt/211800.

199 Baker v. Home Depot, 445 F.3d 541, 547-48 (2d Cir. 2006).

200 *Id.* (holding that an employer does not fulfill its obligation when it offers to accommodate only one of two objections). EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1576 (7th Cir. 1996) (same); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994) (same).

201 Patterson v. Walgreen Co., 727 Fed. Appx. 581 (11th Cir. 2018) (unpublished).

202 *Id.* (employer met its obligation to reasonably accommodate the plaintiff's religious sabbath when it allowed him to swap sabbath-day shifts with other employees and, in the alternative, to switch to a different position where there was a larger pool of employees to cover his shifts; Tabura v. Kellogg USA, 880 F.3d 544 (10th Cir. 2018) (finding accommodation analysis to be case specific and refusing to adopt per se rule that an accommodation must fully and completely eliminate the conflict between religion and work to be reasonable.

203 *Patterson*, 727 Fed. Appx. at 581.

practices."[204] Again, some religious employees believe that misrepresenting their faith could be the difference in reaching the afterlife.[205] Accordingly, employers should be trying to include religious employees in all their conversations of promoting inclusiveness.[206] Political or social branding on uniform does not promote this output because employees would then feel unwilling to share their beliefs, without fear of teasing or adverse action by leadership. Therefore, the pins or buttons would be the better and least invasive branding option.

In sum, employers should use pins, buttons or stickers to brand because employees would feel included, and employers could still brand effectively. An employer has multiple routes to take when deciding how to stick to its core principles and foster an inclusive environment. Dress code policies should not be one of them. Dress codes are supposed to reflect professionalism, boost customer satisfaction, and optimize employee efficiency. However, adding social stances that are contrary to religious views erodes that structure because employees grow involuntary pressure to take a stand, hence losing efficiency. This will affect customer interactions and destroy the professional and inclusive framework many employers seek.[207] Therefore attachments like pins or stickers , and not dress codes, should voice employer social concerns.

C. Brand at Volunteer or Social Events

Another way for employers to socially brand while not compromising inclusive or financial goals is by branding at volunteer and social events. Again, employers are generally hard pressed to remain prevalent and spend millions of dollars creating a diverse workforce.[208] Moreover liability is always a possibility when pressure amounts from the public. Whether pressure amounts from the LGBT community or a religious group that cannot make a change, collisions seem inevitable.[209] Branding at volunteer or social events relieves these concerns by taking pressure off employees to agree with a position. Moreover, transparency is achieved because branding elsewhere provides the option to support or stay silent about social

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204 OLIVEROS ET AL., *supra* note 18, 576-77; *see also* 42 U.S.C. § 2000e(j).
205 *See Galatians* 5:19-21 ESV.
206 *See* Acosta, *supra* note 50.
207 *Id.*
208 *Brown*, 61 F.3d 655.
209 OLIVEROS ET AL., *supra* note 18, 614-16.

injustices the company has a different stance on. Thus, branding at volunteer or social events offer employers a better prospect of relieving conflict and employee satisfaction.

Firstly, just like branding with attachments, event branding provides employers the opportunity to brand in a less coercive manner. The flexibility of branding at locations like volunteer or social events gives religious and secular employees the opportunity to attend or not attend an event. For example, TD supports over 6,000 organizations that work to enrich and strengthen local communities across North America and the U.K, but rely on participation from employees and customers.[210] Accordingly, the causes that matter most to customers and employers dictate outcome.[211] The guiding principle in TD volunteer participation should be the same as all employers should have for social involvement, "encourage[ment]" and not coercion.[212] As a result event branding could promote employee satisfaction, inclusivity, and social change.

Additionally, event branding should not be burdensome because employers already use it and have yielded positive results.[213] Local involvement has become the DNA of some employers, and thousands of organizations have already benefitted from community involvement from employers.[214] Employers have provided help to foodbanks, parades, and even donated flowers on Memorial Day to fallen soldiers (TD Bank).[215] This has brought positive publicity and acknowledgement from community members.[216]

Moreover, branding at events is more memorable than branding using uniform at a company location. The flexibility at locations like volunteer events is immense because employers are then able to provide employees merchandise and make their presence known to customers. For example, an employer can announce its

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210 *Our Community Involvement*, TD BANK (2020), https://jobs.td.com/en/why-choose-us/community-involvement/.

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 TDBankUS, *TD Bank Brings 35,000 Memorial Day Flowers*, YOUTUBE (May 26, 2017) https://www.youtube.com/watch?v=uPYTKcCkdSM; SofaTable, *TD*, YOUTUBE (July 1, 2019) https://www.youtube.com/watch?v=co8rV-Ec5mY; Edmonton's Food Bank, *Volunteering at Edmonton Food Bank*, YOUTUBE (Oct. 20, 2017) https://www.youtube.com/watch?v=hFibswdAvm0.

216 TDBankUS, *supra* note 215.

presence while connecting with customers at these events by sporting a company logo and allowing customer-employee participation. Volunteering and communicating with potential customers are less like uniform branding where a barrier exists, and customers only speak to employees if they need help. As a result, a company logo would be much more memorable at a volunteer or social event as opposed to just walking to a branch or location for a quick purchase.

Financial donations to organizations could accomplish similar goals but does not completely tackle pressing community issues.[217] Financial support is important, but donations without actions are less positive because they make the employer seem as though they are attempting to provide an effortless quick fix. [218] For example, Kroger does not match employee donations to non-profit organizations, thus they are viewed negatively.[219] Accordingly, the community responds this way because of the natural tendency to prefer actions not just words of support coupled with some donations. Thus, making some monetary contributions seems one-dimensional and does not show the support or inclusivity that companies would want to portray.[220]

In addition, autonomy is not lost with employers because the ability to create alternative or customized uniforms remain. Employers would still have the opportunity to create customized uniforms at these volunteer events for employees to take home, and allow them to be worn at work optionally.[221] These options would work a bit more efficiently in an office setting because there are likely no customers to tend to, however leadership would be able to designate days to wear a customized uniform from an event, provided the request is optional.[222] Employers thus are not losing that ability to brand through uniform but are doing so carefully.

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217 *See* TD BANK, *supra* note 210.

218 *Id.*

219 *See* Leslie Albrecht, *Some of America's Biggest Employers Don't Match Employee Donations to Charity*, MARKETWATCH (Dec. 19, 2019), https://www.marketwatch.com/story/do-walmart-amazon-mcdonalds-and-ibm-match-employees-donations-to-charity-the-answers-may-surprise-you-2019-12-04.

220 *See* Fluker, *supra* note 60.

221 *See CornerStone® EZCotton™ Tactical Men's Polo*, ARTCRAFT PROMOTIONAL CONCEPTS, https://products.artcraftpromos.com/products/cornerstone-ezcotton-tactical-men-s-polo_775842.

222 *See* Amanda C. Kooser, *Dress-Down Days As a Morale Booster*, CHRON, https://smallbusiness.chron.com/dress-down-days-morale-booster-1231.html (describing how employers are already using dress down days to boost morale).

Additionally, requiring employees to wear seasonal or political uniforms that violate an employee's religious belief creates unnecessary conflict. Employers should be pressed to avoid conflict with uniforms that are seasonal, because uniforms are always changing. The Supreme Court has been juggling "the intersection of religion and employment"[223] for many years now, thus why the reasonable accommodation doctrine was created.[224] However, dress code should not be the point of discussion for accommodations of customized uniforms, because tomorrow designs will be different, and what may seem socially satisfying today may not be in the future.[225] Therefore, when an employer takes the risk of prioritizing customized uniforms, they are making unnecessary strides which creates friction that could end up being more costly for the employer than necessary.

Furthermore, dress code branding increases the chances of a religious employee suffering from mocking or disturbing comments by employees after requesting an accommodation. Title VII prohibits retaliation by an employer because the employee has engaged in protected activity under the statute, which includes requesting religious accommodations. However, Title VII does not set out a "general civility code" for the American workplace.[226] Judicial standards must "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, [] jokes, and occasional teasing."[227] The anti-retaliation provision seeks to prevent employer interference with "unfettered access"[228] to Title VII's remedial mechanisms, but not "petty slights, minor annoyance[s], and simple lack of good manners from other employees."[229] Thus, dress codes with social messages put religious employees at risk of suffering the harm of humiliation at their place of employment.

Moreover, uniform branding could still leave employees vulnerable to adverse action after requesting a religious accommodation. Unfortunately, the nuanced messages from the judiciary continue to free employers to retaliate against workers

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223 *See* ONTIVEROS ET AL., *supra* note 18, at 614-16.

224 *Id.* at 573-576.

225 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 33.

226 *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 56 (2006).; *see also* 42 U.S.C. § 2000e-2(a).

227 *White*, 548 U.S. at 56.

228 *Id.*

229 *Id.*

seeking accommodations. In *EEOC v. North Memorial Health Care*,[230] a divided panel of the Eighth Circuit considered whether a request for a religious accommodation was protected under § 704(a)'s prohibition of retaliation for "opposing"[231] discrimination.[232] The majority rejected the claim that such requests are generally protected activity, essentially because such requests do not "oppose"[233] anything.[234] Therefore, the hospital had not retaliated when it rescinded a conditional employment offer after concluding it could not grant a requested accommodation to a Seventh Day Adventist nurse seeking Fridays off as her Sabbath.[235] Due to the size of large employers, control of lower management is difficult to monitor by leaders of inclusivity.[236] This gap of information flow increases the likelihood of lower management to treat religious employees unfairly, like the hiring manager in *EEOC v. North Memorial Healthcare.*[237] Thus, dress code branding could subject employees to employer retaliation.

Additionally, because employers cannot control lower management that represent their company, uniform policies should avoid friction between lower management and religious employees. In *Meritor Sav. Bank, FSB v. Vinson*[238], the Court held that agency principles controlled the question of employer liability under Title VII. For example, when "a supervisor or other person acting with the authority of the company"[239] harasses an employee, "the employer is automatically liable for harassment that results in a negative employment action such as termination, failure to promote or hire, and loss of wages."[240] Accordingly, employers should create a policy that brands elsewhere, because uniform branding can conflict with a

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230 EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 1099 (8th Cir. 2018).; *see* Rhett Buchmiller, *Request Denied: Retaliation Under Title VII for a Request for Religious Accommodation*, 85 MO. L. REV. 1 (2020).; *see also* 42 U.S.C. § 2000e-3(a).

231 *N. Mem'l Health Care*, 908 F.3d at 1099.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Management Levels and Types*, LUMEN: BOUNDLESS MGMT. (2021) https://courses.lumenlearning.com/boundless-management/chapter/management-levels-and-types/ (explaining the difficulty in maintaining a fluid information flow for vertically large companies).

237 *N. Mem'l Health Care*, 908 F.3d at 1099.

238 477 U.S. 57 (1985).

239 *Id.*

240 *Id.*

religious employee's moral principle, and put lower managers at risk of responding negatively.

Lastly, religious employees' ramifications for failing to conform with uniform are too great. The Title VII legislators had an" inclusive goal for religion" when created. [241] Religious employees run the risk of termination and not finding a job because a former employer serving as a reference could deem them difficult or hard to accommodate. This would be difficult particularly for Kroger employees Rickerd and Larson who are on the latter part of their careers.[242]

In sum, employers should event brand because vulnerability to liability is reduced, there is more community involvement, and the efficiency of religious workers is promoted. With the method of socially branding through events, employers will be less pressed to create accommodations at work that might stigmatize religious employees and the employer is less likely to lose any autonomy within the process. Moreover, religious employees will be able to operate more efficiently because they will not feel as much pressure or feel micromanaged. Employers already spend millions of dollars with their diversity outreach, but by including employees into these plans, others can see employers make a difference.[243] Accordingly dress codes should not be used as tools to push community agendas as they do not reach out to the community, are forgettable, and do not create the connection that employers wish to obtain.

D. Technology and Vocalness

Employers do not to need compromise any connection with its employees and their social responsibility by giving up uniform branding because today technology makes it possible for most employers to stay connected. Employers are using millions of dollars on diversity efforts, and today the market has changed enough where COVID-19 has made it easier for people to envision a place where branding is not done physically. Employees have already experienced company newsletters, flyers, and volunteer event endorsements.[244] Today most work is done virtually and even at larger retailers,

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241 *See* ONTIVEROS ET AL., *supra* note 18, at 573-76.

242 *See* Complaint at 3, EEOC v. Kroger, No. 20-1099 (E.D. Ark. Sept. 14, 2020), ECF No. 1.

243 *See* Fluker, *supra* note 60.

244 *Id*.

customers are less likely to notice a company stance on uniform due to the lack of physical contact. Accordingly, an electronic flyer or company newsletter would likely be more effective at reaching customers and employees who wish to know an employer's social views.

With the change to technological platforms employers are still able to voice a social concern to their customers. Communicating actions that a company is taking during [lockdowns] are relevant for ... internal and external audiences to hear, and [has] more impact if done with one voice."[245] For example, since the COVID-19 pandemic, posts that have resonated the most are about how companies stepping up to help relief efforts and offer "messages that put people first,"[246] as well as posts about working from home and promoting public health.[247] Since the recent technological changes employer brand messaging has mostly promoted themes of community, support, and care.[248] The share of posts addressing COVID-19 and working from home have rapidly increased — as has engagement with those posts.[249] Accordingly, the tone has changed, with themes of support, community, and care on the rise.

Employers can still brand effectively through technology because uniforms are no longer the center of customer interactions. Although a pandemic is not the best circumstance for a rapid change, most employers today are adapting to the customer's new needed experience. Customers have reacted positively because they are remaining current with retailers and are even surprised to see how often they receive correspondence from CEOs.[250] The response rate and engagement has increased since many lockdowns were implemented.[251] As a result, customers are still being reached and

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245 Roy Maurer, *Managing Employer Brand During the COVID-19 Outbreak*, SHRM (May 21, 2020), https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Managing-Employer-Brand-During-COVID19-Outbreak.aspx.

246 *Id.*

247 *Id.*

248 *Id.*; *see* Stephen Connaughton*, Data Shows How Coronavirus Has Influenced Employer Branding,* LINKEDIN (Apr. 21, 2020) https://business.linkedin.com/talent-solutions/blog/employer-brand/2020/data-shows-how-coronavirus-has-influenced-employer-branding.

249 *See* Connaughton, *supra* note 248.

250 *Id.*

251 *Id.*

interacting through email, social media, and other technological platforms.

Moreover, technological branding provides upper executives and managers the ability to become more vocal with social concerns by reaching employees directly. Email employee newsletters remain a cornerstone of internal communication strategies.[252] Over 500 communicators participated in a survey regarding emerging trends and technology.[253] The survey revealed that employees want them, information overload is reduced, and they start or continue conversations among employees and higher management.[254] On the other hand, a uniform does not provide this option, because although it provides employees notice that employers care about issues they feel deeply about, they do not provide consistent interaction. Additionally, uniform branding does not provide updates regarding changes nor opportunities for feedback.

Next, branding vocally using technology, does not compromise the employee's autonomy to wear attire that does not violate their faith. When an employer makes open endorsements through social platforms to customers and employers, there is no need to rely on dress codes like Kroger aprons to push for a social change. [255] For example, in *EEOC v. Abercrombie*[256], an employee filed a Title VII suit because the employer would not hire an applicant that needed to wear a hijab, as instructed by her Muslim faith.[257] The employee in Abercrombie did not have a choice and therefore was penalized for her commitment.[258] Using a voice through social platforms is intangible, and although an employee may not agree with the social stance, she may abstain if needed, to maintain his or her conviction.

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252 Denise Cox, *Ten Reasons Why Employee Newsletters Matter*, POPPULO (July 18, 2014), https://www.poppulo.com/blog/ten-reasons-employee-newsletters-matter/.

253 *Id.*

254 *Id.*

255 *See* Complaint at 4-8, EEOC v. Kroger, No. 20-1099 (E.D. Ark. Sept. 14, 2020), ECF No. 1.

256 *Abercrombie*, 2009 U.S. Dist. LEXIS 99546, at *9.

257 *Id.*; *see Surah* 24:31 (explaining that women "should lower their gaze and guard their private parts; that they should not display their beauty and ornaments [] that they should draw their khimār over their breasts and not display their beauty except to their husband . . . in order to draw attention to their hidden ornaments); *see Hijab in Islam: Quranic Verses About Hijab*, SOUND VISION (last visited Feb. 14, 2021), https://www.soundvision.com/article/quranic-verses-about-hijab%E2%80%8B.

258 *Abercrombie*, 2009 U.S. Dist. LEXIS 99546, at *9.

Moreover, branding with technology provides transparency and does not confront religious employees with an ultimatum. Branding using technology give employees accurate expectations of their employer, and eases worries of religious employees that fear for their job.[259] Employees reported having more rapport when using email, thus giving more feedback.[260] However, employers understand that although courts are "skeptical of hypothetical hardships that have never been put into practice"[261], an employer may "prove undue hardship without having undertaken any of the possible accommodations."[262] Accordingly, in *Cloutier v. Costco Wholesale Corp.*[263] the court reasoned that an employee could be discharged after being asked to remove piercings although it violated her faith of body modification.[264] This precedent led to the same reasoning in *Sanchez-Rodriguez v. AT&T Wireless*[265] where an employee's sabbath could not be respected because the only viable option was switching with other willing employees.[266] Technological branding eliminates choosing between the daily bread and a way of life, because employees simply choose to support or reject opinions sent through electronic communications.

Moreover, technology makes it easier for employers to promote signs or banners they have created, thus easing tension between religious employees and employers. Most employers have already promoted their social or political views by adopting their support on banners or customized logos that others have not yet seen.[267] For example, top 50 companies like New York Life, TD Bank, and Hilton participated in the pride March holding huge banners while representing their company.[268] These caught the eyes of many but gave executives opportunities to speak on their companies' values that day.[269] Above all banners coupled with consistent correspondence

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259 *See* Cox, *supra* note 252.
260 *Id.*
261 *Cloutier*, 390 F.3d at 128.
262 *Id.*
263 *Id.*
264 *Id.*
265 Sanchez-Rodriguez v. AT&T Wireless, 728 F. Supp. 2d 31, 40 (D.P.R. 2010).
266 *Id.*
267 Kaitlyn D'Onofrio, *Top 50 Companies Show Support Sponsoring Pride March*, DIVERSITYINC (May 31, 2016), https://www.diversityincbestpractices.com/top-50-companies-show-support-sponsoring-pride-march/.
268 *Id.*
269 *Id.*

with the community usually yield positive feedback as it did this day for those employers involved.[270] Thus banners or symbols are another way for employers to voice their social agenda without challenging religious employees.

In sum employers can effectively voice their opinions using technological advances and vocal methods. Employers should have little to no standing for an undue hardship defense for dress code branding, because unlike other employers a variety of technological and outreach programs are already available to employers to accommodate religious employees. [271] Thus, employers should instead take the opportunity to take these other paths and be less stringent on religious employees who do not agree with symbolism on dress codes.

V. CONCLUSION

Conflicts between religious accommodation and employer image are not a dead end, given the continued creativity of branding techniques and all the options already available for employers. Nonetheless, although Title VII claims are generally analyzed on a case-by-case basis, employers still are responsible for treating all their employees equitably and fairly. As held in *EEOC v. Abercrombie*[272]*,* some courts have already agreed that exempting a religious employee from a "look policy"[273] would not cause an employer to suffer more than a de minimis hardship.[274] However, employers should not feel defeated because they should still be able to brand effectively using technology, uniform attachments, and event branding.

Employers can work methodically to avoid dress code conflicts resulting in a Title VII claim. Most employees want to continue working and avoid deciding between moral principles and remaining financially secure. However, uniform branding makes those goals difficult, because it reminds employees that their faith is above all things and triggers a defensive response that to them is necessary to

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270 Sacannah Eadons, *Corporations Need to 'Walk the Walk' Before Displaying Pride Ads, LGBTQ Chicagoans Say*, CHI. TRIB. (June 22, 2018), https://www.chicagotribune.com/entertainment/ct-ent-corporate-pride-0622-story.html.

271 *See* Cox, *supra* note 252.

272 *Abercrombie*, 2009 U.S. Dist. LEXIS 99546, at *9.

273 *Id.*

274 *Id.*

remain firm in their beliefs. Employers should thus continue to make strides in promoting inclusive and socially responsible messages, but without denying employees the opportunity to represent their faith adequately.

The di minimis standard offered for religious accommodation claims should not become a license for employers to discriminate against religious employees.[275] In theory under Title VII "to require [an employer] to bear more than a de minimis cost is an undue hardship."[276] De minimis cost, entails not only monetary concerns, but also an "employer's burden in conducting its business."[277] Because employers have a wealth of tools that can be used to brand without including dress codes and most if not all employers rarely depend on social branding to operate efficiently, there is no reason why any employer should meet the undue hardship threshold. Moreover, the different branding options employers have provided them the opportunity to continue to be financially prosperous, even if uniform branding were eliminated. Chiefly, religious employees have a place in the workplace, and their protections under Title VII should not be ignored, particularly when it comes to dress code accommodations.

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275 *See id.*
276 *Id.*
277 *Id.*