

12-IV REASONABLE ACCOMMODATION

Overview: Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship.^[203] The Title VII “undue hardship” defense is defined differently than the “undue hardship” defense for disability accommodation under the Americans with Disabilities Act (ADA). Title VII’s undue hardship defense to providing religious accommodation has been defined by the Supreme Court as requiring a showing that the proposed accommodation in a particular case poses “more than a *de minimis*” cost or burden. This is a lower standard for an employer to meet than undue hardship under the ADA, which is defined in that statute as “an action requiring significant difficulty or expense.”^[204]

“Title VII requires otherwise-neutral policies to give way to the need for an accommodation.”^[205] An individual alleging the denial of a religious accommodation is generally seeking an adjustment to a neutral work rule that infringes on the employee’s ability to practice his religion.^[206] “The accommodation requirement is ‘plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others.’”^[207]

A. Religious Accommodation

A religious accommodation is an adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. An employer need not provide a reasonable accommodation if doing so would cause undue hardship on the conduct of the employer’s business, which the Supreme Court has interpreted to mean an accommodation that would require the employer to bear more than a *de minimis* cost or burden.^[208] The employer’s duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion. Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work.^[209] The Commission’s position is that the denial of reasonable religious accommodation absent undue hardship is actionable even if the employee has not separately suffered an independent adverse employment action, such as being disciplined, demoted, or discharged as a consequence of being denied accommodation.^[210] This is because requiring him to work without religious accommodation where a work rule conflicts with his religious beliefs necessarily alters the terms and conditions of his employment for the worse.^[211] However, the courts are split on this question.^[212]

1. Notice of the Conflict Between Religion and Work

Employers need not provide an accommodation unless they are on notice that one is needed for religious purposes.^[213] Typically, the employer will advise the applicant or employee of its policies or a particular work requirement, and in response the applicant or employee will indicate that an accommodation is needed for religious reasons. In some instances, even absent an applicant's or employee's request, the employer will be on notice that the observance or practice is religious and conflicts with a work policy, and therefore that accommodation is or could be needed.^[214] In such circumstances, it would violate Title VII for an employer to fail to provide a reasonable accommodation unless it proves that doing so would pose an undue hardship.^[215]

In addition, even in the absence of any notice that a religious accommodation is needed, an employer violates Title VII if it takes an adverse action against an applicant or employee (such as failing to hire) based on its belief that the applicant or employee might need a reasonable religious accommodation, unless the employer proves that such an accommodation would have imposed an undue hardship.^[216]

When requesting accommodation, the applicant or employee need not use any "magic words," such as "religious accommodation" or "Title VII." The employer must have enough information to make the employer aware that there exists a conflict between the applicant's or employee's religious observance, practice, or belief and a requirement for applying for or performing the job.^[217] If the employer reasonably needs more information, the employer and the applicant or employee should discuss the request. The applicant or employee may need to explain the religious nature of the belief, observance, or practice at issue, and cannot assume that the employer will already know or understand it.^[218] Similarly, the employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar, but should ask the applicant or employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement. In determining if a conflict exists, it is irrelevant that the employer does not view the work requirement as implicating a religious belief, or that most people of the applicant's or employee's faith would not; it is the applicant's or employee's own religious beliefs that are relevant.^[219]

EXAMPLE 30

Failure to Advise Employer That Request Is Due to Religious Practice or Belief

Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's

refusal to sign the form was based on his religious beliefs. Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, it did not have an opportunity to offer to accommodate him. The employer has not violated Title VII.^[220]

2. Discussion of Request

Although an employer is not required by Title VII to conduct a discussion with an employee before making a determination on an accommodation request, as a practical matter it can be important to do so. Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted. Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether a reasonable accommodation is available without posing an undue hardship on the operation of the employer's business.^[221] This typically involves the employer and employee mutually sharing information necessary to process the accommodation request. Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.

Failure to confer with the employee is not an independent violation of Title VII. But as a practical matter, such failure can have adverse legal consequences. For example, in some cases where an employer has made no effort to act on an accommodation request, courts have found that the employer lacked the evidence needed to meet its burden of proof to establish that the plaintiff's proposed accommodation would actually have posed an undue hardship.^[222]

Likewise, employees should cooperate with an employer's requests for reasonable information. For example, if an employee requested a schedule change to accommodate daily prayers, the employer might need to ask for information about the religious observance, such as the time and duration of the daily prayers, in order to determine if accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation but instead provides a reasonable alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.^[223]

Where the accommodation request itself does not provide enough information to enable the employer to make a determination, and the employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to make a limited

inquiry into the facts and circumstances of the employee's claim that the belief or **practice at issue is religious and sincerely held**, and that the belief or practice gives rise to the need for the accommodation.^[224] Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case.

EXAMPLE 31

Sincerity of Religious Belief Questioned

Bob, who had been a dues-paying member of the CDF union for fourteen years, had a work-related dispute with a union official and one week later asserted that union activities were contrary to his religion and that he could no longer pay union dues. The union doubted whether Bob's request was based on a sincerely held religious belief, given that it appeared to be precipitated by an unrelated dispute with the union, and he had not sought this accommodation in his prior fourteen years of employment. In this situation, the union can require him to provide additional information to support his assertion that he sincerely holds a religious conviction that precludes him from belonging to – or financially supporting – a union.^[225]

When an employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. That information need not, however, take any specific form. For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is requested, it does not have to come from a clergy member or fellow congregant, but rather could be provided by others who are aware of the employee's religious practice or belief.^[226]

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

EXAMPLE 32

Clarifying a Request

Diane requests that her employer schedule her for “fewer hours” so that she can “attend church more frequently.” The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. While Diane’s request lacked sufficient detail for the employer to make a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting an accommodation would pose an undue hardship on the employer’s business.

3. What is a “Reasonable” Accommodation?

Although an employer never has to provide an accommodation that would pose an undue hardship, see *infra* § 12-IV-B, it discharges its accommodation duty if it provides a “reasonable” accommodation. An adjustment offered by an employer is not a “reasonable” accommodation if it merely lessens rather than eliminates the conflict between religion and work, provided that eliminating the conflict would not impose an undue hardship.^[227] If all accommodations eliminating such a conflict would impose an undue hardship on an employer, the employer must reasonably accommodate the employee’s religious practice to the extent that it can without suffering an undue hardship, even though such an accommodation would be “partial” in nature.^[228] To qualify as a reasonable accommodation, an adjustment also must not discriminate against the employee or unnecessarily disadvantage the employee’s terms, conditions, or privileges of employment.^[229]

Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee.^[230] However, an employer’s proposed accommodation will not be “reasonable” if a more favorable accommodation is provided to other employees for non-religious purposes,^[231] or, for example, if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.^[232]

Ultimately, reasonableness is a fact-specific determination. “The reasonableness of an employer’s attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another ‘The term “reasonable accommodation” is a relative term and cannot be given a hard and fast meaning. Each case . . . necessarily depends upon its own facts and

circumstances, and comes down to a determination of “reasonableness” under the unique circumstances of the individual employer-employee relationship.”^[233]

EXAMPLE 33

Employer Violates Title VII if it Offers Only Partial Accommodation Where Full Accommodation Would Not Pose an Undue Hardship

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel this time off only every other week. The arena’s proposed adjustment does not fully eliminate the religious conflict and therefore cannot be deemed a reasonable accommodation in the absence of a showing that giving Rachel the requested time off every week poses an undue hardship for the arena. If the arena makes that showing, it must still accommodate Rachel’s religious practice to the extent it can without suffering an undue hardship, which could include granting some, but not all, Friday evenings and/or Saturdays off.^[234]

EXAMPLE 34

Employer Not Obligated to Provide Employee’s Preferred Accommodation

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. In response, her employer offered to allow her to work on Thursdays, which she found inconvenient because she takes a college class on that day. Even if Tina preferred a different schedule, the employer is not required to grant Tina’s preferred accommodation.^[235]

EXAMPLE 35

Accommodation by Transfer

Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating directly or indirectly in ending a life, and that this proscription prevents her from assisting with

abortions. She asked the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concluded that, due to staffing cuts and risks to patients' safety, it could not accommodate Yvonne within the Labor and Delivery Unit because there were not enough staff members able and willing to trade with her. The hospital instead offered to permit Yvonne to transfer, without a reduction in pay or benefits, to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform abortion procedures. As described below,^[236] an employee should be accommodated in his or her current position absent an undue hardship. Here, the hospital could not accommodate Yvonne in her current position due to staffing cuts and risks to patient safety, so the hospital's solution of a lateral transfer complies with Title VII.^[237] **If the hospital is government run or receives federal funds, it could also have obligations to accommodate Yvonne under federal laws protecting conscience rights of its health care employees.**^[238]

Title VII is violated by an employer's failure to reasonably accommodate even if, to avoid adverse consequences, an employee continues to work after his or her accommodation request is denied. "[A]n employee who temporarily gives up his [or her] religious practice to submit to employment requirements [does not] waive[] his [or her] discrimination claim."^[239] Thus, the fact that an employee acquiesces to the employer's work rule, continuing to work without an accommodation after the employer has denied the request, should not defeat the employee's legal claim.^[240]

In addition, the obligation to provide reasonable accommodation absent undue hardship is a continuing obligation. Employers should be aware that an employee's religious beliefs and practices may evolve or change over time, and that this may result in requests for additional or different accommodations.^[241] Similarly, the employer has the right to discontinue a previously granted accommodation that is no longer utilized for religious purposes or subsequently poses an undue hardship.

B. Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. The Supreme Court has defined "undue hardship" for purposes of Title VII as imposing "more than a *de minimis* cost" on the operation of the employer's business.^[242] The concept of "more than *de minimis* cost" is discussed below in sub-section 2. **Although the employer's showing of undue hardship under Title VII is easier than under the ADA, the burden of persuasion is still on the employer.**^[243] If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

1. Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each

case.”^[244] Relevant factors may include the type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.^[245] For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who seeks a transfer to a location with a nearby mosque that he can attend during his lunch break.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee’s proposed accommodation would involve.^[246] An employer cannot rely on hypothetical hardship when faced with an employee’s religious obligation that conflicts with scheduled work, but rather should rely on objective information.^[247] A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

2. More than “*De Minimis Cost*”

To establish undue hardship, the employer must demonstrate that the accommodation would require the employer “to bear more than a *de minimis cost*.”^[248] However, “[u]ndue hardship is something greater than hardship.”^[249] Factors to be considered include “the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation.”^[250] Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes, or infrequent or temporary payment of premium wages (e.g., overtime rates) while a more permanent accommodation is sought, will not constitute more than a *de minimis cost*, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally require more than *de minimis cost* to the employer.^[251]

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer’s business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs,^[252] infringes on other employees’ job rights or benefits,^[253] impairs workplace safety,^[254] or causes coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work.^[255] Whether the proposed accommodation conflicts with another law will also be considered.^[256]

EXAMPLE 36

Religious Need Can Be Accommodated

David wears long hair pursuant to his Native American religious beliefs. David applies for a job as a server at a restaurant which requires its male employees to wear their hair “short and neat,” in order to provide a certain image to its customers. When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his religious beliefs and offers to wear it held up with a clip or under a hair net. The manager refuses this accommodation and denies David the position based on his long hair. Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer will be liable for denial of reasonable accommodation and discriminatory failure to hire.

EXAMPLE 37

Safety Risk Poses Undue Hardship

Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill’s dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operates. Because the evidence establishes that wearing pants is truly necessary for safety reasons, the accommodation requested by Patricia poses an undue hardship.^[257]

3. Seniority Systems and Collectively Bargained Rights

A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA).^[258] Of course, the mere existence of a conflict between the requested accommodation and a seniority system or CBA does not relieve the employer of the duty to attempt reasonable accommodation of its employees’ religious practices; the question is whether an accommodation can be provided without violating the seniority system or CBA.^[259] Allowing voluntary substitutes and swaps does not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system or CBA.^[260] Employer and employee arrangements regarding voluntary substitutes and swaps are discussed in more detail in section 12-IV-C-2.

EXAMPLE 38

Schedules Based on a Seniority System or Collectively Bargained Rights

Susan, an employee of Quick Corp., asks not to work on her Sabbath. Quick Corp. and its employees' union have negotiated a CBA which provides that weekend shifts will rotate evenly among employees. If Susan can find qualified coworkers voluntarily willing to swap shifts to accommodate her sincerely held religious beliefs, the employer could be found liable for denial of reasonable accommodation if it refuses to permit the swap to occur. The existence of the collectively bargained system for determining weekend shifts should not result in the denial of accommodation if a voluntary swap can be arranged by the employee without violating the system or otherwise posing an undue hardship. The result would be the same if Quick Corp. had a unilaterally imposed bona fide seniority system (rather than a CBA) pursuant to which weekend shifts are determined.

However, if other employees were unwilling to swap shifts or were otherwise harmed by not requiring Susan to work on the shift in question, or the employer would be subject to other operational costs that were more than *de minimis* by allowing Susan to swap shifts, then the employer can demonstrate undue hardship.^[261]

4. Coworker Complaints

Although infringing on coworkers' abilities to perform their duties^[262] or subjecting coworkers to a hostile work environment^[263] will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of coworkers will not.^[264] Undue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief or by alleged "special treatment" afforded to the employee requesting religious accommodation; a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work.^[265] Applying this standard, it would be an undue hardship for an employer to accommodate religious expression that is unwelcome potential harassment based on race, color, sex, national origin, religion, age, disability, or genetic information, or based on its own internal anti-harassment policy, and it may take action consistent with its obligations under Title VII and the other EEO laws. See also §§ 12-III-C, *supra*, and 12-IV-C-6, *infra* (discussing complaints regarding proselytizing and other forms of religious expression).

5. Security Considerations

If a religious practice conflicts with a legally mandated federal, state, or local security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, courts will engage

in a fact-specific inquiry to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

EXAMPLE 39

Accommodation Implicating Security Concerns

Patrick is employed as a correctional officer at a state prison, and his brother William is employed as a grocery store manager. Both Patrick and William seek permission from their respective employers to wear a fez at work as an act of faith on a particular holy day as part of their religious expression. Both employers deny the request, citing a uniformly applied workplace policy prohibiting employees from wearing any type of head covering. The prison's policy is based on security concerns, supported by evidence, that head coverings may be used to conceal drugs, weapons, or other contraband, and may spark internal violence among prisoners. The grocery store's policy is based on a stated desire that all employees wear uniform clothing so that they can be readily identified by customers. If both brothers file EEOC charges challenging the denials of their accommodation requests, the EEOC likely will not find reasonable cause in Patrick's case because the prison's denial of his request was based on legitimate, evidence-based security considerations posed by the particular religious garb sought to be worn. The EEOC likely will find cause in William's case because there is no indication it would pose an undue hardship for the grocery store to modify its policy with respect to his request.^[266]

EXAMPLE 40

Kirpan

Harvinder, a Sikh who works in a hospital, wears a small sheathed kirpan (religious article of faith resembling a knife) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a coworker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct and gave him literature explaining that the kirpan is a religious article of faith, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than scissors, box cutters, cake knives, paper cutters, and other secular objects in the workplace. Nevertheless, Bill told her that she would be terminated if she continued

to wear the kirpan at work. Absent evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the hospital is liable for denial of accommodation.

C. Common Methods of Accommodation in the Workplace

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. The most common methods are: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfers or changes in job assignment; and (4) modifying workplace practices, policies, or procedures.

1. Scheduling Changes

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious practices.^[267] However, EEOC's position is that it is insufficient merely to eliminate part of the conflict, unless eliminating the conflict in its entirety poses an undue hardship.^[268]

EXAMPLE 41

Break Schedules/Prayer at Work

Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, nor will it affect his ability to perform his duties or otherwise cause an undue hardship for his employer. Thus, Rashid is entitled to accommodation.^[269]

EXAMPLE 42

Blanket Policies Prohibiting Time Off

A large employer operating a fleet of buses had a policy of refusing to accept driver applications unless the applicant agreed that he or she was available to be scheduled to work any shift, seven days a week. This policy would violate Title VII if applied to discriminate against applicants who refrain from work on certain days for religious reasons, by failing to allow for the provision of religious accommodation absent undue hardship.^[270]

2. Voluntary Substitutes and Shift Swaps

The reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available and willing to switch shifts, either for a single absence or multiple absences, including absences occurring over an extended period of time. “[T]he obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which [covered entities] should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, [physical or electronic] bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.”^[271] The employer’s obligation is to make a good faith effort to allow voluntary substitutions and shift-swaps to accommodate a religious conflict.^[272] This does not require the employer itself to arrange a substitute or swap, but where it is difficult for employees to arrange shift substitutes or swaps on their own, the employer may have an obligation to do more to facilitate the search for volunteers.^[273] Likewise, if the employer is on notice that the employee’s religious beliefs preclude him not only from working on his Sabbath but also from inducing others to do so, reasonable accommodation requires more than merely permitting the employee to swap.^[274] An employer does not have to permit a substitute or swap if it would pose an undue hardship. As noted above, under the *de minimis* cost standard, if a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement will be relevant to determining if it poses an undue hardship; “the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation.”^[275]

If it does not pose an undue hardship, an employer must make an exception to its policy of requiring all employees, regardless of seniority, to work an “equal number of weekend, holiday, and night shifts,” and instead permit voluntary shift swaps between qualified coworkers in order to accommodate a particular employee’s sincerely held religious belief that he should not work on his or her Sabbath. Of course, if allowing a swap or other accommodation would not provide the coverage the employer needs for its business operations or otherwise pose an undue hardship, the accommodation does not have to be granted.

3. Change of Job Tasks and Lateral Transfer

When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict with the employee's religion. Whether or not such accommodations pose an undue hardship will depend on factors such as the nature or importance of the duty at issue, the nature of the employer's business, the availability of others to perform the function, the availability of other positions, and the applicability of a collective bargaining agreement or seniority system.

EXAMPLE 43

Restaurant Server Excused from Singing Happy Birthday

Kim, a server at a restaurant, informed her manager that she would not be able to join other waitresses in singing "Happy Birthday" to customers because she is a Jehovah's Witness whose religious beliefs do not allow her to celebrate holidays, including birthdays. There were enough servers on duty at any given time to perform this singing without affecting service. The manager refused any accommodation. If Kim files a Title VII charge alleging denial of religious accommodation, the EEOC will find cause because the restaurant could have accommodated her with little or no expense or disruption.

EXAMPLE 44

Pharmacist Excused from Providing Contraceptives

Neil, a pharmacist, was hired by a large corporation that operates numerous large pharmacies at which more than one pharmacist is on duty during all hours of operation. Neil informed his employer that he refuses on religious grounds to participate in distributing contraceptives or answering any customer inquiries about contraceptives. The employer reasonably accommodated Neil by offering to allow Neil to signal discreetly to a coworker who would take over servicing any customer who telephoned, faxed, or came to the pharmacy regarding contraceptives.^[276]

EXAMPLE 45

Pharmacist Not Permitted to Turn Away Customers

In the above example, assume that instead of facilitating the assistance of such customers by a coworker, Neil leaves on hold indefinitely those who call on the phone about a contraceptive rather than transferring their calls, and walks away from in-store customers who seek to fill a contraceptive prescription rather than signaling a coworker. Neil refuses to signal another employee or inform the customer on the phone that he is placing them on a brief hold while he gets another employee. The employer is not required to accommodate Neil's request to remain in such a position yet avoid all situations where he might even briefly interact with customers who have requested contraceptives, or to accommodate a disruption of business operations. The employer may discipline or terminate Neil if he disrupts business operations.^[277]

The employee should generally be accommodated in his or her current position if doing so does not pose an undue hardship.^[278] For example, if a pharmacist who has a religious objection to dispensing contraceptives can be accommodated without undue hardship by allowing the pharmacist to signal a coworker to assist customers with such prescriptions, the employer should not choose instead to accommodate by transferring the pharmacist to a different position. If no such accommodation is possible, the employer needs to consider whether lateral transfer is a possible accommodation.^[279] The employer cannot transfer the pharmacist to a position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship.^[280]

EXAMPLE 46

Lateral Transfer Versus Transfer to a Lower-Paying Position

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position without posing an undue hardship. The employer can accommodate the lineman by offering a lateral transfer to another assignment at the same pay, if available. If, however, no job at the same pay is readily available, then the employer could satisfy its obligation to reasonably accommodate the lineman by offering to transfer him to a different job, even at lower pay, if one is available.^[281]

4. Modifying Workplace Practices, Policies and Procedures

An employer may have to make an exception to its policies, procedures, or practices in order to grant a religious accommodation.^[282]

a. Dress and Grooming Standards

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation.^[283] Religious dress may include clothes, head or face coverings, jewelry, or other items. Religious grooming practices may relate, for example, to shaving or hair length. Absent undue hardship, religious discrimination may be found where an employer fails to reasonably accommodate the employee's religious dress or grooming practices.^[284]

EXAMPLE 47

Facial Hair

Prakash, who works for CutX, a surgical instrument manufacturer, does not shave or trim his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must shave or trim his beard because otherwise his beard may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable (for reasons unrelated to his religious practice) and files a Title VII charge. CutX will prevail because it offered a reasonable accommodation that would eliminate Prakash's religious conflict with the hygiene rule.

Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers.^[285] While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be considered disparate treatment, including because it is tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII.^[286]

EXAMPLE 48

Religious Garb

Nasreen, a Muslim ticket agent for a commercial airline, wears a hijab (headscarf) to work at the airport ticket counter. After September 11, 2001, her manager objected, telling Nasreen that the customers might think she was sympathetic to terrorist

hijackers. Nasreen explains to her manager that wearing the hijab is her religious practice and continues to wear it. She is terminated for wearing a hijab over her manager's objection. Customer fears or prejudices do not amount to undue hardship. As a result, the airline's refusal to accommodate her and its subsequent decision to terminate her violate Title VII. In addition, if the commercial airline had denied Nasreen the position due to perceptions of customer preferences about religious attire, that would also be disparate treatment based on religion in violation of Title VII, because it would be the same as refusing to hire Nasreen because she is a Muslim. See *supra* § 12-II-B.^[287]

There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship.^[288] This issue should be resolved on a case-by-case basis.

b. Use of Employer Facilities

If any employee needs to use a workplace facility as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship.^[289]

EXAMPLE 49

Use of Employer Facilities

An employee whose assigned work area is a factory floor rather than an enclosed office asks his supervisor if he may use one of the company's unoccupied conference rooms to pray during a scheduled break time. The supervisor must grant this request if it would not pose an undue hardship. An undue hardship would exist, for example, if the only conference room is used for work meetings at that time. However, the supervisor is not required to provide the employee with his choice of the available locations and can meet the accommodation obligation by making any appropriate location available that would accommodate the employee's religious needs if this can be done absent undue hardship, for example by offering an unoccupied area of the work space rather than the conference room.

c. Tests and Other Selection Procedures

An employer has an obligation to reasonably accommodate an applicant when scheduling a test or administering other selection procedures, where the applicant

has informed the employer of a sincerely held religious belief that conflicts with a pre-employment testing requirement, unless undue hardship would result.^[290] An employer may not permit an applicant's presumed or actual need for a religious accommodation to affect its decision whether or not to hire the applicant unless the employer can demonstrate that it cannot reasonably accommodate the applicant's religious observance or practice without undue hardship.^[291]

d. Objections to Providing Social Security Numbers or Complying with Employer Identification Procedures

Whether it poses an undue hardship for an employer to provide an alternative means of identification for matters such as government forms, building security, or timekeeping will depend on the facts. It will typically pose an undue hardship for an employer to accommodate an applicant's or employee's asserted religious belief against providing or using a social security number, or identification requirements imposed by another federal law.^[292] However, in cases where an alternative method of identification is feasible and does not pose an undue hardship, it may be required as a religious accommodation.^[293]

5. Excusing Union Dues or Agency Fees

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union.^[294] Such an employee can be accommodated, in many cases, by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer.^[295] Whether a charity-substitute accommodation for payment of union dues would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals who need the accommodation.^[296]

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, the employee may be accommodated if it would not pose an undue hardship by, for example, reducing the amount owed, allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the employee has a religious objection, or diverting the amount owed to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.^[297]

6. Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

Some employees may seek to display religious icons or messages at their workstations or use a particular religious phrase when greeting others. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs or distributing literature. Still others may seek to engage in prayer at their workstations or to use other areas of the workplace for either individual or group prayer, study, or meeting. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers. As noted in §§ 12-II-A-3 and 12-III-C of this document, prayer, proselytizing, and other forms of religious expression do not solely raise a religious accommodation issue but may also raise intentional discrimination or harassment issues.

To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting the expression of religious belief.^[298] As explained below, relevant considerations may include the effect the religious expression has had, or can reasonably be expected to have, if permitted to continue, on coworkers, customers, or business operations.

a. Effect on Workplace Rights of Coworkers

Religious expression can create undue hardship if it disrupts the work of other employees or constitutes—or threatens to constitute—unlawful harassment. Conduct that is disruptive can still constitute an undue hardship, even if it does not rise to the level of unlawful harassment. Since an employer has a duty under Title VII to protect employees from harassment, it would be an undue hardship to accommodate expression that is harassing.^[299] As explained in § 12-III-A-2-b of this document, religious expression directed toward coworkers, made in coworkers' presence, or that a coworker learns of, might constitute unlawful harassment in some situations, for example where it is facially abusive (i.e., demeans people of other religions) or where, even if not abusive, it persists even though it is clearly unwelcome. However, as with bias from customers, if coworkers' objections are not because the conduct is facially abusive or persistent but rather because of bias of coworkers against religious expression generally or that particular religious expression, it is unlikely that accommodating the religious expression would be an undue hardship. It is necessary to make a case-by-case determination regarding whether the effect on coworkers actually is an undue hardship. Mere subjective offense or disagreement with unpopular religious views or practices by coworkers is not sufficient to rise to the level of unlawful harassment. However, this does not require waiting until the unwelcome behavior becomes severe or pervasive.^[300] As with harassment on any basis, it is permitted and advisable for employers to take action to stop alleged harassment *before* it becomes severe or

pervasive, because while isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful.^[301]

b. Effect on Customers

The determination of whether it is an undue hardship to allow employees to engage in religiously oriented expression toward customers is a fact-specific inquiry and will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on customer relations. For example, one court found that it was a reasonable accommodation to allow an employee to use the general religious greeting "Have a Blessed Day" with coworkers and with customers who had not objected, rather than using it with everyone, including a customer who objected.^[302] However, other courts have found undue hardship where religiously oriented expression was used in the context of a regular business interaction with a client.^[303] Whether or not the client objects, religiously oriented expression may create an undue hardship for an employer where the expression could be mistaken as the employer's message, particularly in the instance of government employers.^[304] Where the religiously oriented expression is not limited to use of a phrase or greeting, but rather is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction.^[305]

EXAMPLE 50

Display of Religious Objects by an Employee

Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with coworkers, but not with clients. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, clients, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective workstations. XYZ orders both to remove the poster despite the fact that both explained that they felt a religious obligation to display it, and despite the fact that there have been no complaints from coworkers or clients.

Susan and Roger file charges alleging denial of religious accommodation. The employer will probably be unable to show that allowing Susan to display a religious message in her personal workspace posed an undue hardship, unless there was evidence of disruption to the business or the workplace which resulted. By contrast,

because Roger sits at the lobby desk and the poster is the first thing that visitors see upon entering the building, it would appear to represent XYZ's views and would therefore likely be shown to pose an undue hardship.^[306]

EXAMPLE 51

Undue Hardship to Allow Employee to Discuss Religion with Clients

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. Helen's belief in the need to evangelize to clients cannot be accommodated without undue hardship. The employer has the right to control speech that threatens to impede provision of effective and efficient services. Clients, especially in a mental health setting, may not understand that the religious message represents Helen's beliefs rather than the facility's view of the most beneficial treatment for the patient.^[307]

7. Employer-Sponsored Programs

Some employers have integrated their own religious beliefs or practices into the workplace, and they are entitled to do so.^[308] However, if an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, including non-belief, absent a showing of undue hardship.^[309] Excusing an employee from religious services normally does not create an undue hardship because it does not cost the employer anything and does not disrupt business operations or other workers.^[310]

EXAMPLE 52

Prayer at Meetings

Michael's employer requires that the mandatory weekly staff meeting begin with a religious prayer. Michael objects to participating because he believes it conflicts with his own sincerely held religious beliefs. He asks his supervisor to allow him to arrive at the meeting after the prayer. The supervisor must accommodate Michael's religious belief by either granting his request or offering an alternative accommodation that would remove the conflict between Michael's religious belief

and the staff meeting prayer, even if other employees of Michael's religion do not object to being present for the prayer.^[311] The outcome would be the same if Michael sought the accommodation based on his lack of religious belief.

EXAMPLE 53

Employer Holiday Decorations

Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions.^[312] The result under Title VII on these facts would be the same whether in a private or government workplace.^[313]

Similarly, an employer is required, absent undue hardship, to excuse an employee from compulsory personal or professional development training or participation in an initiative or celebration where it conflicts with the employee's sincerely held religious beliefs, observances, or practices.^[314] There may be cases, however, where an employer can show that it would pose an undue hardship to provide an alternative training or to excuse an employee from any part of a particular training, even if the employee asserts it is contrary to his religious beliefs to attend (e.g., where the training provides information on how to perform the job, on how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or applicable legal requirements).

EXAMPLE 54

Religious Objection to Training Program – Employee Must Be Excused

As part of its effort to promote employee health and productivity, the new president of a company institutes weekly mandatory on-site meditation classes led by a local spiritualist. Angelina explains to her supervisor that the meditation conflicts with her sincerely held religious beliefs and asks to be excused from participating. Because it would not pose an undue hardship, the company must accommodate Angelina's religious belief by excusing her from the weekly meditation classes, even if the company and other employees believe that this form of meditation does not conflict with any religious beliefs.

EXAMPLE 55

Religious Objection to Training Program – Employee Need Not Be Excused

Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ’s own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille asks to be excused from the portion of the training on sexual orientation discrimination because she believes that it “promotes the acceptance of homosexuality,” which she sincerely believes is immoral and sinful based on her religion. The training does not tell employees to value different sexual orientations but simply discusses and reinforces laws and conduct rules requiring employees not to discriminate against or harass other employees based on sexual orientation and to treat one another professionally. Because an employer needs to make sure that its employees know about and comply with such laws and workplace rules, it would be an undue hardship for XYZ to excuse Lucille from the training.^[315]

Reasonable Accommodation and Undue Hardship

This common formulation derives from the seminal Supreme Court decisions interpreting the conscience exemption in the Military Selective Service Act, 50 U.S.C. § 3806(j). See, e.g., *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (“We believe the proper test to be applied to the determination of what is ‘religious’ under § 2000e(j) can be derived from the Supreme Court decisions in *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1969), i.e., (1) is the ‘belief’ for which protection is sought ‘religious’ in person’s own scheme of things, and (2) is it ‘sincerely held.’” (quoting those decisions)); *Fallon v. Mercy Cath. Med. Ctr.*, 877 F.3d 487, 490-91 (3d Cir. 2017) (applying same test to Title VII claim of religious discrimination); *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014) (same); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (same); *EEOC v. Union Independiente de la Autoridad de Acueductos*, 279 F.3d 49, 56 (1st Cir. 2002) (same); see also, e.g., EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (stating that EEOC has “consistently applied” this standard to Title VII).

religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)

“The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.”); *Welsh*, 398 U.S. at 343 (finding that petitioner’s beliefs were religious in nature although the church to which he belonged did not teach those beliefs)

Meyers, 906 F. Supp. at 1502 (ruling that religions address “ultimate ideas,” i.e., “fundamental questions about life, purpose, and death,” and that single-faceted worship of marijuana was not a religion for First Amendment purposes), *aff’d*, 95 F.3d at 1483. “Thus, a genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities, qualifies as religion under Title VII.” *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013).

Although “religion” is often marked by external manifestations such as ceremonies, rituals or clergy, such manifestations are not required for a belief to be “religious.” See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 209-10 (3d Cir. 1979).

See *Fallon*, 877 F.3d at 492 (employee’s objection to flu vaccine did not qualify as a religious belief protected by Title VII because his beliefs that “one should not harm their own body and . . . that the flu vaccine may do more harm than good” did not “address fundamental and ultimate questions having to do with deep and imponderable matters” and were not “comprehensive in nature”).

Dockery v. Maryville Acad., 379 F. Supp. 3d 704, 718 n.18 (N.D. Ill. 2019) (ruling that “while the ‘validity’ of a religious belief cannot be questioned, ‘the threshold question of sincerity . . . must be resolved in every case’” (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965))).