TITLE VII AND RELIGIOUS ACCOMMODATION: AN EVIDENTIARY APPROACH TO THE UNDUE HARDSHIP STANDARD UNDER *TRANS WORLD AIRLINES V. HARDISON*

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Scholarly commentary reacting to the Supreme Court's 1977 decision in *Trans World Airlines, Inc. v. Hardison* has been mostly negative. That decision held an employer need not accommodate an employee's religion under Title VII of the Civil Rights Act of 1964 if the proposed accommodation would result in anything more than de minimis cost to the employer. Numerous major articles since the Court's decision have addressed important questions arising from *Hardison*, such as value-neutrality in the law, the accommodation of religion as distinct from the accommodation of disability, and the status of religion as a mutable characteristic. This paper does not seek to retread that well-defined ground, but rather to approach the *Hardison* inquiry from an evidentiary standpoint: What evidence must an employer offer to show that making a reasonable accommodation of a devout employee's religion creates an undue hardship on the employer? Given *Hardison's* exceptionally low de minimis threshold, what type of evidence can ever fail to rise to the level of undue hardship under section 701(j) of Title VII? This article argues that long-established requirements that admissible evidence not be speculative or conjectural—only occasionally applied in this context with any rigor—can provide litigants and courts with guidance. In offering this analysis, the article reviews several cases from the Fifth Circuit in comparison to other Circuit Courts of Appeals, and it seeks to analyze what effect proposals like Senate Bill 4046, the Workplace Religious Freedom Act of 2010, might have had on religious accommodation litigation if they ever become law.

I. TITLE VII AND THE DUTY TO ACCOMMODATE EMPLOYEE RELIGIOUS BELIEFS AND PRACTICES

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on the following characteristics: race, sex, color, national origin, and religion.[1] The Age Discrimination in Employment Act

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(1967) and the Americans with Disabilities Act (1990) extend these protections to age and disability, respectively.[2] Of the seven characteristics or traits collectively protected by Title VII, the ADEA, and the ADA, one stands out as being perhaps uniquely situated—religion. To a degree that is largely not possible in the other protected categories, religion may be a mutable characteristic that is susceptible to change, alteration, and acquisition, sometimes in a short period of time. In addition, religion can be a totalizing identity characteristic, where a person's religious self-conception creates defining boundaries for the individual at every level and takes on far more importance than other characteristics like gender, age, or race. Finally, because of the sometimes dynamic nature of a person's religious identity and the evangelistic narrative of some religions, religion is unique among the civil rights statutes' protections because the devout employee may attempt to persuade other employees or business customers to join a particular religion. In other words, while employees generally do not suggest to their coworkers or customers that they change their race, age, or disabled status, the eager workplace proselytizer may make such suggestions in the realm of faith.

Religion's unique status in employment anti-discrimination law is compounded by a further statutory requirement. Title VII not only prohibits making workplace decisions based on an employee's religion, it goes a step further by requiring employers to accommodate the religious beliefs and practices of their employees.[3] The only limitation on the accommodation of religious beliefs and practices is that the employer need not do so if it would cause an undue hardship on the employer. The accommodation component, not part of the original language of Title VII in 1964 but added in 1972 as section 701(j),[4] creates considerable difficulty for courts in adjudicating claims between parties and for scholarly commentators in analyzing trends and making recommendations. Stated succinctly, the case law interpreting

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help in some of the research and analysis underlying this paper. His assistance has been invaluable.

[1] 42 U.S.C. § 2000e-2(a)(1).

[2] 29 U.S.C. § 621, *et seq*. (the Age Discrimination in Employment Act); 42 U.S.C. § 12101, *et seq.* (the Americans with Disabilities Act).

[3] 42 U.S.C. § 2000e(j). It should be noted at the outset that Title VII's reasonable accommodation of religion language is different from that found in the Americans with Disabilities Act of 1990. *Compare* 42 U.S.C. § 2000e(j) with 42 U.S.C. § 12113. The ADA carefully defines "reasonable accommodation" for its own purposes, and lists several factors to be considered in determining if a proposed accommodation can be accomplished without undue hardship. 42 U.S.C. § 12111(9) and (10). Because these same factors are not present in Title VII's definition of religion in section 701(j), ADA reasonable accommodation cases and analysis are not applied to religion cases, and are not at issue in this paper. However, advocates for legislative change point to the carefully described factors for undue hardship in the ADA as a model for future Title VII amendment. *See* discussion at section V, *infra*.

[4] Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 3 (2001).

Title VII's religious accommodation requirement and the concomitant undue hardship defense provides a confused array of conflicting interpretations.

The beginning of the confusion is likely the text of the statute itself. Title VII embeds the undue hardship defense in an odd place: the definition of the world "religion." Specifically, the statute reads:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[5]

Beyond the obvious difficultly of attempting to legislate a definition for something so hard to define with any precision, or the curious manner in which the definition appears to include religious belief as merely a parenthetical afterthought to religious practice, there is the confusing manner in which undue hardship is explained as a subpart of the word "religion." It is almost as if Congress is saying that if accommodating an employee's faith-based practice would create an undue hardship, then the practice or belief does not fall within the definition of religion.[6] In a vast understatement, Chief Justice Rehnquist noted in 1986: "The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion."[7]

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[5] 42 U.S.C. § 2000e(j).

[6] This is the exact scenario confronted by the Third Circuit in United States of America v. Bd. of Education for the Sch. Dist. of Philadelphia, 911 F.2d 882 (3rd Cir. 1990). In that case, a Muslim teacher wore a head covering on three separate occasions in the classroom, in violation of state law prohibiting teachers from wearing religious symbols in public schools. *Id*. at 884-85. The Third Circuit managed to avoid determining how a non-economic burden (such as that claimed by the School District) factored into the undue burden analysis, *Id*. at 890, but noted in the process that, "if public schools cannot accommodate the wearing of religious garb without undue burden, then the wearing of such garb is not 'religion' within the meaning of Title VII." *Id*. at 886.

Perhaps sensing the unusual nature of the definition and the counter-intuitive results that sometimes occur, Judge Posner of the Seventh Circuit created his own definition of the term "religion"—in a Title VII case explicitly dealing with the duty to accommodate under section 701(j)—by simply stating that religion meant "taking a position on divinity." Reed v. The Great Lakes Companies, Inc., 330 F.3d 931, 934 (7th Cir. 2003). Religion then, for Judge Posner, may be equated with an intellectual exercise ("taking a position"). This does not necessarily cohere with the statutory emphasis on practice as being a critical component of religion, and might merit further scholarly exploration. Professor Greenawalt, *supra* note 4, is correct to suggest that defining "religion" by virtue of an employer's ability to accommodate a particular practice is "confusing" and reflects an "inadequate approach."

[7] Ansonia Bd. of Education v. Philbrook, 479 U.S. 60, 63, 107 S.Ct. 367, 369 n.1 (1986). One is reminded of the dialog between Alice and Humpty Dumpty in chapter 6 of Lewis Carroll's *Through the Looking Glass*: "'When I use a word,' Humpty Dumpty said in rather a scornful

The U. S. Supreme Court attempted to clarify the meaning of Title VII's "undue hardship" defense in 1977 with the landmark decision of *Trans World Airlines, Inc. v. Hardison*.[8] The case involved a TWA employee who converted to the Worldwide Church of God, and subsequently requested Friday nights and Saturdays off of work to honor his religion's Sabbath in accordance with the dictates of his faith.[9] Hardison and TWA could not reach a mutually acceptable accommodation of his religious practices because of the nature of TWA's seniority system and collective bargaining agreement, and he eventually stopped showing up for work on Saturdays, one of his assigned days.[10] TWA terminated him for insubordination and refusal to work his assigned shift, and Hardison sued the airline under Title VII.

Initially, the Supreme Court analyzed the aims and legislative history of Title VII, the 1972 amendments adding the reasonable accommodation requirement in section 701(j), and the EEOC guidelines interpreting the statute as applied to religion.[11] Finding no express guidance on what the statute's term "undue hardship" meant, the Supreme Court determined that "TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison meet his religious obligations."[12] Further, and in its most notable pronouncement, the Court stated that the phrase "undue hardship" in section 701(j) means that an employer need not incur more than a de minimis cost in accommodating an employee's religious beliefs.[13] In other words, any cost to the employer that is greater than de minimis is considered an "undue hardship" under Title VII, which excuses an employer's accommodation duty under the statute.

Nine years later, the Supreme Court again addressed the reasonable accommodation burden in its second major pronouncement on section 701(j), in *Ansonia Board of Education v. Philbrook*.[14] *Ansonia* echoed *Hardison's* de minimis holding, and made clear that an employer need not even demonstrate undue hardship by way of greater than a de minimis cost if it has already made an offer of reasonable accommodation.[15] In other words, if an employer makes an offer of a reasonable accommodation that the employee rejects, the employer has met its statutory obligations. If the employee then

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tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

[8] 432 U.S. 63, 97 S.Ct. 2264 (1977).

[9] *Id*. at 67, 97 S.Ct. at 2268.

[10] *Id*. at 69, 97 S.Ct. at 2269.

[11] *Id*. at 71-75, 97 S.Ct. at 2270-72.

[12] *Id*. at 83, 97 S.Ct. 2276.

[13] *Id*. at 84, 97 S.Ct. 2277.

[14] 479 U.S. 60, 63, 107 S.Ct. 367, 369 n.1 (1986).

[15] *Id*. at 67-69, 107 S.Ct. at 371-72.

suggests a different type of accommodation, the employer need not even attempt to demonstrate the greater-than de minimis cost in defense. It is only if the employer has not made an offer of reasonable accommodation that the undue burden affirmative defense becomes a necessary inquiry. "As *Hardison* illustrates, the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."[16]

Taken together, the *Hardison/Ansonia* formulation for undue hardship holds that an employer need only make an offer of accommodation that results in de minimis cost, and it need not make an offer of accommodation at all if all possible accommodations would require greater than de minimis cost. Finally, once a reasonable, less-than de mimimis accommodation is offered, the employer has met its burden and need not consider the employee's proposed alternatives.

Many scholars have examined Title VII's reasonable accommodation requirement, *Hardison*, and to a lesser extent *Ansonia*. One area that receives comparatively less attention relates to evidentiary burdens. In other words, what evidence must an employer muster to meet its burdens under *Hardison* and *Ansonia*? This article seeks to provide guidance on that question. Cases in the first generation of the *Hardison/Ansonia* combined holdings tended to require some tangible demonstration of "undue hardship," but as the distance from *Hardison* has increased, courts appear more willing to consider less concrete costs as evidentiary proof. As a short-hand summary of the current state of the law, demonstrating a greater-than de mimimis cost is getting easier for employers as the case law continues to develop.[17]

This article proposes that employers have an evidentiary burden to offer competent, non-speculative, non-conjectural evidence that accommodating the plaintiff employee will result in greater than de minimis cost. In accordance with analogous situations, evidence of employer costs need not be stated with mathematical certainty, but they should be more than hypothetical. This is not an unusual suggestion, but given the comparative laxity with which courts have discussed the issue, particularly in recent years, it appears to be a nearly forgotten approach. In addition, this paper proposes that courts should be hesitant to accept evidence of hypothetical customer preferences with regard to the religious employee who interacts with the

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[16] *Id*. at 68-69, 107 S.Ct at 372.

[17] *See generally* MICHAEL WOLF, BRUCE FRIEDMAN & DANIEL SUTHERLAND, RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 104-10 (1998). In the context of the financial burden claimed by TWA in the *Hardison* case, these co-authors suggest that, "If an employer the size of TWA is not required to spend $150 in overtime, then there would seem to be little in the way of accommodation costs that would fail to exceed the Supreme Court's de minimis standard." *Id*. at 107.

buying public, given that customer preference is likely not a permissible inquiry in the related defense under Title VII of the bona fide occupational qualification. Finally, this paper analyzes what effect proposed legislative fixes like Senate Bill 4046, the oft-introduced Workplace Religious Freedom Act of 2010, might have on religious accommodation cases if they ever become law.

II. BRIEF REVIEW OF PRIOR SCHOLARSHIP

Title VII's religious accommodation language is no newcomer to academic debate. At one level of the discussion, there is the pervasive question among Constitutional scholars about religious discrimination as a phenomenon in general, and about how governments may seek to ameliorate the problem without simultaneously establishing religion in violation of the First Amendment. Thus, a scholar of the magnitude of Kent Greenawalt can argue persuasively that the federal government may impose more than de mimimis costs on employers in requiring them to accommodate religion without violating the First Amendment.[18] Writing in 2001 about a predecessor to the most recent iteration of the proposed Workplace Religious Freedom Act, Greenawalt endorsed the WRFA's requirement that an employer defending a failure to accommodate claim would have to show "'significant difficulty or expense'" in proving undue hardship, instead of the current de minimis standard.[19] Greenawalt is among the scholars who lament that Supreme Court precedent has resulted in too little being required of employers in Title VII accommodation cases, and suggesting legislative action to remedy the situation.[20]

First Amendment issues are merely one among several concerns raised by the reasonable accommodation of religion. Given the "awkward" and clumsy way the accommodation burden is incorporated into the definition of religion, and the very nature of the debate between an individual's religious expression and an employer's prerogative in setting reasonable working conditions, scholars were bound to capitalize on the tension and offer comment. Within three years of *Ansonia*, Professor Laura Underkuffler asked important questions about religious neutrality, effectively demonstrating that public policy favoring some ill-defined notion of neutrality in matters of employee faith is based on a false assumption.[21] In other words, according to this relatively early piece of scholarship, there are no value-free decisions for

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[18] Greenawalt, *supra* note 4, at 56.
[19] *Id*. at 21.
[20] *Id*.
[21] Laura S. Underkuffler, *'Discrimination' on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 589 (1989).

governments, employers, or employees to make; all decisions imply some level of judgment on "the larger identity of values, moral choices, and religious beliefs."[22] Underkuffler's suggestions about the impossibility of neutrality are well in line with social and political philosophy as far back as Aristotle, and recently and forcefully reasserted by philosopher Michael Sandel.[23] As such, she calls into question important fundamental assumptions about Title VII as applied to religion: the idea of a value-free, wholly secular, and religiously neutral workplace may be difficult to achieve, at best, and more likely a chimerical myth that ignores the reality of human existence in a community.

Professor Karen Engle provided one of the most sustained and sophisticated analyses of the religious accommodation language imbedded in Title VII in her massive 1997 article in the Texas Law Review.[24] Again confronting issues of neutrality, Engle began with the premise that religion is exceptional and unique among the Title VII class protections, but that civil rights proponents seeking to change Title VII to adopt the accommodation doctrine for other classes or cultural characteristics (race, gender, national origin, etc.) may not find the eventual outcome to their liking. In line with the suggestion that reasonable accommodation of religion should apply to other traits, a separate line of commentators suggest that reasonable accommodation of religion should be made consistent with that for disability, which surely provides more protection for the employee at the expense of the employer. Thus, typical in this regard is Professor Keith Blair's call for Title VII to be amended to mirror the reasonable accommodation requirements of the Americans with Disabilities Act.[25] But Engle is not so sure the legislative approach is always helpful. According to her conclusion,

> The religious accommodation cases also demonstrate that broadening or narrowing one definition, or statutorily eliminating what might have seemed to be natural distinctions, does not always reap the benefits one might expect. When the definition of religion is broadened, for example, so too is the exception used by courts to obtain the same result. It is almost as if the legal system is operating autonomously to correct (and protect) itself at every moment.[26]

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[22] *Id*. at 625.
[23] MICHAEL SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 215-20 (2009).
[24] Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997).
[25] Keith S. Blair, *Better Disabled than Devout? Why Title VII has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 520 (2010).
[26] Engle, *supra* note 24, at 432.

In this regard, Engle's suggestion is significant for the present essay. Instead of encouraging legislative change that might not achieve the result desired by proponents of employee rights (or the rights of religious employers), this paper posits that working within the awkward language of section 701(j) and the *Hardison/Ansonia* formulation, flawed though they may be, might provide a clearer way through the confusion and create some kind of balance in the likely unsolvable dilemma created by Title VII. If the history of Title VII and its interpretive cases are part of a story, in other words, the tension should not be resolved by some *deus ex machina*, but rather must come from within the narrative plot itself.

Beyond the value neutrality discussion, which in itself still offers significant opportunities for future inquiry, other scholars have asked important questions about the mutable or immutable nature of religion under Title VII. Professor Debbie Kaminer recently examined the lack of consensus among scholars on the mutability of religion, but noted that courts often use the supposed mutability of religion—even if only implicitly—to limit an employee's right to a religious accommodation in the workplace.[27] Kaminer highlighted the mutability issue with reference to Professor Stephen L. Carter's significant work from *The Culture of Disbelief* in the 1990s.[28] The present author is not attempting to settle the mutability question, but it bears noting that in cases involving recent converts to a particular faith, like *Hardison*, religion as a product of belief and action may involve both mutable and immutable characteristics. Choosing a new religion for oneself is at least partly an act of volitional will—even if one presumes the new convert believes herself or himself to have been willed by God to accede to the new faith; in this sense there is a mutability component as it relates to belief: religious belief can be adopted and likewise jettisoned. But in another context, and this is where Kaminer rightly relies on Carter's arguments, once the mutable belief or non-belief is accepted by the employee, the actions that follow become immutable. The conscientious believer cannot change the dictates of religious practice, since a religion often provides a totalizing discourse under the mandate of the Divine. Thus, to use Carter's example (itself drawn from former Tenth Circuit judge Michael McConnell), a devout Jew does not believe Sabbath observance is mutable or volitional; rather, God requires it and therefore human choice is not at issue as it relates to practice.[29]

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[27] Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 457 (2010).

[28] *Id*. at 457-58 (quoting STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 5-6 (1993)).

[29] *See* Carter, *supra* note 28. Professor Kaminer notes that section 701(j) attempts to collapse both belief and conduct into its definition of "religion," and therefore courts should not

Picking up on the dichotomy of belief and action and casting it in a very practical light, professors Jamie Darin Prenkert and Julie Manning Magid offer a way forward in religious accommodation cases by focusing on the sincerity of the religious employee's belief, practice or observance at issue.[30] This practical suggestion, working as it does within the language of Title VII and the *Hardison/Ansonia* approach and not requiring legislative change or alteration of fundamental Title VII jurisprudence, fits well with the methodology offered herein. Legislative change, in the form of the now-failed Workplace Religious Freedom Act of 2010 (or any of its predecessors) may be too remote a possibility for effective change. Likewise, if Laura Engle is correct, legislative change, by itself, may be met with a legal system that interprets and applies law in a way that is self-correcting and self-protecting. If Title VII's reasonable accommodation requirement and its case law have created a disjointed mess, as many scholars on all sides of the issue(s) argue, one way to promote positive change is to work within the framework already in place and suggest realistic alternatives. While this paper is not intended to criticize the calls by others for policy level change, it does suggest that traditional evidentiary burdens can and should be applied with some consistency and rigor to balance the competing interests of employees and employers.

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attempt to discern the boundaries of the mutability of religion or rely on mutability in determining an accommodation of religion, as that term is defined in and used by Title VII. Kaminer, *supra* note 27, at 458.

French Catholic philosopher Jacques Maritain, one of the Twentieth Century's most prolific proponents of natural law theory and strong advocate for human rights, adds an important perspective on the mutability argument. In the context of human freedoms as they relate to the realms of conscience and belief, he asserts that the first and primary right is the right of the person to make her way along a path that is indicated by God. JACQUES MARITAIN, NATURAL LAW: REFLECTIONS ON THEORY AND PRACTICE 79 (2001). He immediately points out, however, that "With respect to God and truth, one has not the right to choose according to his own whim any path whatsoever, he must choose the true path, insofar as it is in his power to know it." *Id*. (emphasis omitted). Maritain's perspective—as a proponent of natural law—is that neither the religious path nor one's progress on it is mutable or subject to volitional choice. For him, there is a single divine path not subject to change or alteration. The question is whether a particular human knows "the true path," and chooses to set off on journey "indicated by God." Maritain was not speaking to the precise issue addressed in Title VII, but he would likely fall on the side of those who argue that belief had immutable components.

[30] Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467 (2006).

III. OVERVIEW OF RELEVANT CASE LAW

A. *Cases in the First Two Decades After* Hardison *Apply Relatively Rigorous Standards in Determining an Employer's Undue Hardship Defense*

Courts in the immediate aftermath of *Hardison* seem to have been more willing to question the evidence offered by the employer claiming undue hardship. There was a tendency to see the de minimis standard as still requiring some actual, non-speculative, non-hypothetical evidence of hardship. For instance, in 1978, just months after *Hardison*, the Ninth Circuit Court of Appeals decided *Burns v. Southern Pacific Transportation Co.*[31] The Ninth Circuit began its analysis with a fundamental evidentiary notion that has become commonplace and seems practically self-evident, but which still bears repeating for proper context: the burden of producing evidence of undue hardship rests on the employer.[32] *Burns* dealt with a religious employee's refusal to pay union dues, and his suggestion instead that he be allowed to pay the same amount to a designated charity. Both his employer and the union objected to this alternative payment, and he filed suit to prevent his inevitable termination. His employer and union did not attempt to accommodate Burns, arguing instead that his refusal to pay dues created a free-rider problem and that, based on unofficial and unscientific polling, other employees would resent his non-paying status.[33] With no accommodation offered by the defendants, the Ninth Circuit was not persuaded. Quoting a Sixth Circuit case that predated *Hardison*, *Draper v. U.S. Pipe & Foundry Co.*, the *Burns* Court stated: "'We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.'"[34] Undue hardship in the post-*Hardison* era, at least for the *Burns* court, requires more

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[31] 589 F.2d 403 (9th Cir. 1978).
[32] *Id*. at 406.
[33] *Id*.
[34] *Id*. (quoting Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1976)). *Draper*, the Sixth Circuit case relied on by *Burns*, enjoyed a limited period in which it was cited with some frequency as authority for its statement that an employer's evidence of a claimed hardship must be more than hypothetical or speculative. In spite of this early acceptance, a recent Westlaw citation search indicates that *Draper* has only been cited in recorded cases for that proposition a total of four times since 2000. *Keycite citing references search on Westlaw*, Feb. 26, 2011: http://web2.westlaw.com/result/default.wl?tf=0&fn=_top&scxt=WL&mt=Westlaw&elmap=Inline&cite=527+f2d+515&pbc=3F1E7F52&uw=0&cxt=DC&vr=2.0&sv=Split&cnt=DOC&ss=CNT&rs=WLW11.01&service=KeyCite&rlt=CLID_FQRLT388019112262&migkccrresultid=1&rp=%2fKeyCite%2fdefault.wl&n=1&rlti=1&tc=0.

than co-workers' grumbling or dissatisfaction with the accommodation granted to the religious employee.[35] Additional bookkeeping expenses and the loss of union dues from a single member, the only two hardships claimed by the employer and union, were considered merely de minimis costs, at best, and therefore not an undue hardship under section 701(j).[36]

The next year (1979), the Eighth Circuit cited *Draper* in the same manner as the Ninth Circuit in *Burns*, but went a step further in putting the employer to its proofs. In *Brown v. General Motors*, the Eighth Circuit confronted a similar situation to *Hardison*, namely that of a recent convert to the Worldwide Church of God who sought an accommodation to observe his Sabbath.[37] The *Brown* court observed that, if an employer postulating hypothetical hardship is on very weak ground under the articulated *Draper* rationale, it is on even weaker ground when it has attempted the proposed accommodation and no hardship resulted.[38]

By at least 1981, however, lower courts began a trend of uncritically applying *Hardison's* ephemeral anything-greater-than de minimis standard and allowing less concrete evidence of undue hardship. In *E.E.O.C. v. Sambo's of Georgia*, the Northern District of Georgia decided in the employer's favor in a case involving a Sikh applicant's claim that a restaurant chain discriminated against his religion because of its failure to amend its policy prohibiting facial hair.[39] The sole justification offered by Sambo's of Georgia was that its no-beard grooming policy fostered its clean-cut public image.[40] According to the court, Sambo's management's experience to that point had been that the public prefers restaurant employees who are clean-shaven: "the requirement of clean-shavenness is the norm in restaurants catering to the family trade and [] such requirement is essential to attracting and holding customers in that market."[41] As such, in the eyes of the District Court, the employer was on solid evidentiary ground in refusing to hire the Sikh applicant because of the inability to accommodate his religious grooming without undue hardship, and no Title VII violation was present.[42] The *Sambo's* court was cognizant of the tension between the restaurant's reliance on customer preference as evidence of undue hardship and the fact that customer preference is a highly questionable consideration

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[35] *Burns*, 589 F.2d at 407.
[36] *Id*. at 407-08.
[37] Brown v. Gen. Motors Corp., 601 F.2d 956, 958 (8th Cir. 1979).
[38] *Id*. at 960.
[39] 530 F.Supp. 86 (N.D. Ga. 1981).
[40] *Id*. at 89.
[41] *Id*.
[42] *Id*. at 91.

with regard to the BFOQ (bona fide occupational qualification) defense,[43] but dismissed the perceived inconsistency since BFOQ is a defense to a facially discriminatory policy, while customer preference as evidence of undue hardship arises merely from a neutral grooming standard.[44] Thus, the Northern District of Georgia attempted to step around a significant evidentiary issue in undue hardship cases, that of customer preference, which will be discussed more in depth *infra*.

In a 1987 case that continues to stand as a major (though somewhat dated) pronouncement on undue hardship, the Sixth Circuit in *Smith v. Pyro Mining Company* held an employer failed to reasonably accommodate an employee's request to take Sunday off for religious purposes.[45] Significantly, however, the Sixth Circuit stated that an employer may show undue hardship by pointing to a proposed accommodation that has not been put into effect, but the costs of which can be stated without speculation.[46] In other words, a theoretical (meaning non-actual) hardship may be sufficient evidence, so long as it is not also a speculative, in addition to theoretical, hardship. This reasoning coheres to a certain extent with *Ansonia's* careful refinement of *Hardison's* broad holding, recognizing as it does that an employer is not required to try something too expensive before concluding that more than de minimis cost will result.

The idea of a hypothetical hardship, hinted at in *Smith v. Pyro* by virtue of its holding that an undue hardship need not have been put into effect, has received a fair amount of judicial treatment over the past two decades. Thus, the Ninth Circuit, Tenth Circuit, Southern District of New York, and District of Kansas, among others, have all decried an employer's use of a hypothetical situation to establish undue hardship.[47] For instance, in a case where a trucking company refused to accommodate the peyote usage of a member of the Native American Church, the Tenth Circuit held that the risk of increased liability costs for the company were too speculative to create an undue hardship.[48] In fact, the case law on the requirement of an actual undue hardship, even the actual-but-not-yet-suffered undue hardship, was well enough developed that a 1998 practitioner's guide on religious discrimination cases could claim the issue was basically settled. "[E]mployers should be aware of considerable case law demanding that proof of a hardship be

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[43] See section dealing with the bona fide occupational qualification defense and customer preference, *infra*.
[44] *Id*.
[45] 827 F.2d 1081 (6th Cir. 1987).
[46] *Id*. at 1086.
[47] Opuku-Boateng v. State of California, 95 F.3d 1461 (9th Cir. 1996); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481 (10th Cir. 1989); Gordon v. MCI Telecommunications Corp., 791 F.Supp. 431 (S.D. N.Y. 1992); Banks v. Service America Corp., 952 F.Supp. 703 (D. Kan. 1996).
[48] *Toledo*, 892 F.2d at 1492.

concrete, rather than speculative. For this reason, an employer runs a significant risk if it comes to court having made no offer of accommodation."[49] In 1998 this statement was certainly accurate, and indeed the thrust of the religious accommodation/undue hardship jurisprudence in the first twenty years after *Hardison* is largely consistent in this regard. But in the last decade, evidence of undue hardship is increasingly less susceptible to rigorous examination. It is to this trend in the case law, particularly as revealed in a handful of Fifth Circuit cases, that the analysis now turns.

B. *More Recent Religious Accommodation Cases Demonstrate a Lessening in the Evidentiary Burden for Employers Seeking to Establish Undue Hardship*

Over time, there appears to be a decreasing interest in applying evidentiary standards in reasonable accommodation cases rigorously. As noted above, seminal early circuit court cases that closely adhered to more rigorous evidentiary standards are being relied on less and less as the case law develops.[50] Thus, later cases reinterpret decisions like *Brown v. General Motors*, discussed above, holding that unquantifiable costs of a proposed accommodation are sufficient to establish undue hardship.[51] Moreover, there are questions about the documented rise in EEOC charges based on religion in the post-9/11 world, which far outstrip rises in race and gender cases, and the trend in circuit court jurisprudence seemingly making undue hardship easier to establish.[52] Even though charges based on race and sex continue to account for the majority of EEOC filings, charges alleging religious discrimination have grown from 2.1% in 1997 to 3.8% in 2010.[53] There is no reason to think this trend will change any time soon.

A significant Ninth Circuit undue hardship case arose in 2004 when an employee at Hewlett-Packard posted Bible verses at his cubicle that purport to condemn homosexuality.[54] HP required him to take the postings down, and did not agree to the accommodations proposed by Peterson, the employee. Peterson claimed the postings were a response to HP's diversity campaign in his office, where posters promoting tolerance of, among other things, gay employees, were hung by the company. HP argued undue hardship because it felt its diversity campaign was designed to "attract and

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[49] Wolf, et al, *supra* note 17, 108.
[50] *See* discussion of *Draper*'s status in light of searches of electronic databases, *supra*, note 34.
[51] Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992).
[52] *See* Blair, *supra* note 25, at 518.
[53] Equal Employment Opportunity Commission, *Charge Statistics, FY 1997 Through FY 2010*, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited March 1, 2011).
[54] Peterson v. Hewlett-Packard Co., 358 F.3d 599, 602 (9th Cir. 2004).

retain a qualified, diverse workforce, which [was] vital to its commercial success."[55] There is no discussion in the opinion about actual losses that might be suffered by the company, or costs incurred by the company, to support this undue hardship defense. Like the defense of customer preference, discussed in some detail below, the court merely assumed that the accommodations at issue in *Peterson* would lead to a loss of "qualified" and "diverse" employees and applicants. Of course, virtually every employer wants to attract and retain a qualified, diverse workforce as part of its commercial success, so it seems unlikely that HP's supposed undue hardship in this regard is unique or even a meaningful evidentiary justification. The desire to have good employees is so ubiquitous in American business that it fails to offer a compelling rationale for denying an accommodation and otherwise discriminating on the basis of religion. This case is part of a growing trend where courts are more hesitant to apply rigorous evidentiary standards to proving undue hardship.

A celebrated case worthy of an article-length discussion in itself is *Cloutier v. Costco Wholesale Corp.*, from 2004 in the First Circuit.[56] This case involves the now infamous Church of Body Modification, which began in 1999 and counts among its practices, "piercing, tattooing, branding, cutting, and body manipulation."[57] According to the facts relayed in the opinion, some portion of CBM's fundamental tenants reflect religious underpinnings, and therefore when Cloutier refused to cover her piercings at work, she had grounds to bring a claim for religious discrimination under Title VII.[58] Costco defended its refusal to accommodate based on its desire to maintain a "'neat, clean and professional image,'" and it believed Cloutier's piercings detracted from that image and exposed it to potential customer dissatisfaction.[59] It did not matter for the court that there were no customer complaints about Cloutier, as it held without evidentiary analysis that accommodating her would affect Costco's image.[60] Significantly, the *Cloutier* court gave ill-defined and vague concerns over "public image" the greatest weight in upholding the claim of undue hardship.[61] Like *Peterson*, the *Cloutier* decision continues to erode the evidentiary standards pronounced in the initial years following *Hardison*.

In a somewhat rare recent opinion, the Eighth Circuit reiterated strict evidentiary standards in the 2008 case, *Sturgill v. United Parcel Service,*

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[55] *Id*. at 607.
[56] 390 F.3d 126 (1st Cir. 2004).
[57] *Id*. at 129.
[58] *Id*. at 129-30.
[59] *Id*. at 135-37.
[60] *Id*. at 136.
[61] *Id*. at 135-36.

Inc.[62] The Court held that UPS failed to reasonably accommodate a driver because the undue hardship defense requires evidence that is "real rather than speculative . . . merely conceivable, or hypothetical. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."[63] This comment, contained in a footnote, accurately and succinctly describes what the evidentiary standard should be. As can be discerned from other case discussions in this paper, however, it is not applied uniformly or with any consistency.

Finally, the Fourth Circuit addressed issues of seniority rights and displaced co-workers in its 2008 case, *E.E.O.C. v. Firestone Fibers & Textiles Co*.[64] In this case, as in many others, a member of a Sabbatarian tradition sought time off from his shift, which might have displaced other employees.[65] While the Court's analysis of the issues ran a little deeper than other cases, such as those in the Fifth Circuit discussed *infra*, it still fashioned a holding that does not effectively require much evidence from the employer. The Fourth Circuit stated, "If an employer reasonably believes that an accommodation would entail a violation of the applicable CBA or impose 'more than a de minimis impact on coworkers,' then it is not required to offer the accommodation under Title VII."[66] With all due respect, whether an accommodation has more than a de minimis impact is the ultimate issue for the court to decide, not the employer. In other words, the Fourth Circuit has now suggested that what an employer believes to be greater than de minimis is sufficient to establish undue hardship. This type of holding simply cannot be accurate.

C. *Fifth Circuit Jurisprudence Demonstrates a Hesitance by the Court to Apply Rigorous Evidentiary Standards in Reasonable Accommodation Cases*

The Fifth Circuit's jurisprudence fits well within the growing trend now apparent in other circuit courts around the country. Before proceeding further with a review of a few notable cases, however, it might be helpful to provide geographic and religious context for the Fifth Circuit's Title VII religious accommodation jurisprudence.

One of the most significant statistical summaries of the American religious landscape in recent years is the 2008 report issued by the non-partisan, non-sectarian Pew Forum on Religion and Public Life. The 2008 survey, which analyzes trends and categorizes religious data from several

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[62] 512 F.3d 1024 (8th Cir. 2008).
[63] *Id*. at 1033 n.4 (internal quotations and citations omitted).
[64] 515 F.3d 307 (4th Cir. 2008).
[65] *Id*. at 310-11.
[66] *Id*. at 317.

different vantage points, compares the religiosity of persons in discrete regions of the country.[67] Among the data considered significant for present purposes is the fact that the South (which in the Pew survey includes the Fifth Circuit states of Texas, Louisiana, and Mississippi) is the most religious region of the country, with 86% of the populace claiming some religious affiliation—as that term is loosely defined.[68] However, 83% of the whole, or virtually all of the 86% claiming some religious affiliation, claim affiliation with various Christian groups, from evangelical Protestant to mainline Protestant to Catholic denominations.[69] Approximately 3% of the population of the South consists of persons claiming affiliation with the Jewish, Muslim, Buddhist, Hindu, or other faiths.[70] The Northeast and West regions, in comparison, are 7% and 6% non-Christian religions, respectively.[71] In other words, the South—in which the Fifth Circuit lies—is both most religiously affiliated among the nation's regions, and least religiously diverse. Given the struggle for minority religions to achieve respectability and equal footing in both American law and the American workplace as a whole, one can surmise that the struggle in southern states, including Texas, Louisiana, and Mississippi, is even more pronounced. With this context in mind, a few Fifth Circuit cases should be discussed.

In *E.E.O.C. v. Universal Manufacturing* (1990), the Fifth Circuit reversed summary judgment in favor of an employer defendant in a reasonable accommodation case by pointing to a fundamental premise underlying the undue hardship defense: summary judgment was inappropriate because the inquiry usually presents a question of fact.[72] The Court was quick to point out that the employer might very well prevail on the merits of a fact-intensive inquiry, but that it was a decision for the fact-finder, and not susceptible to summary judgment.[73] While unremarkable in some ways, *Universal* clearly lays the groundwork for an evidentiary discussion.

The Fifth Circuit addressed the issue of coworker burden in a Title VII reasonable accommodation case in its 2000 decision, *Weber v. Roadway Express, Inc*.[74] *Weber* involved a member of the Jehovah's Witness faith

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[67] The entire report can be found at http://religions.pewforum.org/reports (last visited March 1, 2011).
[68] The Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey, 2008*, p. 69. The Pew Survey drafters note that "affiliation" is based solely on a respondent's self-identity, and is not a measure of the orthodoxy of beliefs within a particular religious tradition or attendance at worship or other religious practice. *Id*. at 6.
[69] *Id*. at 69.
[70] *Id*.
[71] *Id*.
[72] E.E.O.C. v. Universal Mfg. Corp., 914 F.2d 71, 74 (5th Cir. 1990).
[73] *Id*.
[74] 199 F.3d 270 (5th Cir. 2000).

who drove a truck for a long-haul trucking company, and objected to sharing an overnight run with a female driver.[75] Citing scheduling difficulties with Weber's coworkers if he was allowed to set his own schedule regardless of seniority, the Fifth Circuit held Roadway had established undue hardship precluding an accommodation.[76] Along the way, it cited its own prior precedent and a strict reading of *Hardison* to arrive at the conclusion that, "[T]he mere possibility of an adverse impact on co-workers . . . is sufficient to constitute an undue hardship."[77] It was not fatal to Roadway's defense that it made no effort to accommodate Weber's request for reassignment. Because, in the Fifth Circuit's eyes, the undue hardship inquiry deals in possibilities instead of tangible costs, Roadway had no burden to even make an effort at accommodation.[78]

The next year the Fifth Circuit decided another religious discrimination case, *Bruff v. North Mississippi Health Services, Inc*.[79] Bruff was a counselor for the employee assistance program of a medical center, and refused to counsel another employee (referred to in the opinion as Jane Doe) when the employee sought help in her homosexual relationships. Bruff cited her religious beliefs about homosexual conduct as grounds for the refusal to counsel Doe on this subject.[80] The medical center claimed it would cause an undue hardship for it to have to continue to employ a counselor who refused to counsel other employees in the program when they sought advice on specific topics, but the district court found the evidence supporting the defense to be speculative and theoretical.[81] On appeal, the Fifth Circuit reversed the district court's evidentiary judgment, based largely on its case the prior year in *Weber v. Roadway Express*.[82] The appellate court held that the undue hardship evidence in the case "did not arise from speculation, but from actual experience with Jane Doe and the subsequent concern raised by her employer that other homosexual employees might decline to seek such counseling as a result."[83] Thus, the Fifth Circuit interpreted its prior *Weber* holding, which was itself a restrictive reading of *Hardison*, to uphold a claim of undue hardship when presented with evidence of "concern" and what "might" happen. More recent opinions from trial courts within the Fifth

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[75] *Id*. at 272.
[76] *Id*. at 273-74.
[77] *Id*. at 274 (citing Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 (5th Cir. 1982) and Eversley v. MBank Dallas, 843 F.2d 172, 175 (5th Cir. 1988)).
[78] *Id*. at 275.
[79] 244 F.3d 495 (5th Cir. 2001), *cert. denied* 534 U.S. 952, 122 S.Ct. 348 (2001).
[80] *Id*. at 496-97. Bruff did not refuse to counsel homosexuals in general, only when they sought specific advice related to their relationships.
[81] *Id*. at 501.
[82] *Id*.
[83] *Id*.

Circuit have adhered to the *Weber* and *Bruff* decisions and relied on them in granting summary judgment in the employer's favor, without analyzing the level of evidence present in either case or the fact-intensive nature of the inquiry.[84]

A final Fifth Circuit case issued less than two weeks after *Bruff* is *Daniels v. City of Arlington*.[85] In this case, Daniels, a police officer in the city of Arlington, Texas sued for religious discrimination under Title VII when the department refused to let him wear a cross on his lapel.[86] Given his status as a public employee, he brought claims under the First Amendment that consumed most of the Court's time, and its Title VII analysis is abbreviated and cursory. Ultimately, the Court held that it would be an undue hardship to require the police department to allow individual officers to add religious symbols to their uniforms.[87] There was no discussion of the hardship or cost that might result from a single officer being allowed to display a single, small religious symbol, as the Court determined the blanket prohibition to be in the public interest.

One can summarize the Fifth Circuit's current trend in Title VII religious accommodation cases by noting that the Court's analysis of the evidence does not appear to run particularly deep in comparison to other circuits. The Fifth Circuit has not addressed the tension in the definition of "religion" in the statute, or applied early post-*Hardison* decisions from other circuits that require more rigorous evidentiary support from employers. Rather, the court has simply cited to *Hardison*, then relied on its own simplistic reasoning in *Weber* in later decisions like *Bruff*. It is perilous to make judgments about how "conservative" or "liberal" a particular appellate court is, as demonstrated by recent empirical research, but in common parlance the Fifth Circuit is considered a conservative court,[88] and this image of the court may be accurate as it relates to the undue hardship defense.

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[84] *See*, *e.g.*, Vaughn v. Waffle House, Inc., 263 F.Supp.2d 1075, 1084-85 (N.D. Tex. 2003).
[85] 246 F.3d 500 (5th Cir. 2001).
[86] *Id*. at 501-02.
[87] *Id*. at 506.
[88] Corey Rayburn Yung, *Judged by the Company you Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1183-84 (2010).

IV. RECOMMENDATIONS

A. *Courts Should Consistently Apply the Basic Rules of Evidence to Title VII Religious Accommodation Cases*

The primary suggestion offered herein is that courts should carefully weigh the evidence offered by the employer in Title VII religious accommodation cases. This suggestion is far from novel, yet seems to be increasingly ignored by courts.

Initially, as noted by the Fifth Circuit in *E.E.O.C. v. Universal Manufacturing*, the undue hardship/reasonable accommodation inquiry is typically a question of fact.[89] Obviously, not every case presents a fact question precluding summary judgment, but many will. This has important ramifications for framing the entire inquiry, implying as it does the requirement that evidence establishing undue hardship needs to be in the same form and of the same quality as evidence admitted at trial. Thus, admissible evidence of undue hardship must be relevant,[90] based on personal knowledge of the testifying witness,[91] not subject to exclusion by the hearsay rule,[92] and writings attempting to establish undue hardship must be authentic.[93]

In cases analyzing a plaintiff's burden of proof in discrimination cases, courts routinely hold that subjective belief of discrimination, standing alone, is insufficient to establish a prima facie case.[94] Likewise, a plaintiff may not rely on speculative evidence of discrimination, but must point to tangible evidence discernable by a fact finder.[95] The same rationale ought to apply in judging a defendant's evidence of undue hardship: an employer's subjective belief or speculation that it will suffer greater than de minimis costs should be insufficient to meet its burden under Title VII. Of course, as reminded by *Smith v. Pyro Manufacturing*, the employer need not show that it actually incurred costs in accommodating an employee, but it cannot simply state a hypothetical accommodation that raises greater-than de minimis costs.[96]

The analogous context of lost profits provides some perspective in determining the quantum and quality of damages necessary in reasonable accommodation cases. The Fifth Circuit, in applying Texas state law of damages, notes that a plaintiff claiming lost profits must show the amount of

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[89] *Universal Manufacturing*, 914 F.2d at 74.
[90] FED. R. EVID. 402.
[91] FED. R. EVID. 602.
[92] FED. R. EVID. 802.
[93] FED. R. EVID. 901.
[94] Byers v. Dallas Morning News, Inc., 209 F.3d 419, 426-27 (5th Cir. 2000).
[95] Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 405-06 (5th Cir. 1999).
[96] *Smith*, 827 F.2d at 1086.

damages by competent evidence, and with reasonable certainty.[97] Uncertain and speculative damages are impermissible in this context, and courts weighing a lost profits claim should consider factors like changing market conditions and whether proposals have been tested.[98] A plaintiff seeking lost profits need not prove the loss with exact calculation, but it must show some intelligible evidence from which a damage award can be made with a reasonable degree of certainty and exactness.[99] Lost profits analysis is not a perfect analog to the undue hardship defense, given that the defendant in a Title VII case never bears the ultimate burden of proof in the same way that a plaintiff in a lost profits case does,[100] but it provides helpful context for courts grappling with an uncertain body of law. Because a defendant in a Title VII case seeking to establish a defensive theory has a burden of production (though not proof), similar types of analysis for uncertain evidence, like lost profits, should be utilized by courts.

A common source of questionable proof sometimes offered by employers as evidence of undue hardship is the effect that time off for the religious employee will have on co-workers. In 1996, the Ninth Circuit rejected two strains of this argument: first, based on hypothetical morale and grumbling of coworkers; and second, the fear that if the devout employee is given time off, then everyone will want time off.[101] In *Opuku-Boateng v. State of California*, the Ninth Circuit closely adhered to its early, post-*Hardison* precedent in cases like *Burns*, to dismiss both of these sources of employer support as being too hypothetical and speculative.[102]

To summarize the proposal outlined herein at this point, prior to discussing a final difficult issue and proposals for legislative change, an employer's evidence in a Title VII reasonable accommodation/undue hardship case should meet the following criteria:

- The evidence should be admissible under the Federal Rules of Evidence.
- The evidence must not be speculative, conjectural, or purely hypothetical.
- The evidence should not be based solely on the subjective beliefs of the employer.

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[97] Info. Commc'n Corp. v. Unisys Corp., 181 F.3d 629, 633 (5th Cir. 1999) (applying Texas state law).
[98] *Id*. at 633-34.
[99] Texas Instruments, Inc. v. Teletron Energy Mgmt, Inc., 877 S.W.2d 276, 279 (Tex. 1994).
[100] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993).
[101] Opuku-Boateng v. State of Cal., 95 F.3d 1461 (9th Cir. 1996).
[102] *Id*. at 1473-74.

- The evidence should be grounded in a reasonable degree of certainty and exactness (in a manner similar to lost profits), even though it need not be calculable solely as a monetary cost.
- The evidence should not based on questionable and unproven assumptions, such as morale problems among fellow employees, the possibility of requests for accommodations by other employees, or untested concerns over customer preference or public image.

It is to the difficult issue of customer preference and public image that the analysis now turns.

B. *Evidence of Customer Preference Should be Viewed Skeptically*

As noted above, the issue of customer preference often plays into the discussion of whether an employer can reasonably accommodate an employee's beliefs and practices. Section 703(e)(1) of Title VII creates a defense in discrimination cases where an employer can show that "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" requires the services of a person of a particular religion, sex, or national origin.[103] Notably, and as is by now well-established by the language of the statute, the bona fide occupational qualification (BFOQ) defense does not apply in cases of race or color.[104] Moreover, section 703(e) does not grant the employer a blank check in justifying otherwise impermissible discrimination. As the Supreme Court stated in *Dothard v. Rawlinson*, it is the "virtually uniform view of the federal courts that § 703(e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities."[105] However formulated by various lower courts, the Supreme Court made clear that the BFOQ defense cannot be used to justify employment decisions based on "stereotypical assumptions" about protected classifications.[106]

An analogous case involving the confluence of sex discrimination, the BFOQ defense, and customer preference, is *Wilson v. Southwest Airlines Co*.[107] In that case, Judge Patrick Higginbotham, then of the Northern District of Texas and now of the Fifth Circuit, addressed Southwest Airlines' contention that feminine sex appeal was a BFOQ for the position of airline flight attendant given its predominantly male, business-oriented clientele.[108]

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[103] 42 U.S.C. § 2000e-2(e)(1).
[104] *Id*.
[105] Dothard v. Rawlinson, 433 U.S. 321, 333, 97 S.Ct. 2720, 2728-29 (1977).
[106] *Id*. at 333, 97 S.Ct. at 2729.
[107] 517 F.Supp. 292 (N.D. Tex. 1981).
[108] *Id*. at 293-94.

Citing the EEOC regulation that customer preference cannot be used to create a BFOQ based on sex,[109] Judge Higginbotham determined that Southwest Airlines' defense failed because feminine appeal was not reasonably necessary to the operation of an airline.[110] Perhaps most significantly for present purposes, Higginbotham probed the question of what qualifies as the essence and primary function of the airline. He found that transporting passengers from one place to another safely was Southwest's primary function, and that this function does not depend on feminine sex appeal—which is another way of saying making predominantly male customers happy is not essential to the job.[111] Southwest disagreed, as might be expected, claiming that its primary function was to make a profit and that the feminine appeal of its flight attendants was necessary for its profit-making function. Judge Higginbotham had no problem rejecting this argument, finding that "profit" (based in large part on customer preference) was far too general a business function to justify otherwise impermissible discrimination: "If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order."[112] Finally, troubling for the court in *Wilson* was the lack of competent proof to support Southwest's customer preference argument; there was insufficient evidence of actual customer loss if Southwest discontinued its discriminatory practices.[113]

What the combination of Supreme Court precedent, EEOC regulation, and cases like *Wilson* establish is that customer preference has no real place in the BFOQ inquiry. Moreover, to reiterate the Supreme Court's broad language in *Dothard*, employment decisions based on "stereotypical assumptions" about protected classifications are not protected under Title VII.[114] While classic BFOQ/customer preference defenses in religious accommodation cases are rare,[115] analogous situations involving the same tensions arise with some frequency. In 1989, the District Court for the Western District of Missouri in *Johnson v. Halls Merchandising* addressed a situation where an employee prefaced her comments to customers with, "In the name of Jesus Christ of Nazareth."[116] The employer prohibited the conduct, and relied on the effect of this statement on the religious

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[109] 29 C.F.R. § 1604.2(a)(1)(iii).
[110] *Wilson*, 517 F.Supp. at 302-04.
[111] *Id*. at 302-03.
[112] *Id*. at 302 n.25.
[113] *Id*. at 304.
[114] *Dothard*, 433 U.S. at 333, 97 S. Ct. at 2729.
[115] *But see Sambo's of Georgia*, 530 F. Supp. at 91, discussed *supra*.
[116] Johnson v. Halls Merchandising, Inc., 1989 U.S. Dist. Lexis 2623 (W.D. Mo., Jan. 17, 1989).

sensibilities of its customers to argue that no accommodation was possible.[117] Facts in the opinion are scarce, but the District Court agreed, holding that because no accommodation was possible, the employee's comments were not "religion," as that term is defined in section 701(j).[118]

The reasoning in *Johnson* presents a questionable holding in two regards. First, to what extent can customer preference prevail over religious expression of employees when, as here (and unlike the neutral grooming policy of *Sambo's*, discussed *supra*) the policy in question is targeted specifically at religious expression? Stated another way, given that the employer in *Johnson* was targeting religious expression in its policies, as opposed to merely proscribing certain grooming habits, how can customer preference be allowed to justify the curtailment of religion? Second, even in light of the fact that "religion" is awkwardly defined in section 701(j), how can a reasonable court conclude that the phrase "in the name of Jesus Christ of Nazareth" is not religious expression?[119] This result is possible only because of the most obtuse reading of the statute divorced from common sense. Johnson, the employee, was plainly engaged in conduct motivated by "religion" under any reasonable use of that term, statutory or otherwise. To the extent the statute fails to include this kind of expression within the meaning of religion, it is simply a nonsensical legislative exercise that must be rejected. Evidence that the statement is "religion" can be found in the fact that Halls Merchandising prohibited the conduct so as not to offend "the religious beliefs or non beliefs of its customers."[120] In other words, Halls Merchandising prevented the conduct at issue because of concerns over customer religious beliefs; how then can the employee's conduct not be religiously based? Customer preference, which has no place in a BFOQ determination, played the decisive role in leading to the Court's decision.[121] Perhaps sidestepping the customer preference problem, the Court implicitly found that Halls Merchandising was not targeting "religion" in its policy, since Johnson's conduct was not "religion" under the statute, by virtue of the fact that the conduct could not be reasonably accommodated. It may be true that the correct result was reached in *Johnson*, as it is entirely possible that sufficient non-speculative evidence of customer offense existed, but the Court still used specious, circular logic to arrive at its conclusion.[122]

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[117] *Id*. at *6-7.
[118] *Id*.
[119] *See generally Bd. of Educ. for the Sch. Dist. of Philadelphia*, 911 F.2d at 886, *supra*, note 6 and attendant discussion.
[120] *Id*. at *7.
[121] *Id*.
[122] Greenawalt, *supra* note 4, at 3, suggests that the definitional confusion making an obvious religious exercise not considered "religion" under the statute is simply a practical device that aids courts in decision making, not a comment on whether some practice "*counts* as religious."

Perhaps the most subtle and perceptive of the more recent district court cases dealing with customer preference is *Brown v. F.L. Roberts & Co.*[123] In that case, plaintiff Brown was a member of the Rastafarian religion, and did not cut his hair or trim his beard as a result.[124] Brown's employer, Jiffy Lube, retained a consultant who presented the company with data indicating that customers prefer clean-shaven employees; as a result, Jiffy Lube moved Brown to the lower bay of its oil-change facilities, out of sight of routine customer traffic.[125] Judge Michael Ponser struggled with applying the First Circuit's decision in the well-known *Cloutier v. Costco Wholesale* case (involving employee piercings required by the Church of Body Modification and discussed, *supra*), ultimately concluding he had no choice under controlling precedent but to hold that the employee could not require a modification of Jiffy Lube's neutral grooming policy without undue hardship resulting.[126] Judge Ponser made several related observations about customer preference and religious practice that, while lengthy, bear repeating in abbreviated form:

> If *Cloutier's* language approving prerogatives regarding "public image" is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave. One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of "public image" might persuade an employer to tolerate the religious practices of predominant groups, while arguing "undue hardship" and "image" in forbidding practices that are less widespread or well known.
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> [I]t is a matter of concern when the balance appears to tip too strongly in favor of an employer's preferences, or perhaps prejudices. An excessive protection of an employer's "image"

(Emphasis in the original). And yet, in the *Johnson* case, the court was explicitly holding that the phrase, "In the name of Jesus Christ of Nazareth" did not "count[] as religion." Thus, what may be a practical tool in religious accommodation decision making turns into a sword that cuts down the practice at issue by relegating it to a non-religious exercise.

[123] 419 F.Supp.2d 7 (D.Mass. 2006).

[124] *Id*. at 9.

[125] *Id*. at 10-11.

[126] *Id*. at 17-19 (citing and relying on Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004)).

> predilection encourages an unfortunately (and unrealistically) homogenous view of our richly varied nation. Worse, it places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice. It is unclear whether the decision being made in this memorandum strikes the balance properly, but there is no question that it is compelled by controlling authority.[127]

Judge Ponser's conscientious approach is a model of trial-court level jurisprudence, in that it recognizes the reality of the tension between the faithful employee, the employer that is beholden at some level to its public image in the eyes of customers, and the conservative nature of *stare decisis* in the common law tradition. All Judge Ponser could do, given the expansive language in *Cloutier*, was apply the controlling authority and express grave reservations about doing so. His opinion highlights the very problem with customer preference being granted such controlling power in an employee/employer religious accommodation dispute: employers will likely seek to homogenize and flatten a multi-faceted, richly layered and textured world in the name of pleasing the hypothetical customer.

Unusual grooming and garb are two common targets of the sort of neutral policy at issue in these instances. Because the hypothetical customer allegedly prefers the clean-cut, inconspicuously dressed employee—at least according to the consultant in *Brown v. F.L. Roberts*,[128] employers will be able to prohibit religious practice related to grooming and garb that is outside the norm. An employee wearing a crucifix is likely tolerable to most customers, and one with a yarmulke is probably un-offensive at this point in American history, but the Sikh with his long beard tucked into a turban, or the Muslim employee whose niqāb or burqa covers virtually her entire face may face long odds of acceptance. This echoes Judge Ponser's concerns about the status of less well-known religions,[129] and is reminiscent of Justice Blackmun's concern in a slightly different context in *Employment Division v. Smith* that the implicit repression of minority faiths is anathema to freedom of religion.[130]

With these concerns in mind, and given the ease with which an employer can always appeal to "public image" or "customer preference" to justify purportedly neutral policies, the evidentiary suggestions offered

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[127] *Id*. at 17-19.
[128] *Id*. at 9-10.
[129] *Id*. at 17.
[130] Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 905, 110 S.Ct. 1595, 1616 (1990) (Blackmun, J., dissenting).

herein are even more important. First, as cases in the race and gender context make clear, it is perilous at best, and jurisprudentially irresponsible and indefensible at worst, to allow customer preference to dictate how one complies with Title VII.[131] Beyond that initial word of caution, for an employer to prohibit religious grooming or garb under the guise of what a fickle or stereotype-laden customer base might want, it should be required to offer actual, concrete evidence of customer offense at the grooming or garb at issue. To merely point to the studies of consultants as justification for prohibiting sincerely held religious beliefs—assuming, of course, that the beliefs are in fact sincerely held—seems a precarious form of proof.[132] Speculative evidence from a consultant's study that is divorced in time and context from the specific facts of the employer, employee, and customer base at issue in a particular lawsuit is simply insufficient to allow the trammeling of religious freedom, particularly the rights of minority religions.

V. THE WORKPLACE RELIGIOUS FREEDOM ACT OF 2010

Senator John Kerry introduced the Workplace Religious Freedom Act of 2010 (S.B. 4046) on December 17, 2010, at the end of the 111th Congress.[133] Given that no action was taken on the law before the end of the session, it died at the end of last year and failed to become law.[134] However, the WRFA of 2010 is similar to bills have been introduced at several points in the last decade, only to die for lack of interest and support, so it seems likely that future Congresses will face substantially the same proposals. Whether future versions of the WRFA will continue to be legislative dead letters is unknown, but the bill's proposal bears at least some analysis.

First, the clear intent of the WRFA of 2010, and previous bills in the same vein, was a direct legislative attack on *Hardison*.[135] The bill sought to undo completely the *Hardison* Court's equating of "undue hardship" with "more than de minimis." Rather, section 701(j) would have been amended to provide that undue hardship results "only if the accommodation imposes a significant difficulty or expense on the conduct of the employer's business when considered in light of relevant factors set forth in sections 101(10)(B)

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[131] *See*, *e.g.*, *Wilson*, 517 F.Supp. at 304, discussed *supra*.
[132] *Id*.
[133] ext of Senate Bill 4046, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s4046is.txt.pdf (last visited March 1, 2011).
[134] http://www.govtrack.us/congress/bill.xpd?bill=s111-4046 (last visited March 1, 2011).
[135] Lauren E. Bohn, *Workplace Religious Freedom Bill Finds Renewed Interest*, http://pewforum.org/Religion-News/Workplace-religious-freedom-bill-finds-revived-interest.aspx (last visited March 24, 2011).

of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(10)(B)).”[136] Thus, at the heart of the WRFA of 2010 was an attempt to bring Title VII’s reasonable accommodation requirement for religion in line with that for disability under the ADA, eliminating a distinction commentators have noted.[137]

Second, the WRFA of 2010 was targeted specifically not only at scheduling, a problematic area of jurisprudence predating *Hardison*, but also at the increasingly difficult questions raised in the last few years by garb and grooming cases.[138] This is important because courts sometimes struggle to apply *Hardison’s* de minimis cost formulation in areas unrelated to an employee taking time off for religious observance.

Finally, the WRFA of 2010 would have been significant because it did not allow segregation of the accommodated employee from customers or the general public.[139] Thus, the proposed legislative change would attempt to solve the problem addressed by Judge Ponser of the District of Massachusetts in *Brown v. F.L. Roberts & Co.*, where a Sikh employee was relegated to the lower bay of an oil-change business.[140] The WRFA of 2010 would have prohibited segregation of the devout employee, and thus eliminated the claim sometimes raised by employers that customer concerns create an undue hardship preventing a proposed accommodation.

This analysis of the 2010 version of the Workplace Religious Freedom Act is only meant to illustrate possible future legislative changes. Obviously, Senate Bill 4046 failed to make it out of committee, and never became law. Nevertheless, some discussion of the proposal is merited for at least two interrelated reasons. First, the 2010 proposal is merely the latest in a long line of legislative proposals that would undercut *Hardison*, and therefore it can be expected that future attempts will recur with frequency. And second, the language of the 2010 proposal demonstrates how Congress might address the undue hardship/reasonable accommodation problem if enough support can ever be achieved.

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[136] S.B. 4046, proposed section 4(a)(3)(B). http://www.govtrack.us/congress/billtext.xpd?bill=s111-4046 (last visited August 31, 2011).
[137] Blair, *supra* note 24, at 537-39.
[138] S.B. 4046, proposed section 4(a). http://www.govtrack.us/congress/billtext.xpd?bill=s111-4046 (last visited August 31, 2011).
[139] S.B. 4046, proposed section 4(a). http://www.govtrack.us/congress/billtext.xpd?bill=s111-4046 (last visited August 31, 2011).
[140] 419 F.Supp.2d 7 (D. Mass. 2006). *See* discussion in section IV.B., *supra*.

VI. CONCLUSION

Sometimes the best remedy for a legal morass is to apply traditional doctrines in contemporary ways. Title VII's protection of religion, coupled with an awkward definition of the term and a confused interpretation of the reasonable accommodation doctrine by courts, have created a situation crying out for clarity. Legislative change seems possible, but perhaps not likely—or maybe even most desirable. An overruling of *Trans World Airlines v. Hardison* likewise appears unrealistic. A solution that may offer clarity, and that may provide a better resolution to the tension inherent in the relationship between the religious employee and secular employer, is for courts to rigorously require concrete evidence of undue hardship.