

---

ARTICLE

---

---

---

IMAGE IS EVERYTHING: CORPORATE BRANDING AND  
RELIGIOUS ACCOMMODATION IN THE WORKPLACE

---

---

DALLAN F. FLAKE<sup>†</sup>

*There is growing tension in the law between an employee's right to religious expression in the workplace and an employer's countervailing right to cultivate its corporate image. The existing case law provides little meaningful guidance to employers and employees faced with this conflict. Not only do outcomes vary from court to court, but the analysis and reasoning underlying these decisions are often inconsistent, and sometimes contradictory. I argue that because a company's image is one of its most valuable assets, courts should more closely scrutinize religious accommodation claims that interfere with a company's ability to control its image. Such enhanced scrutiny does not require a break from Supreme Court precedent; rather, it requires stricter adherence thereto. I offer three recommendations for how courts can recalibrate their analyses of religious accommodation cases involving corporate image concerns. These recommendations should help produce a more balanced case law that better harmonizes with Supreme Court precedent, while providing employers and employees greater clarity in navigating this sensitive and complex issue.*

INTRODUCTION ..... 700  
I. RELIGION AND WORK IN MODERN AMERICA .....703  
    A. *America's Changing Religious Landscape* .....703  
    B. *The Prominence of Religion in the Workplace*..... 705  
    C. *The Conflict Between Work and Religion* ..... 709  
II. THE PARAMETERS OF RELIGIOUS ACCOMMODATION LAW ..... 710

---

<sup>†</sup> Visiting Assistant Professor of Sociology, Brigham Young University; J.D., University of Michigan Law School; B.S. and M.S., Brigham Young University.

III. THE POWER OF CORPORATE IMAGE.....	720
IV. KEY CASES WEIGHING RELIGION AGAINST IMAGE.....	724
A. <i>Cases Favoring Image over Religion</i> .....	725
B. <i>Cases Favoring Religion over Image</i> .....	733
C. <i>The EEOC's Interpretation of the Case Law</i> .....	743
V. RECOMMENDATIONS AND POTENTIAL IMPACT.....	745
A. <i>A True De Minimis Standard</i> .....	745
B. <i>A Uniform Standard of Proof</i> .....	748
C. <i>Greater Employer Deference</i> .....	751
D. <i>Potential Impact</i> .....	752
CONCLUSION.....	753

## INTRODUCTION

Several high-profile companies have recently come under fire for refusing to accommodate their employees' religious expression in the workplace out of concern that such accommodations would compromise the companies' public image. Abercrombie & Fitch,<sup>1</sup> Costco,<sup>2</sup> Home Depot,<sup>3</sup> Wal-Mart,<sup>4</sup> and Disney<sup>5</sup> are just some of the companies to have taken this position. Disney was recently embroiled in a highly contentious lawsuit with a Muslim ex-employee, who lost her job as a hostess at a Disneyland café for insisting on wearing a hijab, or headscarf, at work in violation of Disney's dress code.<sup>6</sup> The employee rejected as unreasonable Disney's attempts to accommodate her by either allowing her to wear a hat on top of her hijab or

---

<sup>1</sup> See generally *EEOC v. Abercrombie & Fitch Stores, Inc. (Abercrombie IV)*, 966 F. Supp. 2d 949 (N.D. Cal. 2013); *EEOC v. Abercrombie & Fitch Stores, Inc. (Abercrombie III)*, No. 10-3911, 2013 WL 1435290 (N.D. Cal. Apr. 9, 2013); *EEOC v. Abercrombie & Fitch Stores, Inc. (Abercrombie II)*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011), *rev'd on other grounds*, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014); *EEOC v. Abercrombie & Fitch Stores, Inc. (Abercrombie I)*, No. 08-1470, 2009 WL 3517584 (E.D. Mo. Oct. 26, 2009).

<sup>2</sup> See generally *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).

<sup>3</sup> See generally Brian Skoloff, *Fla. Man Says Home Depot Fired Him Over God Button*, USA TODAY (Oct. 28, 2009, 9:34 AM), [http://usatoday30.usatoday.com/money/workplace/2009-10-28-home-depot-god\\_N.htm](http://usatoday30.usatoday.com/money/workplace/2009-10-28-home-depot-god_N.htm), archived at <http://perma.cc/R74W-N8S7>.

<sup>4</sup> See generally *Lorenz v. Wal-Mart Stores, Inc.*, No. 05-0319, 2006 WL 1562235 (W.D. Tex. May 24, 2006), *aff'd*, 225 F. App'x 302 (5th Cir. 2007).

<sup>5</sup> See generally *Complaint, Boudlal v. Walt Disney Corp.*, No. 12-01306 (C.D. Cal. Aug. 13, 2012), 2012 WL 3267542.

<sup>6</sup> *Id.* at 3-4.

to work in the rear of the café, where she would have no contact with customers.<sup>7</sup>

There exists an inherent tension in the law—played out daily in workplaces across the United States—between an employee’s right to religious expression and an employer’s countervailing right to cultivate the corporate image of its choosing. Thomas Jefferson famously declared religious freedom “the most inalienable and sacred of all human rights.”<sup>8</sup> On the other hand, the Court of Appeals for the D.C. Circuit has observed: “Perhaps no facet of business life is more important than a company’s place in public estimation. That the image created by its employees dealing with the public . . . affects its relations is so well known that we may take judicial notice of an employer’s proper desire to achieve favorable acceptance.”<sup>9</sup> Although the right to religious expression and the right to establish a favorable corporate image are both highly regarded, neither right is absolute.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate employees whose religious beliefs conflict with some element of their job duties, unless doing so would cause “undue hardship on the conduct of the employer’s business.”<sup>10</sup> In cases where employers claim that a religious accommodation would cause undue hardship by damaging their corporate image, courts struggle to strike the proper balance between an employee’s right to religious expression and an employer’s right to control its image. Not only do outcomes vary from court to court, but perhaps more disconcertingly, the analysis and reasoning underlying these decisions is often inconsistent and, in some cases, contradictory.<sup>11</sup> Particularly troublesome are the disparate levels of proof courts require for an employer to establish that an accommodation would adversely affect its image and therefore impose undue hardship. For example, Costco prevailed on summary judgment by contending, with little supporting evidence, that it would be unduly burdensome to accommodate an employee’s request to leave her religiously mandated facial piercings uncovered, because such piercings detracted from the “neat, clean and professional image” that the company aimed to present.<sup>12</sup> By contrast, Abercrombie & Fitch has been on the losing end of summary judgment in four cases involving challenges to its

---

<sup>7</sup> *Id.* at 4.

<sup>8</sup> Thomas Jefferson, Freedom of Religion at the University of Virginia, in *THE COMPLETE JEFFERSON* 957, 958 (Saul K. Padover ed., 1943).

<sup>9</sup> *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973).

<sup>10</sup> 42 U.S.C. § 2000e(j) (2012).

<sup>11</sup> See analysis of cases cited *infra* Part IV.

<sup>12</sup> *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136-37 (1st Cir. 2004).

“Look Policy,” notwithstanding the fashion retailer’s abundant expert and lay witness testimony that granting religious-based exemptions would interfere with its meticulously crafted image.<sup>13</sup> These incongruous results have left employers and employees alike wondering when Title VII requires a religious accommodation that conflicts with an employer’s corporate image and when it does not.

This Article focuses on the conflict between an employee’s right to religious expression and an employer’s right to establish and maintain the image of its choosing. I argue that the existing case law provides little meaningful guidance for employers and employees facing this conflict. Because a company’s image is one of its most valuable assets, courts should more closely scrutinize religious accommodation claims that interfere with a company’s ability to control its image. I offer three recommendations for how courts can recalibrate their analyses of religious accommodation claims that do not require any break from Supreme Court precedent and could help to produce a clearer, more balanced case law.

Part I examines America’s changing religious landscape and, more specifically, what these changes mean for the workplace. Part II addresses the ongoing struggle between Congress, the courts, and the U.S. Equal Employment Opportunity Commission (EEOC) to reach a consensus on the types of religious accommodations required under Title VII. Part III explores the power of corporate image and how frontline employees in particular can directly influence outsiders’ perceptions of the employer through both their appearances and actions. Part IV analyzes the most important cases involving claims of image-based undue hardship—highlighting the need for a more consistent and unified approach to weighing religious expression against corporate image. Part V provides recommendations for ways courts might analyze corporate image cases in a more uniform, practical manner to generate case law that strikes the appropriate balance

---

<sup>13</sup> See generally cases cited *supra* note 1. In *Abercrombie I*, the district court denied Abercrombie’s summary judgment motion, No. 08-1470, 2009 WL 3517584, at \*4 (E.D. Mo. Oct. 26, 2009), but the jury ultimately decided in favor of the company. Jury Verdict, *Abercrombie I*, No. 08-1470 (E.D. Mo. Dec. 4, 2009), ECF No. 84. In *Abercrombie II*, the district court granted partial summary judgment against Abercrombie, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011), but the appellate court reversed on other grounds. 731 F.3d 1106, 1143 (10th Cir. 2013) (ruling that no fact issue persisted as to whether Abercrombie knew of the plaintiff’s religious conflict with its dress code prior to its hiring decision, as the plaintiff never informed Abercrombie beforehand that her practice of wearing a hijab stemmed from her religious beliefs and that she therefore would require an accommodation), *cert. granted*, 135 S. Ct. 44 (2014). In *Abercrombie III* and *Abercrombie IV*, the district courts granted partial summary judgment against the company. *Abercrombie IV*, 966 F. Supp. 2d. 949, 971 (N.D. Cal. 2013); *Abercrombie III*, No. 10-3911, 2013 WL 1435290, at \*17 (N.D. Cal. Apr. 9, 2013).

between religious expression and corporate image and provides employers and employees with greater clarity in navigating this sensitive and complex issue.

## I. RELIGION AND WORK IN MODERN AMERICA

The relationship between religion and work in the United States is becoming increasingly strained due to two significant developments. First, the religious characteristics of the workforce are becoming more complex as a result of broader changes in the American religious landscape. Second, religious expression in the workplace is becoming more commonplace, as traditional barriers between work and religion continue to erode in response to a variety of social forces. This Part examines how changes in the religious characteristics of the workforce and growing presence of religion at work have transformed the American workplace into a tinderbox for religious conflict.

### A. *America's Changing Religious Landscape*

The role of religion in the workplace continues to evolve as a result of broader shifts in the American religious landscape. Although religion remains a prominent fixture of American society, the ways Americans are choosing to express—or not express—their religiosity are changing. Particularly noteworthy is the decline in formal religious affiliation,<sup>14</sup> the increasing diversity of religious sects,<sup>15</sup> and the growing number of Americans who switch religious affiliations.<sup>16</sup> These broader social patterns mean religion in the workplace looks much different today than just a few years ago. It is therefore imperative that employers understand these changes and adapt their policies and practices accordingly.

The most remarkable trend in American religiosity is the rising percentage of adults who do not affiliate with any particular religion. While the vast majority of Americans—over eighty percent—profess a belief in God,<sup>17</sup> the number who do not identify with a specific religion continues to grow at a rapid pace. One-fifth of the U.S. public and one-third of adults under age

---

<sup>14</sup> PEW FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9 (2012), *available at* <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf>.

<sup>15</sup> PEW FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 10-12 (2008).

<sup>16</sup> *Id.* at 5.

<sup>17</sup> TOM W. SMITH, BELIEFS ABOUT GOD ACROSS TIME AND COUNTRIES 8 (2012), *available at* [http://www.norc.org/PDFs/Beliefs\\_about\\_God\\_Report.pdf](http://www.norc.org/PDFs/Beliefs_about_God_Report.pdf).

thirty are religiously unaffiliated today—the highest percentages ever in Pew Research Center polling.<sup>18</sup> Between 2007 and 2012 alone, the percentage of unaffiliated adults jumped from just over fifteen percent to approximately twenty percent of the U.S. population.<sup>19</sup> Significantly, however, nonaffiliation does not necessarily equate to nonbelief. Two-thirds of unaffiliated adults say they believe in God, more than half report often feeling “a deep connection with nature and the earth,” over one-third classify themselves as “‘spiritual’ but not ‘religious,’” and one-fifth claim they pray every day.<sup>20</sup> For employers, this decline in formal religious affiliation necessitates an increased sensitivity to both the growing number of nonaffiliated workers and the possibility that some employees may still qualify for a religious accommodation despite practicing a less formal spirituality.

A second important trend is the growing diversity of religion in America. Although the United States has always been a land of many religions,<sup>21</sup> the immigrants of the last several decades have dramatically expanded the diversity of religious life.<sup>22</sup> While Americans remain overwhelmingly Christian (78.4%), non-Christian religions continue to grow, with Buddhists, Muslims, Baha’is, and others immigrating to the United States in greater numbers.<sup>23</sup> Moreover, immigration has also increased diversity within established religious traditions. For instance, the internal diversity of American Judaism is greater than ever before due to the influx of Jewish immigrants from Russia and Ukraine.<sup>24</sup> The “face of American Christianity has also changed” with sizeable Latino, Filipino, and Vietnamese Catholic communities; Chinese, Haitian, and Brazilian Pentecostal communities; Korean Presbyterians; Indian Mar Thomas; and Egyptian Copts.<sup>25</sup> Increasing religious diversity presents unique challenges in the workplace, as traditional notions of what religion looks like and how it is expressed may no longer be accurate. Employers may have to accommodate unfamiliar—and perhaps

---

<sup>18</sup> PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 14, at 9.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9-10.

<sup>21</sup> See *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 589 (1989) (“This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent.”), *abrogated by* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

<sup>22</sup> See DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION 1-4 (2001) (discussing the history of Hindus, Buddhists, and Muslims in the United States).

<sup>23</sup> See PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 15, at 10-11 (finding that while 78.4% of the American population is Christian, Buddhists constitute 0.7% of the population, Muslims constitute 0.6%, and Baha’is and members of other world religions constitute less than 0.3%).

<sup>24</sup> ECK, *supra* note 22, at 4.

<sup>25</sup> *Id.*

objectionable—religious practices, and employees must learn to work together harmoniously despite their religious differences. For employers and employees alike, adapting to changes in the American religious landscape undoubtedly requires greater familiarization with, and tolerance of, unique beliefs and practices.

A third significant feature of American religiosity is the increasing fluidity of religious affiliation. Approximately forty-four percent of American adults “have either switched religious affiliation, moved from being unaffiliated with any religion to being affiliated with a particular faith, or dropped any connection to a specific religious tradition altogether.”<sup>26</sup> Although older and younger Americans switch religious affiliation at comparable rates, affiliation changes tend to be more drastic among younger adults. More than half of Americans age seventy and older who changed affiliation switched “from one family to another within a religious tradition (e.g., from one Protestant denominational family to another),” whereas among adults under age thirty, “roughly three-quarters of those who have changed affiliation left one religious tradition for another (e.g., left Protestantism for Catholicism) or for no religion at all.”<sup>27</sup> The remarkable amount of movement by Americans from one religious group to another—particularly among younger adults—supports the characterization of the United States as “a vibrant marketplace where individuals pick and choose religions that meet their needs, and religious groups are compelled to compete for members.”<sup>28</sup> For employers, fluidity of religious affiliation may require greater flexibility in accommodating religious beliefs. Employees may need different types of accommodations at different points in their employment as their religious affiliations change over time.

### B. *The Prominence of Religion in the Workplace*

Overt religious expression in the workplace is becoming increasingly commonplace. Such expression, however, “has traditionally been frowned upon in Corporate America.”<sup>29</sup> For years, the prevailing assumption in business was that, because we do not all share the same faith-based worldview, there must be a wall of separation between work and religion.<sup>30</sup>

---

<sup>26</sup> PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 15, at 5.

<sup>27</sup> *Id.* at 33.

<sup>28</sup> *Id.* at 22.

<sup>29</sup> Eileen P. Kelly, *Accommodating Religious Expression in the Workplace*, 20 EMP. RESPS. & RTS. J. 45, 46 (2008).

<sup>30</sup> JAMES L. NOLAN, *DOING THE RIGHT THING AT WORK: A CATHOLIC'S GUIDE TO FAITH, BUSINESS, AND ETHICS* 20 (2006).

That wall has deteriorated in recent years, as a “spiritual revival”<sup>31</sup> in the workplace has taken hold, prompting companies like American Airlines to establish prayer rooms,<sup>32</sup> New York law firms to lead Talmudic studies,<sup>33</sup> and Tyson Foods to employ a team of chaplains to provide on-site ministerial services to employees.<sup>34</sup> Today, workplace conversations about religion are routine. Twenty-two percent of American workers report sharing their religious beliefs with a coworker at least once a month.<sup>35</sup> Moreover, “religious . . . conversations at work do not seem to generate a great deal of discomfort.”<sup>36</sup> Seventy-seven percent of workers feel “somewhat” or “very comfortable” when the topic of religion arises, whereas just twenty-two percent feel “somewhat” or “very uncomfortable.”<sup>37</sup>

Scholars attribute the growing prominence of religion in the American workplace to a variety of demographic and cultural shifts, as well as to transformations within both religion and the workplace. Demographically, the most important factor is the aging of the baby boomer generation.<sup>38</sup> As Americans reach middle age, their interest in faith typically intensifies.<sup>39</sup> Given the tremendous size of the baby boomer cohort, the “characteristic

---

<sup>31</sup> Mark A. Spognardi & Staci L. Ketay, *In the Lion's Den: Religious Accommodation and Harassment in the Workplace*, 25 EMP. REL. L.J. 7, 7 (2000).

<sup>32</sup> See WFAA Staff, *North Texas Employers Answer Prayer Room Requests*, WFAA.COM (Oct. 16, 2009, 10:31 AM), <http://www.wfaa.com/news/local/64530747.html>, archived at <http://perma.cc/XP5F-BSWW> (describing how North Texas companies, including Texas Instruments and American Airlines, have made space in their offices to accommodate Muslim employees' daily prayers).

<sup>33</sup> See Michelle Conlin, *Religion in the Workplace: The Growing Presence of Spirituality in Corporate America*, BUS. WK., Nov. 1, 1999, at 151, 152 (“Gone is the old taboo against talking about God at work. In its place is a new spirituality, evident in the prayer groups at Deloitte & Touche and the Talmud studies at New York law firms such as Kaye, Scholer, Fierman, Hays & Handler.”).

<sup>34</sup> See *Chaplain Services*, TYSON FOODS, INC., <http://www.tysonfoodscareers.com/Working-At-Tyson/Tyson-Benefits/Chaplain-Services.aspx> (last visited Jan. 16, 2015), archived at <http://perma.cc/GCJ4-AZMV> (“Tyson Chaplain Services has chaplains available to Team Members at numerous plants around the country and in our corporate offices. The chaplains provides [sic] compassionate pastoral care and ministry to Team Members and their families, regardless of their religious or spiritual affiliation or beliefs.”).

<sup>35</sup> TANENBAUM CTR. FOR INTERRELIGIOUS UNDERSTANDING, *WHAT AMERICAN WORKERS REALLY THINK ABOUT RELIGION: TANENBAUM'S 2013 SURVEY OF AMERICAN WORKERS AND RELIGION 16* (2013), available at [http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/\\$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf](http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 16-17.

<sup>38</sup> See DOUGLAS A. HICKS, *RELIGION AND THE WORKPLACE: PLURALISM, SPIRITUALITY, LEADERSHIP* 28 (2003) (“The most often cited demographic change contributing to an increased interest in spirituality, in the workplace and elsewhere, is that the baby boomer generation has reached midlife.”).

<sup>39</sup> See *id.* (“[Y]oung adults have relatively little interest in religious or spiritual matters, but, as they reach middle age, their interest in faith heightens.”).

attitudes and behaviors [of this generation] have had a disproportionate impact on . . . the workplace.”<sup>40</sup> Thus, the baby boomers’ heightened interest in religion has reshaped the relationship between religion and the workplace across all generations of American workers.<sup>41</sup> Other demographic factors attributed to the rise of religion in the workplace include immigration (and the resulting increase in religious pluralism),<sup>42</sup> the growing participation of women in the labor market,<sup>43</sup> and the affluence of American society.<sup>44</sup>

Culturally, employees today are more likely to expect, and even demand, the right to individualized expression of their whole selves—including their religious identities—in the workplace.<sup>45</sup> Some employees are no longer content to check their religion at the workplace door, believing instead that their religious identity, like their race and sex, is an integral part of their being that cannot—and should not—be separated from their total person. Other “[c]ultural factors such as the stress and pace of modern life, the dehumanizing aspects of technology, and the lack of boundaries between work and personal time” may also “lead many employees to seek to integrate their work life with their religious beliefs.”<sup>46</sup> Additionally, Robert Putnam argues that the intermingling of work and religion may be part of employees’

---

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* (“[T]he aging of the boomer-dominated workforce has been a prime factor in the rise in spirituality in the office.”).

<sup>42</sup> *See id.* at 30-31 (explaining how immigrants have shared their religions within American culture, increasing the breadth and depth of spiritual philosophies used to shape American religious culture).

<sup>43</sup> *See id.* at 41-42 (explaining that women’s increasing participation in the labor force has led to the further integration of religion and work because women are more likely than men to discuss their faith in the workplace).

<sup>44</sup> *See* Len Tischler, *The Growing Interest in Spirituality in Business: A Long-Term Socio-Economic Explanation*, 12 J. ORGANIZATIONAL CHANGE MGMT. 273, 276-77 (1999) (explaining that economic prosperity enables individuals to focus less on meeting basic human needs and more on their own spiritual needs).

<sup>45</sup> *See* Kelly, *supra* note 29, at 46-47 (“Individualized expression of the whole person in terms of their ethnic, cultural, sexual and other identities is increasingly expected and even demanded by employees. Religion is no exception to this trend.” (citation omitted)).

<sup>46</sup> *Id.* at 47 (citation omitted); *see also* HICKS, *supra* note 38, at 46 (“Many employees and employers have increasingly brought spirituality to the workplace because they do not have time to spend in religious communities.”); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 81, 82-83 (2000-2001) (“Another explanation is the fact that Americans now spend more time in the workplace, working in excess of one month more per year than they did a decade ago. Therefore, aspects of an individual’s life previously kept private—such as religious belief and expression—are more likely to become part of an individual’s work day.”).

quest for community as other types of civic associations have diminished in quality and importance.<sup>47</sup>

Two developments in American religion itself may also be contributing to the rise of religion in the workplace. A new public evangelicalism has emerged in response to a perceived erosion of Christian morality.<sup>48</sup> Galvanized to reclaim a prominent voice, evangelicals in particular often use the workplace as a staging ground for this expression.<sup>49</sup> Additionally, New Age religions continue to grow in popularity through their emphasis on “self-discovery, integration, and harmony.”<sup>50</sup> The “noninstitutional or quasi-institutional nature of New Age [religious] practice has made it conducive to expression at the office,”<sup>51</sup> as adherents tend to emphasize individual expressions of faith through personal spirituality, rather than the rituals of organized religion.<sup>52</sup>

The workplace, too, has undergone a critical paradigm shift that has enabled religion to play a more prominent role in work life. The rational and mechanistic view of labor that once dominated has given way to the increasing recognition that workers are motivated by more than “self-interest and competition with other workers.”<sup>53</sup> Employers today are more likely to view employees in terms of their “whole person,” incapable of separating who they are as workers from who they are in total.<sup>54</sup> Because an employee’s “functioning in the workplace is not isolated from his or her functioning as a total person,” “the identity and background of the worker . . . influence[s] [his or her] . . . contribution to a production process.”<sup>55</sup> For many employees, increased spirituality in the workplace improves both motivation and morale, which in turn leads to greater involvement, satisfaction, and productivity.<sup>56</sup>

---

<sup>47</sup> See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 111-13 (2000) (surveying Americans’ increasing disconnect from family, friends, neighbors, and democratic structures).

<sup>48</sup> See HICKS, *supra* note 38, at 33-36 (describing the roots, evolution, and motivation galvanizing Christian evangelism in public life, specifically combating the rise of American secularism).

<sup>49</sup> *Id.* at 35.

<sup>50</sup> *Id.* at 31.

<sup>51</sup> *Id.* at 32.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 39-41 (describing the managerial trend toward “person-centered management,” in which employees’ role in the workplace is recognized as one part of their lives “not isolated from [their] functioning as a total person” (citations omitted)).

<sup>54</sup> *Id.* at 40.

<sup>55</sup> *Id.*

<sup>56</sup> See Jean-Claude Garcia-Zamor, *Workplace Spirituality and Organizational Performance*, 63 PUB. ADMIN. REV. 355, 361-62 (2003) (concluding that spirituality in the workplace allows

### C. *The Conflict Between Work and Religion*

Changes in the religious characteristics of the workforce and the growing prominence of religion in the workplace have proven to be an explosive combination. More than one-third of U.S. workers report experiencing or witnessing religious bias at work.<sup>57</sup> Employers now face more pressure than ever to balance the respective interests of employees, coworkers, and other stakeholders.<sup>58</sup> This growing struggle is evident from the EEOC's most recent statistics on religious discrimination charges. Between 1997 and 2013, the number of religious discrimination charges filed nationally more than doubled from 1709 to 3721.<sup>59</sup> Within this same timeframe, the percentage of charges alleging religious discrimination jumped from 2.1% in 1997 to 4.0% in 2013.<sup>60</sup> There is also some evidence that religious discrimination charges may be increasing in merit, at least from the EEOC's perspective. The EEOC issued reasonable-cause determinations on 4.4% of religious discrimination charges in 1997.<sup>61</sup> In 2012, however, that figure rose to 7.1%, before dropping to 4.3% in 2013.<sup>62</sup> Although religious discrimination charges comprise a relatively modest percentage of all discrimination charges, the number, percentage, and merits of such charges continue to increase.

Religious conflict in the workplace has received attention from federal, state, and local lawmakers. Legislators have considered a variety of reforms attempting to more sharply define the parameters of religious accommodation law. Efforts at the federal level have largely failed. While every Congress

---

businesses to meet their profit-making goals by helping employees feel happier, more creative, and more connected to the work community); Fahri Karakas, *Spirituality and Performance in Organizations: A Literature Review*, 94 J. BUS. ETHICS 89, 94-97 (2010) ("[T]here is growing evidence in spirituality research that workplace spirituality programs result in positive individual level outcomes for employees such as increased joy, serenity, job satisfaction, and commitment. There is also evidence that these programs improve organizational productivity and reduce absenteeism and turnover." (citations omitted)).

<sup>57</sup> TANENBAUM CTR. FOR INTERRELIGIOUS UNDERSTANDING, *supra* note 35, at 20.

<sup>58</sup> See Ronald J. Adams, *Balancing Employee Religious Freedom in the Workplace with Customer Rights to a Religion-Free Retail Environment*, 117 BUS. & SOC'Y REV. 281, 281 (2012) (noting the polarizing effects of religion in the workplace and the competing interests involved in retail environments).

<sup>59</sup> Office of Research, Info. & Planning, *Religion-Based Charges: FY 1997 - FY 2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Jan. 16, 2015) [hereinafter *Religion-Based Charges*], archived at <http://perma.cc/P2EW-3D87>.

<sup>60</sup> Office of Research, Info. & Planning, *Charge Statistics: FY 1997 Through FY 2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Jan. 16, 2015) [hereinafter *Charge Statistics*], archived at <http://perma.cc/9879-YKC7>.

<sup>61</sup> *Religion-Based Charges*, *supra* note 59.

<sup>62</sup> *Id.*

has considered the Workplace Religious Freedom Act (WRFA) since the bill's introduction in 1994,<sup>63</sup> it has never come particularly close to passing the legislation, despite bipartisan support.<sup>64</sup> Although the WRFA has undergone various modifications over the years, its primary objective has been to provide greater religious freedom to employees by making it more difficult for employers to prove that a religious accommodation would cause undue hardship.<sup>65</sup> The most recent version of the bill, introduced by former Senator John Kerry in late 2012,<sup>66</sup> died in committee.<sup>67</sup> State and municipal efforts have proven more successful, with California,<sup>68</sup> Oregon,<sup>69</sup> and New York City<sup>70</sup> recently enacting laws similar to the WRFA. As religious conflict in the workplace continues to increase in the coming years, the legislative response will only intensify.

## II. THE PARAMETERS OF RELIGIOUS ACCOMMODATION LAW

In the five decades since the passage of the Civil Rights Act of 1964, Congress, the courts, and the EEOC have struggled to reach consensus on the extent to which an employer must accommodate an employee's religious expression. Title VII prohibits employers from not hiring, discharging, or otherwise "discriminat[ing] 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."<sup>71</sup> Title VII also

---

<sup>63</sup> See S. 3686, 112th Cong. (2012); S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); H.R. 1445, 109th Cong. (2005); S. 677, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); H.R. 5233, 103d Cong. (1994).

<sup>64</sup> See, for example, H.R. 1431, 110th Cong. (2007), which was introduced by an equal number of Republican and Democratic Representatives. See generally LORRAINE C. MILLER, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, OFFICIAL LIST OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES AND THEIR PLACES OF RESIDENCE (2009), available at <http://clerk.house.gov/110/olm110.pdf> (showing the party affiliation of every member of the House of Representatives of the 110th Congress).

<sup>65</sup> See Workplace Religious Freedom Act of 2013, S. 3686, 112th Cong. § 4(a)(3) (defining undue hardship as "a significant difficulty or expense on the conduct of the employer's business").

<sup>66</sup> *Id.* at 1.

<sup>67</sup> See S. 3686 (112th): Workplace Religious Freedom Act of 2013, GOVTRACK, <https://www.govtrack.us/congress/bills/112/s3686#overview> (last visited Jan. 16, 2015), archived at <http://perma.cc/8VZ4-VFMV> (stating that the bill was referred to the House Committee on Health, Education, Labor, and Pensions in late 2012, and there have been no subsequent votes).

<sup>68</sup> CAL. GOV'T CODE §§ 12926, 12940 (2013).

<sup>69</sup> OR. REV. STAT. § 659A.033 (2011).

<sup>70</sup> N.Y.C. ADMIN. CODE §§ 8-102, 8-107 (2010 & Supp. 2012).

<sup>71</sup> 42 U.S.C. § 2000e-2(a)(1) (2012). Additionally, state laws prohibiting religious discrimination in employment largely track the language of Title VII, though several contain important differences.

forbids employers from “limit[ing], segregat[ing], or classify[ing]” applicants or employees “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 any of the aforementioned characteristics.<sup>72</sup> Little is known about why Congress included religion in Title VII, as the legislative history is brief and unilluminating.<sup>73</sup> Some scholars contend that the arguably voluntary nature of religion makes its inclusion in Title VII alongside otherwise immutable characteristics anomalous.<sup>74</sup> While the propriety of including religion as a protected category is beyond the scope of this Article, there can be no doubt that its inclusion in Title VII places religion on equal footing with race, color, sex, and national origin.

Title VII originally provided for equal treatment in employment solely by prohibiting status-based discrimination.<sup>75</sup> However, soon after Title VII’s enactment, the EEOC began receiving complaints from employees whose employers refused to grant them time off during the workweek to observe their Sabbath or religious holidays.<sup>76</sup> This prompted the EEOC to adopt new guidelines in 1966, which suggested that it was not enough for an employer to treat a religiously observant employee merely the same as other employees.<sup>77</sup> Instead—and unlike with any of Title VII’s other protected classes<sup>78</sup>—the employer bore an affirmative obligation to accommodate an employee’s “reasonable religious needs” unless doing so would create a “serious inconvenience to the conduct of the business.”<sup>79</sup> A year later, in 1967, the EEOC retreated slightly from its previous position, revising its guidelines to require an employer to provide “reasonable accommodations

---

See, e.g., OR. REV. STAT. § 659A.033(4) (2011) (exempting an employer from providing a religious accommodation only “if the accommodation requires significant difficulty or expense”).

<sup>72</sup> 42 U.S.C. § 2000e-2(a)(2) (2012).

<sup>73</sup> See James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1034 (2004) (“[T]here is little in the way of legislative history to determine whether Congress considered religion an immutable characteristic, whether it was singled out for protection based on its historical importance in the constitutional context, or for some other reason.”).

<sup>74</sup> *Id.*

<sup>75</sup> Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations that Negatively Affect Coworkers’ Shift Preferences Constitute an Undue Hardship on the Employer under Title VII?*, 78 FORDHAM L. REV. 1331, 1336 (2009).

<sup>76</sup> Thomas D. Brierton, “Reasonable Accommodation” Under Title VII: Is It Reasonable to the Religious Employee?, 42 CATH. LAW. 165, 167 (2002).

<sup>77</sup> *Id.* at 167-68.

<sup>78</sup> See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 320 (1997) (observing that whereas Title VII generally requires employers to apply workplace requirements “neutrally,” the statute mandates “facially different treatment of religion”).

<sup>79</sup> 29 C.F.R. § 1605.1(a)(2) (1967).

to the religious needs of employees and prospective employees where such accommodations c[ould] be made without undue hardship on the conduct of the employer's business."<sup>80</sup> The EEOC did not elaborate on what it believed made an accommodation "reasonable" or a hardship "undue."

The EEOC's guidelines carried little weight with courts, which were leery of interpreting Title VII as imposing affirmative obligations on employers. In *Dewey v. Reynolds Metals*, the Sixth Circuit rejected the EEOC's position outright:

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.

. . . .

To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. . . .

The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.<sup>81</sup>

After the Supreme Court affirmed the *Dewey* decision by an equally divided Court,<sup>82</sup> Congress, led by Senator Jennings Randolph of West Virginia,<sup>83</sup> responded by amending Title VII in 1972 to broaden the definition of "religion" to include "all aspects" of religious observance and to impose an affirmative obligation on employers to accommodate an employee's religious observance "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."<sup>84</sup> The amendment left open the question of what constitutes "reasonable accommodation" and "undue hardship" under the law. Some commentators claim Congress's intent in amending Title VII was to ensure employees would not have to choose between their jobs and their

---

<sup>80</sup> 29 C.F.R. § 1605.1(b) (1968).

<sup>81</sup> *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334-35 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

<sup>82</sup> *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 689 (1971).

<sup>83</sup> Sonne, *supra* note 73, at 1039.

<sup>84</sup> 42 U.S.C. § 2000e(j) (2012).

religions.<sup>85</sup> This seems an overstatement, however, as the qualifiers “reasonable” and “undue” indicate Congress anticipated situations would arise where an employer may justifiably withhold an accommodation. While Senator Randolph did express “deep concern over employees being forced to choose between religion and their jobs” and his hope “to eliminate that difficult choice for employees,”<sup>86</sup> the conditional language of the amendment makes clear that some employees may very well have to choose between their jobs and their religions if the requisite accommodation would cause the employer undue hardship.

Since the 1972 amendment, courts have struggled to draw clear lines between reasonable accommodations and those that cause undue hardship. The Supreme Court eliminated some of the confusion in 1977 with its seminal decision in *Trans World Airlines, Inc. v. Hardison*.<sup>87</sup> In *Hardison*, the Supreme Court confronted for the first time the extent of an employer’s obligation to reasonably accommodate an employee’s religious expression.<sup>88</sup> The plaintiff worked for Trans World Airlines (TWA) as a supply clerk in a department that “operate[d] 24 hours per day, 365 days per year.”<sup>89</sup> During his employment with TWA, the plaintiff joined the Worldwide Church of God, which prohibits adherents from working on certain religious holidays and from sunset on Friday until sunset on Saturday in observance of the Sabbath.<sup>90</sup> TWA held several meetings with the plaintiff to discuss possible accommodations.<sup>91</sup> TWA was able to accommodate the plaintiff’s observance of religious holidays.<sup>92</sup> However, TWA could not exempt the plaintiff from Saturday work, because employees at the plaintiff’s base were unionized and the union was unwilling to deviate from the collective bargaining agreement’s seniority-based shift-bidding system.<sup>93</sup> Seemingly

---

<sup>85</sup> See, e.g., Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE 103, 124-26 (2012) (arguing that Senator Randolph’s comments suggest that “Congress did not intend to allow employers to segregate minority employees”); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) (“[A] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.”).

<sup>86</sup> See Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 518; see also 118 CONG. REC. 705 (1972).

<sup>87</sup> 432 U.S. 63 (1977).

<sup>88</sup> *Id.* at 66.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 67.

<sup>91</sup> *Id.* at 77.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 67, 78.

out of options, TWA discharged the plaintiff for insubordination, after he stopped reporting for assigned Saturday shifts.<sup>94</sup> The plaintiff subsequently brought suit against TWA, alleging that the company failed to reasonably accommodate his religious beliefs.<sup>95</sup>

The district court sided with TWA, concluding that the company satisfied its accommodation obligation and that any further accommodation would have imposed undue hardship.<sup>96</sup> The Eighth Circuit disagreed, determining that TWA did not make reasonable efforts to accommodate the plaintiff because the company rejected three reasonable alternatives that would not have caused undue hardship.<sup>97</sup> These alternatives included permitting the plaintiff to work a four-day week by using in his place a supervisor or coworker on duty elsewhere;<sup>98</sup> paying overtime to other available personnel to fill the plaintiff's Saturday shifts;<sup>99</sup> and arranging a swap in shifts between the plaintiff and another employee, regardless of the collective bargaining agreement's seniority provisions.<sup>100</sup>

The Supreme Court reversed the Eighth Circuit, holding that "TWA made reasonable efforts to accommodate [the plaintiff] and that each of the Court of Appeals' suggested alternatives would have been an undue hardship."<sup>101</sup> The Supreme Court rejected the Eighth Circuit's contention that the plaintiff's religious beliefs took precedence over the seniority provisions of the collective bargaining agreement, noting "TWA was not required by Title VII to carve out a special exception to its seniority system in order to help the plaintiff to meet his religious obligations."<sup>102</sup> The Court likewise dismissed the other two alternatives that the Eighth Circuit considered reasonable, concluding that allowing the plaintiff to work a four-day week or paying other employees overtime wages to replace the plaintiff on his Saturday shifts "would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages."<sup>103</sup> Such costs, the Court

---

<sup>94</sup> *Id.* at 69.

<sup>95</sup> *Id.*

<sup>96</sup> *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877, 890-91 (W.D. Mo. 1974), *rev'd in part* 527 F.2d 33 (8th Cir. 1975), *rev'd* 432 U.S. 63 (1977).

<sup>97</sup> *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 39-42 (8th Cir. 1975).

<sup>98</sup> *Id.* at 39-40.

<sup>99</sup> *Id.* at 40.

<sup>100</sup> *Id.* at 41.

<sup>101</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977).

<sup>102</sup> *Id.* at 83.

<sup>103</sup> *Id.* at 84. According to the dissent, however, accommodating the plaintiff by paying overtime wages to substitute workers would have cost TWA a total of \$150, because the plaintiff would have been eligible after three months to transfer to his old department, where he would not have to work Saturdays. *Id.* at 92 n.6 (Marshall, J., dissenting).

determined, could not be imposed on TWA because “requir[ing] TWA to bear more than a *de minimis* cost in order to give [the plaintiff] Saturdays off is an undue hardship.”<sup>104</sup> Over Justices Marshall and Brennan’s vigorous dissent,<sup>105</sup> the Supreme Court set the bar as low as possible for employers to withhold a religious accommodation: any accommodation that would cause an employer to incur more than *de minimis* costs constitutes an undue hardship and is therefore unreasonable under Title VII.<sup>106</sup>

As with *Dewey*, the *Hardison* decision prompted efforts by Congress to amend Title VII to change “undue hardship” to “severe material hardship.”<sup>107</sup> When those attempts failed, the EEOC issued new guidelines in 1980 that, unsurprisingly, interpreted the undue hardship standard more stringently than the *Hardison* court had allowed.<sup>108</sup> These new guidelines were notable in three regards. First, they stated that an employer could not claim undue hardship based on the “mere assumption” that other employees would demand accommodation if the employer were to accommodate one employee.<sup>109</sup> Second, because Title VII contains no set definition of “undue hardship” or “reasonable accommodation,” and “*de minimis* cost” was likewise undefined, the guidelines stated that the determination of whether an employer had met its burden to accommodate depended on various factors, such as the size of the employer, the number of employees needing accommodation, and the employer’s operating costs.<sup>110</sup> Third, the guidelines expanded the definition of “religious practices” to include sincerely held

---

<sup>104</sup> *Id.* at 84.

<sup>105</sup> In his scathing dissent, Justice Marshall characterized the majority decision as “a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices.” *Id.* at 86 (Marshall, J., dissenting). Justice Marshall argued that an accommodation, by definition, requires unequal treatment by allocating privilege according to religious belief. *Id.* at 87. He contended that by exempting an employer from offering an accommodation that involves more than *de minimis* cost, an employer “need not grant even the most minor special privilege to religious observers to enable them to follow their faith.” *Id.* Justice Marshall concluded: “The ultimate tragedy is that despite Congress’ best efforts, one of this Nation’s pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today’s decision is erased.” *Id.* at 97.

<sup>106</sup> *Id.* at 84; *see also* Kaminer, *supra* note 46, at 100 (“The Supreme Court’s failure to require greater accommodation of religious expression in the workplace is not surprising, since courts generally tend to focus on Title VII as an anti-discrimination statute and hesitate to require differential or preferential treatment based on any of the protected categories.”).

<sup>107</sup> *See* Robert A. Caplen, Note, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J.L. & PUB. POL’Y 579, 592 (2005) (noting various attempts by Congress to “reverse the Court’s definition of undue hardship”).

<sup>108</sup> *See id.* at 594-96 (stating that the EEOC’s new 1980 guidelines were “an attempt to limit the scope of *Hardison*”).

<sup>109</sup> 29 C.F.R. § 1605.2(e)(1) (1981).

<sup>110</sup> *Id.* § 1605.2(e)(1).

moral and ethical beliefs.<sup>111</sup> These provisions remain part of the EEOC's current guidelines.<sup>112</sup>

The Supreme Court has revisited the issue of religious accommodation in the workplace just one other time.<sup>113</sup> In the 1986 case *Ansonia Board of Education v. Philbrook*, the Court considered whether an employer must accept an employee's preferred accommodation absent proof of undue hardship.<sup>114</sup> The plaintiff's religious beliefs required him to miss approximately six days of work each year to observe certain holy days.<sup>115</sup> Under the school board's collective bargaining agreement, the employee, a teacher, received three days each school year for observance of religious holidays.<sup>116</sup> Although teachers could use three days of their accumulated sick leave for "necessary personal business," they could not use their sick leave for further religious observance.<sup>117</sup> Pursuant to the collective bargaining agreement, the employee used the three days granted for religious holidays each year, and then either took unpaid leave, scheduled required hospital visits on church holy days, or worked on holy days.<sup>118</sup> The employee petitioned the school board to adopt a policy allowing use of the three days of personal business leave for religious observance or, alternatively, to allow him to pay the cost of a substitute and receive full pay for additional days off for religious observance.<sup>119</sup> When the school board rejected both proposals as unreasonable, the employee filed suit.<sup>120</sup>

The district court ruled against the plaintiff-employee, concluding the school board had not placed him "in a position of violating his religion or losing his job."<sup>121</sup> The Second Circuit reversed and remanded for consideration of the hardship that would result from the employee's suggested accommodations.<sup>122</sup> The Supreme Court then granted certiorari, in part to address whether "an employer must accept the employee's preferred accommodation absent proof of undue hardship."<sup>123</sup> Once again, the Supreme Court construed Title

---

<sup>111</sup> *Id.* § 1605.1.

<sup>112</sup> 29 C.F.R. §§ 1605.1, 1605.2(c)(1), 1605.2(e)(1) (2013).

<sup>113</sup> See Caplen, *supra* note 107, at 595 (stating that *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), was the "second and most recent Title VII religious accommodation case").

<sup>114</sup> 479 U.S. 60, 63 (1986).

<sup>115</sup> *Id.* at 62-63.

<sup>116</sup> *Id.* at 63-64.

<sup>117</sup> *Id.* at 64.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 64-65.

<sup>120</sup> *Id.* at 65.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 65-66.

<sup>123</sup> *Id.*

VII's reasonable accommodation provision narrowly, holding that "an employer has met its obligation . . . when it demonstrates that it has offered a reasonable accommodation to the employee."<sup>124</sup> Thus, when multiple reasonable accommodations are available, an employer need not offer the accommodation preferred by the employee.<sup>125</sup> Instead, the employer can implement the accommodation of its choosing so long as the accommodation eliminates the employee's work-religion conflict.<sup>126</sup> Although the Supreme Court ultimately remanded to the district court to determine whether the school board had interpreted its leave policy in a nondiscriminatory manner, it observed that the board's policy requiring the plaintiff to take unpaid leave for religious observance exceeding the amount of leave days allowed under his collective bargaining agreement "would generally be a reasonable one," even though it was not the employee's preferred accommodation.<sup>127</sup>

*Hardison* and *Philbrook* helped to solidify the framework for analyzing religious accommodations, but the line between a reasonable accommodation and an undue hardship remains blurred. To prevail on an accommodation claim, a plaintiff-employee must first establish a prima facie case of discrimination by proving that he (1) had a bona fide religious belief that conflicts with the employer's policies or rules, (2) informed his employer of this belief, and (3) suffered an adverse employment action for failing to comply with the policy or rule.<sup>128</sup> The burden then shifts to the employer to show that it either offered the employee a reasonable accommodation or that it could not have accommodated the employee without undue hardship.<sup>129</sup> Although this framework is fairly straightforward, considerable uncertainty persists as to whether a particular accommodation is reasonable or imposes an undue hardship. The difficulty of this determination lies in the highly fact-specific nature of the inquiry.<sup>130</sup> For instance, in some cases, dress code

---

<sup>124</sup> *Id.* at 69-70 (rejecting the Second Circuit's approach, because it would give the employee "every incentive to hold out for the most beneficial accommodation, despite that an employer offers a reasonable resolution to the conflict").

<sup>125</sup> *Id.* at 70.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 70-71.

<sup>128</sup> See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122 (10th Cir. 2013) (laying out the framework for analyzing religious accommodation cases), *cert. granted*, 135 S. Ct. 44 (2014); *Antoine v. First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013) (same); *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012) (same).

<sup>129</sup> See sources cited *supra* note 128.

<sup>130</sup> See, e.g., *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1030 (8th Cir. 2008) ("What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict."); *Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988) (examining the accommodations made available to the employee by the employer

exceptions,<sup>131</sup> unpaid leave,<sup>132</sup> shift swaps,<sup>133</sup> and abstention from work activities<sup>134</sup> constitute reasonable accommodations, whereas in other cases, such accommodations have been deemed unduly burdensome—demonstrating that the line between trivial and nontrivial costs is hardly clear. Courts have repeatedly reached opposite conclusions as to whether costs, such as coworker burdens,<sup>135</sup> economic losses,<sup>136</sup> and safety risks,<sup>137</sup> rise above the de minimis threshold. Without clearly defined parameters, courts

---

and concluding that “[a]ll of these accommodations together” provided the employee with a reasonable accommodation).

<sup>131</sup> Compare EEOC v. GEO Grp., Inc., 616 F.3d 265, 274 (3d Cir. 2010) (holding that it was unreasonable to require a prison to exempt Muslim female guards from its no-headscarf policy), with *Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337, 1341-42 (8th Cir. 1995) (finding that an employer reasonably accommodated its employee by allowing the employee to wear an antiabortion button, even though the employer required the employee to cover up the button while at work).

<sup>132</sup> Compare EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 319 (4th Cir. 2008) (holding that an employer acted reasonably when refusing to grant an eleven-day unpaid leave of absence for a religious holiday), with *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455-56 (7th Cir. 2013) (finding an issue of fact as to whether allowing an employee to take three weeks of unpaid leave would create undue hardship for his employer).

<sup>133</sup> Compare *Eversley v. MBank Dall.*, 843 F.2d 172, 176 (5th Cir. 1988) (finding it unreasonable for an employer to force employees, over their express refusal, to permanently switch shifts in order to accommodate another employee’s Sabbath observation), with *Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 12-13 (1st Cir. 2012) (holding that a voluntary shift swap constituted a reasonable accommodation).

<sup>134</sup> Compare *Al-Jabery v. ConAgra Foods, Inc.*, No. 06-3157, 2007 WL 3124628, at \*6-7 (D. Neb. Oct. 24, 2007) (holding it unreasonable to require a ham processing plant to exempt a Muslim employee from cleaning machinery that processed pork), with *EEOC v. Work Connection*, No. 08-5137, 2008 WL 8954713, at \*1-5 (D. Minn. Dec. 1, 2008) (holding that an employment agency reasonably accommodated its employees by entering into a consent decree agreeing to no longer require job applicants at meatpacking plants to sign forms stating that they would agree to handle pork).

<sup>135</sup> Compare *Crider v. Univ. of Tenn., Knoxville*, 492 F. App’x 609, 614 (6th Cir. 2012) (finding coworker dissatisfaction and inconvenience alone insufficient to create an undue hardship), with *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (“The mere possibility of an adverse impact on co-workers as a result of [changing schedules] is sufficient to constitute an undue hardship.”).

<sup>136</sup> Compare *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir. 1981) (holding that an accommodation imposing minimal administrative costs did not amount to undue hardship), with *DePriest v. Dep’t of Human Servs.*, No. 86-5920, 1987 WL 44454, at \*3 (6th Cir. Oct. 1, 1987) (unpublished table decision) (stating that payment of overtime to one employee so another could take time off for religious observance would have imposed an undue hardship on employer).

<sup>137</sup> Compare *EEOC v. Papin Enters., Inc.*, No. 07-1549, 2009 WL 961108, at \*6-7 (M.D. Fla. Apr. 7, 2009) (rejecting an employer’s claim that accommodating an employee’s religiously significant nose ring imposed an undue hardship because such facial jewelry could jeopardize food safety), with *EEOC v. Oak-Rite Mfg. Corp.*, No. 99-1962, 2001 WL 1168156, at \*12-13 (S.D. Ind. Aug. 27, 2001) (upholding a manufacturer’s policy requiring all employees to wear long pants because exploring alternative accommodations, such as allowing female employees to wear close-fitting, ankle-length skirts, would put employee safety at risk, thereby posing an undue hardship).

seem to pick and choose which facts to emphasize to support the preferred outcome. Consequently, both employers and employees have little judicial guidance as to when Title VII requires a religious accommodation.

As religious conflicts in the workplace continue to rise, some lawmakers have recognized the need to clarify when employees are entitled to religious accommodation under Title VII. The latest incarnation of the WRFA, for example, would have imposed accommodation standards similar to those of the Americans with Disabilities Act of 1990 (ADA).<sup>138</sup> The WRFA would have required employers to engage in an interactive process with employees requesting religious accommodations and redefined “undue hardship” to mean “a significant difficulty or expense on the conduct of the employer’s business when considered in light of relevant factors set forth in section 101(10)(B) of the [ADA].”<sup>139</sup> While the merits of such legislation are certainly debatable, Congress’s efforts to address a problem that the courts seem unable or unwilling to resolve are noteworthy.

In sum, there is no question that religion warrants the same protection under Title VII as race, color, sex, and national origin in terms of status-based discrimination. But unlike the other protected categories, Title VII imposes an affirmative duty on employers to accommodate religion under certain circumstances. The extent of this obligation has been the source of much disagreement for five decades, as Congress, the courts, and the EEOC have struggled to align their interpretations of the law. The fact-specific nature of religious accommodation claims has generated an uneven, and at times contradictory, body of case law that often raises more questions than it answers. Attempts to clarify the parameters of religious accommodation law have largely failed, particularly on the federal level, suggesting that at least some legislators are content with the status quo.<sup>140</sup>

---

<sup>138</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2014)).

<sup>139</sup> Workplace Religious Freedom Act of 2013, S. 3686, 112th Cong. § 4(a)(2)-(3) (2012). Under section 101(10)(B) of the ADA, factors to consider in determining whether an accommodation would impose an undue hardship include: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility involved in the provision of the accommodation, the number of persons employed at such facility, and the effect on expenses and resources of such accommodation upon the operation of the facility; (3) the overall financial resources of the employer and the size of the business with respect to the number of its employees and the number, type, and location of its facilities; and (4) the nature of the employer’s operations. 42 U.S.C. § 12111(10)(B) (2012).

<sup>140</sup> See Sonne, *supra* note 73, at 1045 (“[T]he fact that no [proposed version of the WRFA] ha[s] yet passed reflects, at the very least, some congressional support for the Court’s approach.”).

## III. THE POWER OF CORPORATE IMAGE

Few assets are as critical to an organization's success as the image it projects to customers, shareholders, the media, and the general public. Image and the related concepts of branding, identity, and reputation draw academic interest from diverse fields, including economics, management, marketing, organizational behavior, sociology, and visual or graphic design.<sup>141</sup> Interdisciplinary research has generated a myriad of definitions, dimensions, and measurements of corporate image. Generally speaking, corporate image refers to the "net result of all experiences, impressions, beliefs, feelings, and knowledge people have about a company."<sup>142</sup> Corporate image consists of both "functional and emotional" components, the former relating to "tangible attributes that can easily be measured," whereas the latter is associated with more nuanced "psychological dimensions that are manifested by feelings and attitudes towards an organisation."<sup>143</sup> Image derives from an "aggregate process by which customers compare and contrast the various attributes of [an] organisation[]," such as its name, architecture, products, services, traditions, ideologies, and employees.<sup>144</sup> Thus, in a very real sense, the perception of a corporation is more important than reality—regardless of whether a stakeholder's view accurately reflects the organization's true profile.

In today's hypercompetitive business environment in which companies often struggle to stand out from the competition, a positive, well-defined image can mean the difference between success and failure. The importance of corporate image is evident from the vast and varied laws designed to protect an organization's rights to cultivate the image of its choosing. Commercial speech, defamation, noncompetition, privacy, trademark, and trade secret laws are just some of the legal protections available to a company

---

<sup>141</sup> See Sebastian Arendt & Malte Brettel, *Understanding the Influence of Corporate Social Responsibility on Corporate Identity, Image, and Firm Performance*, 48 MGMT. DECISION 1469, 1471-72 (2010) (noting that a sizable body of research from the fields of graphic design, organizational behavior, and marketing has addressed corporate identity management); Hean Tat Keh & Yi Xie, *Corporate Reputation and Customer Behavioral Intentions: The Roles of Trust, Identification and Commitment*, 38 INDUS. MARKETING MGMT. 732, 733 (2009) (describing the vast body of academic research in management, economics, sociology, and marketing focused on corporate reputation).

<sup>142</sup> Sir Robert Worcester, *Reflections on Corporate Reputations*, 47 MGMT. DECISION 573, 578 (2009); see also Nha Nguyen, *The Collective Impact of Service Workers and Servicescape on the Corporate Image Formation*, 25 HOSPITALITY MGMT. 227, 230 (2006) ("Corporate image is the consumer's response to the total offering and is defined as the sum of beliefs, ideas, and impressions that a public has of an organisation." (citation omitted)).

<sup>143</sup> Nguyen, *supra* note 142, at 231 (citation omitted).

<sup>144</sup> *Id.* at 230-31.

seeking to defend its image. In enforcing these laws, courts are typically quick to emphasize the importance of image. As one district court observed, “[t]here are few things in our commercial life more valuable than a company’s reputation, goodwill, and trademarks.”<sup>145</sup>

Corporate image deserves legal protection, as researchers have linked corporate image to a myriad of outcomes impacting an organization’s bottom line. A favorable image or reputation is positively associated with business continuity and growth, organizational morale, and overall strength and profitability.<sup>146</sup> As such, reputation may be “the most valuable intangible asset that helps sustain an organization throughout its lifetime” and “safeguard [it] at times of crises.”<sup>147</sup>

One of the most critical components of corporate image is the appearance and conduct of frontline employees who interact with the company’s various stakeholders and thus form the face of the company. Depending on their actions, these employees can project a positive or negative image of their company to the consuming public. For example, teen-fashion retailer Rue 21 recently received negative press after a sales clerk allegedly told a fourteen-year-old customer that she was “too big” for the store’s clothing.<sup>148</sup> By contrast, fast-food chain Chick-fil-A received worldwide acclaim when one of its drive-through workers responded to a verbally abusive customer with remarkable poise and kindness.<sup>149</sup> For better or worse, the behavior of frontline employees plays a key role in stakeholders’ perceptions of the company. As the touchpoint of a company, frontline employees are pivotal

---

<sup>145</sup> *By-Rite Distrib., Inc. v. Coca-Cola Co.*, 577 F. Supp. 530, 541 (D. Utah 1983).

<sup>146</sup> See Roderick J. Brodie et al., *Investigating the Service Brand: A Customer Value Perspective*, 62 J. BUS. RES. 345, 347-49 (2009) (finding that a positive image and reputation has direct influence on customers’ perceptions of service quality and indirect influence on customer loyalty); Keh & Xie, *supra* note 141, at 733 (discussing the beneficial effects of a positive corporate image, including better financial performance, the ability to attract larger investments, higher employee morale, and better marketing abilities); Hamed M. Shamma, *Toward a Comprehensive Understanding of Corporate Reputation: Concept, Measurement and Implications*, 7 INT’L J. BUS. & MGMT. 151, 161 (2012) (collecting studies that demonstrate the strategic benefits of nurturing a positive corporate reputation).

<sup>147</sup> Shamma, *supra* note 146, at 151.

<sup>148</sup> Ashley Lutz, *Teenager Says She Was Kicked Out of a Clothing Store for Being Too Fat*, BUS. INSIDER (Sept. 3, 2013, 12:26 PM), <http://www.businessinsider.com/teen-got-kicked-out-of-rue-21-for-weight-2013-9>, archived at <http://perma.cc/9995-3AV7>.

<sup>149</sup> See Philip Caulfield, *Chick-fil-A Drive-Thru Worker Forgives Bully Who Heckled Her for Company’s Anti-Gay Stance in Viral Video*, N.Y. DAILY NEWS (Aug. 8, 2012, 12:22 PM), <http://www.nydailynews.com/news/national/chick-fil-a-drive-thru-worker-forgives-bully-heckled-company-anti-gay-stance-viral-video-article-1.1131566>, archived at <http://perma.cc/Y7SR-CBA9> (praising a cashier at Chick-fil-A for how she handled an angry customer).

in developing customer relationships, gathering customer information, and creating customer satisfaction, loyalty, and brand commitment.<sup>150</sup>

Given the importance of frontline employees to corporate image, it is no wonder that many companies require employees to follow strict dress and conduct standards. Controlling how employees look and act serves a “variety of organizational objectives” such as projecting a positive and consistent company image, fostering adherence to company norms, and conveying different levels of status and prestige.<sup>151</sup> Employee appearance, in particular, is associated with a range of stakeholder impressions and behaviors that can directly impact a company’s image. For example, one study found that consumers tend to perceive a store with obese salespeople as less successful than other stores and come away with a poorer store image.<sup>152</sup> Another study discerned that employee cues such as appearance can positively influence consumers’ perceptions of interpersonal service quality.<sup>153</sup> And other researchers found that older consumers perceive tattooed white-collar workers as less intelligent and less honest than non-tattooed workers.<sup>154</sup> As with physical appearance and demeanor, employees’ manner of dress influences corporate image: appropriately dressed personnel can, according to one study, lead to higher service-quality expectations and higher consumer intention to patronize a service business.<sup>155</sup> Moreover, the formality of employee clothing can inform consumer inferences about service quality and can also influence—directly and indirectly—consumers’ perceptions of

---

<sup>150</sup> See Christoph Burmann & Verena König, *Does Internal Brand Management Really Drive Brand Commitment in Shared-Service Call Centers?*, 18 J. BRAND MGMT. 374, 387-89 (2011) (stating that developing brand commitment in shared-service centers is important because customer contacts influence the consumer-brand relationship). See generally Eric (Er) Fang et al., *Effects of Customer and Innovation Asset Configuration Strategies on Firm Performance*, 48 J. MARKETING RES. 587 (2011) (discussing the importance of customer assets and their relationship to the firm’s financial situation).

<sup>151</sup> Carrie Leigh Haise & Margaret Rucker, *The Flight Attendant Uniform: Effects of Selected Variables on Flight Attendant Image, Uniform Preference and Employee Satisfaction*, 31 SOC. BEHAV. & PERSONALITY 565, 566 (2003).

<sup>152</sup> Michael L. Klassen et al., *Perceived Effect of a Salesperson’s Stigmatized Appearance on Store Image: An Experimental Study of Students’ Perceptions*, 6 INT’L REV. RETAIL, DISTRIBUTION & CONSUMER RES. 216, 222 (1996).

<sup>153</sup> Julie Baker et al., *The Influence of Multiple Store Environment Cues on Perceived Merchandise Value and Patronage Intentions*, 66 J. MARKETING 120, 127-28, 137 (2002).

<sup>154</sup> Dwane H. Dean, *Consumer Perceptions of Visible Tattoos on Service Personnel*, 20 MANAGING SERVICE QUALITY 294, 303 (2010).

<sup>155</sup> Chris Y. Shao et al., *The Effects of Appropriateness of Service Contact Personnel Dress on Customer Expectations of Service Quality and Purchase Intention: The Moderating Influences of Involvement and Gender*, 57 J. BUS. RES. 1164, 1172 (2004).

store image.<sup>156</sup> On a contrary note, ill-fitting uniforms can convey that a company is careless and inefficient, while well-fitting uniforms give the opposite impression.<sup>157</sup>

Today, many employers have come to expect their frontline employees to do more than merely comply with dress and conduct policies. Recognizing the vital role employees can play in projecting corporate image, businesses are leveraging employees for brand-building by strategically aligning employee behavior and appearance with brand positioning.<sup>158</sup> Thus, Southwest Airlines seeks fun and vivacious personalities for its flight crews, while sportswear retailer Lululemon hires avid runners and yoga instructors as sales staff.<sup>159</sup> Employees become a part of the brand itself by dressing and behaving in a manner consistent with the corporate brand.<sup>160</sup> Under the rubric of “living the brand,” ordinary frontline employees are transformed into brand ambassadors, who communicate the values associated with the corporate brand through their behavior and interactions with customers.<sup>161</sup> Reinforcement of brand meaning during customer service interactions leads customers to form “positive brand impressions” that accurately reflect the “brand’s overall meaning.”<sup>162</sup>

Significantly, “living the brand” not only affects customer perceptions but may also have the added benefit of influencing how employees think and act.<sup>163</sup> Because dress contributes to a “sense of self,” controlling appearance through dress is potentially an effective way to influence employees’ behavior.<sup>164</sup> Indeed, one study found that store clerks who wear uniforms are more likely to follow company rules regarding displaying positive emotions than are clerks not in uniform.<sup>165</sup> As employees align their personal

<sup>156</sup> Ruoh-Nan Yan et al., *Does Formality Matter? Effects of Employee Clothing Formality on Consumers’ Service Quality Expectations and Store Image Perceptions*, 39 INT’L J. RETAIL & DISTRIBUTION MGMT. 346, 355-57 (2011).

<sup>157</sup> Kathy Nelson & John Bowen, *The Effect of Employee Uniforms on Employee Satisfaction*, 41 CORNELL HOTEL & RESTAURANT ADMIN. Q. 86, 88 (2000).

<sup>158</sup> Nancy J. Sirianni et al., *Branded Service Encounters: Strategically Aligning Employee Behavior with the Brand Positioning*, 77 J. MARKETING 108, 108-09 (2013).

<sup>159</sup> *Id.* at 108.

<sup>160</sup> See Celia V. Harquail, *Employees as Animate Artifacts: Employee Branding by “Wearing the Brand”* (discussing the rise of “internal branding” through encouraging employees to dress and act in a way consistent with the brand), in ARTIFACTS AND ORGANIZATIONS: BEYOND MERE SYMBOLISM 161, 163 (Anat Rafaeli & Michael G. Pratt eds., 2006).

<sup>161</sup> *Id.* at 161-67.

<sup>162</sup> Sirianni et al., *supra* note 158, at 108-09.

<sup>163</sup> See Harquail, *supra* note 160, at 166 (finding that employee branding may be useful in influencing “the thoughts and behaviors of employees themselves”).

<sup>164</sup> *Id.*

<sup>165</sup> Anat Rafaeli, *When Clerks Meet Customers: A Test of Variables Related to Emotional Expressions on the Job*, 74 J. APPLIED PSYCHOL. 385, 389 (1989).

image with the corporate brand, they become increasingly conscious of how they represent the brand and thus may be more likely to keep the brand and its attributes in the forefront of their minds while interacting with customers and coworkers.<sup>166</sup>

The importance of corporate image is difficult to overstate. Various studies have established a strong link between image and a wide range of economic indicators, each of which ultimately affects an organization's bottom line.<sup>167</sup> As frontline employees play a critical role in how outsiders perceive an organization,<sup>168</sup> many employers have moved beyond requiring employees to simply comply with dress and conduct standards and now expect them to live the corporate brand through what they wear and how they act.<sup>169</sup> Because a favorable corporate image can take years to build and mere seconds to destroy, the law must grant organizations freedom to cultivate the image of their choosing while safeguarding against unwarranted interference with their right to do so.

#### IV. KEY CASES WEIGHING RELIGION AGAINST IMAGE

Since the Supreme Court's pronouncement in *Hardison* that a religious accommodation under Title VII is only reasonable if it does not impose more than de minimis costs,<sup>170</sup> employers often have the upper hand in defending against religious accommodation claims. But while courts frequently find undue hardship where profitability or productivity is at stake,<sup>171</sup> they are more skeptical of undue hardship claims based on corporate image concerns.<sup>172</sup> Despite abundant research demonstrating the importance of image to organizations, the notion of image presents unique conceptual and empirical challenges that courts have proven ill-equipped to handle. Consequently, as the following cases illustrate, there is little consensus

---

<sup>166</sup> See *id.* at 391 (discussing the possibility that wearing uniforms may increase awareness of one's emotions).

<sup>167</sup> See *supra* note 146 and accompanying text.

<sup>168</sup> See *supra* notes 151-57 and accompanying text.

<sup>169</sup> See *supra* notes 158-66 and accompanying text.

<sup>170</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

<sup>171</sup> See, e.g., *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1339 (8th Cir. 1995) (finding undue hardship where allowing the plaintiff to wear a button depicting a fetus decreased her coworkers' productivity by forty percent); *El-Amin v. First Transit, Inc.*, No. 04-0072, 2005 WL 1118175, at \*6 (S.D. Ohio May 11, 2005) (finding undue hardship where accommodating the plaintiff's beard would cost employer twenty-five dollars per day under terms of a customer contract).

<sup>172</sup> See, e.g., *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 17 (D. Mass. 2006) (raising concerns that employers could rely on corporate image to "tolerate the religious practices of predominant groups" while "forbidding practices that are less widespread or well known").

on what constitutes an image-related undue hardship or what evidence is sufficient to prove such hardship.

A. *Cases Favoring Image over Religion*

Courts typically sided with employers in the earliest cases pitting religious expression against corporate image. Their analyses focused primarily on whether there were possible inconsistencies between the proposed accommodations and the company's image, rather than whether such inconsistencies generated customer complaints, lost business, or other tangible evidence of hardship.

One of the first cases addressing a claim of image-related undue hardship was *EEOC v. Sambo's of Georgia, Inc.*<sup>173</sup> The EEOC brought suit on behalf a practicing Sikh, whose religion prohibited him from shaving his beard, after Sambo's rejected his application for a restaurant manager position pursuant to its grooming policy that forbade restaurant personnel from having any facial hair other than a neatly trimmed mustache.<sup>174</sup> At the bench trial, Sambo's argued that granting an exception to its grooming policy would constitute undue hardship because the policy was necessary to protect the "clean cut," sanitary image Sambo's had built up over the years.<sup>175</sup> Sambo's presented no evidence of customer complaints, and instead relied on its management's perceptions and experience to support its claim that a "significant segment" of family-restaurant consumers preferred restaurants whose employees were clean-shaven, either out of "a simple aversion to, or discomfort in dealing with, bearded people; from a concern that beards are unsanitary or conducive to unsanitary conditions; or . . . from a concern that a restaurant operated by a bearded manager might be lax in maintaining its standards as to cleanliness and hygiene in other regards."<sup>176</sup> Sambo's supplemented its testimonial evidence with a National Restaurant Association survey showing cleanliness ranked as a "consideration of utmost concern in the minds of the consuming public."<sup>177</sup>

The district court easily determined that Sambo's would suffer undue hardship by exempting the plaintiff from its grooming policy.<sup>178</sup> The court found the exemption "would adversely affect Sambo's public image and the operation of the affected restaurant or restaurants as a consequence of

---

<sup>173</sup> 530 F. Supp. 86 (N.D. Ga. 1981).

<sup>174</sup> *Id.* at 88-89.

<sup>175</sup> *Id.* at 89-90.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 90-91.

offending certain customers and diminishing the 'clean cut' image of the restaurant and its personnel," thus imposing "a significant cost to Sambo's Restaurants that is more than merely *de minimis*."<sup>179</sup> In rejecting the EEOC's contention that Sambo's illegally considered customer preference in maintaining its grooming policy, the court noted that even if the policy were "nothing more than an appeal to customer preference, . . . it is not the law that customer preference is an insufficient justification as a matter of law."<sup>180</sup> The court did not stop there, noting that even if Sambo's had discriminated against the plaintiff because of his religion, such discrimination was justified because "clean-shavenness is a bona fide occupational qualification for a manager of a restaurant, such as those operated by Sambo's," that markets to families.<sup>181</sup>

The deference the *Sambo's* court afforded the employer became standard in subsequent cases involving image-related hardships. For example, in *Johnson v. Halls Merchandising, Inc.*, the court did not cite any evidence of undue hardship in awarding the employer summary judgment.<sup>182</sup> The plaintiff claimed that Halls Merchandising failed to reasonably accommodate her religiously mandated need to "preface nearly every sentence she spoke with the phrase 'In the name of Jesus Christ of Nazareth.'"<sup>183</sup> Halls argued it could not reasonably accommodate the plaintiff without potentially damaging its relationship with customers.<sup>184</sup> The district court agreed, concluding Halls had "legitimate and reasonable interests" in operating its retail business "so as not to offend the religious beliefs or non beliefs of its customers."<sup>185</sup> The court did not reference any evidence in the record indicating the plaintiff's religious expression had or was likely to jeopardize customer relationships; instead, it focused on the fact that her religious expression was at odds with Halls's reasonable interest in maintaining a nonoffensive environment for customers.<sup>186</sup>

In *Hussein v. Waldorf-Astoria*, a Muslim banquet waiter brought suit against one of New York's most iconic luxury hotels, the Waldorf Astoria, for refusing to let him work when he arrived for his shift with a beard in

---

<sup>179</sup> *Id.* at 90.

<sup>180</sup> *Id.* at 91.

<sup>181</sup> *Id.*

<sup>182</sup> No. 87-1042, 1989 WL 23201, at \*2-3 (W.D. Mo. Jan. 17, 1989) (accepting the defendant-employer's argument of undue hardship based on a lack of genuine issue of material fact concerning the plaintiff-employee's religious beliefs and consequent behavior).

<sup>183</sup> *Id.* at \*2.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

violation of the hotel's grooming standards.<sup>187</sup> Although the plaintiff claimed his beard was "part of [his] religion," hotel management denied his request for an exemption from the grooming policy in part because they believed it would "jeopardize the hotel's reputation" as well as "undermin[e] its efforts to maintain standards and discipline among the banquet waiters."<sup>188</sup> The court granted the Waldorf's summary judgment motion, holding the hotel had "valid, nondiscriminatory reasons" for its no-beard policy and that accommodating Hussein's last-minute request for an exemption was an undue hardship as a matter of law.<sup>189</sup> The court did not elaborate on what, if any, evidence justified this conclusion but simply pointed out that courts in *Sambo's* and other cases had determined that "clean-shavenness is a bona fide occupational qualification in certain businesses and, in those situations, as long as the employer's grooming requirement is not directed at a religion, enforcing the policy is not an unlawful discriminatory practice."<sup>190</sup>

*Anderson v. U.S.F. Logistics (IMC), Inc.*<sup>191</sup> was the first corporate image case involving an actual customer complaint. There, the plaintiff sought an injunction against her employer, U.S.F. Logistics, so that she could use the phrase "Have a Blessed Day" in her written communications with customers as an expression of her Christian faith.<sup>192</sup> U.S.F. permitted her to use the phrase until a representative of its largest customer complained.<sup>193</sup> U.S.F. subsequently reprimanded Anderson and implemented a new policy prohibiting employees from "using 'additional religious, personal or political statements' in their closing remarks in verbal or written communications" with customers or coworkers.<sup>194</sup> Despite its changed policy, U.S.F. continued to allow the employee to "use the 'Blessed Day' phrase with coworkers, to hang objects containing various religious phrases in her work area, to read the Bible on her work break and to listen to a religiously oriented radio station at her work station."<sup>195</sup> The district court denied the plaintiff-employee's request for an injunction, and the Seventh Circuit affirmed.<sup>196</sup> On appeal, she argued that U.S.F. failed to present the lower court with any evidence that she had imposed her religious beliefs on customers through

---

<sup>187</sup> 134 F. Supp. 2d 591, 592 (S.D.N.Y. 2001).

<sup>188</sup> *Id.* at 598.

<sup>189</sup> *Id.* at 599.

<sup>190</sup> *Id.*

<sup>191</sup> 274 F.3d 470 (7th Cir. 2001).

<sup>192</sup> *Id.* at 474.

<sup>193</sup> *Id.* at 473.

<sup>194</sup> *Id.* at 474.

<sup>195</sup> *Id.* at 477.

<sup>196</sup> *Id.* at 474, 478.

her use of the “Blessed Day” phrase.<sup>197</sup> The Seventh Circuit disagreed, reasoning that the customer complaint indicated the employee’s religious practice could, at the very least, damage U.S.F.’s relationship with its largest customer.<sup>198</sup> The court concluded that permitting the employee to express her religion in various ways within the office was a reasonable accommodation but requiring U.S.F. to let her express her religion to customers constituted undue hardship.<sup>199</sup>

*Birdi v. UAL Corp.*<sup>200</sup> was the first case to address whether an employer can transfer a frontline employee whose religious expression conflicts with the corporate image to a position that does not involve customer contact. The plaintiff–employee, a Sikh, sued United Airlines for removing him from his position as a customer service representative based on his need to wear a turban for religious purposes.<sup>201</sup> United’s uniform policy required that “[a]ll headgear must be removed when indoors.”<sup>202</sup> United “attempted to accommodate [the employee] by offering him six alternative positions in which he could wear his [turban].”<sup>203</sup> The employee refused, claiming the proposed accommodations were unreasonable, primarily because four of the positions offered would not have allowed him face-to-face customer contact, which was the main reason he took the original position.<sup>204</sup> The district court disagreed, concluding United fulfilled its accommodation obligation by offering the employee multiple alternative positions, one of which involved telephone customer contact and two of which paid more than his current position.<sup>205</sup> The court noted that Title VII did “not require United to accommodate [the employee’s] need for face-to-face customer contact”;<sup>206</sup> rather, the company’s efforts in offering multiple positions were sufficient to constitute reasonable accommodation.<sup>207</sup> This decision was especially significant as it opened the door for an employer to remove an employee

---

<sup>197</sup> *Id.* at 476.

<sup>198</sup> *Id.* at 476-77.

<sup>199</sup> *See id.* (finding that U.S.F.’s actions, including permitting the plaintiff to say a prayer during a company event, demonstrated that the employer made reasonable accommodations and that the plaintiff’s continued use of the phrase in question after a customer complaint threatened the company’s relations with that customer).

<sup>200</sup> 88 Fair Empl. Prac. Cas. (BNA) 877 (N.D. Ill. 2002).

<sup>201</sup> *Id.* at \*1.

<sup>202</sup> *Id.* (alteration in original).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at \*2.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *See id.* at \*1-2 (calling United’s actions an attempt to engage in “a conversation . . . during which [the employee] could express his preferences” and noting that accommodations are not unreasonable simply because such preferences are denied).

whose religious expression conflicts with the corporate image, provided that the employee is offered a comparable position.

*Cloutier v. Costco Wholesale Corp.*<sup>208</sup> provides the most in-depth appellate analysis of the conflict between corporate image and employee religious expression. While working as a cashier at Costco, the plaintiff engaged in various forms of body modification, including facial piercing and cutting, which she claimed was a tenet of her religious beliefs as a member of the Church of Body Modification.<sup>209</sup> When Costco later revised its dress code to prohibit all facial jewelry other than earrings, the plaintiff refused to comply because she believed that her religion required her piercings to be visible at all times.<sup>210</sup> Eventually, Costco offered to accommodate the plaintiff by letting her wear either clear plastic retainers or a Band-Aid over her jewelry.<sup>211</sup> Despite having herself suggested using retainers or Band-Aid coverings as a solution months earlier, the plaintiff rejected this offer, and Costco consequently terminated her employment.<sup>212</sup> During the court proceedings, the plaintiff insisted that the only reasonable accommodation was for Costco to excuse her from its dress code.<sup>213</sup> Costco, however, maintained that such an exemption would create an undue hardship by “interfer[ing] with [the company’s] ability to maintain a professional appearance.”<sup>214</sup> The preface to Costco’s dress code underscores the importance of image to the company: “Appearance and perception play a key role in member service. Our goal is to be dressed in professional attire that is appropriate to our business at all times. . . . All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image.”<sup>215</sup>

The district court granted Costco summary judgment, holding that the offer to allow the plaintiff to temporarily cover her piercings or wear retainers was “manifestly reasonable.”<sup>216</sup> On appeal, the First Circuit did not decide whether the accommodation was reasonable but instead affirmed the lower court’s decision based on Costco’s undue hardship argument.<sup>217</sup> The plaintiff argued that Costco’s undue hardship was purely hypothetical

---

<sup>208</sup> 390 F.3d 126 (1st Cir. 2004).

<sup>209</sup> *Id.* at 129.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 130.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 135 (alteration in original).

<sup>216</sup> *Id.* at 131.

<sup>217</sup> *Id.* at 134.

because “she did not receive complaints about her facial piercings and . . . the piercings did not affect her job performance.”<sup>218</sup> While acknowledging that courts are “somewhat skeptical of hypothetical hardships” in the religious accommodation arena, the court responded that, “[n]evertheless, it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations.’ It can do so by ‘examining the specific hardships imposed by specific accommodation proposals.’”<sup>219</sup> The court then turned to the issue of corporate image, declaring:

It is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers, as [the plaintiff] did in her cashier position. Even if [the plaintiff] did not personally receive any complaints about her appearance, her facial jewelry influenced Costco’s public image and, in Costco’s calculation, detracted from its professionalism.<sup>220</sup>

Without any citation to the record, the court accepted two critical assumptions about the plaintiff’s appearance: it influenced Costco’s public image, and it detracted from the company’s professionalism.<sup>221</sup> The court considered this a “business determination” within Costco’s discretion.<sup>222</sup> In the court’s estimation, granting an exemption to the plaintiff would constitute an undue hardship because it would go against Costco’s determination that facial piercings would detract from the “‘neat, clean and professional image’ that it aims to cultivate.”<sup>223</sup> The court observed that “Costco is far from unique in adopting personal appearance standards to promote and protect its image,”<sup>224</sup> and pointed out that “[c]ourts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco’s, are designed to appeal to customer preference or to promote a professional public image.”<sup>225</sup>

In subsequent cases, employers have frequently relied upon *Cloutier* in arguing that an inconsistency between a religious accommodation and a company’s image can, in and of itself, constitute undue hardship. In *Brown*

---

<sup>218</sup> *Id.* at 135.

<sup>219</sup> *Id.* (citation omitted) (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989)).

<sup>220</sup> *Id.* at 135.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 136.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 135.

<sup>225</sup> *Id.* at 136.

*v. F.L. Roberts & Co.*, the district court granted the employer's summary judgment motion solely on this basis, despite expressing serious concern about the potential for abuse.<sup>226</sup> In his work as a technician at Jiffy Lube, the plaintiff in *Brown* serviced vehicles in both the upper and lower bays of the facility and occasionally greeted customers and discussed products and services with them.<sup>227</sup> The plaintiff was a practicing Rastafarian, who did not shave or cut his hair because of his religious beliefs.<sup>228</sup> During the plaintiff's employment, Jiffy Lube implemented a policy requiring employees with customer contact to be clean-shaven, after a consultant presented data to management indicating that businesses with a clean-shaven appearance policy tended to be more successful.<sup>229</sup> Like in *Birdi*, Jiffy Lube accommodated the plaintiff by allowing him to work exclusively in the lower bay, which was out of customer view.<sup>230</sup> The plaintiff objected, arguing that this accommodation was unreasonable because working conditions were significantly worse in the isolated lower bay.<sup>231</sup>

The court did not decide whether the accommodation was reasonable but instead focused on whether exempting the plaintiff from the grooming policy would subject Jiffy Lube to undue hardship.<sup>232</sup> The court noted that under *Cloutier*, "granting an outright exemption from a neutral dress code would be undue hardship because it would adversely affect the employer's public image."<sup>233</sup> The court therefore granted summary judgment to Jiffy Lube but expressed a "sense of uneasiness" with the decision that it believed *Cloutier* compelled:

If *Cloutier*'s language approving employer 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"

---

<sup>226</sup> 419 F. Supp. 2d 7, 17 (D. Mass. 2006).

<sup>227</sup> *Id.* at 9.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 9-10.

<sup>230</sup> *Id.* at 10.

<sup>231</sup> *Id.* at 13.

<sup>232</sup> *Id.* at 15-17.

<sup>233</sup> *Id.* at 15 (internal quotation marks omitted).

and “image” in forbidding practices that are less widespread or well known.<sup>234</sup>

The court questioned whether *Cloutier*, *Sambo’s*, *Hussein*, and other corporate image cases deferring to employer preference could be read to rely on narrower grounds, such as an employee’s demand for a complete exemption from the company policy, the last-minute timing of the employee’s demand, or, in the case of *Sambo’s*, sanitation concerns.<sup>235</sup> The court observed that these cases illustrate the difficulty of striking the proper balance between employee religious beliefs and employer preferences<sup>236</sup> and cautioned against tipping the balance too strongly in favor of the employer, reasoning that “[a]n excessive protection of an employer’s ‘image’ predilection encourages an unfortunately (and unrealistically) homogeneous view of our richly varied nation” and forces employees with work–religion conflicts to choose between their jobs and their religions.<sup>237</sup>

One of the most recent cases favoring corporate image over religious expression is *Lorenz v. Wal-Mart Stores, Inc.*<sup>238</sup> The *Lorenz* plaintiff, an overnight stocker at Wal-Mart, referred to his religious beliefs as “Universal Belief System.”<sup>239</sup> He expressed his beliefs by showing up for work wearing various pieces of religious attire, including a priest’s shirt and collar, a beret and a court jester hat, a kaffiyeh (Muslim headdress), a fanny pack with an anarchy symbol, a chain with multiple crosses hanging from it, and a necklace with a crucifix.<sup>240</sup> After a customer complained about the plaintiff’s attire, the store manager discussed with him the importance of customer perception and respect for others.<sup>241</sup> The manager allowed the plaintiff to continue wearing the kaffiyeh but prohibited the rest of his attire.<sup>242</sup> The manager subsequently learned of other customer and coworker complaints, which led him to conclude that customers and employees viewed the plaintiff’s combination of articles associated with different religions as mocking the symbolism of those religious articles.<sup>243</sup> Despite the initial conversation with management, the plaintiff continued to wear all of his

---

<sup>234</sup> *Id.* at 17.

<sup>235</sup> *Id.* at 17-18.

<sup>236</sup> *Id.* at 18-19.

<sup>237</sup> *Id.* at 19.

<sup>238</sup> No. 05-0319, 2006 WL 1562235 (W.D. Tex. May 24, 2006), *aff’d*, 225 F. App’x 302 (5th Cir. 2007).

<sup>239</sup> *Id.* at \*2-3.

<sup>240</sup> *Id.* at \*2.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at \*3.

religious attire to work, prompting various disciplinary actions and additional meetings with management.<sup>244</sup> In one meeting, an assistant manager explained to the plaintiff that as a Catholic, she and other members of her religion were offended that he would wear a kaffiyeh along with a priest's shirt, especially during the season of Lent.<sup>245</sup> When the plaintiff reported for work later that evening wearing the prohibited attire, Wal-Mart terminated his employment.<sup>246</sup>

In granting Wal-Mart summary judgment, the district court concluded Wal-Mart had proven it could not accommodate the plaintiff without suffering undue hardship.<sup>247</sup> Because his religious expression was inconsistent with Wal-Mart's image, allowing the plaintiff to continue wearing his religious attire would threaten Wal-Mart's relationship with customers and employees.<sup>248</sup> The court noted that in order to both accommodate the plaintiff and erase the adverse consequences to Wal-Mart's business from individuals offended by his attire, Wal-Mart would have "had to isolate [the] plaintiff from both customers and other employees."<sup>249</sup> Unlike in *Birdi* and *Brown*, where the employers offered to transfer the plaintiffs to other existing positions outside of only customer view, Wal-Mart would have had to create a new position outside of both customers' and other employees' views to accommodate the *Lorenz* plaintiff.<sup>250</sup> The court concluded that requiring Wal-Mart to form an entirely new position for the plaintiff "would have imposed more than a *de minimus* [sic] cost" on the company.<sup>251</sup>

#### B. Cases Favoring Religion over Image

In contrast to cases favoring corporate image over religious expression, courts siding with employees tend to focus on how a religious accommodation that conflicts with corporate image actually harms an employer, as opposed to whether the accommodation would in fact conflict with a company's image. *Banks v. Service America Corp.*<sup>252</sup> was one of the first cases to reject an image-based claim of undue hardship. In that case, Service America operated a cafeteria at a General Motors (GM) manufacturing plant, "serv[ing] meals

---

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at \*10.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> 952 F. Supp. 703 (D. Kan. 1996).

to GM employees in an operation similar to a fast food business.”<sup>253</sup> Because Service America received a significant portion of its business from the GM cafeteria, it valued GM’s satisfaction with its services.<sup>254</sup> The plaintiffs, two Service America employees, expressed their Christian beliefs by greeting GM food service customers with phrases such as “God bless you” and “Praise the Lord.”<sup>255</sup> After twenty to twenty-five GM employees, including GM’s liaison to Service America, complained about the plaintiffs’ religious greetings, Service America warned the men to stop making such comments.<sup>256</sup> The men refused to comply and were subsequently terminated.<sup>257</sup>

Service America moved for summary judgment on the plaintiffs’ religious accommodation claim, arguing in part that accommodating their religious expression would have constituted undue hardship in light of the numerous complaints the company received from a major customer.<sup>258</sup> The record contains no reference to any particular image Service America hoped to project, though it is clear the company terminated the plaintiffs out of concern that their actions would offend customers, thereby adversely affecting its relationship with GM.<sup>259</sup> The district court disagreed with Service America, reasoning that twenty to twenty-five complaints over a three-month period “presented no material problem,” given that Service America served 2000 to 3000 GM employees daily.<sup>260</sup> The court noted that “[a]n employer does not sustain its burden of proof merely by showing that accommodation would be bothersome or disruptive of operating routine. An employer’s costs of accommodation must mean present undue hardship, as distinguished from anticipated or multiplied hardship.”<sup>261</sup> Unlike in *U.S.F. Logistics*, the court downplayed the significance of the customer complaints, contending that the record revealed “no evidence of polarization between Christian customers and other customers, any legitimate fear that plaintiffs might favor those with similar religious beliefs in performing their jobs, or evidence that plaintiffs’ religious practices adversely affected their job performances.”<sup>262</sup> Although the court purported to apply the de minimis standard, its apparent disregard for the customer complaints suggests it used a heightened burden.

---

<sup>253</sup> *Id.* at 706.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 707.

<sup>256</sup> *Id.* at 707 & n.2.

<sup>257</sup> *Id.* at 707.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 708-09.

<sup>260</sup> *Id.* at 710.

<sup>261</sup> *Id.* at 711 (citations and internal quotation marks omitted).

<sup>262</sup> *Id.*

In *EEOC v. Red Robin Gourmet Burgers, Inc.*,<sup>263</sup> the court again focused on the harm caused by the conflict between religious expression and corporate image, rather than on the conflict itself. In accordance with his Kemetic religion, the *Red Robin* plaintiff had two, quarter-inch-wide tattoos encircling his wrists.<sup>264</sup> Written in Coptic, the tattoos translated in English read, “My Father Ra is Lord. I am the son who exists of his Father; I am the Father who exists of his son.”<sup>265</sup> Red Robin permitted the plaintiff to work as a server with his tattoos uncovered for approximately six months, but when he transferred to another location, his new managers ordered him to cover the tattoos in accordance with Red Robin’s grooming policy.<sup>266</sup> The plaintiff refused, claiming it was a sin for him to intentionally cover his tattoos.<sup>267</sup> Red Robin subsequently terminated the plaintiff’s employment, and the EEOC brought suit on his behalf thereafter.<sup>268</sup>

Red Robin moved for summary judgment, arguing in part that exempting the plaintiff from the restaurant’s appearance standards would constitute undue hardship because his tattoos conflicted with the company’s family-friendly image.<sup>269</sup> This was precisely the same argument that permitted the restaurant in *Sambo’s* to deny a managerial position to a practicing Sikh, even though that employee claimed his religion prohibited him from shaving his beard.<sup>270</sup> The only evidence Red Robin submitted to support its position was a company profile and customer study suggesting that Red Robin “seeks to present a family-oriented and kid-friendly image.”<sup>271</sup> Red Robin otherwise relied entirely on case authority from outside the Ninth Circuit, whose law governed the case, focusing primarily on *Cloutier*.<sup>272</sup> The court acknowledged that *Cloutier* was “well-reasoned,” but stated it was nevertheless obligated to follow Ninth Circuit precedent requiring “proof of actual imposition on coworkers or disruption of the work routine” to establish undue hardship.<sup>273</sup> Noting that there was no evidence that any customer complained about the plaintiff’s tattoos, the *Red Robin* court reasoned that the tattoo’s small size and obscure language suggested few

---

<sup>263</sup> No. 04-1291, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005).

<sup>264</sup> *Id.* at \*1.

<sup>265</sup> *Id.* (internal quotation marks omitted).

<sup>266</sup> *Id.* The pertinent rule in Red Robin’s “Uniform/Appearance” policy reads “[b]ody piercings and tattoos must not be visible.” *Id.* (alteration in original).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at \*4.

<sup>270</sup> *EEOC v. Sambo’s of Ga., Inc.*, 530 F. Supp. 86, 90-91 (N.D. Ga. 1981).

<sup>271</sup> *Red Robin*, 2005 WL 2090677, at \*5.

<sup>272</sup> *Id.* at \*4; *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).

<sup>273</sup> *Red Robin*, 2005 WL 2090677, at \*4 (citation omitted).

customers noticed or understood the tattoos.<sup>274</sup> The court rejected the company profile and customer study as inappropriate summary judgment evidence, because Red Robin failed to present any evidence that visible tattoos were inconsistent with its goals or that customers specifically shared the perception of Red Robin as a family-oriented and kid-friendly restaurant.<sup>275</sup> In the court's view, Red Robin presented only hypothetical hardship rather than evidence of actual hardship.<sup>276</sup> Following the court's denial of summary judgment, Red Robin agreed to pay the plaintiff \$150,000 and make "substantial policy and procedural changes" to settle the case.<sup>277</sup>

One year later, *EEOC v. Alamo Rent-a-Car LLC*<sup>278</sup> became the first major case in which the plaintiff prevailed on summary judgment over an employer's claim of image-related undue hardship. The EEOC brought suit on behalf of a Muslim employee, who was fired by Alamo after refusing to remove her head covering while working at the car rental counter.<sup>279</sup> Alamo maintained a "Dress Smart Policy," which "promoted a favorable first impression with customers" and "prohibited employees from wearing certain clothing and accessories."<sup>280</sup> When the employee requested to wear a head covering during the Muslim holiday of Ramadan, Alamo responded that she could wear the head covering while working in the back office but must remove it when at the rental counter in customer view.<sup>281</sup> Contrary to her employer's instruction, the employee repeatedly wore the head covering while working at the rental counter.<sup>282</sup> Alamo subsequently fired her for violating company rules, prompting the EEOC to file suit on the employee's behalf.<sup>283</sup>

The district court granted the EEOC's motion for summary judgment, holding that Alamo could not prove undue hardship as a matter of law.<sup>284</sup> Like the employers in *Sambo's*, *Cloutier*, and other cases upholding image over religion, Alamo argued that "any deviation from [its] carefully cultivated

---

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at \*5.

<sup>276</sup> *Id.*

<sup>277</sup> Press Release, EEOC, Burger Chain to Pay \$150,000 to Resolve EEOC Religious Discrimination Suit (Sept. 16, 2005), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-16-05.cfm>.

<sup>278</sup> 432 F. Supp. 2d 1006 (D. Ariz. 2006).

<sup>279</sup> *Id.* at 1008-09.

<sup>280</sup> *Id.* at 1008.

<sup>281</sup> *Id.* at 1009.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1017.

image is a definite burden.”<sup>285</sup> But, in the court’s view, this argument “simply assume[d] the question of cost” without supplying any factual basis of the hardship that Alamo would have incurred if it permitted the employee to wear the head covering at the rental counter.<sup>286</sup> Furthermore, the employee’s supervisor admitted that he did not believe permitting her to wear the head covering would “negatively impact customer expectations,” although he suggested that allowing this one exception could affect the “efficiency of Alamo’s operations by opening the door for other employees to violate the company uniform policy.”<sup>287</sup> The court rejected this “floodgates” argument as speculative and fundamentally at odds with Title VII protections.<sup>288</sup> The court entered summary judgment against Alamo on the issue of liability, and a jury awarded the employee \$287,640 in damages.<sup>289</sup>

In *United States v. New York City Transit Authority*, a rare pattern and practice case, the Department of Justice accused the Transit Authority of “pursuing policies or practices that discriminate[d] against employees whose religious beliefs require[d] them to wear certain headwear, such as turbans and khimars.”<sup>290</sup> The Transit Authority maintained a dress code that prohibited passenger-service employees from wearing headwear other than depot logo caps.<sup>291</sup> The Transit Authority rejected as unreasonable a request that employees be allowed to wear turbans and khimars in the same blue color as their uniforms and affix the Transit Authority logo to the front pocket or collars of their uniform shirts rather than to their headwear.<sup>292</sup> Relying on *Cloutier*, the Transit Authority claimed it was entitled to summary judgment, because Title VII does not require an accommodation that would cause an employer to cede control of its public image.<sup>293</sup> The *Transit Authority* court rejected this argument, reasoning that *Cloutier* involved a request for an outright exemption from a dress code and that “there was no question that granting such an exception would adversely affect the employer’s public image.”<sup>294</sup> By contrast, the Transit Authority

---

<sup>285</sup> *Id.* at 1015.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 1016 (“Alamo has not supplied any basis for concluding that those [floodgate] opinions were anything other than pure speculation.”).

<sup>289</sup> Press Release, EEOC, Phoenix Jury Awards \$287,640 to Fired Muslim Woman in EEOC Religious Discrimination Lawsuit ( June 4, 2007), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-4-07.cfm>.

<sup>290</sup> No. 04-4237, 2010 WL 3855191, at \*1 (E.D.N.Y. Sept. 28, 2010).

<sup>291</sup> *Id.* at \*1-2.

<sup>292</sup> *Id.* at \*21.

<sup>293</sup> *Id.* at \*19.

<sup>294</sup> *Id.*

failed to provide any proof that placing the logo on a shirt rather than on headgear would adversely affect its business, particularly since the Transit Authority runs all of New York City's subways and most of its busses and therefore "does not face the 'highly competitive business environment' that justified upholding the grooming requirements in cases [involving commercial businesses]." <sup>295</sup> The court observed that the causal relationship between the exemption and damage to public image was "not intuitively obvious, as it was in the grooming cases." <sup>296</sup> The court further questioned whether the Transit Authority could prove undue hardship at trial, since the evidence would come primarily from the Transit Authority's own employees or retained experts and therefore would be "somewhat speculative in nature." <sup>297</sup> Following the denial of its summary judgment motion, the Transit Authority settled the case for \$184,500 and agreed, as part of the settlement, to revise its dress code policy to allow employees working in public contact positions to wear religious headwear without the Transit Authority logo attached. <sup>298</sup>

Most recently, the EEOC has taken aim at the famously image-conscious clothing retailer Abercrombie & Fitch. Since 2008, the EEOC has sued Abercrombie four times for failing to accommodate applicants and employees who could not comply with the company's "Look Policy" for religious reasons. <sup>299</sup> Abercrombie's marketing strategy seeks to create an "in-store experience" for customers that perfectly matches Abercrombie's vision of each of its brands. <sup>300</sup> Abercrombie considers customers' in-store experience to be its main form of marketing, as it uses almost no television, print, or radio advertising. <sup>301</sup> Sales associates are expected to "reinforce the aspirational lifestyles represented by the brands and are a central element in creating the atmospheres of the stores." <sup>302</sup> To ensure that employees properly and consistently model Abercrombie's brands, the company maintains a "Look Policy," which gives employees extremely specific guidelines regarding

---

<sup>295</sup> *Id.* at \*22.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Settles Religious Discrimination Lawsuit Against New York City Transit Authority, No. 12-688 (May 30, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-crt-688.html>.

<sup>299</sup> See *Abercrombie IV*, 966 F. Supp. 2d 949 (N.D. Cal. 2013); *Abercrombie III*, No. 10-3911, 2013 WL 1435290 (N.D. Cal. Apr. 9, 2013); *Abercrombie II*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011), *rev'd on other grounds*, 731 F.3d 1106 (10th Cir. 2013), *cert. granted* 135 S. Ct. 44 (2014); *Abercrombie I*, No. 08-1470, 2009 WL 3517584 (E.D. Mo. Oct. 26, 2009).

<sup>300</sup> See *Abercrombie IV*, 966 F. Supp. 2d at 954; *Abercrombie III*, 2013 WL 1435290, at \*2.

<sup>301</sup> *Abercrombie III*, 2013 WL 1435290, at \*1.

<sup>302</sup> *Abercrombie IV*, 966 F. Supp. 2d at 954 (citation and internal quotation marks omitted).

their appearance and the clothing they are expected to wear at work.<sup>303</sup> The Look Policy has undergone various changes over the years, at times requiring employees to wear clothes similar to those sold in Abercrombie stores, requiring male employees to be clean-shaven, requiring employees to wear specific types of shoes, and prohibiting necklaces, bracelets, caps, piercings, nail polish, and heavy makeup.<sup>304</sup>

In *Abercrombie I*, the EEOC brought suit on behalf of an Abercrombie employee, who resigned after Abercrombie denied her request for an exemption from the Look Policy.<sup>305</sup> Abercrombie initially hired the employee as a salesperson or “model” in its Abercrombie & Fitch store but subsequently promoted her to a manager-in-training position at one of its Hollister stores.<sup>306</sup> At that time, the Hollister style consisted of “‘ripped-up jeans, a little revealing, sporty, California, beach style, laid back,’ and was sexy, form-fitting, and designed to show off body contours and draw attention to the wearer.”<sup>307</sup> Following her promotion, the employee converted to the Apostolic religion and began adhering to the faith’s regulations regarding dress, including wearing “only skirts that fell below the knee, and shirts with sleeves that came to the forearm.”<sup>308</sup> Abercrombie offered to let the employee wear jeans instead of skirts or short skirts with leggings underneath to cover her legs, or look in other stores “for skirts that would both meet her religious requirements and be consistent with the Hollister style.”<sup>309</sup> The employee rejected each proposed accommodation and ultimately resigned her employment in lieu of termination.<sup>310</sup>

Abercrombie moved for summary judgment, arguing the accommodation that the employee sought would have imposed undue hardship by compromising the Hollister brand.<sup>311</sup> Abercrombie supported its argument with testimony from several employees as well as an expert witness who testified that inconsistent or off-brand customer experiences could damage the Hollister brand and detrimentally impact sales.<sup>312</sup> The court concluded that Abercrombie failed to demonstrate that, as a matter of law, it would have

---

<sup>303</sup> *Abercrombie III*, 2013 WL 1435290, at \*2; *Abercrombie IV*, 966 F. Supp. 2d at 954.

<sup>304</sup> See *Abercrombie III*, 2013 WL 1435290, at \*2; *Abercrombie II*, 798 F. Supp. 2d at 1275.

<sup>305</sup> *Abercrombie I*, No. 08-1470, 2009 WL 3517584, at \*1 (E.D. Mo. Oct. 26, 2009).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at \*4.

<sup>312</sup> Defendants’ Statement of Undisputed Facts in Support of Their Motion for Summary Judgment at 2-4, EEOC v. Abercrombie & Fitch Stores, Inc., No. 08-1470 (E.D. Mo. July 31, 2009).

suffered more than a de minimis hardship by accommodating the employee.<sup>313</sup> Although Abercrombie's evidence was insufficient to warrant summary judgment, the company ultimately prevailed at the jury trial.<sup>314</sup>

In *Abercrombie II*, the EEOC alleged that Abercrombie failed to hire a female applicant as a sales model because she wore a headscarf in accordance with her Muslim religion.<sup>315</sup> Abercrombie submitted much of the same evidence in this latter case that it relied upon in *Abercrombie I*, including both lay and expert testimony stating that exempting this particular job applicant from the Look Policy would constitute undue hardship.<sup>316</sup> Abercrombie executives uniformly testified that allowing exceptions to the Look Policy negatively impacts the brand and its sales.<sup>317</sup> Abercrombie's expert witness likewise testified that deviations from the Look Policy are "identity distorting," would appear "off-brand" to Abercrombie's target market, and could potentially cause consumer confusion and "decreased brand preference and value perceptions for the Abercrombie brand," resulting in "a decreased ability to effectively market to its target customers and establish strong emotional bonds with them[,] a decreased ability to retain existing customer[s,] and increased costs of marketing and merchandising its products successfully."<sup>318</sup>

The *Abercrombie II* court not only denied Abercrombie's motion for summary judgment but also granted summary judgment to the EEOC on the issue of liability, finding as a matter of law that accommodating the applicant would not have caused more than de minimis cost to Abercrombie.<sup>319</sup> The court discounted Abercrombie's lay testimony because none of the witnesses conducted studies nor cited examples to support Abercrombie's claim that accommodating the applicant would negatively impact the brand, its sales, or other employees' compliance with the Look Policy.<sup>320</sup> The court also rejected the testimony of Abercrombie's expert witness for the same reason, observing that the expert "made no effort . . . to collect or analyze data to corroborate his opinion."<sup>321</sup> The court noted that Abercrombie had previously granted eight or nine headscarf exceptions, the impact of which

---

<sup>313</sup> *Abercrombie I*, at \*4.

<sup>314</sup> Judgment in a Civil Case, *Abercrombie I*, No. 08-1470, 2009 WL 3517584 (E.D. Mo. Dec. 5, 2009).

<sup>315</sup> *Abercrombie II*, 798 F. Supp. 2d 1272, 1275 (N.D. Okla. 2011), *rev'd on other grounds*, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

<sup>316</sup> *Id.* at 1280-81.

<sup>317</sup> *Id.* at 1280.

<sup>318</sup> *Id.* at 1281.

<sup>319</sup> *Id.* at 1287.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

the expert failed to consider in assessing the potential consequences of granting an exception in the instant case.<sup>322</sup> Accordingly, Abercrombie's past provision of headwear exceptions to its Look Policy undermined the company's claim of undue hardship because it could not show the past exceptions adversely affected its corporate image.<sup>323</sup> On appeal, the Tenth Circuit reversed the district court on other grounds, holding that Abercrombie was entitled to summary judgment because the job applicant failed to notify the company that she needed an accommodation.<sup>324</sup>

In *Abercrombie III*, the EEOC prevailed on summary judgment on its claim that Abercrombie discriminated against a Muslim job applicant because of her religion.<sup>325</sup> Although the applicant received a passing score in her interviews, Abercrombie did not offer her a position because it determined her headscarf was "inconsistent with the 'Abercrombie look.'"<sup>326</sup> As in the prior cases, Abercrombie presented testimony from several executives stating that granting an exception would disrupt the company's careful branding efforts and hurt store performance.<sup>327</sup> The EEOC countered that, like in *Abercrombie II*, the company's evidence in this case was speculative because it did not offer any studies demonstrating a correlation between Look Policy exemptions and either customer confusion or decreased sales.<sup>328</sup> Abercrombie's Director of Stores testified that because a large number of variables factor into store performance, one would be "guessing essentially" in determining if a correlation exists between any one factor and a drop in sales.<sup>329</sup>

Noting that the Ninth Circuit requires "heightened proof of the hardship alleged," the district court discredited the executives' testimony, even though they had shown "some correlation, based on their personal experience, among Look Policy compliance, store sales, and brand image," because none of the witnesses were able to "isolate its effects or the magnitude of such effects on store sales or brand image."<sup>330</sup> The court reasoned that this "dearth of proof" conflicted with the employer's obligation to prove actual imposition or disruption rather than a de minimis, hypothetical, or

---

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1143 (10th Cir. 2013).

<sup>325</sup> No. 10-3911, 2013 WL 1435290, at \*1, 17 (N.D. Cal. Apr. 9, 2013).

<sup>326</sup> *Id.* at \*1.

<sup>327</sup> *Id.* at \*14-15.

<sup>328</sup> *Id.* at \*14.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

“merely conceivable” hardship.<sup>331</sup> In the court’s view, Abercrombie’s evidence afforded “little basis” upon which a reasonable jury could conclude that the company would be unduly burdened by granting the applicant an exception to its Look Policy.<sup>332</sup>

In *Abercrombie IV*, the court granted the EEOC’s motion for summary judgment as to liability on its claim that Abercrombie discriminated against a Muslim employee by discharging her for refusing to remove her headscarf.<sup>333</sup> Abercrombie took a slightly different approach in responding to the EEOC’s summary judgment motion, arguing that the Ninth Circuit did not require proof of “economic harm to prove undue hardship nor that such proof be proffered with specificity or exactitude.”<sup>334</sup> Abercrombie offered lay testimony from numerous employees who testified that, based on their personal experiences, “compliance with the Look Policy is key to Abercrombie’s success and/or that deviations from the policy ‘detract from the in-store experience and negatively affect [the] brand.’”<sup>335</sup>

The court rejected Abercrombie’s evidence, reasoning that none of the witnesses were able to “provide a more concrete basis than that it was their ‘belief’ based on ‘personal experience’ that such harms result.”<sup>336</sup> The court observed that Abercrombie’s evidence provided “only a tenuous, potential connection between the Look Policy and undue hardship, as ‘other’ store issues contributed to declining sales.”<sup>337</sup> As in the earlier cases, the *Abercrombie IV* court cited the absence of any report, survey, or complaint as detrimental to Abercrombie’s undue hardship claim.<sup>338</sup> The court was particularly skeptical of Abercrombie’s position because the Muslim sales associate had worn the headscarf on the job for four months without any complaints, disruption, or noticeable effect on sales.<sup>339</sup> Once again, Abercrombie’s evidence was deemed insufficient to withstand summary judgment.<sup>340</sup>

Although Abercrombie’s recent defeats in federal court have not deterred the clothing retailer from continuing to enforce its Look Policy, it

---

<sup>331</sup> *Id.* at \*14-15.

<sup>332</sup> *Id.* at \*15.

<sup>333</sup> 966 F. Supp. 2d 949, 965 (N.D. Cal. 2013).

<sup>334</sup> *Id.* at 962.

<sup>335</sup> *Id.* at 962-63 (alteration in original).

<sup>336</sup> *Id.* at 964.

<sup>337</sup> *Id.* at 965.

<sup>338</sup> *Id.* at 964.

<sup>339</sup> *Id.* at 963-64. By contrast, the First Circuit rejected a nearly identical argument in *Cloutier v. Costco Wholesale Corp.*, reasoning that even though Costco had not received complaints about the plaintiff’s facial jewelry, the fact that the piercings conflicted with Costco’s intended image was enough to amount to undue hardship. 390 F.3d 126, 135-37 (1st Cir. 2004).

<sup>340</sup> *Abercrombie IV*, 966 F. Supp. 2d at 967.

agreed to several measures to facilitate religious exceptions to the policy as part of a consolidated settlement of the *Abercrombie III* and *Abercrombie IV* cases, including “creat[ing] an appeals process for denials of religious accommodation requests, inform[ing] applicants during interviews that accommodations to the ‘Look Policy’ may be available, and incorporat[ing] headscarf scenarios into all manager training.”<sup>341</sup> Abercrombie also agreed to pay \$71,000 to the two Muslim complainants in those cases.<sup>342</sup>

### C. *The EEOC’s Interpretation of the Case Law*

The EEOC has long pushed for greater religious freedom in the workplace through its expansive interpretation of Title VII’s religious accommodation provision.<sup>343</sup> It is hardly surprising, then, that in recent years the EEOC has relied exclusively on cases favoring religion over image—while completely ignoring contrary cases—in formulating its guidance on image-related hardships. In 2005, the EEOC issued a “fact sheet” in response to discrimination charges based on religion and national origin following the attacks of September 11, 2001.<sup>344</sup> The fact sheet contains various hypothetical situations and the EEOC’s position as to how an employer should respond in each scenario. Two of the example questions implicate corporate image concerns:

[Question:] Narinder, a South Asian man who wears a Sikh turban, applies for a position as a cashier at XYZ Discount Goods. XYZ fears Narinder’s religious attire will make customers uncomfortable. What should XYZ do?

[Answer:] XYZ should not deny Narinder the job due to notions of customer preferences about religious attire. That would be unlawful. It would be the same as refusing to hire Narinder because he is a Sikh. . . . It is important to hire people based on their qualifications rather than on perceptions about their religion, race or national origin.<sup>345</sup>

This hypothetical scenario is consistent with *Red Robin* in that it rejects customer preference as a legitimate basis for withholding a religious accommodation. However, the EEOC’s position in this fact sheet is at odds

---

<sup>341</sup> Press Release, EEOC, *Abercrombie & Fitch Settles Two Pending EEOC Religious Discrimination Suits* (Sept. 23, 2013), available at <http://eeoc.gov/eeoc/newsroom/release/9-23-13c.cfm>.

<sup>342</sup> *Id.*

<sup>343</sup> See *supra* notes 79-81 and accompanying text.

<sup>344</sup> *Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/facts/backlash-employer.html> (last modified Mar. 21, 2005), archived at <http://perma.cc/6KEG-XMAA>.

<sup>345</sup> *Id.*

with the holdings in *Sambo's*, *Cloutier*, *Lorenz*, and other cases in which the courts upheld the denial of accommodations based on what they deemed as the employer's legitimate concern about customer reactions.

The second scenario from the EEOC fact sheet also rejects degradation of corporate image as a conceivable undue hardship:

[Question:] Susan is an experienced clerical worker who wears a hijab (head scarf) in conformance with her Muslim beliefs. XYZ Temps places Susan in a long-term assignment with one of its clients. The client contacts XYZ and requests that it notify Susan that she must remove her hijab while working at the front desk, or that XYZ assign another person to Susan's position. According to the client, Susan's religious attire violates its dress code and presents the "wrong image." Should XYZ comply with its client's request?

[Answer:] XYZ Temps may not comply with this client request without violating Title VII. The client would also violate Title VII if it made Susan remove her hijab or changed her duties to keep her out of public view. Therefore, XYZ should strongly advise against this course of action. Notions about customer preference real or perceived do not establish undue hardship, so the client should make an exception to its dress code to let Susan wear her hijab during front desk duty as a religious accommodation. If the client does not withdraw the request, XYZ should place Susan in another assignment at the same rate of pay and decline to assign another worker to the client.<sup>346</sup>

The EEOC's response to this second hypothetical scenario is consistent with the *Alamo Rent-a-Car* court's rejection of the notion that an employer can remove a frontline employee from public view if the employee's religious expression conflicts with the employer's corporate image. Again, however, the EEOC's position on the employer's responsibility fails to acknowledge that in other cases, such as *Birdi* and *Brown*, reassignment to positions with no public contact was upheld as reasonable.

The latest version of the EEOC Compliance Manual contains similar hypotheticals to those from the EEOC fact sheet.<sup>347</sup> These hypotheticals show that the EEOC puts little stock in claims of image-based hardship. Although these kinds of agency materials only have the "power to persuade" judicial decisions,<sup>348</sup> the EEOC's position nonetheless influences both how

---

<sup>346</sup> *Id.*

<sup>347</sup> EEOC, EEOC COMPLIANCE MANUAL § 12 (2008), available at <http://www.eeoc.gov/policy/docs/religion.html>. Examples 14 and 47 are factually similar to the scenarios from the EEOC fact sheet referenced above. *Id.*

<sup>348</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (citation omitted).

courts decide discrimination charges and, consequently, how employers and employees view religious accommodation issues under Title VII.

## V. RECOMMENDATIONS AND POTENTIAL IMPACT

As the diversity of religious beliefs and practices in the American workplace grows, conflicts between religious expression and corporate image will likely increase in both frequency and intensity. Unfortunately, case law offers little, if any, practical guidance; indeed, the cases highlighted in Part IV illustrate how inconsistent courts can be in weighing religious accommodations against corporate image. Costco, Jiffy Lube, and Wal-Mart could deny religious accommodations that conflicted with their respective images, but when Red Robin, Alamo Rent-a-Car, and Abercrombie & Fitch did the same, their actions were deemed discriminatory. Obviously, what constitutes undue hardship can vary from case to case. But, even though accommodation law may not lend itself to bright-line tests or one-size-fits-all solutions, employers and employees deserve more than the vague and ultimately unhelpful “fact-specific inquiry” or “totality of circumstances” rubric that dominates today’s jurisprudence. When courts well-versed in the nuances of Title VII reach conflicting decisions in factually similar cases, it is unrealistic to expect employers to fare any better. Aside from possible appellate reversal (or perhaps a critical law review article), courts have little incentive to rethink their approach to claims of image-related undue hardship. By contrast, employers stand to lose much more from inconsistent case law through litigation costs, verdict payouts, or reputational damage. The following recommendations are intended to generate more consistent decisions that will in turn provide meaningful direction to employers and employees faced with religious accommodation issues.

### A. *A True De Minimis Standard*

To generate more consistent case law, courts analyzing claims of image-based undue hardship should apply a true de minimis standard. When the Supreme Court announced in *Trans World Airlines, Inc. v. Hardison* that an employer need not provide an accommodation that would impose more than de minimis cost, it quite deliberately set the bar as low as possible for employers to prove undue hardship.<sup>349</sup> Translated from Latin, “de minimis” means “of the least.”<sup>350</sup> *Black’s Law Dictionary* defines “de minimis”

---

<sup>349</sup> 432 U.S. 63, 84 (1977).

<sup>350</sup> See BLACK’S LAW DICTIONARY 524 (10th ed. 2014).

as “trifling,” “negligible,” and “so insignificant that a court may overlook it in deciding an issue or case,”<sup>351</sup> while courts characterize the standard as “not a heavy burden,”<sup>352</sup> “minimal,”<sup>353</sup> “very low,”<sup>354</sup> “extremely low,”<sup>355</sup> and “neither onerous, nor intended to be rigid, mechanized or ritualistic.”<sup>356</sup> The *Hardison* dissent interpreted the de minimis standard as so low that employers “need not grant even the most minor special privilege to religious observers to enable them to follow their faith.”<sup>357</sup> Religious freedom proponents have echoed this concern, pushing for legislation that replaces the de minimis standard with a more demanding “significant difficulty or expense” test.<sup>358</sup>

Although most religious accommodation decisions cite *Hardison*’s de minimis language, adherence to this standard can vary from court to court.<sup>359</sup> Not surprisingly, courts favoring image over religion tend to interpret the standard quite literally: they treat the standard as so low that they focus on whether there is an inconsistency between the accommodation and the corporate image that could cause the employer to lose control over its image, rather than on whether the accommodation itself has or will cause economic loss, customer complaints, or other adverse consequences beyond loss of control. For example, in *Cloutier*, the First Circuit did not concern itself with whether the plaintiff’s appearance adversely affected Costco’s business—the evidence showed there were no customer complaints.<sup>360</sup> Instead, the court focused on the notion that the plaintiff’s facial jewelry

---

<sup>351</sup> *Id.*

<sup>352</sup> *Dupree v. UHAB-Sterling St. Hous. Dev. Fund Corp.*, No. 10-1894, 2012 WL 3288234, at \*4 (E.D.N.Y. Aug. 10, 2012).

<sup>353</sup> *Faul v. Potter*, 355 F. App’x. 527, 528 (2d Cir. 2009).

<sup>354</sup> *Cannon v. Burkybile*, No. 99-4623, 2002 WL 448988, at \*9 (N.D. Ill. Mar. 22, 2002).

<sup>355</sup> *Franklin v. Astrue*, No. 11-1615, 2012 WL 3059407, at \*2 (W.D. Wash. July 25, 2012).

<sup>356</sup> *Beyer v. Cnty. of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (citation omitted).

<sup>357</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

<sup>358</sup> *See, e.g.*, Workplace Religious Freedom Act of 2013, S. 3686, 112th Cong. § 2(3) (2012) (“In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Supreme Court held that an employer could deny an employee’s request for religious accommodation based on any burden greater than a de minimis burden on the employer, and thus narrowed the scope of protection of title VII against religious discrimination in employment, contrary to the intent of Congress.”); *see also id.* at § 4(a)(3) (“[W]ith respect to the practice of wearing religious clothing or a religious hairstyle, or of taking time off for a religious reason, an accommodation of such a religious practice . . . shall be considered to impose an undue hardship on the conduct of the employer’s business only if the accommodation imposes a significant difficulty or expense on the conduct of the employer’s business.”).

<sup>359</sup> *See* Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII’s Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 *FORDHAM L. REV.* 839, 847 (1985) (citing cases involving Seventh Day Adventists’ religious objections to mandatory payment of union dues as examples of courts demanding a higher evidentiary burden from employers).

<sup>360</sup> *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004).

genuinely conflicted with Costco's professional public image, holding that such conflict amounted to undue hardship by interfering with the company's ability to project the image of its choosing.<sup>361</sup> Likewise, the *Sambo's*, *Johnson*, *Hussein*, *Birdi*, and *Brown* decisions make no mention of customer complaints or any other evidence of how an accommodation would adversely impact corporate image. Instead, the courts relied on the fact that the requested religious accommodations conflicted with the company's images, concluding this conflict itself imposed more than de minimis cost by jeopardizing the companies' ability to control their images.

By contrast, in cases favoring religion over image, courts tend to reject the notion that conflict itself can constitute undue hardship and instead focus on whether there is some cost to the employer beyond loss of control over its image. In a sense, these courts pay lip service to the de minimis standard, while in reality imposing a de minimis-plus burden that is more demanding than the Supreme Court precedent allows. For example, the *Banks* court largely ignored the fact that twenty to twenty-five customers complained about the plaintiffs' religious expression in holding that "[t]he record does not compel the conclusion that plaintiffs' greetings inflicted on Service America anything more than a *de minimis* burden, or that a refusal to prevent plaintiffs from extending such greetings was likely to cause undue future hardship to defendant."<sup>362</sup> Similarly, the *Red Robin* court downplayed the conflict between the employer's family-friendly image and the employee's religious tattoos, instead focusing on the tattoos' small size and foreign language scripts in speculating that "few" customers would notice them.<sup>363</sup> In the court's view, the risk of an adverse response to the tattoos by a few customers did not impose more than a de minimis cost.<sup>364</sup>

Unless and until Congress legislates a more onerous burden, the de minimis standard remains the proper measure of undue hardship. Correctly interpreted, this standard means that to establish undue hardship, an employer need only prove an accommodation would impose more than trifling or minimal cost. An accommodation at odds with corporate image diminishes a company's control over its image. Given the importance—and fragility—of corporate image, courts must recognize that this loss of control itself can impose more than a de minimis cost to a company. Accordingly, proper application of the de minimis standard mandates that this inquiry be

---

<sup>361</sup> *Id.* at 135-36.

<sup>362</sup> *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703, 709 (D. Kan. 1996).

<sup>363</sup> *EEOC v. Red Robin Gourmet Burgers, Inc.*, No. 04-1291, 2005 WL 2090677, at \*4 (W.D. Wash. Aug. 29, 2005).

<sup>364</sup> *Id.*

the starting point of a court's analysis. Only if the conflict itself between a proposed religious accommodation and the company's image does not impose more than *de minimis* cost should the court then examine the accommodation's secondary consequences, such as customer complaints, loss of business, or reputational harm. To conform with Supreme Court precedent, courts must apply a true *de minimis* standard in analyzing such consequences to ensure employers incur no more than minimal damage to their image.

### B. *A Uniform Standard of Proof*

A second way to establish a more consistent body of religious accommodation case law is mandating that courts apply a uniform evidentiary standard for establishing undue hardship. Because the Supreme Court has never weighed in on what an employer must prove to establish "more than *de minimis* cost,"<sup>365</sup> the level of proof varies from circuit to circuit. The Ninth Circuit sits on one end of the spectrum, having adopted a heightened standard requiring proof of "actual imposition" or "disruption of the work routine"; hypothetical or conceivable hardships are not competent evidence of undue hardship.<sup>366</sup> On the other end of the spectrum is the Fifth Circuit, which does not require proof that the employer actually incurred costs to demonstrate undue hardship, but instead recognizes that "[t]he mere possibility of an adverse impact . . . is sufficient to constitute an undue hardship."<sup>367</sup> The First Circuit falls somewhere in the middle: it is skeptical of hypothetical hardships but allows an employer to prove undue hardship without actually having undertaken an accommodation by permitting the court to "examin[e] the specific hardships imposed by specific accommodation proposals."<sup>368</sup> Unsurprisingly, these disparate standards of proof among the circuit courts contribute significantly to the dissonance of the religious accommodation case law.

The Ninth Circuit's requirement of actual imposition or disruption makes little sense, particularly in the context of image-based hardships, where a single employee's actions or appearance can jeopardize an entire

---

<sup>365</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

<sup>366</sup> *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (citation omitted) (internal quotation marks omitted); *see also Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.").

<sup>367</sup> *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000).

<sup>368</sup> *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (quoting *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989)).

organization's image. Under this heightened standard, proving undue hardship is practically impossible for an employer unless the employer implements the accommodation and proves that the accommodation somehow damaged its business. For example, the *Abercrombie III* and *Abercrombie IV* courts held that Abercrombie's lay and expert testimony about the prospective damage to the company's careful branding efforts caused by accommodating the plaintiffs was so speculative and hypothetical that it failed to even raise an issue of fact as to whether Abercrombie would suffer undue hardship.<sup>369</sup> The courts required Abercrombie to use studies, survey data, customer complaints, sales reports, or financial statements to prove it had already incurred undue hardship to survive summary judgment.<sup>370</sup> Abercrombie could not rely on the risk of harm to its image to justify denying religious accommodations. Instead, to establish undue hardship, the courts required that Abercrombie incur such harm and also isolate and prove the causal connection between the accommodation and the damage to its corporate image.

Requiring that an employer suffer hardship to prove hardship is inherently unfair. For instance, in cases where a religious accommodation poses safety concerns, it would be ludicrous to require employers to wait until injury or death actually results to establish undue hardship. Indeed, several courts have rejected this proposition outright. In *EEOC v. GEO Group, Inc.*, the Third Circuit upheld the employer's refusal to allow Muslim prison guards to wear headscarves out of purely prospective concerns that the headscarves could be used to smuggle in contraband, to conceal the identity of the wearer, or as a weapon against a prison employee in an attack.<sup>371</sup> The court noted that even though there were no reports of these types of incidents, the employer "should not have to wait for a khimar [headscarf] to actually be used in an unsafe or risky manner, risking harm to employees or inmates, before this foreseeable risk is considered in determining undue hardship."<sup>372</sup> In *Finnie v. Lee County*, the court held that a detention officer's request to wear skirts in accordance with her religion imposed an undue hardship as a matter of law, even though there was no evidence to substantiate the employer's claim that wearing a skirt could cause safety and security risks.<sup>373</sup> The court observed that "to carry a burden of showing undue hardship, Defendants do not even need to prove that a skirt

---

<sup>369</sup> *Abercrombie IV*, 966 F. Supp. 2d 949, 964-65 (N.D. Cal. 2013); *Abercrombie III*, No. 10-3911, 2013 WL 1435290, at \*14-15 (N.D. Cal. Apr. 9, 2013).

<sup>370</sup> *Abercrombie IV*, 966 F. Supp. 2d at 963; *Abercrombie III*, 2013 WL 1435290, at \*14-15.

<sup>371</sup> 616 F.3d 265, 274 (3d Cir. 2010).

<sup>372</sup> *Id.* (citation omitted).

<sup>373</sup> 907 F. Supp. 2d 750, 781 (N.D. Miss. 2012).

has . . . actually *caused* such safety and security problems. Instead, the Defendants must show safety and security *risks*.<sup>374</sup> There is no reason that courts should analyze image cases any differently from safety cases. A company's image can take years to build and only moments to destroy. Because image-related cases can involve potentially serious consequences, courts should focus on the risks that an accommodation poses to the employer's corporate image rather than the accommodation's actual consequences.

The First Circuit's approach to analyzing claims of undue hardship seems most consistent with Supreme Court precedent. While less accepting of hypothetical hardships than the Fifth Circuit, the First Circuit acknowledges employers should not have to actually incur hardship to prove undue hardship. Instead, the focus should be on how a specific proposed accommodation would impose a specific hardship.<sup>375</sup> This approach is supported by *Hardison*, in which the Supreme Court did not require proof of actual imposition or disruption but instead focused on how possible accommodations could potentially create undue hardship.<sup>376</sup> The First Circuit's approach seems particularly well-suited to image cases. Given the fragility of corporate image, it makes sense for courts to analyze the risk of specific hardship that might result from an accommodation rather than requiring an employer to actually incur and then prove such hardship.

---

<sup>374</sup> *Id.*; see also *McCarter v. Harris Cnty., Tex.*, No. 04-4159, 2006 WL 1281087, at \*5 (S.D. Tex. May 5, 2006) (finding that evidence that the plaintiff-employee worked for two years in a skirt without a safety incident did not undermine defendant's undue hardship claim, as the law does not require proof that the defendant actually incurred costs to demonstrate undue hardship); *EEOC v. Oak-Rite Mfg. Corp.*, No. 99-1962, 2001 WL 1168156, at \*14 (S.D. Ind. Aug. 27, 2001) (holding that the defendant-employer was not required to prove conclusively that the plaintiff-employee would be injured if allowed to wear an ankle-length skirt instead of pants in the defendant's manufacturing plant); *Favero v. Huntsville Ind. Sch. Dist.*, 939 F. Supp. 1281, 1293 (S.D. Tex. 1996), *aff'd mem.*, 110 F.3d 793 (5th Cir. 1997) (noting that Title VII does not require employers to deny accommodation requests only if they are certain in advance that honoring the request would cause an undue hardship).

<sup>375</sup> See *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (noting that "it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations" (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975))).

<sup>376</sup> See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977) (finding that TWA "made reasonable efforts to accommodate" the plaintiff and that it could not have implemented the plaintiff's suggested alternatives without undue hardship involving breach of the seniority provisions of the airline employees' collective bargaining agreement).

### C. Greater Employer Deference

A final recommendation is that courts grant employers greater deference in proving image-based undue hardships. Employers know their own brands far better than anyone else and, therefore, are best positioned to explain the nuances of their image and how an accommodation might conflict or interfere with that image. Because image is among a corporation's most valuable assets, companies devote millions of dollars and countless hours to building and maintaining an image that appeals to a variety of stakeholders. They hire marketing firms, strategists, consultants, branding analysts, public relations experts, graphic designers, and organizational behaviorists—all with the singular purpose of building an image that will generate the consumer commitment, loyalty, passion, and trust necessary for long-term success. Given their intimate knowledge of their own branding efforts, employers can best articulate how a certain religious accommodation might interfere with their corporate image. The fact that the most qualified witnesses often work for the defendant should not automatically diminish the credibility of the evidence, as some courts seem to suggest.<sup>377</sup> Assuming an employer's evidence of hardship holds up against traditional discrediting mechanisms such as cross-examination and rebuttal testimony, courts should afford such evidence greater weight in recognition that the company is in the best position to explain how an accommodation would interfere with its image.

A second reason for greater employer deference is that proving an accommodation's negative effects on the employer's image can be extraordinarily difficult and expensive. Absent a customer complaint about an employee's religious expression, it is almost impossible for an employer to prove an accommodation damaged its image.<sup>378</sup> Unlike other types of hardship, damage to image is almost always intangible and, consequently, very difficult to measure. It is easy to calculate the impact of paying

---

<sup>377</sup> See, e.g., *Abercrombie IV*, 966 F. Supp. 2d 949, 963 (N.D. Cal. 2013) (noting with disfavor that “Abercrombie only offers unsubstantiated opinion testimony of its own employees to support its claim of undue hardship”); *Abercrombie III*, No. 10-3911, 2013 WL 1435290, at \*14 (N.D. Cal. Apr. 9, 2013) (criticizing that “Abercrombie offers only the seemingly speculative assertion on the part of its executives that the correlation [between failure to comply with the Look Policy and consumer confusion or decreased sales] exists”); *United States v. N.Y.C. Transit Auth.*, No. 04-4237, 2010 WL 3855191, at \*22 (E.D.N.Y. Sept. 28, 2010) (finding that “[a]lthough defendants may be able to introduce evidence that these hardships will result, that evidence comes largely from defendants' own employees or retained experts and is somewhat speculative in nature”).

<sup>378</sup> Even then, as *Banks* illustrates, customer complaints alone may not be enough to prove undue hardship. See *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703, 710 (D. Kan. 1996) (“[T]he fact that defendant received assorted complaints . . . does not, standing alone, demonstrate that plaintiffs' jobs were ‘completely incompatible’ with their practice of extending religious greetings to food service customers.”).

overtime wages to an employee who works in place of a coworker observing the Sabbath. But proving the adverse consequences of an employee saying “God bless you” to customers is far more difficult. Unless an offended customer actually complains, there is no clear way to measure how an employee’s religious expression affects customers’ buying intentions, commitment, loyalty, or overall perception of the business. The effect such expression has on how other stakeholders view an organization may be even more difficult to detect, although certainly no less significant.

Measuring an accommodation’s impact is further complicated by the difficulty of isolating the effect of the accommodation itself from other variables that could jointly affect stakeholder perception. For instance, a customer may vow never to shop at a store again if he perceives the store as dirty or crowded, its prices as too high, its employees as unapproachable, or any combination of such factors. Perhaps an employee’s religiously mandated appearance or expression also contributed to the customer’s overall negative perception of the store. Or perhaps not. Proving the lost business was the result of the employee’s religious expression—independent of the other negative factors the customer experienced—is nearly impossible, even using the most advanced statistical measures. Given the difficulty of proving the impact of an accommodation on corporate image, courts should be open to other types of evidence, particularly employee testimony, to establish undue hardship.

A final reason to grant employers greater deference in proving image-based hardships is that the undue hardship standard itself supposedly requires so little. The *de minimis* burden means an employer can lawfully withhold an accommodation if the accommodation would impose anything more than a minimal cost. However, the *de minimis* standard is of little use to employers if courts automatically discount managerial testimony as biased or insist on “objective” evidence that an accommodation directly damaged a company’s bottom line.<sup>379</sup> Although it is reasonable to require employers to present more than *de minimis* evidence of *de minimis* hardship, the level of proof should be somewhat commensurate with the level of hardship. Granting greater deference to employers is an effective means of accomplishing this objective.

#### D. *Potential Impact*

If implemented, the foregoing recommendations will likely produce more consistent judicial decisions. This result alone would go a long way

---

<sup>379</sup> See *supra* note 377 and accompanying text.

toward helping employers more correctly and confidently balance religious accommodation proposals against image concerns. Furthermore, although the EEOC has long been at odds with the courts in its interpretation of Title VII's religious accommodation requirements, perhaps the Commission would feel compelled to align its regulations with a more unified case law. If the courts and the EEOC can present a more united front in their assessment of image-based undue hardship claims, employers will have a much better sense of when they must set aside image concerns in favor of religious accommodations. Employees, too, stand to benefit by having a clearer sense of when to push for an accommodation that conflicts with the employer's image and when it may make more sense to look for another job.

Aside from generating greater clarity, the intended effect of these recommendations is to afford employers greater control over their own image. There is no doubt employers stand to benefit if courts apply a more conservative *de minimis* standard, acknowledge hypothetical hardships, and grant the employer greater deference in proving its defense. Each of these recommendations will make it easier for employers to prove undue hardship in most cases. In a perfect world, an employee would never have to choose between her religion and her job. Unfortunately, that is not realistic. The cases discussed herein illustrate the conflict that can arise between an employee's religious expression and a company's image. The Supreme Court has made clear that when employers and employees clash over religious accommodations, the employer can and should prevail upon minimal proof of undue hardship. This principle should apply with equal, if not greater, force when a religious accommodation conflicts with corporate image. In today's cutthroat business environment, a company's image simply is too critical—and too fragile—to justify imposing anything beyond the least intrusive religious accommodation obligations. The recommendations proposed in this Article will help ensure this standard for evaluating an employer's obligations to make religious accommodations remains in effect.

#### CONCLUSION

Conflicts between religious accommodation and corporate image are almost certain to increase in the coming years, given the growing religious diversity of the American workforce and the increasing prominence of religion in the workplace. When such conflicts arise, it is critical that both employers and employees have a clear sense of their rights and obligations under Title VII. Existing case law provides little meaningful guidance, because courts continue to reach conflicting decisions in factually similar cases. When a New York federal district court upholds a hotel's right to

prohibit a bearded waiter from serving guests, while a Washington federal district court rules against a restaurant that fired a waiter for refusing to cover his tattoos, employers and employees are left to wonder when a religious accommodation that conflicts with corporate image might be required. At present, there is no definitive answer.

Religious accommodation law is unique in that it sometimes requires differential or preferential treatment of employees based on religious beliefs. Because courts focus on Title VII as an antidiscrimination statute rather than an affirmative action mandate, it is unsurprising that the Supreme Court set the bar for establishing undue hardship as low as possible. In theory, the *de minimis* standard means an employer need not grant a religious accommodation if the cost of doing so is more than minimal. But in practice, some courts—especially in cases involving claims of image-based hardship—make it much more difficult for employers to prove undue hardship by imposing a heightened standard or by demanding evidence that is nearly impossible to obtain. The inconsistency in the religious accommodation case law is a direct consequence of these different standards.

Because religious accommodation cases do not lend themselves to bright-line tests, there will always be some uncertainty as to whether an accommodation is required under a particular set of facts. However, the degree of uncertainty can be greatly reduced if courts adopt the foregoing recommendations, namely, courts should stay true to the *de minimis* standard, apply a uniform standard of proof, and grant employers greater deference in proving undue hardship. These guidelines will not only assist courts in striking the proper balance between religious expression and corporate image, but will also lead to a more consistent body of case law that employers and employees alike can rely on as religious accommodation issues in the workplace become more commonplace.