Go Tell it on the Mountain, But Keep it Out of the Office: Religious Harassment in the Workplace

Julia Spoor
GO TELL IT ON THE MOUNTAIN,
BUT KEEP IT OUT OF THE OFFICE:
RELIGIOUS HARASSMENT IN THE WORKPLACE

"Some of the Pharisees in the crowd said to Jesus, 'Teacher, rebuke Your
disciples!' 'I tell you,' He said, 'if they keep quiet, the stones will cry out.'"[1]

I. INTRODUCTION

Mavis works in the accounting department of a small business. As a
fundamentalist Christian, Mavis believes that the only way to obtain eternal life
is through faith in Jesus Christ as her personal savior. Although Mavis has
always believed that it is her duty as a Christian to share the Gospel with
others, she had never actively proselytized, preferring instead to respond if
someone came to her with questions about her faith. However, as Mavis and
other members of her church saw the government ban school-sponsored
prayer, lift restrictions on abortion, and perpetuate what Mavis saw as the
continuing degradation of a moral, Christian nation, Mavis vowed to personally
do more to bring God to an increasingly amoral society. As a result of this

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2. This is a hypothetical situation used to illustrate the problem of religious harassment in the
workplace. It is created from the author’s imagination and is not intended to reflect any one person
or case.
3. Matthew 28: 19-20 commands: “Therefore go and make disciples of all nations... teaching
them to obey everything I have commanded you.” See also Richard John Neuhaus, Jews for Jesus,
Established A.D. 32, FIRST THINGS, Dec. 1996, at 48 (discussing the duty of Christians to
4. Webster’s dictionary defines proselytization as the act of inducing another to convert to one’s
for voluntary prayer is invalid when its sole purpose is to endorse a religious exercise); Abington
Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding that reading from the Bible and student
recitation of the Lord’s Prayer in public schools promotes religion and is thus unconstitutional);
Engel v. Vitale, 370 U.S. 421 (1962) (holding that the government may not mandate any particular
form of prayer to be used in public schools).
6. Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman’s decision whether to terminate
a pregnancy is encompassed within a right of personal privacy implicit in the concept of “liberty”
(holding that the state’s interest in protecting the mother’s health and the potentiality of life are
outweighed by the woman’s right to have an abortion without imposition of “undue burdens” or
“substantial obstacles” by the state).
vow, Mavis began to tell her co-workers that they each must accept Jesus Christ as their personal savior to receive eternal life. Although none of them converted, they did not seem to find Mavis' actions objectionable.

Then Mavis learned that her office-mate, Frank, had moved in with his fiancee. Mavis told Frank that his actions were sinful, and that if he did not stop living with his girlfriend and accept Jesus Christ, he would go to hell. Frank told Mavis that he already belonged to a church, and that he intended to live with his girlfriend until they were married. Mavis replied that if Frank's faith were real, he would not be living in sin, and that if he refused to repent, he would go to hell. After a few weeks, Frank told Mavis that her preaching was offensive and asked her to stop. But Mavis wanted to convince Frank that Jesus Christ was the one true savior, and she believed that if she stopped witnessing every time someone turned away, she might never save anyone. In the hope that she would ultimately save Frank, Mavis continued to preach. Instead of repenting, Frank called the human resource department and complained that Mavis' actions constituted religious harassment.

This hypothetical situation illustrates a growing problem in employment law. Under Title VII of the Civil Rights Act, an employer may not discriminate against any individual based on religion.\(^7\) This proscription includes a duty on the part of the employer to accommodate an employee's religious observance, unless to do so would result in an undue burden or hardship on the employer's business.\(^8\) In interpreting Title VII, courts\(^9\) have held that an employer has a

\(^7\) 42 U.S.C. § 2000e-2 (1994). Section 703 states:
(a) It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. Sections 701(b)-(c) also prohibit discrimination by employment agencies and labor unions on similar grounds. Id.

\(^8\) Section 701(j) of Title VII was amended to read: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1994). See also infra notes 76-112 and accompanying text.

To make a prima facie case of religious discrimination under Title VII, a plaintiff must show three things: first, that he holds a sincere religious belief that conflicts with an employment requirement; second, that he has informed the employer about the conflict; and finally, that he was discharged or disciplined for failing to comply with the conflicting employment standard. Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987); Young v. Southwestern Sav. and Loan

http://scholar.valpo.edu/vulr/vol31/iss3/5
duty to provide a workplace free from harassment, including religious harassment. Courts recognize that excessive proselytization in the workplace can create an atmosphere of religious harassment which affects the conditions of employment. Courts have also held, however, that an employer may

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1997] **GO TELL IT ON THE MOUNTAIN** 973

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Ass'n, 509 F.2d 140, 143 (5th Cir. 1985); Lambert v. Condor Mfg., 768 F. Supp. 600, 601-02 (E.D. Mich. 1991). Once this standard has been met, the burden shifts to the defendant to show that it cannot reasonably accommodate the employee without incurring undue hardship. *Smith*, 827 F.2d at 1085; *Young*, 509 F.2d at 143; *Lambert*, 768 F. Supp. at 602-03.

9. Because Title VII is a federal statute, controversies arising under the Act are heard by federal courts. For the sake of simplicity, unless otherwise indicated, this note will always use "court" to refer to federal district or appellate courts.

10. While Title VII does not explicitly proscribe harassment, courts interpret the language prohibiting discrimination with respect to conditions of employment to include a ban on harassment. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).


12. *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (noting that the employer has a legal right to ensure that the workplace is free from religious activity which harasses or intimidates other employees); *Beasley v. Home Healthcare Serv. Corp.*, 940 F.2d 1085 (7th Cir. 1991) (discussing the "personal problems" that arose between the plaintiff and co-workers because of the plaintiff's proselytization); *Ground Trans. Corp. v. Pennsylvania Human Rel. Comm'n*, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990) (holding that an employer's attempt to proselytize by placing Bible verses on paychecks and religious symbols in the company newsletter constituted religious harassment because it sent the message that non-Christian employees would be treated differently); In the Matter of Sapp's Realty, No. 11-83 (BOLI 1985). In this Labor Board review, the Oregon Commission found that the plaintiff had been religiously harassed, despite the fact that no derogatory religious comments or epithets were aimed at the plaintiff personally. *Id.* Rather, the Commission found that the continuous stream of religious discussion and comments made by a co-worker made the plaintiff's working conditions intolerable and forced her to quit. *Id.* The plaintiff shared an office with a very devout Seventh Day Adventist, who discussed his faith with everyone in the office. *Id.*

This co-worker made negative remarks about the plaintiff's faith and personal lifestyle, sometimes directly to the plaintiff, and other times in conversations with other employees within earshot of the plaintiff. *Id* at 88. See also Dean J. Schaner & Melissa M. Erlemier, *When Faith and Work*...
violate Title VII by refusing to allow an employee to express his religion in the workplace. In the hypothetical above, the company is presented with a direct conflict—if it attempts to silence Mavis, she may claim that the company has failed to accommodate her religious practice and is in violation of Title VII. If it allows Mavis to continue, Frank may claim that Mavis’ actions are sufficiently severe to constitute religious harassment, and that his right to work in an environment free from harassment has been violated.

Collide: Defining Standards for Religious Harassment in the Workplace, 21 Employee Rel. L.J. 7 (1995). The above cases refer to harassment by both employers or supervisors, and co-workers. For a discussion of the legal difference between harassment by co-workers and harassment by supervisors or employers, see infra notes 176-84 and accompanying text.

13. Brown, 61 F.3d at 650. The plaintiff in Brown recited Bible passages and allowed spontaneous prayer in his office during department meetings. Id. at 656. He also furnished his office with various religious items, such as a Bible and "prayer plaque." Id. at 659. The court held that the employer had a duty to accommodate the plaintiff’s practices despite the employer's argument that these practices created an environment which "hurt the morale" of the department. Id. at 657.

14. Mavis would argue that, by failing to accommodate her religious practice or belief, the company has discriminated against her on the basis of religion. To make out a prima facie case of religious discrimination, Mavis would have to show that she holds a sincere religious belief that she must proselytize, which conflicts with her employer’s requirement that she stop. She must then show that she has informed the employer about the conflict, and she was discharged or disciplined for failing to comply. See supra note 8.

15. See infra notes 113-75 and accompanying text. First, Frank will have to show that he belongs to a protected class. Since Title VII protects an employee from harassment on the basis of his religious belief or lack of belief, Frank will merely have to show that the conduct was offensive because his beliefs conflicted with Mavis’. Second, Frank will have to show that this harassment was unwelcome, or that he did not solicit or incite Mavis’ discussions. Third, Frank will have to show that the harassment was based on religion, which is usually interpreted to mean that the conduct would not have occurred “but for” Frank’s difference in religion. Fourth, Frank will have to show that Mavis’ conduct affected a term, condition or privilege of Frank’s employment. In Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), the Supreme Court held that this occurs when the conduct is severe or pervasive enough to alter the conditions of employment. In Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), the Court held that conduct need not lead to serious psychological damage before it was actionable, but that psychological harm to the plaintiff was one factor to consider when looking at the totality of the circumstances. The Court in Harris also held that not only will the conduct have to be offensive to the reasonable person, but that it must be subjectively offensive to the victim as well. Id. at 21-22. Finally, Frank will have to show that the company is liable for the conduct. If Mavis were Frank’s supervisor, liability might be imputed; however, since Mavis is Frank’s co-worker, Frank will have to show that the company knew or should have known of her conduct. See infra notes 176-84 and accompanying text. This model is borrowed from the disparate treatment model established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See infra note 71. See also Compston v. Borden Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976); Vaughn v. Ag Processing Inc., 459 N.W.2d 627, 632-33 (Iowa 1990).
Religious freedom is not a new concept. The United States was founded by people in search of religious freedom, and both the Constitution of the United States and Title VII specifically protect religion and religious practice. Title VII prohibits overt employment discrimination on the basis of religion. Traditionally, a claim of religious harassment arose when supervisors or co-workers tormented an employee because of his faith. The more common claim of failure to accommodate a religious practice typically arose when employees were forced to work on their Sabbath.

16. See Paul T. Hayden, Religiously Motivated “Outrageous” Conduct: Intentional Infliction of Emotional Distress as a Weapon Against “Other People’s Faiths,” 34 Wm. & Mary L. Rev. 580, 599 (1993) (noting that the first Europeans to settle in the Colonies did so not to establish freedom of all religions, but to escape persecution of their own faith). See also Kurt Andersen, For God and Country; An Emotional Issue Arises: Where is the Wall Between Religion and Politics, Time, Sept. 10, 1984, at 8.

17. The First Amendment to the Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” U.S CONST. amend. 1. Since the Constitution was written to limit the powers of the federal government, the First Amendment does not apply unless the government is an actor in the relationship. See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 12.1, at 470-71 (5th ed. 1995). In a case involving a government employee, courts consider the free exercise clause of the First Amendment to protect “at least as much” religious activity as does Title VII. See, e.g., Brown, 61 F.3d at 650 (holding that the first amendment protects the religious activity of government employees at least as much as does Title VII); United States v. Board of Educ., 911 F.2d 882, 890 (3d Cir. 1990) (noting that undue hardship is, at the very least, a lower standard than compelling state interest). Because Title VII applies to nearly all employees, see infra note 68, while First Amendment protection only covers public employees, this note focuses primarily on liability under Title VII.

18. See infra section III for a discussion of how Title VII protects individuals from discrimination in employment.

19. Although Title VII does specifically prohibit religious discrimination in the workplace, the focal point of most of the caselaw is the duty of reasonable accommodation. See infra notes 76-110 and accompanying text. Most cases involve adjusting work schedules to permit religious observances. See, e.g., Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (holding that reasonable accommodation does not require an employer to demonstrate that each of an employee’s suggested alternatives for time off for religious purposes would result in undue hardship); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that to require employers to bear more than a de minimis cost to accommodate an employee’s request for leave to observe a holy day would impose an undue hardship); Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987) (holding that to require an employer to find a replacement for an employee who cannot work for religious reasons is not an undue hardship when it would result in no additional cost to the employer).

20. The first federal case to recognize religious harassment involved just such a circumstance. In Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976), the court held that a supervisor’s constant references to the plaintiff as a “damn Jew,” a “Christ-killer,” “the kike,” and “the Jewboy” constituted religious harassment. See also Turner v. Barr, 811 F. Supp 1 (D.D.C. 1993). In Turner, the court held that supervisors' and co-workers' persistent references to the Holocaust constituted religious harassment. Id. at 5. Among other things, the supervisor said that the cost of Germany's reconstruction after World War II was high because of the gas bill. Id. at 3.

21. See Ansonia, 479 U.S. at 60; Hardison, 432 U.S. at 63.
decade, however, new varieties of religious harassment claims have emerged in which an employee’s religious practice creates a hostile or offensive working environment for co-workers.  

In 1993, the Equal Employment Opportunity Commission (EEOC) proposed guidelines on harassment based on race, color, religion, gender, national origin, age or disability. The purpose of these guidelines was to set forth standards for determining what conduct in the workplace constituted harassment under Title VII and other antidiscrimination statutes. However, many conservative religious groups became concerned that the EEOC was, in fact, attempting to create a “religion-free zone” in the workplace, similar to that of the public schools. Mainstream religious groups, as well as organizations such as the American Civil Liberties Union and People for the American Way,  


23. The Equal Employment Opportunity Commission was created by Title VII to promote voluntary action programs by employers, unions, and community organizations to put the equal employment opportunities intended by Title VII into actual operation. 42 U.S.C. § 2000e-4 (1994). The Commission is customarily referred to as the EEOC.


25. Id.


Just as an employer or employee who kept a sexually explicit bikini pin-up on their office wall could be found guilty of sexual harassment, someone who keeps a religious painting or cross on his wall could, under these proposed guidelines, be guilty of creating a hostile, intimidating, or offensive work environment.

Frame, supra, at 49. Lou Sheldon, chairman of TVC and one of the most outspoken critics of the EEOC’s Proposed Guidelines, was quoted in Christianity Today as saying, “It wouldn’t surprise me that there is some person at the EEOC who doesn’t like evangelical Christianity in the workplace.” Id. Similarly, the Christian Action Network sent out a fundraising letter which stated that the Proposed Guidelines would make “carrying the Bible, wearing a cross, having a calendar with religious scriptures on it, even breathing the name of our Lord Jesus . . . illegal while working.” Heavens No!, supra, at B4. Dudley Rochelle, an Atlanta labor attorney, claimed that the Proposed Guidelines were so broad that she advised employers to “sanitize their workplace” of any religious expression. EEOC Will Address Religious Harassment, supra, at D20.
urged the EEOC to revise and clarify the proposed guidelines. Conservative lawmakers and religious groups, on the other hand, demanded that guidelines concerning religious harassment be withdrawn altogether. In response to this outcry, the Senate, in 1994, approved legislation ordering the EEOC to drop religion from the proposed guidelines. As a result, employers are now left without clear direction as to what employee actions may constitute religious harassment in the workplace.

This Note addresses what constitutes religious harassment under Title VII. This Note also proposes a model employment policy for use by employers in avoiding liability for religious harassment or failure to accommodate. This Note suggests that the best way for employers to avoid liability is to allow employees to express their religious beliefs in the workplace. At the same time, employees should be given notice that, if a practice interferes with a co-worker's ability to work, that practice will not be allowed.

Section II of this Note will explore the expanding role of religion in public life for two reasons: to understand why this 200-year-old concept of religious freedom has only recently resulted in increased litigation, and to understand the goals of religious legal groups in order to draft an employment policy which will not conflict with these goals. Section III will then examine Title VII and its legal requirements and precedent. Finally, Section IV will propose a model

27. Frame, supra note 26, at 49. Frame states that "virtually everyone" who read the Proposed Guidelines agreed that they are too subjective and vague to be effective. Id. This is in part because the Guidelines merely mimic sexual harassment guidelines without taking into account the difference between romantic advances and religious expression. Id. Groups differ, however, on the best way to deal with the Guidelines. Steve McFarland of the Christian Legal Society maintains that the Proposed Guidelines are unnecessary and chill religious expression. Id. J. Brent Walker, general counsel for the Baptist Joint Committee on Public Affairs (BJCPA), claims that the Guidelines, if modified, would be not only acceptable but helpful to religious freedom. Id.


29. Washington, LEGAL INTELLIGENCER, July 27, 1994, at 8. The legislation was adopted as an amendment to a fiscal appropriations bill. Id. According to Democratic Senator Howell Heflin, the legislation was necessary because members of the Commission declined to say if they would follow the Senate's urging to drop religion from the Proposed Guidelines. Id. On September 20, 1994, the EEOC formally withdrew the religion section from the Proposed Guidelines dealing with harassment in the workplace. EEOC Formally Withdraws Religious Harassment Guidelines, LEGAL INTELLIGENCER, Sept. 21, 1994, at 11 [hereinafter EEOC Formally Withdraws].

30. See infra notes 113-75 and accompanying text.

31. See infra notes 221-39 and accompanying text.

32. See infra notes 35-64 and accompanying text.

33. See infra notes 65-218 and accompanying text.
policy for employers to implement to address and solve the conflicts between religious accommodation and the right to be free from harassment. 34

II. RELIGION IN PUBLIC LIFE

Over the past twenty years, religion has played an expanding role in public life as people return to their religious heritage. 35 One effect of this was that during the late seventies and early eighties evangelical and fundamentalist Christian groups banded together politically to combat what they considered the intrusion of the state into their private lives. These groups also tried to return fundamentalist Christian morality to American society. 36 As a result, people who were once best described as “religious separatists” 37 have learned to use

34. See infra notes 219-45 and accompanying text.
35. David Bollier, Who “Owns” the Life of The Spirit?, TIKKUN, Jan. 1994, at 29. Bollier claims that the growing number of demands by religious groups for recognition of their sacred concerns follows a breakdown of white-male-Protestant dominance in society, and analogizes this to the “riot of destabilizing tribalisms” that followed the breakdown of the Soviet Union. Id. See also Karlyn Bowman et al., Faith in America, PUB. PERsP., Sept. 1994, at 90. Bowman’s survey concludes that America is a “deeply religious nation,” with 95% of Americans stating that they believe in God, and 77% stating that God has led or guided them in making decisions in life. Id. Of these, 55% agree with the statement, “God is the moral guiding force of American democracy.” Id.
36. Dinesh D’Souza, Out of the Wilderness; The Political Education of the Christian Right, POL’Y REV., Summer 1987, at 54. The most often cited example of this is the government ousting of religion from public schools. Andersen, supra note 16, at 8. This is not to imply that Americans only seek out Christian worship services, nor that only Christians attempt to enforce their religious rights in court. Rather, conservative Christian groups have proven to be the “squeaky wheel.” See Laura S. Underkuffler, “Discrimination” on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581, 609 (1989):

Christian fundamentalists . . . present the most extreme cases because of the all-pervasive, uncompromising and (to some) unpopular nature of their views. Their belief that religion cannot be separated from secular activities, and that the religious imperative transcends conflicting governmental norms, presents a disquieting challenge to the larger social and governmental order. The extreme implications of their views, however, should not detract from the fundamental issues that their claims present. These issues affect any individual or organization—whether Christian, Jewish, Moslem, or any other religious orientation—that refuses to accept a complete dichotomy between the religious and secular spheres of life, and therefore attempts to implement religious beliefs or practices in the workplace.
37. D’Souza, supra note 36, at 54. D’Souza defines a separatist as one who withdraws from the mainstream of society because of its perceived corruption. Id. This is taken from the biblical command to “be in the world but not of the world.” Id. During the early part of the 20th century, conservative Christians reacted to modern theories, such as evolution, by separating themselves from secular society, and building their own schools, churches, and clubs. Id. Not until the IRS and the ACLU began intruding upon these institutions in the 1970s and early 1980s did the conservative groups emerge in the public arena. Id. See Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding the denial of tax exempt status by the IRS to private schools whose religious beliefs require them to practice racial discrimination in admissions); Stone v. Graham, 449 U.S. 39 (1980)
increased political action to promote Christian religious values in what is seen as an amoral, increasingly secular society.\textsuperscript{38}

The power of the Religious Right first emerged in the elections of 1980.\textsuperscript{39} In reaction to the increasing secularization of society and what was perceived as an attack on established religion, Christian fundamentalists banded together to help put Ronald Reagan in the White House.\textsuperscript{40} This signaled the beginning of a decade of conservative executive leadership, geared at preserving traditional nuclear "family values," returning the country to a religious rather than secular base, and breaking down the wall between church and state.\textsuperscript{41} Under this leadership, Christian conservatives grew politically bolder.\textsuperscript{42} As Ronald Reagan was re-elected president in 1984, the assertiveness of the Religious Right and its power in the Republican Party was shown in full force.\textsuperscript{43}
This all changed in 1992. As the Democrats took control of the White House and Congress, they strengthened the Religious Right's forum to the courts, where the judiciary consisted of Reagan and Bush appointees. Conservative religious legal groups first began to file amicus curiae briefs in select cases. By the mid-1990s, these Christian legal movements became a powerful and influential force in American politics.

Historically, evangelical Christians were politically aligned with the Democratic party, as were Catholics and Jews. Lyman A. Kellstedt et al., Politics of the Nineties, Has Godot Finally Arrived?, PUB. PERSP., June 1995, at 18; Jay P. Lefkowitz, Jewish Voters and the Democrats, AM. JEWISH COMMITTEE COMMENTARY, Apr. 1993, at 38. In the late 1960s, evangelical Christians (characterized by Kellstedt as “born-again Christians”) began to move away from the Democratic Party. Kellstedt, supra, at 38. By the early 1980s, younger, less religiously observant Catholics began to follow the evangelicals to the GOP, as mainline Protestants, once aligned with the Republican party, began to vote along Democratic party lines. Id. The most recent polls indicate that evangelical Christians, along with Mormons, constitute the largest religious block to vote Republican. Id. Catholics are still the largest Democratic religious constituency. Id. For more documentation about these trends, see CORWIN W. SMIDT, CONTEMPORARY EVANGELICAL POLITICAL INVOLVEMENT 99-117 (1989); MICHAEL CROMARTIE, NO LONGER EXILES 85-117 (1993).

On the United States Supreme Court alone, Reagan appointed three justices: Antonin Scalia in 1981; Sandra Day O’Connor in 1986; and Anthony M. Kennedy in 1988. In addition, Reagan named William Rehnquist as Chief Justice in 1986, upon the retirement of former Chief Justice Warren Burger. President George Bush appointed David H. Souter in 1990, and Clarence Thomas in 1991. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 1699-1700 (1993). See also Moore, supra note 38, at 1560. While some say that conservative religious groups stand a better chance of winning in court today than a decade ago, many of the litigators disagree. Id. Religious liberty attorneys consider Chief Justice William Rehnquist too “pro-government” and Justice Antonin Scalia too economically conservative to be relied upon in a case dealing with church-state issues. Id. For example, in the recent Supreme Court case Employment Div., Dep’t of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), Scalia wrote a majority opinion which held that the Free Exercise Clause affords no right to a religious exemption from a generally applicable law. Two members of the Native American Church were fired from their jobs as drug counselors because of their sacramental use of peyote during religious ceremonies, as mandated by their religion. Id. at 874. The Supreme Court could have reasoned that the state had a compelling interest to keep the workplace free from drugs, which outweighed the plaintiffs’ right to practice their religious beliefs; instead, Scalia stated that there was no need to apply the compelling interest test because Oregon’s law was neutral and affected all employees, irrespective of religious belief. Id. at 878-79. While O’Connor agreed with the result in this case, she pointed out in her concurring opinion that the majority’s reasoning was “incompatible with our nation’s fundamental commitment to individual religious liberty.” Id. at 891. In response to this case, Congress passed the Religious Freedom Restoration Act, which reestablished the compelling interest test in cases where government action infringes upon religious liberty. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-41, 107 Stat. 1488 (1993).

“Amicus Curiae” means, literally, friend of the court. A person with a strong interest in the subject matter of an action, but who is not actually a party to the action, may petition the court for permission to file a brief to suggest a rationale consistent with his or her own views. See FED. R. APP. P. 29.

Moore, supra note 38, at 1560. See also, e.g., Romer v. Evans, 854 P.2d 1270 (Colo. 1995) (granting leave to admit the amicus curiae brief of the ACLJ in support of Colorado’s law limiting gay rights); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 244 (1995) (holding that to allow the Ku Klux Klan to erect a latin cross in a public square did not violate the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the
groups began to expand, raising millions of dollars to finance litigation and winning impressive decisions on issues such as abortion protests and prayer in public schools. Additionally, the Religious Right had learned that legal activism plays a large part in policy-making in the United States. In the same way that pro-choice activists once secured abortion rights through legal precedent, conservative Christian attorneys are trying to secure legal precedent to protect their religious liberty interests. Instead of attempting to

government may provide sign-language instructors to deaf parochial school students without violating the Establishment Clause).

48. Moore, supra note 38, at 1560. In 1994, the Christian legal movement announced the formation of the Alliance Defense Fund, a fund-raising unit for religious legal groups. Id. It was estimated that this fund would provide $25 million for religious litigation in 1994 alone. Id. The American Center for Law and Justice (ACLJ) has an annual budget of $10 million Id. This is significantly less than the $30 million budget of the ACLJ's longtime rival, the American Civil Liberties Union. However, the ACLU uses its thirty million to litigate civil rights, First Amendment and reproductive freedom cases, as well as to lobby in Washington. Id. The ACLJ litigates only religious liberty issues. Id.

49. Id. See also, e.g., Cook v. Reno, 74 F.3d 97 (5th Cir. 1996) (vacating a district court's denial of an injunction against the federal Freedom of Access to Clinic Entrances Act of 1994); United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995) (holding that the Freedom of Access to Clinic Entrances Act exceeds Congress' scope of power under the Commerce Clause, and is thus unconstitutional); Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991) (holding that student-initiated prayer at graduation ceremonies is permissible when requested by a majority of graduates). The Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994), provides that an illegal act is committed by anyone who

by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.


50. Moore, supra note 38, at 1560. Many religious liberty attorneys claim that, as society grows more secular, religious believers are treated with less respect. Id. The Christian Coalition's 1995 "Contract With the American Family" states "with each passing year, people of faith grow increasingly distressed by the hostility of public institutions toward religious expression." William Schneider, Stealth Strategy for Religious Right?, NAT'L J., May 27, 1995, at 1314. Christian conservatives have found that one way to preserve their values is through the court system. Moore, supra note 38, at 1560. For a discussion on how societal respect for religion and religious leaders has declined, see STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION (1993).

51. See SARAH WEDDINGTON, A QUESTION OF CHOICE 43-108 (1993) (discussing how pro-choice activists used the courtroom to obtain abortion rights in California, Texas, and ultimately, the entire United States).

52. Keith Fournier, president of the ACLJ, attacks what he terms "religious cleansing" by "secularists." Moore, supra note 38, at 1560. Similarly, John W. Whitehead, president of the Rutherford Institute, claims that "religious people are being persecuted." Id. Critics of the
influence politics through the executive office, Christian conservatives are now fighting for religious freedom in the courtroom.\(^{53}\)

This new attitude is evidenced by the growing number of religious discrimination cases. In 1993, nearly 800 religious discrimination suits were filed with the Equal Employment Opportunity Commission.\(^{54}\) By 1994, this number had grown to 2900.\(^{55}\) Because the majority of complaints to the EEOC still involve racial or sexual discrimination, many employers have not considered the potential for religious harassment.\(^{56}\) It is clear, however, that as the American workforce becomes more diverse and as fundamentalist Christians grow more willing to fight to protect their rights of religious expression, the potential for lawsuits will continue to grow.\(^{57}\)

One area in particular where the number of lawsuits is increasing is in the workforce.\(^{58}\) As politically active religious groups fight against what they view as societal encroachments on their faith,\(^{59}\) they are demanding religious

Religious Right contend that, far from being persecuted, the conservative groups are trying to "force-feed a right wing political agenda." \(^{Id.}\)

53. Moore, supra note 38, at 1560. Christian legal groups in this country include the American Center for Law and Justice, whose founder and president is Pat Robertson, the Liberty Counsel, the Rutherford Institute, the Western Center for Law and Religious Freedom, and the Becket Fund for Religious Liberty. \(^{Id.}\) Copying legal strategy from the American Civil Liberties Union, these groups have, among other things, sued dozens of local school districts to allow student-led prayer, represented a landlord in California who refused to rent to unmarried couples on religious grounds, and represented an employer charged with religious harassment by an employee to whom he refused to stop proselytizing. \(^{Id.}\) These groups differ in their approach to legal matters. For example, Jay Alan Sekulow, general counsel for the ACLJ, claims that his organization tends to "pull the trigger on litigation quicker than other groups do." \(^{Id.}\) Sekulow was lead counsel in six cases before the Supreme Court. \(^{Id.}\) In contrast, the Center for Law and Religious Freedom often works with nonreligious groups on legislative issues, and was the top lobbyist on the 1984 Equal Access Act. \(^{Id.}\) The Equal Access Act, 20 U.S.C. § 200bb (1995), makes it unlawful for public secondary schools to deny equal access to any student who wishes to hold a meeting, simply because the content of the meeting is religious.


55. Jacobs, supra note 22, at B1 (attributing the growing number of lawsuits involving religious discrimination in the workplace to Christians' increasing awareness of their rights).

56. Schaner & Erlemier, supra note 12, at 7; Peter Key, Religious Discrimination in Workplace Not a Big Issue in Indiana, Experts Say, INDIANAPOLIS STAR, June 18, 1995, at A7. See also Religious Harassment in the Workplace Debated, supra note 54, at 635 (commenting that EEOC failure to issue guidelines on religious harassment could signal that religious harassment is of less concern).

57. Schaner & Erlemier, supra note 12, at 7; Jacobs, supra note 22, at B1; Moore, supra note 38, at 1560. ACLJ press releases have threatened to sic "legal SWAT teams" on perceived foes of religious liberty. \(^{Id.}\)

58. See supra notes 54-55 and accompanying text.

59. Moore, supra note 38, at 1560.
freedom in the workplace.\textsuperscript{60} Legally, discrimination on the basis of religion is forbidden.\textsuperscript{61} Further, an employer is required to accommodate an employee's religious practice or observance.\textsuperscript{62} An employer is also required, however, to provide a working environment free from hostile or offensive harassment.\textsuperscript{63} Thus, a conflict may arise when one employee's religious practice is hostile or offensive to a co-worker.\textsuperscript{64}

\section*{III. Religious Freedom in the Workplace}

Employees are protected from discrimination on the basis of religion by both federal and state laws.\textsuperscript{65} The rights of government employees are also preserved by the Free Exercise Clause of the United States Constitution, a shield which does not extend to employees of private industry.\textsuperscript{66} Both public and private employees, however, receive the greatest protection against religious

\begin{itemize}
  \item \textsuperscript{60} See supra notes 26-28 and accompanying text.
  \item \textsuperscript{61} See infra notes 65-71 and accompanying text.
  \item \textsuperscript{62} See infra notes 76-92 and accompanying text.
  \item \textsuperscript{63} See infra notes 113-75 and accompanying text.
  \item \textsuperscript{64} See infra notes 155-75 and accompanying text.
  \item \textsuperscript{66} See supra note 17. In addition, 42 U.S.C. § 1983 (1994) allows employees to bring an action for violation of the equal protection clause against some governmental employers by providing a federal cause of action against any person who, acting under color of state law, deprives another of any federal constitutional or statutory right. Lower federal courts are divided as to whether Title VII preempts any other cause of action. See Gudel, \textit{Title VII Preemption of Employment Discrimination Action Under 42 U.S.C. Section 1983}, 76 ILL. B.J. 910 (1987) (arguing that suit under § 1983 should be required only when the federal right under § 1983 should be required only when the federal right that the employer allegedly violated is a right created by Title VII). 42 U.S.C. § 1985(3) provides a remedy against private violations of constitutional rights. See Griffin v. Breckenridge, 403 U.S. 88, 96 (1971). However, when Title VII forms the basis of the action under § 1985(3), Title VII preempts § 1985, and the plaintiff must proceed under the statute. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979).
\end{itemize}
discrimination under Title VII of the Civil Rights Act of 1964. Title VII makes it illegal for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ." When Congress drafted Title VII, the focus was on racial discrimination. However, the Act also prohibits an employer from terminating or otherwise discriminating against any individual on the basis of religion. In addition to prohibiting

67. See Underkuffler, supra note 36, at 589:

Federal, state, and local statutes and ordinances, as well as the equal protection clause of the fourteenth amendment . . . have long afforded employees protection against discrimination on the basis of religion. The primary federal statute prohibiting religious discrimination in employment is Title VII . . . . The vast majority of federal employment discrimination claims raising religious issues have been brought under this statute, and the elements of proof under state civil rights laws are usually quite similar. Originally, Title VII did not apply to government employers, but in 1972, Congress amended the Act to include federal, state, and local governmental employers. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (amending Title VII).

68. Title VII applies to all private employers with 15 or more employees. It also applies to federal, state, and local government employers. All employees are covered, regardless of their status or rank within a company. Title VII's proscription against discrimination in employment also extends to employment agencies and labor unions. See 42 U.S.C. § 2000e(b) (1994). See also Mark A. Rothstein & Lance Lieberman, Employment Law 227 (1994).

69. 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII contains 11 Titles barring discrimination in voting rights, public accommodations, education, employment, and the use of federal funds. In Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), the United States Supreme Court held that the act was constitutional under the commerce clause and the fourteenth amendment. Section 703 of the Act also provides four exceptions or defenses to this obligation:

(1) if religion, sex, or national origin is a bona fide occupational requirement (BFOQ) reasonably necessary to the normal operation of the business;

(2) where a bona fide seniority or merit system exists, or earnings are measured by quantity or quality of production;

(3) if the employer acts on the results of a professionally developed, non-discriminatorily administered ability test;


71. There are two main theories of employment discrimination under Title VII: disparate treatment and disparate impact. The essence of a disparate treatment claim is that an employer has treated an employee or potential employee differently because of his or her race, religion, color, sex, or national origin. To state a cause of action under this theory, the employee must present evidence that is sufficient to establish a prima facie case of discrimination. The burden then shifts to the defendant-employer to produce a legitimate, nondiscriminatory reason for the action. The burden then shifts back to the plaintiff-employee to prove that the proffered reason is pretextual or discriminatory in its application. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252, 257 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

Under the disparate impact theory, the plaintiff must show that a facially neutral policy or practice results in a significant adverse impact on a protected class. The burden then shifts to the employer to demonstrate that the practice is related to the job and is justified by business necessity.
discrimination, Title VII requires employers to reasonably accommodate an employee's religious observance or practice. Both the EEOC and the Supreme Court of the United States have also recognized that Title VII encompasses the right of an employee to work in an environment free from harassment. In some circumstances, however, an employee's religious practice may create an atmosphere of harassment for other employees. Thus, to avoid liability, an employer must understand the duty to accommodate under Title VII, the primary defense of undue hardship, and the rights of employees and duties of employers in hostile environment harassment situations.

A. Duty to Accommodate an Employee's Religious Practice

When Congress first enacted Title VII in 1964, it made religious discrimination unlawful, but failed to indicate whether an employer had a duty to accommodate employee religious practices. In 1966, the EEOC issued a guideline stating that employers were obligated under Title VII to accommodate the religious practices or observances of their employees when this could be done without "serious inconvenience" to the business. In 1967, the EEOC amended the guideline to require accommodation when it would not result in serious inconvenience to the business. See infra notes 76-110 and accompanying text.
“undue hardship.” Although courts usually give great deference to EEOC guidelines, they are not bound by them. In fact, many courts ignored this EEOC guideline, and instead interpreted Title VII as requiring only that an employer avoid employment practices that were clearly discriminatory in purpose. This resulted in a confusing split among circuit courts, with some courts imposing upon employers a duty to accommodate employee religious practices, and other courts holding employers only to a standard of non-discrimination.

In response to this confusion, Congress amended section 701 of Title VII to require that an employer accommodate an employee's religious observance or practice, unless the employer can demonstrate that to do so would result in undue hardship. In *Trans World Airlines, Inc. v. Hardison* and *Ansonia Board of Education v. Philbrook*, the United States Supreme Court defined

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78. Id. § 1605.1(b).

79. See Rothstein & Lieberman, supra note 68, at 260. "While the EEOC Guidelines have received deference from the courts as an interpretation of the law from the agency charged by Congress with enforcing the statute, they are not binding on the federal courts . . . ." Id.


82. Equal Employment Opportunity Act of 1972 § 2, 42 U.S.C. § 2000e(j) (1994). “The term religion includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Id. See also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977). In Justice Marshall’s dissent, he argues against the conclusion that this requirement may also raise Establishment Clause issues. Id. at 90-91 (Marshall, J., concurring in part and dissenting in part). No majority opinion of the Supreme Court, however, has ever directly addressed the constitutionality of § 701(j). For a discussion on the constitutionality of the accommodation requirement of Title VII, see Mary Beeson, Note, Anderson v. General Dynamics Convair Aerospace Division: First Amendment Establishment Clause Challenge to Title VII’s Mandated Accommodation of Religion, 76 Nw. U. L. Rev. 487 (1981).

83. 432 U.S. 63 (1977)

84. 479 U.S. 60 (1986).
and narrowed the scope of reasonable accommodation and undue hardship. According to these cases, section 701(j) does not create an absolute requirement for employers to accommodate the religious practices of their employees. Instead, accommodation is only required in those instances where an undue hardship on the business would not result. This is determined on a case by case basis, and a court must balance all alternatives for accommodation against the hardship involved.

Thus, if an employer can show that to accommodate the employee's religious observance would result in a hardship to the business, the employer is exempted from the accommodation requirement. However, any hardship asserted by the employer must be real, not speculative. Courts do not accept arguments of undue hardship based on theory, assumption, or hypothetical facts, and such circumstances will not release an employer from his duty to accommodate an employee's religious practice.

85. Ansonia, 479 U.S. at 67 (stating that accommodation results in undue hardship whenever that accommodation results in more than a de minimis cost to the employer); Hardison, 432 U.S. at 83-84 (reasoning that to require an employer to bear more than a de minimis cost to accommodate one employee with respect to other employees would result in unequal treatment of employees based on religion and employer financing of employee religious practices.) The holdings in these cases were later codified by the EEOC. See Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(b) (1995).

86. Ansonia, 479 U.S. at 67; Hardison, 432 U.S. at 83-84.


88. Examples of alternatives for accommodation may range from granting exemptions to facially neutral rules which conflict with an employee's religious practice to finding and paying substitute workers to allow an employee time to observe a religious practice. For a discussion of the differences between these examples and the attitudes of courts towards each, see infra notes 97-110 and accompanying text.

89. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 77-85 (1977); American Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 775 (9th Cir. 1986) (noting that the circumstances under which accommodation may result in undue hardship must be examined in the factual context of each case).

90. See infra notes 93-110 and accompanying text.

91. Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992). See also Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981). In addition, the Ninth Circuit has recognized that proof of co-workers' unhappiness with a particular accommodation is not enough to cause a hardship. See EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988).

92. Tooley, 648 F.2d at 1243; Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989); Smith v. Pyro Mining Co., 827 F.2d 1081, 1085-86 (6th Cir. 1987); Brown v. General Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978). A de minimis burden may, however, entail not only monetary cost, but an increased burden in conducting a business which may not affect the company financially. Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir. 1995); United States v. Board of Educ., 911 F.2d 882, 887 (3d Cir. 1990).
B. Undue Hardship

While Congress provided undue hardship as a defense to the accommodation requirement, it failed to define the term or the scope of the defense. It is clear, however, that undue hardship requires an employer to bear no more than a de minimis burden, and if this burden is more than de minimis, undue hardship negates the duty to accommodate. Further, undue hardship has been held to apply only to employers, and does not require the hardship of the employee to be weighed. Since courts do not consider the hardship to the employee in their analysis, employers are under no requirement to adopt the method of accommodation that best suits the employee.

Aside from these factors, courts must decide whether accommodation will result in undue hardship on a case by case basis. In general, courts distinguish between cost and no-cost accommodation alternatives. A cost alternative is one which would result in some sort of financial loss to the employer. This approach first appeared in Trans World Airlines, Inc. v. Hardison, where the Supreme Court held that any alternative which required an employer to incur financial cost was an undue burden. Where the Supreme Court held that any alternative which required an employer to incur financial cost was an undue burden.

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93. See 42 U.S.C. § 2000e(j) (1994). See also Hardison, 432 U.S. at 75 (noting that Congress did not spell out the scope of undue hardship or accommodation).


95. Ansonia, 479 U.S. at 66 (holding that the concept of undue hardship is inapplicable to employees). See also Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390 (10th Cir. 1984).

96. Ansonia, 479 U.S. at 66; Pinsker, 735 F.2d at 390.


98. Id.

99. Id. See also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). For example, in Hardison, the plaintiff was a Sabbath observer who was required to work on Saturdays when a co-worker went on vacation. Id. at 67-68. The plaintiff claimed that he was unable to do so because of his religious beliefs. Id. One of the alternatives suggested by the plaintiff was paying another employee to replace the plaintiff. Id. at 69. This alternative would have cost the employer one hundred and fifty dollars for three months. Id. at 92 n.6 (Marshall, J., dissenting). Because of this financial cost to the employee, the Supreme Court held that this was an undue burden. Id. at 84.

100. 432 U.S. 63 (1977).

101. Id. at 84. The plaintiff in Hardison was discharged for refusing to work on the Sabbath. Id. at 69. In upholding his discharge, the Supreme Court noted that he had not been assigned to work on Saturdays arbitrarily, but as part of a seniority provision in a collective bargaining agreement. Id. at 79-81. The Court held that this seniority provision already represented a
cost alternative has become a per se undue burden. Therefore, an employee will rarely be granted an accommodation alternative which results in cost to the employer.

No-cost alternatives are those which create no financial burden, either directly or indirectly, on the employer. For example, an employee may request a flexible scheduling arrangement or agree to exchange places with another employee who does not share his or her religious restrictions. Prior to Ansonia Board of Education v. Philbrook, courts reasoned that an alternative which did not financially burden the employer could not be an undue burden. The Supreme Court in Ansonia approached undue hardship as a separate and controlling issue, holding that once an employer has offered an employee a reasonable alternative, the employer is not required to demonstrate the hardship of the employee’s alternatives. Hence, the Court acknowledged that even a no-cost alternative may be more than de minimis and, thus, an undue hardship. However, while the decision in Ansonia may have theoretically reduced an employer’s duty to accommodate, lower courts continue to define the duty less restrictively, and hold that when an employer fails to offer a reasonable method of accommodation when one is available that would not result in an undue burden on the business, the employer is liable under Title VII. Therefore, while an employer may argue that a no-cost alternative

significant accommodation of employee religious practices. Id.

102. Zablotsky, supra note 94, at 547.

103. Id. Zablotsky notes an exception to this rule: in cases involving employees who have religious objections to paying union dues, an impact approach is used. Id. Under this approach, the amount of financial expenditure is evaluated in light of its impact on the union. Id.

104. American Postal Workers Union v. Postmaster Gen., 781 F.2d 772 (9th Cir. 1986); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985), aff’d, 479 U.S. 60 (1986); Zablotsky, supra note 94, at 548-49.

105. 479 U.S. 60 (1986).

106. Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146-47 (5th Cir. 1982) (holding that requiring director to substitute for pharmacist, operating without a pharmacist, or requiring employer to switch employee shifts would constitute undue hardship because a loss of efficiency would result); Brown v. General Motors, 601 F.2d 956, 960 (8th Cir. 1979) (holding that the possibility that another employee would have to be hired in the future did not constitute undue hardship because additional monetary expenditure was not required); Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 522 (6th Cir. 1976) (holding that requiring an employer to adjust shifts was not an undue hardship because no additional expenditure was required).


108. Id. See also Zablotsky, supra note 94, at 544-51 (discussing the differences between cost and no-cost alternatives).

109. Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987). In Smith, the plaintiff was a member and officer of a church whose doctrine prohibited all officers from working on Sundays. Id. at 1083. The plaintiff believed that it was a sin either to work on Sundays or to actively solicit another to work in his stead. Id. at 1083-84. The employer had a neutral work policy which allowed an employee to avoid working on Sundays if he or she found another employee willing to
creates an undue hardship, an employer is still required to reasonably accommodate an employee's religious observance if another available means exists that would not create an undue hardship.\footnote{110}

This analysis can be applied to the hypothetical posed in this Note.\footnote{111} If the human resource department asks Mavis to stop preaching while at work, she may claim that her actions are mandated by her religious belief.\footnote{112} In this case, the human resource department will be obligated to accommodate her actions, unless it can show that to do so would result in an undue hardship on the business. The company may attempt to argue that Mavis' actions make the work environment uncomfortable for other employees. However, unless the company can show that this has affected production or resulted in an increased cost to the business, it is unlikely that a court would consider this an undue hardship. If there is no cost to the business in allowing Mavis to witness at work, and if Mavis is still performing her job duties adequately, the human resource department may not be able to force Mavis to stop preaching.

C. Duty to Ensure a Working Environment Free From Harassment

If the human resource department fails to stop Mavis from preaching, Frank may argue that Mavis' actions constitute harassment in violation of Title VII. While Title VII does not specifically mention workplace harassment, courts find the right to be free from harassment within Title VII's prohibition against discrimination on the basis of race, religion, color, sex or national origin.\footnote{113}

\footnote{exchange shifts. \textit{Id.} at 1083. Since the plaintiff's beliefs prevented him from either working or finding a replacement, he was fired. \textit{Id.} at 1084. The Sixth Circuit Court of Appeals held that because the employer's policy did not resolve the conflict for the plaintiff, it was not a reasonable accommodation. \textit{Id.} at 1088. The court then determined that the employer could have solicited a replacement for the plaintiff without working an undue hardship on the company, because the company had previously taken an active role in arranging shift trades and had previously advertised an employee's need to arrange a shift trade through the company newspaper and bulletin board. \textit{Id.} at 1089. While staying within the parameters of \textit{Ansonia}, the Sixth Circuit required the employer to take steps beyond the neutral rule when to do so would not constitute an undue hardship on the employer. Compare \textit{Ansonia}, 479 U.S. at 64-65 with \textit{Smith}, 827 F.2d at 1085-89. \textit{See also EEOC v. Ithaca Indus., Inc.}, 849 F.2d 116 (4th Cir. 1988) (en banc).
110. \textit{See Smith}, 827 F.2d at 1027.
111. \textit{See supra} notes 2-6 and accompanying text.
112. \textit{See supra} notes 76-77 and accompanying text.
The first cases to recognize a hostile work environment were cases of racial harassment. In these cases, courts looked for extensive discrimination in the workplace to determine whether a racially hostile environment existed. For example, in Rogers v. Equal Employment Opportunity Commission, the Fifth Circuit upheld a Hispanic worker's suit for hostile environment discrimination under Title VII based on the fact that the employer discriminated against Hispanic clientele. The employer argued that this discrimination could not be actionable under Title VII because it was directed at patients and not towards an employee. The court rejected this argument, noting instead that patient segregation could be sufficiently demeaning to an employee to affect a condition of employment. The court stated that a working environment heavily charged with discrimination constituted an unlawful employment practice under Title VII. The Supreme Court further developed this standard by applying it to cases of sexual harassment. In Meritor Savings Bank, FSB v. Title VII has from its enactment proscribed discrimination against any individual with respect to his . . . conditions . . . of employment, because of such individual's . . . religion. 42 U.S.C. § 2000e-2(a)(1). When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment.

Id. at 160-61.


115. See, e.g., Rogers, 454 F.2d at 238. In Rogers, the court held that a working environment heavily charged with racial discrimination constituted an unlawful employment practice. Id. at 239. The court noted that an environment "heavily polluted" with discrimination could completely destroy the emotional and psychological stability of minority group workers. Id. at 238.


117. Id. at 238. The employers in Rogers were optomistrists who segregated their patients by ethnic origin. Id. at 227.

118. Id. at 238.

119. Id. at 240.

120. Id. at 239. The court in Rogers also implied that any secondary effect on the employee may have been intentional:

As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees. The [employers'] alleged patient discrimination may very well be just such a sophisticated method and, if so, [the plaintiff] . . . is entitled to protection in accordance with the provisions of Title VII.

Id.
Vinson, a landmark sexual harassment case, the Supreme Court held that harassment by speech or nonspeech conduct violates Title VII if it is severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment. Later, in Harris v. Forklift Systems, the Supreme Court held that to determine whether an environment is abusive, one must look at the totality of the circumstances, including the frequency of discriminatory conduct, its severity, and whether it unreasonably interferes with an employee's work performance. These tests, though developed for sexual harassment claims, have been applied to cases involving other forms of workplace harassment, including religious harassment.

121. 477 U.S. 57 (1986).
122. Id. at 67. In Meritor, the plaintiff's supervisor repeatedly demanded sex from the plaintiff, fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, and, on several occasions, forcibly raped her. Id. at 60. The Court, in extending Title VII's prohibition against a racially hostile environment to sexual harassment, first cited Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982): "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." Meritor, 477 U.S. at 67. The Court then went on to conclude that, while the "mere utterance" of a comment which might offend an employee would not affect the conditions of employment, harassment which altered the conditions of the victim's employment would be actionable. Id.
124. Id. at 22-23. Certiorari was granted in Harris ostensibly to resolve conflict between the federal courts as to whether a victim must show severe psychological injury before hostile environment harassment was actionable. Id. at 20. The Supreme Court stated that the victim need not make this additional showing, as long as the conduct was sufficiently severe or pervasive so as to alter the conditions of employment. Id. at 21. The Court went on to state, however, that whether an abusive environment exists is to be determined by looking at the totality of the circumstances surrounding the alleged harassing conduct. Id. at 23. The decision in Harris also looked not only to whether the reasonable person would have found the environment hostile or abusive, but to whether the victim subjectively viewed the environment as offensive. Id. at 21-22. The Court also used broad language which implies that the reasoning in Harris is applicable to other forms of workplace harassment. Id. at 22 (stating that "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality"). This broader interpretation of actionable harassment is expected to lead to an "expansionist trend" in workplace harassment law. See Barry A. Hartstein & Thomas M. Wilde, The Broadening Scope of Harassment in the Workplace, 19 EMPLOYEE REL. L.J., 639 (1994).
126. Meltebeke v. Bureau of Labor and Indus., 903 P.2d 351 (Or. 1994). While agreeing with the Oregon Bureau of Labor that religious harassment had occurred, both the appellate and state supreme courts held for the employer because the plaintiff had not informed his employer that he found the action offensive, and thus the employer was never given notice of the harassment. Id.
1. Religious Harassment

There are generally two types of religious harassment claims. The most common occurs when a supervisor or co-worker intentionally makes an environment hostile to an employee because of that employee’s religion. This was the case in Weiss v. United States. The court in Weiss held that the plaintiff, a member of the Jewish faith, was subjected to a hostile environment because co-workers and supervisors made constant, derogatory comments towards the plaintiff based on his faith. Although the plaintiff’s job performance evaluations were originally high, as a result of the constant verbal abuse, the plaintiff’s productivity fell so far below average that he was terminated.

127. Underkuffler, supra note 36, at 612. Underkuffler identifies 4 broad categories of religious discrimination:

1. Where the employer fails to accommodate the employee’s religious practice;
2. Where the employer refuses to hire, promote, or provide equal terms or conditions of employment to an employee because of that employee’s religious identity;
3. Where the religious beliefs or practices of the employer are offensive to the employee;
4. Where the work environment is hostile or offensive to the employee’s religious beliefs (or lack thereof).

Id. at 611-13.

This note argues that Underkuffler’s final two categories can be combined and re-categorized into two types of harassment claims. The more common type places the emphasis upon the environment, which would include co-workers or supervisors who may be making offensive or hostile slurs. See infra notes 129-38 and accompanying text. The second, more subtle type, has evolved from the “reasonable victim standard” recognized by the Supreme Court in Harris v. Forklift Systems, 510 U.S. 17 (1993). See infra notes 139-54 and accompanying text. In this second type of harassment action the emphasis is almost completely on the employee and his or her individualized reaction to what might, to another employee, be an acceptable work environment. Because this is a very subjective standard, based entirely on the perception of the alleged victim, it raises more difficult questions for employers in determining what may constitute a hostile environment. See Hartstein & Wilde, supra note 124, at 639.


130. Id. at 1052. For approximately two years, the plaintiff was the constant target of religious slurs made by a co-worker and a supervisor. Id. These included such remarks as “Jew faggot,” “rich Jew,” “Christ killer,” “nail him to the cross,” and “you killed Christ . . . so you’ll have to hang.” Id.

131. Id. at 1052-53. Although the plaintiff claimed to have suffered “anxiety-related disorders” as a result of this verbal abuse, he did not complain at first to anyone about the abuse. Id. at 1053. During the period of abuse, the plaintiff’s performance evaluations indicated that his work performance was satisfactory. Id. In fact, the plaintiff did not begin to receive substantially lower performance appraisals until after he complained about the verbal abuse. Id. at 1054. The district court concluded that the plaintiff’s work performance did suffer as a result of his frustration with his work environment, but stated that this diminished work performance was caused by the verbal abuse. Id. at 1057. In holding for the plaintiff, the court stated: “Plaintiff’s performance was . . .
Vaughn v. Ag Processing presents another example of this type of harassment. In Vaughn, the plaintiff worked under a supervisor who was known as a "rough talker," and who had a habit of calling his workers derogatory names when he was dissatisfied with their work. When this supervisor became aware that the plaintiff was a devout Catholic, the supervisor began focusing these derogatory comments specifically at the plaintiff’s faith. The court in Vaughn concluded that, while it was clear that the supervisor used abusive language with all the workers, the particular comments directed at the plaintiff would not have occurred but for his religion, and, thus, this conduct constituted religious harassment.

In both Weiss and Vaughn, the plaintiffs were made the targets of harassment because of their faith. This type of harassment is usually easy to identify, and therefore it can be more easily remedied. However, the second type of religious harassment is more complicated. It occurs when what

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. below average during this difficult period; nonetheless, the defendant cannot point to that performance as a legitimate basis for removal when the defendant itself is responsible for . . . causing the sub-par performance." Id.

132. 459 N.W.2d 627 (Iowa 1990).

133. This case was heard by the Iowa State Supreme Court, because Vaughn was brought under the Iowa Civil Rights Act rather than Title VII. See Vaughn, 459 N.W.2d at 627, 632. However, the Iowa Civil Rights Act is based on Title VII, and the elements of proof are the same. In addition to providing an excellent example of religious harassment, Vaughn demonstrates the similarities between Title VII and its analogous state statutes. See Iowa Code § 602.1401 (1995); 42 U.S.C. § 2000e (1991); Vaughn, 459 N.W.2d at 632 (discussing the elements of proof in a case of religious harassment). See also supra notes 65, 67.

134. Vaughn, 459 N.W.2d at 630-31.

135. Id. A few days after the plaintiff requested time off to attend mass, the supervisor began referring to the plaintiff as a "goddamn stupid fuckin' Catholic." Id. The supervisor later told the plaintiff, "I know you're Catholic, but I haven't seen one yet that had any fuckin' brains." Id. The plaintiff also heard the supervisor refer to other Catholic employees as "[a]nother dumb Catholic," a "pus-gutted Catholic," and, while discussing a Catholic co-worker whose wife had just had a baby, the supervisor asked the plaintiff "is that all you people do is have kids?" Id.

136. Id. at 632-33. The Supreme Court of Iowa affirmed the lower court's decision that the conduct constituted harassment and that the plaintiff was the victim of religious discrimination. Id. However, the court declined to address the issue of whether the supervisor's behavior was sufficiently severe and pervasive to alter a condition of the plaintiff's employment. Id. at 633-34. The court determined that it did not need to address this issue because it held that the employer was not liable for the harassing conduct. Id. The employer responded to the plaintiff's complaint by reprimanding the supervisor and assuring the plaintiff that the conduct would not be repeated. Id. at 633-35. Because the employer took prompt remedial action to remedy the situation, the supreme court reversed the lower court's award of damages. Id. at 635.


138. For example, in Vaughn the Iowa Supreme Court reversed the lower court's decision regarding employer liability specifically because the employer had taken swift remedial action once it learned of the verbal abuse. See Vaughn v. Ag Processing, 459 N.W.2d 627, 634-35 (Iowa 1990).
might otherwise be a tolerable environment becomes hostile to an employee because of that employee's particular beliefs. For example, in Young v. Southwestern Savings and Loan Association, the employer required all employees to attend a monthly staff meeting. This meeting was opened with a short devotion and a prayer. The plaintiff, who was an atheist, found this disturbing and refused to attend the meetings because of the religious aspect. When the plaintiff was told by her manager that she was required to attend the entire meeting, the plaintiff quit her job. The Fifth Circuit held that the plaintiff was constructively discharged, because this requirement,

139. See, e.g., Turic v. Holland Hospitality Inc., 849 F. Supp. 544 (W.D. Mich. 1994) (observing that the plaintiff had been terminated because her contemplation of abortion was offensive to her Christian co-workers); Young v. Southwestern Sav. and Loan Assoc., 509 F.2d 140, 145 (5th Cir. 1975) (noting that the claim was solely the product of the plaintiff’s objection to the religious content of the defendant’s staff meetings).
140. 509 F.2d 140 (5th Cir. 1975).
141. Id. at 141-42. When the plaintiff accepted employment with the bank branch, she was aware of the requirement. Id. However, she did not learn of the “theological appetizer” until she attended the meeting. Id. at 142.
142. Id. The court in Young described the devotional as “non-denominational.” Id.
143. The court noted that the plaintiff had been a member of the Unitarian Church. Id. at 142 n.3. The Unitarian Church is a Christian denomination which is founded upon the doctrine that God is one being, rejects the doctrine of the Trinity, and emphasizes the tolerance of difference in religious opinions. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1291 (1984). An atheist is one who denies the existence of God. Id. at 112. The court in Young went on to state that the plaintiff had since left that church, and concluded that there was “no question of the sincerity of [the plaintiff’s] religious beliefs.” Young, 509 F.2d at 142 n.3.
144. Young, 509 F.2d at 142. Neither the plaintiff nor another teller attended the mandatory meetings for several months before their absence was noticed. Id. When their absences were noticed, they were reported to the plaintiff’s manager. Id. He confronted both employees, and when the other worker confessed to having forgotten about the meetings, she was excused. Id. However, when the plaintiff told her manager that she could not attend the meetings because she found the religious content objectionable, she was told that the meetings were mandatory, and that if she objected to the devotional, she could “close her ears” during that time. Id.
145. Id. The manager told the plaintiff that the meetings were mandatory, and that he would “leave the decision to her.” Id. The plaintiff then informed him that she would be leaving because she could not attend the prayer meetings. Id. When he asked for a letter of resignation, she refused, stating “I am being fired.” Id. The court concluded that the only possible reason for her resignation was her resolution not to attend the religious meetings, and that it was reasonable for her to infer that, if she did not attend the meetings, she would be fired. Id.
146. Young v. Southwestern Sav. & Loan Assoc., 509 F.2d 140, 143 (5th Cir. 1975). Title VII forbids an employer to “discharge any individual . . . because of such individual’s religion.” 42 U.S.C. § 2000e-2 (1994). To prevail in a religious discrimination lawsuit, a plaintiff would have to prove that she was discharged on account of her religious beliefs. To avoid lawsuits, employers on occasion do not fire employees, but instead make their working conditions so intolerable that the employee feels compelled to quit. To avoid the unfairness that would result from this practice, courts have developed the doctrine of constructive discharge. See Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981); NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204 (6th Cir. 1964); See also ROTHSTEIN & LIEBERMAN, supra note 68, at 906-07.
coupled with the plaintiff’s belief, created an abusive environment for the plaintiff.147

A similar situation occurred in Lambert v. Condor Manufacturing.148 In Lambert, the plaintiff refused to perform machine work in an area where other employees had displayed nude photographs of women.149 The plaintiff informed his supervisor that these photographs violated his religious beliefs,150 and that he was unable to work around them.151 Because the plaintiff refused to operate the machine in this area, he was fired.152 The plaintiff then filed suit, alleging that his employment was terminated because the employer failed to provide an environment free from sexually explicit pictures, which created an offensive environment for him because of his religious beliefs.153 The court reasoned that if the plaintiff’s termination would not have occurred but for his religious beliefs, then the employer had terminated him in violation of Title VII.154

147. Young, 509 F.2d at 144. The court stated that the doctrine of constructive discharge applies when an employee resigns against his or her will to avoid intolerable and illegal employment practices. Id.
149. Id. at 601.
150. The employer in Lambert argued that the plaintiff’s objections related to his personal moral beliefs rather than to any organized religious teachings or doctrines. Id. at 602. The court rejected this argument, noting that it has never been suggested that “unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief.” Id. (citing Frazee v. Illinois Dept. of Employment Sec., 109 S. Ct. 1514, 1517 (1985)).
151. Id. At trial, the defendant claimed that it had never been informed of the plaintiff’s religious objections. Id. However, the plaintiff referenced deposition testimony that he spoke to his supervisor on three separate occasions. Id. The court held that this was a question of fact for the jury. Id.
152. Id. at 601.
153. Id. at 601, 604.
154. Lambert v. Condor Mfg., 768 F. Supp. 600, 602-03 (E.D. Mich. 1991). The court denied the defendant’s motion for summary judgment, holding that whether the termination was related to the plaintiff’s religious beliefs was a question of fact for the jury. Id. Although the plaintiff argued that the photographs created an offensive environment, the court approached this as an accommodation case. Id. at 601-03. The defendant argued that it offered a reasonable accommodation to the plaintiff by offering to let him work as an inspector, so that he would not have to work around the offensive photographs. Id. The plaintiff asserted that this was not reasonable, because it would require him to work the late shift. Id. The plaintiff’s preferred accommodation was for the employer to require removal of the offensive pictures. Id. The court first noted that the Supreme Court has held that an employer was under no obligation to choose the method of accommodation which the plaintiff preferred. Id. (citing Ansonia Bd. of Ed. v. Philbrook, 107 S. Ct. 367, 372 (1986)). The court then went on to hold that whether the employer’s proposal that the plaintiff work the late shift was reasonable was a question of fact for the jury. Id. at 603.

Interestingly, the employer also asserted that to remove the photographs would place an undue hardship on the business because it would violate the free expression rights of the employees who had placed them there. Id. at 604. The court quickly pointed out that this argument ignored the fact
This type of religious harassment may become further complicated when created by an employer’s attempt to accommodate another employee’s religious practice. A recent Eighth Circuit case illustrates the problem caused when one employee’s religious belief creates a hostile environment for co-workers. In *Wilson v. US West Communications*, the plaintiff was a Roman Catholic who claimed that a religious vow required her to wear a badge with a two inch color photo of an aborted fetus, with the words “Stop Abortion.” The plaintiff claimed that she had made a vow to God to wear this particular button until there was an end to abortion. She believed that to take off the button would cause her to break her vow and lose her soul. Many of her co-workers found the badge offensive; two of them filed grievances, complaining that the supervisor’s failure to prevent the employee from wearing the badge amounted to harassment. The company gave the employee several options, including wearing a different badge or covering it while at work. The

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155. 58 F.3d 1337 (8th Cir. 1995).

156. *Id.* at 1339. In July of 1990, the plaintiff made a religious vow to God to wear this button until there were no more abortions. *Id.* After making the vow, she wore the button at all times, unless she was sleeping or bathing. *Id.* The plaintiff chose this particular button because she wanted to be an instrument of God, as she believed the Virgin Mary had been, and she believed that the Virgin Mary would choose this button.

157. *Id.* The button, measuring 2 inches in diameter, had a color photograph of a fetus between 18 and 20 weeks. *Id.* The fetus was surrounded by a black background, and directly above the fetus were the words “Stop Abortion.” *Id.* Above this, in smaller letters, was the phrase “They're Forgetting Someone.” *Id.*

158. *Id.* According to the plaintiff, she had made a sacred vow through verbal commitment to Blessed Mary and her son Jesus Christ to acknowledge the sanctity of the unborn child by wearing the pro-life button in question until the day that abortions were no longer performed. This now is sacred and is also considered a vow to God which cannot nor shall not be broken.

159. *Wilson*, 58 F.3d at 1339. Many of the co-workers found the button offensive for reasons unrelated to their stance on abortion or religion. *Id.* For example, one witness who testified for the defendant found the button disturbing because she had suffered a miscarriage. *Id.* Others expressed distress related to the death of a premature infant and an inability to have children. *Id.* As a result of the plaintiff’s activity, the employer noted a forty percent decline in the productivity of the department. *Id.* In addition, the supervisor was accused of harassment for not preventing the plaintiff from wearing the button, employees refused to attend meetings where the plaintiff and her button were present, and some co-workers threatened to walk off the job.

160. *Id.* For the district court’s analysis, see *Wilson v. US West Communications*, 860 F. Supp 665, 668 (D. Neb. 1995). The employer proffered three forms of accommodation, and the district court weighed each separately. *Id.* First, the employer suggested that the plaintiff only wear the button while she was alone in her cubicle. *Id.* The court held that, because the plaintiff’s vow only allowed her to remove the button when she slept or bathed, this was not a reasonable accommodation. *Id.* Next, the employer suggested that the plaintiff wear a less offensive button. *Id.* Again, because the plaintiff's vow was to wear this particular button, the court held that this was
Eighth Circuit ruled that, under Title VII, these options reasonably accommodated the employee's religious observance, and that to do more would place an undue hardship on the company by creating a hostile environment for the plaintiff's co-workers. Thus, the employer was justified in terminating the plaintiff.

In another case, however, the same court rejected an employer's argument that occasional religious discussion and prayer, coupled with the prominent display of religious objects, could place an undue hardship on its operations by polarizing the work force between those who were fundamentalist Christians and those who were not. In Brown v. Polk County, the plaintiff, a born-

not a reasonable accommodation. Id. Finally, the employer suggested that the plaintiff cover the button. Id. The court held that this was reasonable, since the plaintiff's vow did not extend to prominent displays. Id.

The plaintiff claimed that her vow did extend to prominent displays, because the vow required her to be a "living witness." Id. As a "living witness," the plaintiff would have to witness through her actions as well as her words, and so she would not be able to maintain her religious vow by covering up her button. Id. The district court held that she was not a "living witness," because she had not mentioned being a living witness until after her supervisor suggested that she cover the button. Id.

161. Wilson v. US W. Communications, 58 F.3d 1337, 1342 (8th Cir. 1995). Once a court determines that an employer has reasonably accommodated an employee's religious needs, the inquiry is at an end. Id. In Wilson, however, the district court continued to examine whether wearing the button uncovered would result in an undue hardship on the business. Id. at 1342 n.3; Wilson, 860 F. Supp. at 675. The district court first concluded that the loss of productivity, as well as the energy expended in attempting to alleviate the situation, presented more than a de minimis cost to the employer. Id. The court went on to state that "exposing an employer to legal liability is considered an undue hardship." Id. at 675-76.

Before the Court of Appeals, the plaintiff argued that the hostile environment was not caused by her wearing the button, but was created by her co-workers' reactions. Wilson, 58 F.3d at 1341. The plaintiff contended that the employer's focus should have been on the co-workers, not on her button, and that the employer "should have simply instructed the troublesome co-workers to ignore the button and get back to work." Id. The court rejected this argument, agreeing with the district court that the plaintiff's position would force the employer to allow the plaintiff to force her views on unwilling co-workers. Id. The Appellate Court stated, "To simply instruct [the] co-workers that they must accept [the plaintiff's] insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation." Id.

162. Wilson, 58 F.3d at 1338. When the plaintiff refused to remove or cover the button, she was sent home. Id. at 1339. She was then told that three unexcused absences would constitute job abandonment. Id. She again reported to work wearing the button; she refused to remove it and was again sent home. Id. When she remained absent and unexcused for three consecutive days, she was terminated. Id.

163. Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995). The plaintiff in this case sued the county, its board of supervisors, and the county administrator. Id. at 652. Since the employer in Brown was a government actor, the plaintiff also alleged in his complaint that his discharge violated the First and Fourteenth Amendments to the United States Constitution by denying him the free exercise of religion. Id. The court in Brown noted, however, that the plaintiff only requested a declaratory judgment and compensatory damages for the constitutional claims, while he requested
again Christian, opened his office early for morning prayers, affirmed his faith, referred to Bible passages regarding work ethics, prayed, and encouraged prayer during departmental meetings. The plaintiff also expressed his faith through various religious items he kept in his office, such as a Bible and prayer plaques. The plaintiff was reprimanded for his activities by a supervisor and was ordered to remove all religious items from his office, including the Bible on his desk. Ultimately, he was fired.

back pay and reinstatement under the statutory claims of Title VII and the analogous Iowa state statute. Id. at 652-53. The court first stated that the requirements of the state statute were the same as those of Title VII. Id. at 652. It went on to state that, in the case of a government employer, any religious activities protected by Title VII would also be protected by the First Amendment. Id. at 653. With this said, the court then stated that it would, for the sake of simplicity, only examine in detail the requirements of Title VII. Id.

164. 61 F.3d 650 (8th Cir. 1995).

165. Id. at 650-51. Title VII requires employers to accommodate employees' religious needs. See supra notes 76-78 and accompanying text. Here, the court concluded that the plaintiff's need to express his religion was necessary because "there can be no doubt that his religious beliefs are extremely important to him and play a central role in his life." Brown, 61 F.3d at 658. The plaintiff had reportedly undergone a personal spiritual revival that he described as "life-changing." Id. The plaintiff also claimed that prayer was a part of his being, and something that led and guided him on a daily basis. Id. Further, the plaintiff testified that he believed that God expected him to pray for "the pandemic problems inherent in our society," and that prayer "changes things." Id. Based on this testimony, the court concluded that the employer's prohibitions against the plaintiff's activity were oppressive and in violation both of Title VII and of the Free Exercise Clause of the Constitution. Id. at 657-59.

166. Brown, 61 F.3d at 650, 659. The plaintiff had, among other things, prayer plaques which contained the "serenity prayer" ("God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference"), the Lord's Prayer, and one which read "God be in my life and in my commitment." Id. at 659. The court implied that the harmlessness of these items revealed the zealotry, and thus the intolerance, of the supervisor who demanded their removal.

167. Id. at 650. A county administrator first gave the plaintiff a written warning for a "lack of judgment pertaining to his personal participation in and/or his knowledge of employees participating in activities that could be construed as the direct support of or the promotion of a religious organization or religious activities utilizing the resources of Polk County Government." Id. This reprimand also ordered the plaintiff to "cease any . . . religious proselytizing [or] witnessing." Id. On a separate occasion, the administrator directed the plaintiff to remove from his office all items with a religious connotation, including his Bible. Id. The plaintiff apparently complied with these directives; following the first reprimand, he "went across the street to the library . . . to read his Bible and pray." Id. at 660. However, the plaintiff was reprimanded twice again in that same year for reasons not related to his religious activity. Id. at 650.

168. Id. In late 1990, the plaintiff was asked to resign; when he refused, he was fired. Id. In the first trial, both the county administrator who fired the plaintiff and the labor relations manager for the county testified that religion was the primary factor for the plaintiff's termination. Id. at 654.
The plaintiff sued the employer under Title VII on the theory that he was fired because of his religion.\textsuperscript{169} The employer argued that the plaintiff's activities created an undue hardship on the business because the activities had the potential to cause a division among the staff by creating an impression of preference for born-again Christians.\textsuperscript{170} While the district court found in favor of the employer, the Court of Appeals reversed.\textsuperscript{171} The appellate court reasoned that, while the employer was not required to accommodate religious activities which imposed more than a de minimis cost, the employer must be able to point to actual impositions on co-workers, or disruptions of the workforce.\textsuperscript{172} The employer offered several witnesses who testified that there was a separation in the office between born-again Christians and others, but these witnesses all agreed that this did not cause a disruption in the work environment.\textsuperscript{173} Rather, the plaintiff had been reprimanded as part of the employer's attempt to avoid any disruption or offense.\textsuperscript{174} The employer was unable to show that the prayers and references to religion had any actual negative effect on the office operations, and as a result, the court held that the employer was liable under Title VII for failing to accommodate the plaintiff's religious practice.\textsuperscript{175} 

\textsuperscript{169} Id. at 653. Under Title VII, the plaintiff alleged that he was wrongfully terminated because of his race and religion. The plaintiff also alleged, under 42 U.S.C. §1983, that the first reprimand and the order to remove all religious items violated constitutional guarantees of freedom of religion, free speech, and equal protection. \textit{Id. See also supra note 66} (discussing the provisions of § 1983).

\textsuperscript{170} Brown v. Polk County, 61 F.3d 650, 658-59 (8th Cir. 1995). The defendant supported this contention by pointing to concerns expressed by some of the plaintiff's subordinates about the potential effects of the plaintiff's religious beliefs on his personnel decisions. \textit{Id.} at 656-57. The Eighth Circuit Court of Appeals did not consider these concerns to be a substantial enough disruption of the workplace to qualify as an undue hardship on the business. \textit{Id.} at 657. The court noted that there was no evidence of an actual effect of discrimination by the plaintiff towards his non-Christian subordinates, implying that it might have reached a different decision if there were. \textit{Id.} This indicates that, in the Eighth Circuit at least, employee complaints alone may not be enough to substantiate an employer's contention of undue hardship caused by religious proselytization.

\textsuperscript{171} Id. at 653. The district court found for the defendants in all respects. \textit{Id.} The Eighth Circuit Court of Appeals affirmed the judgment of the district court. \textit{Id. See also Brown v. Polk County}, 37 F.3d 404 (8th Cir. 1994). On rehearing en banc, however, the Court of Appeals affirmed the decision of the district court with regard to the plaintiff's claim of racial discrimination, but reversed in respect to the statutory religious discrimination and constitutional claims. \textit{Brown}, 61 F.3d at 653, 657-58.

\textsuperscript{172} \textit{Brown}, 61 F.3d at 655.

\textsuperscript{173} Id. at 656-67.

\textsuperscript{174} Id. An investigation report stated that the plaintiff's religious activities had the "potential effect" of generating an impression of preference for those who share similar beliefs. \textit{Id.} at 657. The court found this too hypothetical to satisfy the undue hardship standard. \textit{Id.}

\textsuperscript{175} Id.
2. Employers' Defense to Claims of Religious Harassment

In the event that conduct in the workplace does constitute harassment, it is important to understand when the employer is liable for this conduct. Title VII is aimed at preventing discriminatory conduct by employers, not co-workers. Therefore, if the employer successfully argues that he is not liable for the harassment, the plaintiff will still have no cause of action under Title VII. Courts rarely find an employer strictly liable for the actions of co-workers, or even of supervisors. Rather, the Supreme Court has suggested that courts should look to agency law to determine whether an employer is legally responsible for the acts of the employee.

176. Of course, an employer may first argue that no harassment occurred, or that if it did occur, it was not severe or pervasive enough to constitute actionable harassment. See supra notes 113-54. Once conduct has been found to constitute harassment, however, an employer may still escape liability if it is able to show that it had no notice of the conduct. See, e.g., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986); Meltebeke v. Bureau of Labor & Indus., 903 P.2d 351 (Or. 1995). For example, in Meltebeke, the court, while concluding that religious harassment had occurred, imposed no sanction on the employer because the plaintiff had never informed the employer that he found the conduct abusive. Meltebeke, 903 P.2d at 363. In this case, the employer, a proselytizing Christian, went on to spark yet another lawsuit. This claim was filed by a client of his housepainting business who found his persistent preaching offensive. See CBS Evening News, supra note 22.

177. See 42 U.S.C. § 2000(e)(b) (1994). See also Michael D. Vhay, Comment, The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment, 55 U. CHI. L. REV. 328, 344 (1988) (stating that employer liability is a necessary proof under Title VII because the statute targets only the conduct of employers, labor organizations, and employment agencies).

178. See Weddle, supra note 114, at 1722 n.22; Vhay, supra note 177, at 344.

179. See Meritor, 477 U.S. at 72: Congress' decision to define "employer" to include any "agent" of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for . . . harassment by their supervisors.

Id. See also Katherine S. Anderson, Note, Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1260-61 (1987). Courts will, however, find an employer strictly liable if a supervisor engages in quid pro quo harassment, where the supervisor conditions employment benefits, such as retention of a job, promotion, or pay increase, on the victim's submission to sexual demands. See Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1988); Garber v. Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976). In a case of religious quid pro quo harassment, the employment benefit would be conditioned upon the victim's relinquishing or renouncing his religious belief. Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

180. In Meritor Savings Bank FSB v. Vinson, the Supreme Court discussed the various standards for employer liability in the area of sexual harassment. Meritor, 477 U.S. at 69-73. The plaintiff in Meritor contended that, as long as the circumstance is work related, the supervisor is the employer and the employer is the supervisor—in other words, strict liability. Id. The Court rejected this view as inconsistent with Congress' intent. Id. The defendant argued that without notice, there could be no liability, since it would be unfair to hold an employer liable for conduct which it may
Under the law of agency, the actions of a supervisor may be imputed to the employer if the supervisor has authority to engage in such actions.\textsuperscript{181} not even know about and have no opportunity to cure. \textit{Id}. The court rejected this as well, although partly because the defendant’s policy for providing notice would have required the plaintiff to notify her supervisor, who in this case was her harasser. \textit{Id}. at 72-73. Finally, the Court looked to the EEOC’s brief as amicus curiae, which contended that courts formulating employer liability rules should draw from traditional agency principles. \textit{Id}. at 70. These principles state that “where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer.” \textit{Id}. However, the EEOC went on to suggest that when a . . . harassment claim rests exclusively on a “hostile environment” theory . . . agency principles lead to a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee’s complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge. \textit{Id}. at 70-71.


181. \textsc{Re}statement (Second) Of Agency § 140 (1995).

The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that:

(a) the agent was authorized;
(b) the agent was apparently authorized; or
(c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority.

\textit{Id}. Even if the acts were unauthorized by the employer, the employer, as principal may be held liable to third parties for damages caused by the supervisor’s actions if it would appear reasonable to the third party that the acts were authorized by the employer. \textit{See} \textsc{Re}statement (Second) Of Agency § 161 (1995).

A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.

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Similarly, the actions of an employee may be imputed to the employer if the employer has notice of the actions, and fails to act in such a way as to deny authority. In other words, an employer may be charged with religious harassment if a supervisor harasses an employee and the employer has not expressly forbidden it. Likewise, if an employee harasses a co-worker, and the employer finds out about it but fails to correct the situation, the employer may be liable for harassment.

For example, in *Meritor Savings Bank, FSB v. Vinson,* the Supreme Court noted that traditional agency principles would make an employer strictly liable for discriminatory discharges of employees by supervisors because the supervisor is exercising authority actually extended to him by the employer. However, while the Court declined to issue a definitive rule on employer liability, it did hold that the lower court erred in imposing strict liability on employers without regard for the circumstances. The Court indicated that

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(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.

(2) Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.

183. *Id.*

184. See, e.g., Weiss v. United States, 595 F. Supp. 1050, 1053 (E.D. Va. 1984) (noting that the plaintiff's supervisor made no attempt to stop the repeated religious slurs directed at the plaintiff by a co-worker); Young v. Southwestern Sav. & Loan Assoc., 509 F.2d 140, 144 n.5 (5th Cir. 1975).

[The employer] argues that [the plaintiff] could not have been discharged because [the supervisor] had no authority to fire any of the employees at the . . . branch. While it is certain that [the employer] is correct with respect to the extent of [the supervisor's] actual authority, it is also certain that [the plaintiff] had no reason to know of this limitation, and in fact had every reason to assume the contrary, in view of [the supervisor's] firm language . . . and of plaintiff's knowledge that her original application for employment had been submitted to [the supervisor] for his approval. Under these circumstances, [the employer] cannot disclaim responsibility for [the supervisor's] apparently authorized actions.

Young, 509 F.2d at 144 n.5.


186. *Id.* at 70-71.

187. *Id.* at 72. See also Restatement (Second) of Agency §§ 219-37 (1958).

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

*Id.* § 219. "An act, although forbidden, or done in a forbidden manner, may be within the scope
when a supervisor's actions are outside the scope of his duty, then the employer may not be imputed with knowledge if the employer had made it clear to employees that it had an interest in prohibiting these actions.188 This is usually put forth in the form of a policy against discrimination.189 In Meritor, the Court held that the employer's general policy against discrimination did not insulate it from liability because its policy did not address sexual discrimination in particular.190 Thus, the policy did not alert employees of the employer's intent to prohibit this specific type of discrimination.191 This reasoning implies that sexual harassment is of such a unique nature that it must be addressed separately from other types of harassment.192

The EEOC endorsed this view in its proposed guidelines on harassment.193 In the supplemental information section, the Commission stated that these guidelines supersede the guidelines on national origin harassment, but not sexual harassment, because sexual harassment is a "unique" issue which warrants "separate emphasis."194 Religious harassment is also a "unique" of employment." Id. § 230. "An act may be within the scope of employment although consciously criminal or tortious." Id. § 231.

188. Meritor, 477 U.S. at 71.
190. Meritor, 477 U.S. at 72.
We reject [the employer's] view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate [the employer] from liability. While those facts are plainly relevant . . . they are not necessarily dispositive. [The] general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination.

Id.

192. In addition, the Court noted that the employer's grievance procedure apparently required the plaintiff to first notify her immediate supervisor, who in this case was also her harasser. Id. at 73. Otherwise, the Court stated, "If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the . . . hostile environment. . . ." Id. at 71.
194. Id. at 51,267.

[The National Origin Guidelines will be incorporated into and superseded by these proposed Guidelines on Harassment . . . . Sexual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis . . . . The Commission's Sex Discrimination Guidelines remain in effect and there is no change in the Commission's policy regarding sexual harassment.

Id.
issue. While an employee's interest in making sexual or racial comments may be questionable, many employees have a fundamental, societally recognized interest in commenting on religious matters. To those who believe that it is their duty to proselytize to others, an inflexible proscription against this activity may be an unbearable impairment to their religious practice. Employers cannot afford the liability that this type of action may invite. Instead, employers should implement an in-house employment policy which is aimed specifically at religious harassment.

The problems that may arise when the special nature of religion is not taken into account are exemplified by the EEOC’s attempt to codify guidelines for religious harassment. In 1980, the EEOC first issued guidelines acknowledging sexual harassment in the workplace and outlining what actions constitute

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195. Of all the protected categories under Title VII, religion is the only one that is not an immutable characteristic. Unlike race, sex or national origin, religion is inherently a statement. Statement of Senator Howell Heflin, Gov't Press Release, June 17, 1994, available in WESTLAW, Allnewsplus Database, Gov’t Press Releases (citing the Society For Human Resource Management). See also Underkuffler, supra note 36, at 609.

196. Underkuffler, supra note 36, at 610. Underkuffler argues that:

Religion is unique among the prohibited classifications found in Title VII and other civil rights statutes. Only religious speech, exercise, and expression have intrinsic, societally recognized and constitutionally enunciated value. At best, racist speech is constitutionally tolerated; the practice of racism, in employment or elsewhere, "violates deeply and widely accepted views of elementary justice." The same can be said of practices that involve sexism . . . . Religion is different. Although the elimination of religious discrimination in employment is a matter of the highest public policy, that goal must be achieved in a manner that is cognizant of the explicit, affirmative value of religious speech, practice, and expression by all parties . . . .

Id.

For example, if a private employer requires its employees to refrain from using racist or sexist language, the employee will have no standing to argue that his free speech rights have been violated. See supra note 17. However, if a private employer requires an employee to forego a particular religious practice, or attempts to restrict an employee's religious speech, the employee may argue that the employer has failed to accommodate his religious practice. See supra notes 76-92 and accompanying text.

197. See Jim DeSimone, Low Key Approach Popular, ORLANDO SENTINEL, Feb. 27, 1995, at 17 (discussing the duty of Christians to spread the Gospel of Jesus Christ); John W. Moore, Possibly One “Thou Shalt Not” Too Many, NAT’L J., May 21, 1994, at 1191 (quoting Traditional Values Coalition leader Lou Sheldon as saying it is normal for Christians to be evangelical). See also Brown v. Polk County, 61 F.3d 650, 658 (8th Cir. 1995).

198. See, e.g., Schaner & Erlemier, supra note 12, at 7 (noting that, since the Civil Rights Acts of 1991, employers found liable for violating Title VII are also subject to liability for emotional distress and punitive damages); Brown & Germanis, supra note 189, at 574-77 (stating that no employer can afford to have a vague and ineffective policy against sexual harassment, especially given the recent availability of compensatory and punitive damages under Title VII). Courtroom costs are not the only losses an employer may incur; when Southwest Airlines disciplined an airline attendant for proselytizing on the job, local churches called for a boycott of the airline. See Grossman, supra note 22, at 1D.
harassment. In 1993, the EEOC attempted to extend these guidelines to cover harassment of all protected classes, including religion. Unfortunately, these proposed guidelines did not take into account the special nature of religion in this country. The vague language of the guidelines was intended to ensure protection against all harassment, regardless of cause. Instead, individuals who had grown wary of government intervention in religious matters saw the guidelines as encouraging employers to outlaw all religious expression in the workplace. The resulting uproar forced the EEOC to withdraw religion from the proposed guidelines.

200. Guidelines, supra note 24, at 51,266.
   The Commission has previously issued guidelines on sex-based harassment .... For several reasons, the Commission has determined that there is a need for new guidelines that emphasize that harassment based upon race, color, religion, gender, age or disability is egregious and prohibited by Title VII, the ADEA, the ADA, and the Rehabilitation Act. Id. at 51,266-67.
201. According to the Proposed Guidelines, the standard for determining if conduct is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person would find the conduct intimidating, hostile or abusive. Id. at 51,269. The Proposed Guidelines also instruct that the reasonable person standard should take into account the perspective of the alleged victim. Id. at 51,267. The Commission emphasized the importance of considering the perspective of the victim of harassment, rather than notions of acceptable behavior. Id. Opponents of the Guidelines argued that, because the EEOC ignored acceptable notions of behavior and instead called for the trier of fact to consider the victim's perspective of the alleged offense as a basis for a ruling, employers would have to anticipate the potential reaction of every employee to any religious symbol in the workplace. House Action Takes Step Away From Regulation of Religion in Workplace, Gov't Press Release, Aug. 19, 1994, available in WESTLAW, Allnewspus Database, Gov't Press Releases. The fear of litigation would chill employees' rights to express their religious preferences. Id.
202. Among the reasons given for the new guidelines are the Commission's interest in emphasizing that harassment on the basis of any of the protected categories is egregious and prohibited, to offer more detailed information about what is prohibited, and to expand the prohibition against some forms of harassment. Guidelines, supra note 24, at 51,267. See also Hartstein & Wilde, supra note 124, at 643 (stating that the Proposed Guidelines are likely to add to the expansionist trend in workplace harassment law).
203. For example, Chick-Fil-A is a fast food chain whose policies reflect its founder's Christian beliefs. The chain closes its restaurants on Sundays and holds voluntary Monday morning devotional services at its corporate offices. During a June Senate hearing on the Proposed Guidelines, Chick-Fil-A's executive vice president testified that the guidelines would force the company to eliminate all references to religion, significantly changing the company's culture and morale. Chick-Fil-A's vice president fears that "the guidelines would make work-places as devoid of religious expression as the public schools." Virginia I. Postrel, Persecution Complex; Religion in the Workplace, REASON, Aug. 1994, at 4. See also Grossman, supra note 22, at D1; Religious Harassment in Workplace Debated, supra note 54, at 635.
204. On September 20, 1994, the EEOC agreed to eliminate all reference to religion from the Proposed Guidelines on workplace harassment. See EEOC Formally Withdraws, supra note 29, at 11; Heavens No!, supra note 26, at B4; Washington, supra note 29, at 8.
It is possible that the EEOC's proposed guidelines would have been acceptable had they acknowledged the singularity of religion as a protected class. The guidelines should also have been more specific in outlining which activities would have been considered harassment, and which would be acceptable expressions of faith. As written, however, the proposed guidelines were attacked by conservative religious groups who feared that the guidelines would chill religious expression in the workplace. Many of these groups argued that there was no need for EEOC guidelines on religion at all. It is unlikely that these politically active groups will ever allow the government to regulate religious activity in the workplace. At the same time, it is apparent that these and other politically and litigiously active religious groups will continue to fight in the courtroom to preserve religious liberty in the workforce.

To avoid litigation, employers may try to ban all religious expression from the workplace. As conservative Christians grow more aware of their rights,

205. See supra notes 27-29. See also EEOC Will Address Religious Harassment, supra note 26, at D20 (recommending separate guidelines on religious discrimination which address the unique demands of religion while eradicating religious harassment); Betty L. Dunkum, Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines, 71 NOTRE DAME L. REV. 953, 954-56 (1996) (analyzing the criticisms raised regarding the Proposed Guidelines).

206. See supra note 26 (discussing the concerns and recommendations of various religious and civil rights groups). See also Schaner & Erlemier, supra note 12, at 7 (critiquing the proposed guidelines and suggesting that the Commission define the terms used and reduce the emphasis placed on the subjective perspective of the alleged victim).

207. See supra notes 24-29 and accompanying text.

208. See supra note 27.

209. See supra note 26. Congress' amendment requiring the EEOC to withdraw its guidelines on religion also states that the Commission must hold public hearings on any new guidelines and receive additional public comment before issuing any new guidelines. Congress Approves Move To Delete EEOC Guidelines on Religion, Gov't Press Release, Aug. 19, 1994, available in WESTLAW, Allnewsplus Database, Gov't Press Releases. According to a statement by Senator Howell Heflin, the EEOC is now required to "go the extra mile" to ensure religious freedom in the workplace. Id. See also Religious Harassment in Workplace Debated, supra note 203, at 635 (noting the "intense lobbying" by religious conservatives to delete all reference to religion in the Guidelines); Heavens No!, supra note 26, at B4 (stating that it was "easier—or more politically tempting—to paint the guidelines as part of 'the Clinton Democrats' attack on religion'"); EEOC Formally Withdraws, supra note 29, at 11 (quoting the Commission as saying it was "better to withdraw the Guidelines in light of the public outcry. . . ").

210. See supra notes 35-64 and accompanying text.

211. See Postrel, supra note 203, at 4. Postrel states that the safest policy may be a religion-free workplace: "Employers trying to avoid lawsuits want a clear-cut, simple rule which can be understood and obeyed by all employees . . . . Their primary aim is not to be sensitive to [the] EEOC's intentions or to maximize religious liberty. Their bottom line is to stay out of court." Id. Yet Postrel notes that this is no sure protection against liability: "Federal law requires employers to accommodate employees' religious practices. If a company lets evangelical Christian employees
however, this type of action will only increase the likelihood of lawsuits. Employers may also attempt to rely on a general nondiscrimination policy against harassment, as the employer did in Meritor Savings Bank, FSB v. Vinson. In Meritor, however, the Supreme Court noted that a general policy against harassment did not alert employees to the special concerns of sexual harassment. Thus, the general policy did not insulate the employer from liability for sexual harassment. Similarly, a general employment policy against harassment will not address the special concerns of religious harassment and the unique nature of religion in the workplace. Instead, an employer must adopt an in-house employment policy aimed specifically at religious harassment.

IV. A MODEL EMPLOYMENT POLICY

Left without clear guidelines as to what may constitute religious harassment, employers must operate under their own initiative to avoid litigation and ensure the best possible workplace for employees. This is a workplace where employees are free to express their religious beliefs, as well as free from interferences with their job performance. To achieve this goal, employers should develop and implement an explicit policy defining religious harassment and informing employees of their rights. In this way, employees are proselytize on the job, it can be sued for creating a 'hostile environment' for non-christians. If it doesn't allow proselytizing, it can be sued for failing to accommodate evangelical Christians." Id.

212. The fear that the EEOC's guidelines would result in a religion-free workplace caused the public outcry against the Proposed Guidelines. See Moore, supra note 197, at 1191. See also supra notes 35-64 and accompanying text.

213. Most employers do have general non-discrimination policies against discrimination or harassment on the basis of any of the protected classes. See Hartstein & Wilde, supra note 124, at 639; Schaner & Erlemier, supra note 12, at 7. These are usually comprised of a simple, one-sentence statement that the company does not discriminate. Margaret A. Jacobs, Employers' Religious Bias Tolerated, Case Shows, PITTSBURGH POST GAZETTE, Aug. 27, 1995, at D1. Following the Supreme Court's decision in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), most employers adopted additional policies aimed specifically at sexual harassment. See Hartstein & Wilde, supra, note 124, at 639. This note argues that to avoid liability for failure to accommodate an employee's religious practice and failure to provide an environment free from religious harassment, employers should adopt an additional employment policy aimed specifically at religious harassment.

215. Id. at 72-73. See also supra notes 185-92 and accompanying text.
216. Meritor, 477 U.S. at 72.
217. See supra notes 195-96 and accompanying text.
218. See infra section IV.
219. See supra notes 185-98 and accompanying text. See also Brown & Germanis, supra note 189, at 567. Brown and Germanis state that an employer's best defense against a claim of sexual harassment is a clearly stated policy against harassment. However, "A policy does not mean the bare written prohibition of sexual harassment—it means a policy that is implemented and enforced.
assured that their rights will be protected, and at the same time are put on notice that if their activities violate set boundaries, these activities will not be tolerated. The Supreme Court of the United States has held that an employer need not accommodate an employee’s religious practice if this creates even a de minimis burden on the business. Therefore, employers need a model in-house employment policy that will protect the religious freedoms of employees to the extent that the exercise of this freedom will not interrupt the work environment of other employees, which would constitute a de minimis cost to the employer.

MODEL RELIGIOUS HARASSMENT POLICY

SECTION 1: DEFINITIONS

(a) Employee: any full-time, part-time, casual, or temporary laborer paid by this Company to further the Company’s business. It does not include workers paid by outside businesses, such as temporary employment agencies.

(b) Supervisor: any employee of this Company who is directly responsible for the work of two or more other employees within his or her department.

(c) Manager: any employee of this Company who is directly responsible for the employees or the production of a department within this Company.

(d) Human Resource Manager: any employee who is directly responsible for the production and operating procedures of the human resource department.

(e) Religious Observance: An employee’s religious observance is a practice which is mandated by the faith or the sincerely held belief of an employee. It is one which, if proscribed or limited by this Company, would interfere with the employee’s ability to practice his or her faith.

One court has stated, "Though the intent of the policy was commendable... not only was it vague on paper, it was vague and ad hoc in its implementation and did not function effectively to eliminate harassment." Id. (citing Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987)). Brown and Germanis recommend a sexual harassment policy which includes a reporting procedure, an internal investigation mechanism, and an effective resolution procedure. Id. The religious harassment policy proposed in this note also contains these elements.

220. See Trans World Airlines v. Hardison, 432 U.S. 63, 67 (1981) (holding that accommodation results in undue hardship whenever that accommodation results in more than a de minimis cost to the employer). See also supra notes 76-110 and accompanying text.

221. Because this policy is intended for use by one company, it does not include a definition of "employer." If circumstances warranted, Title VII's definition of employer could be inserted to ensure clarity. See supra note 68.
(f) Harassment: This occurs when the continuous verbal or non-verbal conduct of one or more employees directly results in the inability of another employee or employees to perform their job duties, or otherwise adversely affects another employee's employment opportunities.

SECTION 2: STATEMENT OF COMPANY POLICY

This Company is dedicated to creating and maintaining a positive work environment for all employees. While this Company does not promote or advocate any religious practice, it will accommodate any employee's religious practice to the furthest extent possible. Any employee practice which results in a loss of safety or efficiency, or which disrupts the work environment of any employee will not be tolerated. It is also the policy of this Company that any form of harassment on the basis of religion or any other protected status will not be tolerated in the workplace. Included within this prohibition is any form of religious activity which disrupts an individual's work or the working environment.

SECTION 3: REPORTING PROCEDURE

Any incidents of discrimination or harassment should be immediately reported to your supervisor so that an investigation can be conducted. This report will be kept in confidence. If you are unable to report an incident to your supervisor, or if the circumstances make this uncomfortable, you may contact any manager, including the human resource manager. Once the report has been made, the human resource department will investigate the allegation as swiftly and as thoroughly as possible. The first priority of the human resource department will be to resolve the conflict so as to avoid any repeated incidents, and, if possible, this will be done without severe or unnecessary punitive action. However, should the harassment continue, or should the incident be particularly egregious, any employee who has been found to have engaged in discriminatory harassment in violation of this policy will be subject to disciplinary action, up to and including termination.

For example, if an investigation reveals that the action was not intended to inflict distress or interfere with the employee's work environment, the

222. This policy is written for a company which does not incorporate any particular religious belief in its organization. See supra note 72.

223. This language is intended to distinguish the type of harassment which occurred in Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984), from that which occurred in Wilson v. US West Communications, 58 F.3d 1337 (8th Cir. 1995). See supra notes 129-62 and accompanying text. In Weiss, the harasser assaulted the plaintiff with derogatory religious epithets. Weiss, 595 F. Supp. at 1053. In Wilson, the plaintiff wore an anti-abortion button which her co-workers found
corrective action may be administrative: A supervisor may explain to the offending employee that her actions are disturbing to a co-worker, and she may be asked to voluntarily desist. If she refuses or is unable, she may be transferred or rescheduled, assuming that the conduct would not be offensive to others or to the workforce in general. On the other hand, if the conduct is targeted at a specific employee for the purpose of harassment, or if the conduct persists even after the offender has been told to stop, the offender may be subject to disciplinary action, such as verbal or written warnings or suspension. If the conduct continues even after such warnings, or if the conduct is especially outrageous, the offending employee may be subject to further disciplinary action, including termination.

COMMENTS:

Under state and federal law, employers have a duty both to accommodate an employee's religious practice, and to prevent harassment in the workplace. Like sexual harassment, religious harassment is best avoided by prevention. The best way to prevent religious harassment is to keep both managers and employees informed about what constitutes harassment, and what will and will not be tolerated. This policy accomplishes this in three ways:

hostile and offensive. Wilson, 58 F.3d at 1338. The plaintiff in Wilson did not, however, wear this button with the intention of offending her co-workers, but rather to fulfill a religious duty. Under the language proposed in this policy, both the harasser in Weiss and the plaintiff in Wilson would ultimately face the same disciplinary action. However, before the plaintiff in Wilson would be faced with disciplinary action, she would have an opportunity to explain the religious vow which mandated her action. Under the EEOC's Proposed Guidelines, she would have had no such opportunity. See supra note 26.

224. See supra section III.

225. See Hartstein & Wilde, supra note 124, at 639. Hartstein and Wilde state that an employer who implements an in-house policy against harassment will not only reduce its risk of liability for workplace harassment, but will also reduce the number of incidents and ensure that when incidents do occur, they will be quickly redressed. Id. Hartstein and Wilde, however, suggest that employers extend their sexual harassment policies to cover all forms of harassment. Id. This note argues that such action would only result in increased litigation. See supra notes 35-64 and accompanying text. Instead, this note proposes that employers adopt separate guidelines tailored to the unique issue of religious harassment.

226. Id. For example, Wal-Mart Stores, Inc., recently settled a lawsuit brought by a former employee who was fired when he refused to work on his Sabbath. According to a Wal-Mart attorney, the case resulted from an "honest mistake" made by a store manager who did not understand the company's obligation to accommodate an employee's religious observance. As part of the settlement, Wal-Mart agreed to take reasonable steps and use its best efforts to train managers on employees' rights to religious freedom. See Jacobs, supra note 213, at D1; Margaret Awacdas, Wal-Mart Accord Heralds New Look At Workers' Faith, ARK. DEMOCRAT-GAZETTE, Aug. 23, 1995, at D1.
first, by clearly defining the terms used in the policy to ensure that employees and managers fully understand the policy and are sensitized to issues surrounding religious harassment; second, by explaining employee and employer rights and responsibilities in the workplace; and finally, by detailing a complaint procedure through which employees can bring concerns to the appropriate officials.

Section One of the model policy contains definitions of the terms used within the policy. This is not a standard practice in employment manuals; however, here it clarifies the definition of harassment, and reemphasizes the purpose of the policy. It also serves to make the policy more explicit, and thus better communicates the employer's intent to proscribe harassment.

An anti-harassment policy should also be both clear and regularly communicated to the employees. Here, by further defining what is meant by "religious observance" and "harassment," the employer ensures that employees understand their rights under Title VII. The policy also provides definitions for various employees, so that an individual can clearly determine whether this policy applies to him or her, and, looking forward to Section Three, how to begin the procedure to report a violation of the policy.

Section Two of this policy informs employees of their rights under Title VII, including the duty of the employer to accommodate an employee's religious observances unless it would result in undue hardship on the business, in simple, "non-legal" terminology. The qualitative sentence "Any employee practice which results in a loss of safety or efficiency, or which disrupts the work environment of this or any employee . . ." gives examples of the types of religious practices which the employer may not be able to accommodate. This serves two purposes: first, it puts the employee on notice that his or her right of religious expression is not without limitation, and secondly, it incorporates

two legally accepted justifications for failing to accommodate a religious practice.\textsuperscript{228} This will clarify the standard within the minds of both managers and employees.

In addition, the assurance that employees’ religious beliefs will be respected will help to alleviate concerns that a “religion-free zone” is being created in the workplace.\textsuperscript{229} By promising to protect employees’ religious freedoms, this policy attempts to neutralize the hostility which can occur when an individual feels threatened by restrictions or impositions on his or her faith.\textsuperscript{230} This respect for employees’ religious diversity complements Section Three. Section Three encourages employees to file internal complaints, as opposed to lawsuits. Thus, employees are not only reassured of their rights, they are given options to pursue if these rights are violated.

Section Two is also consistent with the EEOC’s Proposed Guidelines. According to the Commission, the best way to eliminate harassment is to prevent it.\textsuperscript{231} The best way for an employer to prevent harassment is to have a clearly established policy against harassment which is communicated to employees.\textsuperscript{232} Further, the EEOC recognized that in the absence of an explicit policy against harassment, employees could reasonably believe that a harassing supervisor’s conduct is condoned by the employer.\textsuperscript{233} Unlike the Proposed Guidelines,

\begin{footnotes}
\footnotetext[228]{See Wilson v. US W. Communications, Inc., 860 F. Supp. 665, 675 (8th Cir. 1994) (holding that “[I]ssue of efficiency and productivity as well as the expenditure of time and energy in attempts to alleviate the acrimonious atmosphere . . . presented more than a de minimis cost to [the employer]”). See also Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984).}
\footnotetext[229]{See supra notes 26, 203.}
\footnotetext[230]{According to Lewis Maltby of the American Civil Liberties Union, “Employers frequently try to suppress religious expression to avoid conflict. That doesn’t work.” Grossman, supra note 22, at D1.}
\footnotetext[231]{The Proposed Guidelines state:}
\footnotetext[232]{Id.}
\footnotetext[233]{Id.}
\end{footnotes}

If the employer fails to establish an explicit policy against harassment, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials, apparent authority to act as the
however, this model policy does not focus on whether a “reasonable victim” would find the action intimidating, hostile, or abusive.\textsuperscript{234} Rather, the focus is on whether the action disrupts the work environment. Upon actual evidence of a disruption of the work environment, the employer can argue that undue hardship prevents accommodation of a particular employee’s religious habit. For example, in the hypothetical situation posed in this Note,\textsuperscript{235} Frank’s complaint alone would not justify silencing Mavis.\textsuperscript{236} However, if upon investigation the human resource department determines that Mavis’ conduct affects Frank’s work, or prevents him from doing his job,\textsuperscript{237} and that there is

employer’s agent is established. In the absence of an explicit policy against harassment and a complaint procedure, employees could reasonably believe that a harassing supervisor’s actions will be ignored, tolerated, or even condoned by the employer. \textit{Id.} This is also the case with sexual harassment. \textit{See} Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11 (1992).

\textsuperscript{234} Proposed § 1609.1 states:

\begin{itemize}
  \item [(c)] The standard for determining whether verbal \ldots conduct relating to \ldots religion \ldots is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The “reasonable person” standard includes consideration of the perspective of persons of the alleged victim’s \ldots religion \ldots.
  \item [(d)] Harassing conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct.
\end{itemize}

Guidelines, supra note 24, at 51,269.

Under these Proposed Guidelines, an atheist could argue that overhearing a Christian co-worker talk about his faith to another employee constituted an intimidating or hostile environment. This vague language led many conservative religious groups to fear that the EEOC was attempting to create a religion-free zone in the workplace, or that employers, in an attempt to avoid liability, would proscribe all religious speech. \textit{See} supra notes 2-6 and accompanying text.\textsuperscript{235} \textit{See} supra notes 2-6 and accompanying text.

\textsuperscript{235} Under section three of this Model Employment Policy, the first priority of the Company is to resolve the conflict. Thus, a human resource manager would first meet with Mavis to explain to her that there has been a complaint about her conduct. This might be the first time Mavis realizes that her conduct could be construed as offensive, and she may voluntarily cease. If not, Mavis will then have the opportunity to explain the religious necessity of her conduct, and she and the human resource manager may be able to work out a compromise where Mavis will be able to follow her religious mandates without creating an offensive environment for her co-workers. If Mavis is persistent in her belief that she must aggressively attempt to convert Frank, the human resource manager must then determine if these attempts affect a term or condition of Frank’s employment. The objective, however, is to resolve any conflicts as simply and quickly as possible, with as little ill-will among the parties as possible.\textsuperscript{236} \textit{See} supra notes 113-26 and accompanying text. For example, the human resource manager may discover that Mavis’ proselytizing consists of inviting Frank to church once a week. While this could be annoying, it is unlikely that Frank’s ability to perform his job would be seriously affected, and thus the Company would likely face no liability for allowing Mavis to continue. \textit{See} Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995). However, if Mavis is praying over Frank’s desk while he tries to work, constantly screaming at him that he is going to hell, and replacing his budget forecasts with Bible verses, it is likely that Frank’s productivity has been affected. \textit{See} Peck v. Sony Music, 91 Civ. 8465, 1995 U.S. Dist. LEXIS 12322 (Aug. 25, 1995). If Mavis were then disciplined and sued the Company for failing to accommodate her religious belief, the Company

http://scholar.valpo.edu/vulr/vol31/iss3/5
no way to allow Mavis to proselytize without additional cost to the business,\textsuperscript{238} the company is justified in restraining Mavis' activities.

Section Three establishes the procedure by which an alleged victim of harassment can make a complaint to a supervisor or manager. In the nature of sexual harassment policies,\textsuperscript{239} it gives employees options as to whom they may report. This recognizes that, in many cases, a supervisor may be the harasser. Part Three also acknowledges that religious harassment may occur innocently, that is, without intent on the part of the offending employee. The policy deals with these types of situations by providing that mediation, rather than discipline, may be the first step in preventing or stopping the objectionable behavior. This informs employees that they will not be automatically reprimanded for engaging in behavior that some might consider offensive, such as proselytization at work. Like Section Two, this will reassure employees that they will have the opportunity to defend their actions. At the same time, it puts employees on notice that if their behavior goes beyond set limits, such as disrupting the work environment, it may not be tolerated. Thus, legitimate religious practices are protected, while practices which impose on the working conditions of other employees are not.

Under the guidelines on harassment proposed by the EEOC, many of these legitimate religious practices could be banned.\textsuperscript{240} This Model Employment Policy acknowledges the unique nature of religion in a way that the EEOC's Proposed Guidelines did not.\textsuperscript{241} The EEOC attempted to proscribe religious harassment in the same way it proscribed racial or sexual harassment.\textsuperscript{242} In doing so, the EEOC incurred the wrath of conservative religious groups who demanded the withdrawal of religion from the guidelines.\textsuperscript{243} An employer who attempts to ban religion from the workplace, or treat religion the way it would treat any other protected class, will draw the same reaction from religious

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\textsuperscript{238} See supra notes 93-103 and accompanying text.

\textsuperscript{239} See supra notes 189-92. The Supreme Court in \textit{Meritor Savings Bank, FSB v. Vinson}, 477 U.S. 57 (1986), held that the employer's anti-discrimination policy failed because it required the plaintiff to report the harassment to her supervisor, who in this case was the harasser. Following this case, most employers have implemented separate policies against sexual harassment which give employees options as to whom they must report. See Hartstein & Wilde, \textit{supra} note 124, at 639; Brown & Germanis, \textit{supra} note 189, at 567.

\textsuperscript{240} See supra note 234.

\textsuperscript{241} See supra notes 195-98.

\textsuperscript{242} See supra notes 199-201.

\textsuperscript{243} See supra notes 202-04.
V. CONCLUSION

Religious harassment claims are on the rise. This is a result, in part, of the increasing number of religious groups who have learned to use the courtroom to protect their religious liberty interests. In 1994, these politically active religious conservatives forced the EEOC to drop religion from its Proposed Guidelines on harassment. Left without clear guidance as to which employee religious practices may constitute harassment, employers must implement an in-house employment policy which proscribes religious harassment, while protecting religious expression.

An employment policy written specifically for religion will help employers avoid liability both for religious harassment and for failure to accommodate an employee's religious practice. In addition, this policy can help resolve the conflict that results when one employee's religious practice becomes offensive to co-workers, by educating both employers and employees of the special needs of religion in the workplace. Thus, an anti-religious harassment policy will not only help employers in court, it will help employers stay out of court.

Julia Spoor

* 244. See supra notes 35-64.
245. See supra notes 211-18, 221-23.