Love They Neighbor: Should Religious Accommodations that Negatively Affect Coworkers' Shift Preferences Constitute and Undue Harshness on the Employer Under Title VII?

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NOTES

LOVE THY NEIGHBOR: SHOULD RELIGIOUS ACCOMMODATIONS THAT NEGATIVELY AFFECT COWORKERS’ SHIFT PREFERENCES CONSTITUTE AN UNDUE HARDSHIP ON THE EMPLOYER UNDER TITLE VII?

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In applying Title VII, courts are often confronted with proposed religious accommodations that would negatively affect other employees and must decide whether such an accommodation amounts to an undue hardship on the employer. However, there is a conflict among circuit courts over the scope of an employer’s duty to accommodate religious employees when doing so would negatively affect coworkers’ scheduling preferences, outside the context of a collective bargaining agreement. The conflict turns on whether courts consider any negative impact on coworkers to amount to impermissible preferential treatment, or whether they require that the defendant demonstrate a more severe impact on coworkers’ rights before finding that the accommodation would present an undue hardship. This Note argues that preferential treatment of the religious employee exists only when the proposed accommodation infringes on coworkers’ contractually protected rights, creates an economic burden on the employer, or requires coworkers to take on additional, physically hazardous tasks.

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INTRODUCTION

Imagine that you manage a pharmacy at a hospital that operates twenty-four hours a day, 365 days a year. Some of your employees have certain schedules in which they are off from work on Fridays and Saturdays. During their days off, they may choose to spend time with their spouses, who also have those days off from work, attend their children’s sporting events, or take care of an ill family member. Imagine further that a new pharmacist is hired who informs you that his strongly held religious beliefs and observances require him to observe the Sabbath from Friday sundown until Saturday sundown, during which he must abstain from doing work.¹

Under Title VII of the Civil Rights Act of 1964 (Title VII), you are required to reasonably accommodate the new employee’s religious observances absent undue hardship on the conduct of your business.² To do this, you may have to require other employees to trade shifts with the new employee, forcing them to work on Friday nights and Saturdays in exchange for other undesirable shifts off, such as Christmas or Thanksgiving.

Although the other employees lack contractual rights, such as those found in a collective bargaining agreement,³ to their preferred schedules, they have been working the same shifts for years and have built their personal lives around their expected schedules. Those employees are unhappy about having to change shifts and complain that they think it is unfair that you effectively require them to accommodate the new employee. Does imposing on these employees and causing them to resent the accommodation constitute an “undue hardship” excusing you from accommodating the religious employee? Should you be relieved of the obligation to accommodate when it causes your longtime employees to feel mistreated?

The above situation is an increasingly common dilemma for employers who receive little guidance from courts or the Equal Employment Opportunity Commission (EEOC) as to what sorts of accommodations they are required to make that may negatively affect other employees.⁴

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¹. This fact pattern is borrowed from Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982).
³. A collective bargaining agreement is a contract between an employer and a labor union governing the employees’ employment conditions including wages, benefits, hours, and grievances. BLACK’S LAW DICTIONARY 280 (8th ed. 2004). Collective bargaining is the resolution by employee unions and employers of the problems of the employment relationship. Such problems include wage rates and systems, hours and overtime, vacations, seniority, discipline, workloads, classification of employees, layoffs, and worker retirement. See Fred Witney & Benjamin J. Taylor, LABOR RELATIONS LAW 105 (7th ed. 1996).
Religious employees, also unclear about what sorts of accommodations they are entitled to, have increasingly resorted to litigation alleging that their employers, or prospective employers, have failed to accommodate their religious needs as required by law.\(^5\)

As previously mentioned, Title VII does not require religious accommodation if it would cause an "undue hardship" on the employer's business conduct.\(^6\) The EEOC guidelines explaining the accommodation duty also only refer to undue hardships on the employer's business and do not mention hardships stemming from negative effects on other employees.\(^7\) Yet the U.S. Supreme Court in *Trans World Airlines, Inc. v. Hardison*\(^8\) seemed to suggest that an accommodation that treated the religious employee preferentially at the expense of his coworkers could amount to an undue hardship.\(^9\) The U.S. courts of appeals are split over just what level of negative effects on other employees resulting from an accommodation amounts to such barred preferential treatment.\(^10\)

According to some courts, giving a religious employee shift priority at the expense of nonreligious employees would amount to preferential treatment, placing an undue hardship on the employer and relieving him of the duty to accommodate.\(^11\) In contrast, other courts require a higher degree of negative impact on coworkers before they consider differential treatment of religious employees to be preferential. These courts find that although an employee is treated differently, he is not necessarily being treated preferentially, suggesting that requiring the employer in the hypothetical to accommodate the new employee would therefore be reasonable.\(^12\)

This Note argues against those courts that have found that imposing on shift preferences of coworkers outside the context of a collective bargaining agreement amounts to preferential treatment. It asserts that protecting the mere shift preferences of other workers effectively reduces the duty to accommodate to a level far below what Congress could have intended when

\(^5\) In 2007, 2880 complaints of religious discrimination were filed with the EEOC. See Emily Bazas, *Prayer Leads to Disputes in Workplace*, USA TODAY, Oct. 16, 2008, at 3A (discussing Muslim factory workers' religious accommodation claims).


\(^8\) 432 U.S. 63 (1977).

\(^9\) See infra Part I.E. The U.S. Supreme Court in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), did not explicitly hold that preferential treatment is tantamount to undue hardship. However, lower courts have interpreted the *Hardison* Court's seeming unease with preferential treatment as an indication that such treatment is barred. See, e.g., Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000); Aron v. Quest Diagnostics Inc., No. Civ.A.03-2581 JSH, 2005 WL 1541060, at *6–7 (D.N.J. June 30, 2005). The *Hardison* dissent also viewed the majority opinion as barring preferential treatment. Taking this as the standard, the presence of undue hardship hinges on courts' understanding of preferential treatment. See *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

\(^10\) See infra Part II.A–B.

\(^11\) See infra Part II.A.

\(^12\) See infra Part II.B.
it included the duty to accommodate religious employees under Title VII. Since every accommodation of an employee's religious needs potentially requires differential treatment, it is necessary to have a higher threshold for impact on other employees that can constitute employer hardship.

Part I of this Note discusses the genesis of the religious accommodation requirement and compares religion as a protected class under Title VII with other protected classes. Part I then details the path that failure-to-accommodate claims take through the EEOC and to the courts. Finally, it explores the case law that has defined the scope of an employer's duty to reasonably accommodate a religious employee absent undue hardship, focusing on cases in which proposed accommodations would negatively impact other employees. Part II of this Note analyzes courts' differing interpretations of when an accommodation's imposition on coworkers' shift preferences amounts to preferential treatment and an undue hardship on the employer. Part III of this Note concludes that preferential treatment of the religious employee exists only when imposition on the coworkers infringes on their rights, creates an economic burden on the employer, or requires coworkers to take on additional physically dangerous tasks.

I. PROTECTION AFFORDED FOR RELIGIOUS OBSERVERS: BACKGROUND OF TITLE VII'S RELIGIOUS ACCOMMODATION REQUIREMENT

Concentrating on courts' differing interpretations of when an accommodation's impact on coworkers' shift preferences amounts to preferential treatment of a religious employee, this Part first details the history of an employer's obligation to reasonably accommodate a religious employee absent undue hardship. Next, it compares religion with other protected classes under Title VII. Then, it discusses the path that a religious employee's claim of discrimination must make through the EEOC to the courts. Finally, this Part surveys the case law that has defined the scope of an employer's accommodation obligation, focusing on its application to accommodations that negatively impact other employees.

A. The History of the Employer's Duty To Reasonably Accommodate a Religious Employee Absent Undue Hardship

The Civil Rights Act of 1964 was forged in an atmosphere of great urgency. Mounting unrest, pervasive racial discrimination, and segregation exposed during the 1960s outraged Americans and tarnished America's image abroad. On June 19, 1963, during the height of the civil rights protests and demonstrations, President John F. Kennedy sent

14. Id.
comprehensive civil rights legislation to Congress. After fierce opposition in Congress, the Civil Rights Act of 1964 was passed.

Title VII, one part of the Civil Rights Act of 1964, proscribes discrimination in employment on the basis of race, color, sex, religion, or national origin. It applies to employers with fifteen or more employees, including state and local governments, employment agencies, labor organizations, and the federal government. The Civil Rights Act also established the EEOC, an agency formed to receive, investigate, and conciliate employment discrimination complaints but which lacks any enforcement power.

Originally, Title VII provided solely for equal treatment in employment. Its goal was to eliminate status-based discrimination: that is, discrimination based on an individual's status as a member of a protected class. However, in the two years following the passage of Title VII, the EEOC had received several complaints from a number of religious employees claiming that their employers were refusing to allow them to take time off during the workweek to observe holy days. Due to these complaints, the EEOC adopted guidelines that required an employer to make reasonable accommodation for religious employees absent "serious inconvenience" on the employer's business. In 1968, the Guidelines were amended to replace the term "serious inconvenience" with "undue hardship."

Despite the EEOC guidelines calling for religious accommodation, before 1972, courts interpreted Title VII's prohibition of discrimination based on religion merely to mean treating employees the same way without

15. Id.
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .
23. See Brierton, supra note 22, at 167–68; see also 29 C.F.R. § 1605.1 (1967).
regard to their religion. However, after *Dewey v. Reynolds Metal Co.* and *Riley v. Bendix Corp.*, in which courts held—and the Supreme Court later affirmed—that requiring all employees to work on Sunday was not discriminatory because it was applicable to all employees without regard to religion, Congress amended Title VII.

Senator Jennings Randolph, a Seventh-Day Baptist who observed Saturday Sabbath, proposed an amendment to Title VII that would codify the accommodation obligation set forth in the EEOC guidelines and overturn *Dewey* and *Riley*. Congress overwhelmingly passed the amendment, and included the *Dewey* and *Riley* opinions in the legislative history as examples of judicial reasoning that the amendment was intended to overturn. The statute in its current form requires employers to “reasonably accommodate... an employee’s or prospective employee’s religious observance or practice” unless doing so would be an “undue hardship on the conduct of the employer’s business.”

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29. See *Brierton*, *supra* note 22, at 169. In the congressional hearings for the proposed amendment to Title VII, Senator Randolph stated,

> There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh-day Adventists.... [T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work... on particular days.

118 CONG. REC. 705.

30. See 118 CONG. REC. 705–06; see also *Prenkert & Magid*, *supra* note 20, at 476 n.34 (noting that Senator Randolph viewed the amendment not as changing the meaning of Title VII, but instead as “correct[ing] the erroneous interpretation by several courts of Title VII’s prohibition of religious discrimination” (citing 118 CONG. REC. 705–06)).

31. See *Prenkert & Magid*, *supra* note 20, at 474.

32. 42 U.S.C. § 2000e(j) (2006) (stating that the definition of religion is “all aspects of religious observance and practice, as well as belief,” and that an employer has a duty of reasonable accommodation of employees’ religion); see also Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 n.1 (1986) (noting that “[t]he reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religious practice”); Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 3 (2001) (noting that § 2000e(j) is oddly crafted as a definition of religion).
protects both membership in a particular religion as well as the conduct necessary to observe that religion.\footnote{33} However, the 1972 amendment to Title VII was hastily passed and provided little indication of what was considered a "reasonable accommodation" or an "undue hardship," and courts have since been struggling with the meaning of these terms.\footnote{34} The legislative record, however, does indicate that the language of the amendment was intended to provide a flexible approach to accommodation issues and that, to some degree, courts and the EEOC were intended to have discretion in determining whether a religious observer's needs were being unreasonably interfered with.\footnote{35}

B. Religion Compared with Other Protected Classes Under Title VII

The common perception of "antidiscrimination" in the United States is that differential treatment of individuals on the basis of protected characteristics beyond their control is prohibited.\footnote{36} However, Title VII protects both mutable and immutable characteristics. At first glance, it may seem anomalous that religion is a protected class under Title VII—religion is a trait that is directly within one's control, whereas race or gender is

\footnote{33} 42 U.S.C. § 2000e(j) (protecting religious observance and belief as well as membership in a particular religious group); see also \textit{Engle}, \textit{supra} note 28, at 369–72 (arguing that the 1972 amendment collapsed religious status and conduct, making them indistinguishable).

\footnote{34} See \textit{Debbie N. Kaminer, Title VII's Failure To Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment}, 21 BERKELEY J. EMP. & LAB. L. 575, 584 (2000) (noting that many commentators have suggested there is a lack of helpful legislative history of the 1972 amendment, which makes determining the meaning of "reasonable accommodation" and "undue hardship" difficult); \textit{James M. Oleske, Jr., Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation}, 6 U. PA. J. CONST. L. 525, 532–35 (2004); \textit{Peter Zablotsky, After the Fall: The Employer's Duty To Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook}, 50 U. PITT. L. REV. 513, 516–17 (1989) ("Although [§ 2000e(j) was] enacted to clarify the nature of the employer's duty under Title VII, the amendment did not provide guidance with respect to three significant issues: 1) the definition and scope of reasonable accommodation; 2) the definition and scope of undue hardship; and 3) the relationship between reasonable accommodation and undue hardship." (footnotes omitted)); \textit{Aron v. Quest Diagnostics Inc.}, No. Civ.A.03-2581 JSH, 2005 WL 1541060, at *7 (D.N.J. June 30, 2005) (discussing undue hardship with reference to the reasonableness of an accommodation).

\footnote{35} \textit{See 118 CONG. REC. 706 (1972) (statement of Sen. Randolph); see also \textit{Ansonia}, 479 U.S. at 69 (noting that Senator Randolph expressed his hope that accommodations "would be made with 'flexibility' and 'a desire to achieve an adjustment'" (quoting 118 CONG. REC. 706)); id. at 73 (Marshall, J., dissenting in part); Zablotsky, \textit{supra} note 34, at 553 (noting that the legislative history of the amendment to § 701(j) calls for "flexibility"). The specific context of Senator Randolph's remarks suggests that he was "concerned with providing the EEOC with flexibility and discretion when evaluating claims of religious discrimination and determining satisfaction by employers of the duty to accommodate." Zablotsky, \textit{supra} note 34, at 553–54.}

typically immutable. Although prejudice based on immutable characteristics, like race or sex, seems particularly unfair, American antidiscrimination law also prohibits discrimination based on mutable traits, which may be equally unfair. Religion is protected, although it is a trait within an individual’s control, in part because many find the idea of requiring one to choose between a job and one’s religious beliefs pernicious, especially within the context of the nation’s history of protecting religious freedom as a fundamental right.

Title VII’s prohibition on religious discrimination incorporates protection for both the status of being a member of a particular religion and the conduct of observing a particular religion, requiring employers to pay special attention to the religious needs of their employees. In contrast, protection from discrimination based on birthright—such as gender, national origin, or race—only considers the status of being in a particular group and requires employers to treat such status as irrelevant in employment decisions and treatment. Thus, nondiscrimination based on religion requires an employer to treat employees differently in order to accommodate their religious needs, whereas protection based on gender or race requires employers to treat members of such groups neutrally.

Some commentators argue that the religious accommodation duty not only requires different treatment but also may require the employer to discriminate in favor of certain employees by granting religious employees

37. See Post, supra note 36, at 8 (noting that discrimination based on traits under an individual’s control, such as religion or marital status, are protected by antidiscrimination laws); cf. Engle, supra note 28, at 359 (arguing that a reason for the different treatment of religion under Title VII compared with other protected characteristics “might be that religion just feels different from the other categories in that it seems both compelled and voluntary and that it is largely about observance”).

38. Post, supra note 36, at 8–9.

39. As was eloquently noted by the dissenting Justices in Hardison, “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.” Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting); cf. Engle, supra note 28, at 380–81; Prenkert & Magid, supra note 20, at 468 n.5, 513–14.

40. See Michael D. Moberly, Bad News for Those Proclaiming the Good News?: The Employer’s Ambiguous Duty To Accommodate Religious Proselytizing, 42 SANTA CLARA L. REV. 1, 2–3 (2001); see also Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish children could not be placed under compulsory education past eighth grade, as it violated their parents’ fundamental right to freedom of religion).

41. See Engle, supra note 28, at 369–72.

42. For instance, an employer’s no-braided-hair policy is not considered discriminatory under Title VII to African-American women who have braided hair. See Engle, supra note 28, at 329–30 (citing Rogers v. Am. Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981)).

43. See Engle, supra note 28, at 327–28. Professor Robert Post argues that, in the context of gender and race discrimination, American antidiscrimination law forces employers to treat their employees as if they did not display “socially powerful and salient attributes, because these attributes may induce irrational and prejudiced judgments.” Post, supra note 36, at 11–12.

44. See Engle, supra note 28, at 327, 369–72.
special treatment because of their religious practices. However, courts often reject the idea of requiring unequal or preferential treatment of religious employees and hold that an employer is only required to accommodate by allowing differential treatment of religious employees, not special or preferential treatment. This distinction may be due to courts' wariness of anything resembling discriminatory treatment, stemming from the "canonical idea" that the antidiscriminatory purpose of Title VII is to provide neutral, not unequal, treatment.

C. Procedural Prerequisites to Religious Discrimination Claims

When an employee believes that she has suffered employment discrimination in violation of Title VII, she cannot go directly to court. Instead, she must first go through the EEOC's processes intended to resolve many employment disputes before they reach the courts. The Civil Rights Act of 1964 established the EEOC, an administrative agency dealing solely with employment discrimination claims. The EEOC officially began operations on July 2, 1965, one year after the passage of the Act. The agency enforces federal laws that prohibit employment discrimination including Title VII, the Equal Pay Act of 1963, the Age Discrimination

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45. See Jamar, supra note 25, at 742; cf. Nantiya Ruan, Accommodating Respectful Religious Expression in the Workplace, 92 MARQ. L. REV. 1, 16 (2008).

It should be noted that some observers do not consider an employer's obligation to accommodate religious employees as falling under the legal category of "antidiscrimination." See, e.g., Jolls, supra note 36, at 643. Professor Christine Jolls contrasts the accommodation requirement with typical antidiscrimination enactments, which focus on "equal," not "special" treatment of employees. Id. at 643–44. Jolls succinctly notes how accommodation differs from antidiscrimination in that the "canonical idea of 'antidiscrimination' in the United States condemns the differential treatment of otherwise similarly situated individuals," whereas accommodation seems to require it. Id. at 643 (citing Post, supra note 36, at 9–12).

47. See Greenawalt, supra note 32, at 20 ("[J]udges have generally been very resistant to claims of accommodation and hesitant to require employers to deviate from neutral rules of general application." (citing Engle, supra note 28, at 392–406)); Jolls, supra note 36, at 698 (arguing that certain categories of antidiscrimination law, in particular the disparate impact branch, overlap with the accommodation category, which is traditionally thought of as a separate aspect of employment discrimination law); 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, 99 (2000); Kaminer, supra note 34, at 579 ("Th[e] discomfort [with requiring religious accommodation] can also be explained by the fact that courts are generally reluctant to require differential or preferential treatment based on any of the protected categories under Title VII.").

51. 42 U.S.C. § 2000e (prohibiting employment discrimination based on race, color, religion, sex, or national origin).
in Employment Act of 1967, Title I and Title V of the Americans with Disabilities Act of 1990, sections 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991. Although it lacks the power to make binding determinations, all laws enforced by the EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court. This section will focus primarily on the procedure that an employee complaining of religious discrimination must follow to pursue her claim under Title VII, although the procedure is virtually the same for individuals complaining of discrimination based on Title VII’s other protected traits.

Individuals filing charges for discrimination on the basis of religion can allege that their employer has treated them differently based on their religion, failed to accommodate their sincerely held religious belief, or refused to allow their religious expression in the workplace. Over the last decade, the number of charges of religious discrimination that the EEOC has received has almost doubled. In 1997, the EEOC received 1709 charges of religious discrimination, and it resolved 2137. But in 2008, the EEOC received 3273 charges of religious discrimination, and it resolved 2727. In 2008, it recovered $7.5 million in monetary benefits for aggrieved individuals, compared with just $2.2 million in 1997, not including monetary relief obtained through litigation.

The first step for an individual who believes that her employment rights have been violated is filing a complaint, called a charge, of discrimination with the EEOC within 180 days of the alleged violation. Once an individual files a charge with the EEOC, the employer is notified that the charge has been filed and the EEOC will begin its investigation.

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58. See EEOC, supra note 18.
59. See infra notes 60–61 and accompanying text.
61. Id.
62. Id.
63. See EEOC, supra note 57.
64. See EEOC, supra note 48.
EEOC can seek to settle a charge at any point in the investigation if the aggrieved employee—referred to as the charging party—and the employer express an interest in pursuing settlement. A charge may also be selected for mediation if both the charging party and the employer express an interest in this option.

A charge may be dismissed at any point if, in the EEOC's judgment, further investigation will not establish a violation of the law. When a charge is dismissed, the EEOC issues a "right to sue" letter, which gives the charging party ninety days to file a private lawsuit in court.

If the investigation produces evidence that establishes that a violation of the law has occurred, the EEOC will inform the employer and the charging party of its findings and then will attempt conciliation with the employer to develop a remedy for the discrimination. If the case is successfully conciliated, or if a case has been successfully mediated or settled earlier, neither the EEOC nor the charging party may file suit in court unless the conciliation, mediation, or settlement agreement is not honored.

If a violation of the employment discrimination laws is found and the EEOC is unable to successfully conciliate the case, the agency will decide whether to bring suit in federal court. If the EEOC decides not to sue on the plaintiff's behalf, it will issue a notice closing the case and giving the charging party ninety days in which to file a lawsuit on his or her own behalf.

Claims of religious discrimination reach federal court when the EEOC files suit on the employee's behalf, when an aggrieved employee receives a "right to sue" letter from the EEOC as mentioned above, or if the employee requests a "right to sue" letter from the EEOC 180 days after the charge was first filed with the EEOC. If the EEOC issues a right to sue letter, the employee then has ninety days to bring suit after receiving the letter. The cases this Note discusses infra all began with EEOC charges and followed one of these paths to federal court.

D. Prima Facie "Failure To Accommodate" Claim

Once a plaintiff has fulfilled the procedural prerequisites, she must still carry her burden of proof in court. To do this, the plaintiff must show that her employer failed to "reasonably accommodate" her religious needs or

65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. See supra Part I.C.
observances. To avoid liability, the employer must then demonstrate that accommodating the plaintiff would result in an “undue hardship” to the employer’s business.

Courts agree that to establish a prima facie failure-to-accommodate claim, a plaintiff must show

(1) that an employment policy conflicts with an employee’s religious practice; (2) that the religious practice is required by the employee’s bona fide religious belief; (3) that the employer has been made aware of the conflict; and (4) that the employee has been refused employment or otherwise suffered adverse consequences because of his noncompliance with the employer’s requirement.

Once the plaintiff presents her prima facie case, the burden shifts to the employer. At this point, the employer must show either (1) that a reasonable accommodation was presented to the employee or (2) that the employer was unable to reasonably accommodate the employee’s religious practices without enduring an undue hardship on the conduct of the employer’s business.

Title VII itself, however, provides no guidance for deciding when a reasonable accommodation has been offered or what accommodations amount to undue hardships. Courts have, therefore, largely been left to determine the scope of the accommodation obligation unaided by legislative expression.

E. The Current Understanding of the “Undue Hardship” Standard

As previously mentioned, Title VII does not define what constitutes an “undue hardship.” To delineate the meaning of the term, the Supreme

77. Id.
78. Jamar, supra note 25, at 743; see also EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 614 n.5 (9th Cir. 1988).
79. See Jamar, supra note 25, at 743; see also Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 133–34 (1st Cir. 2004); Opoku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 144 (5th Cir. 1982); Jackson v. Bob Evans-Columbus, No. 2:04cv559, 2006 WL 3814099, at *12 (W.D. Pa. Dec. 22, 2006); Aron v. Quest Diagnostics Inc., No. Civ.A.03-2581 JSH, 2005 WL 1541060, at *3 (D.N.J. June 30, 2005). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), first articulated the burden-shifting analysis used by many courts in failure-to-accommodate claims; however, that case was a race discrimination claim brought under Title VII. Id. at 794–96.
80. See Jamar, supra note 25, at 743.
81. Courts and commentators often note that the legislative history of Title VII is also of “little assistance” in interpreting § 2000e(j). See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977); Kaminer, supra note 34, at 589; Zablotsky, supra note 34, at 534–35 n.70; see also supra note 34 and accompanying text. But see Hardison, 432 U.S. at 88–90 (Marshall, J., dissenting) (“[T]he Court seems almost oblivious of the legislative history of the 1972 amendments to Title VII . . . . That history is far more instructive than the Court allows.”).
82. See Michael Wolf, Bruce Friedman & Daniel Sutherland, Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities 104 (1998); Prenkert & Magid, supra note 20, at 480 (“The statute itself provides no guidance for
Court decided *Trans World Airlines, Inc. v. Hardison*, its first decision dealing with the undue hardship standard and the current controlling authority on the issue. As explained in further detail later in this section, however, *Hardison* has only somewhat defined "undue hardship," and lower courts have continued to be unsure of the precise meaning of the term.\(^8\)

Part I.E explores the employer’s obligation to reasonably accommodate a religious employee, focusing on the current understanding of the undue hardship standard. First, this section summarizes the facts and holdings of *Hardison*. Next, it outlines the two methods by which an employer can demonstrate undue hardship and explains how these two methods were integral to the *Hardison* decision. Finally, it outlines three cases that are useful in further understanding the employer’s accommodation obligation.

1. Facts of *Trans World Airlines, Inc. v. Hardison*

The facts of *Hardison* are typical of many “failure to accommodate” claims. Larry Hardison, a Saturday Sabbath observer and member of the Worldwide Church of God, worked for Trans World Airlines (TWA) in the stores department, which was open twenty-four hours per day, every day of the year.\(^8\) The employees who worked at this facility were subject to a seniority system, contained in their collective bargaining agreement,\(^8\)

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84. See infra notes 110–13, 122–28 and accompanying text; see also Part I.E.1.

85. Although the Supreme Court has defined “undue hardship” as more than a de minimis burden, courts have continued to be unsure of what types of burdens are de minimis. *Hardison*, 432 U.S. at 84–85 (holding that an employer is not required to bear more than a de minimis burden in accommodating a religious employee); see also Engle, supra note 28, at 390 (noting that the Court in *Hardison* gave little guidance as to when an accommodation could ever be required but gave many suggestions as to when it could not be required); Kaminer, supra note 34, at 596 (arguing that lower courts have followed the Supreme Court’s overall narrow interpretation of § 2000e(j), which has led to conflicting views regarding the appropriate scope of accommodation obligation). See generally infra Part II. Courts are even less clear as to what types of religious accommodations are considered “reasonable” under Title VII and most concede that the determination of reasonable accommodation is typically a case-by-case analysis. See Beadle v. Hillsborough County Sheriff’s Dep’t, 29 F.3d 589, 592 (11th Cir. 1994); United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976). For a discussion of the different approaches to the “undue hardship” analysis see infra Part I.E.2.

86. *Hardison*, 432 U.S. at 66.

which allowed the most senior employees to have first choice in scheduling
shifts.\textsuperscript{88} Under this system, Hardison was able to avoid working on his
Sabbath, but when his request to move to a different building within TWA
was granted, he lacked sufficient seniority to avoid being scheduled to work
on Saturday.\textsuperscript{89} When Hardison’s union refused to violate the collective
bargaining agreement to accommodate Hardison’s religious needs, Hardison
was scheduled to work on a Saturday.\textsuperscript{90} He refused to work on
his Sabbath and was discharged for insubordination.\textsuperscript{91}

Hardison sued, claiming that TWA violated Title VII and discriminated
against him on the basis of religion by failing to accommodate his religious
needs.\textsuperscript{92} The Supreme Court reversed the decision of the U.S. Court of
Appeals for the Eighth Circuit and found that TWA did not violate Title
VII.\textsuperscript{93}

The \textit{Hardison} Court held that an accommodation would subject an
employer to an undue hardship if the employer was required to bear more
than a “de minimis”\textsuperscript{94} cost in accommodating a religious employee.\textsuperscript{95}
However, as discussed in Part I.E.2.b, this case is also often cited for the
proposition that an employer can demonstrate an undue hardship by
showing that a religious accommodation would negatively affect the
religious employee’s coworkers, treating the religious employee

\textsuperscript{88} \textit{Hardison}, 432 U.S. at 67.
\textsuperscript{89} \textit{Id.} at 68.
\textsuperscript{90} \textit{Id.} at 69.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 70.
\textsuperscript{94} The term “de minimis” is defined as “1. Trifling; minimal. 2. (Of a fact or thing) so
insignificant that a court may overlook it in deciding an issue or case.” \textit{Black’s Law
Dictionary}, supra note 3, at 464; \textit{see infra} Part I.E.2.a; \textit{see also} \textit{Cloutier v. Costco
Wholesale Corp.}, 390 F.3d 126, 134 (1st Cir. 2004) (noting that a hardship may be undue if
it would result in “economic costs, such as lost business or having to hire additional
employees to accommodate” a religious employee).
\textsuperscript{95} \textit{Hardison}, 432 U.S. at 84.
preferentially. Thus, two possible ways of demonstrating undue hardship have emerged from lower courts' interpretation of *Hardison*.

2. The Two Methods of Demonstrating Undue Hardship

As previously mentioned, there are two methods by which an employer can show that an accommodation would result in an undue hardship. First, undue hardship can be demonstrated by showing an accommodation would cause a financial hardship that is more than de minimis. An employer may also prove that an accommodation would result in preferential treatment of the religious employee over her coworkers. This Note refers to the first method of demonstrating undue hardship as “Financial Cost Hardship” and to the second as “Preferential Treatment Hardship.” Today, the current understanding of the undue hardship standard is still primarily defined by *Hardison*, which involved Financial Cost Hardship and, implicitly, Preferential Treatment Hardship.

In demonstrating undue hardship by either method, courts typically hold that a hardship needs to be more than merely speculative to relieve the employer of its duty to accommodate. Some courts, however, hold that an employer is not required to endure the hardship to claim that it has been

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96. See infra Part I.E.2.b; see also Cook v. Chrysler Corp., 981 F.2d 336, 338 (8th Cir. 1992); Turpen v. Mo.-Kan.-Tex. R.R., 736 F.2d 1022, 1026 (5th Cir. 1984); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981); Yott v. N. Am. Rockwell Corp., 602 F.2d 904, 908 (9th Cir. 1979); Burns v. S. Pac. Transp. Co., 589 F.2d 403, 406 (9th Cir. 1978).

97. See Cloutier, 390 F.3d at 134–35 (noting two possible ways of demonstrating hardship); Kalsi v. N.Y. City Transit Auth., 62 F. Supp. 2d 745, 758 (E.D.N.Y. 1998) (stating that an employer can show undue hardship by showing either that an accommodation’s “impact on co-workers or its cost would be more than de minimis” (quoting Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984))); see also EEOC, supra note 18.

98. See supra notes 95–97 and accompanying text.

99. See supra note 94 and accompanying text.

100. See infra Part I.E.2.b; see also Cloutier, 390 F.3d at 134 (noting that noneconomic costs may amount to an undue hardship); EEOC, supra note 18.

101. See infra Part I.E.2.a–b.


103. See id. at 81–83.

104. See Cloutier, 390 F.3d at 135 (“Courts are ‘somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice.’” (quoting Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975))); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1365 (S.D. Fla. 1999); see also Kaminer, supra note 34, at 611 (“Many courts agree that an employer must establish that it will suffer an actual undue hardship in accommodating a religious employee, and that speculative or hypothetical hardships do not constitute undue hardship.”); WOLF ET AL., supra note 82, at 108. However, there are at least a few cases that support the proposition that a hypothetical hardship can constitute undue hardship. See Weber v. Roadway Express, Inc., 199 F.3d 270, 274–75 (5th Cir. 2000); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579, 583 n.22 (3d Cir. 1977); see also Cloutier, 390 F.3d at 135.
unduly burdened and instead can show evidence that such a hardship would in fact occur if the employer was required to accommodate the employee.\textsuperscript{105}

Using \textit{Hardison} as a paradigm, this section first discusses Financial Cost Hardship. Next, it examines Preferential Treatment Hardship and explains how it was integral to \textit{Hardison}'s disposition.

\textbf{a. The First Method: Financial Cost Hardship}

To demonstrate "Financial Cost Hardship," an employer must show that accommodating the religious employee would result in an economic cost, including lost efficiency, to the conduct of the employer's business.\textsuperscript{106} Relying on the \textit{Hardison} holding that any cost that is more than de minimis is an undue hardship,\textsuperscript{107} courts tend to find that virtually any economic cost to an employer is an undue hardship.\textsuperscript{108} In these cases, unless an

\begin{footnotesize}
\textsuperscript{105} See EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 317 (4th Cir. 2008) (citing Brown v. Polk County, Iowa, 61 F.3d 650, 655 (8th Cir. 1995)) (noting that the undue hardship determination cannot be based on speculation, but an employer is not required to wait until it feels the effects of the accommodation before determining that it constitutes an undue hardship); Cloutier, 390 F.3d at 135 ("[I]t is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations . . . .") (quoting Draper, 527 F.2d at 520)); see also Prenkert & Magid, supra note 20, at 469–70 (noting that in religious expression-proselytization cases, courts have expanded the undue hardship defense to allow employers' speculation regarding the harm resulting from accommodating proselytizing to amount to an undue hardship).


\textsuperscript{107} \textit{Hardison}, 432 U.S. at 84. In addition to spending money to accommodate a religious employee, breaching a contract or collective bargaining agreement would also inflict harm on a business. WOLF ET AL., supra note 82, at 110–11.

\textsuperscript{108} See, e.g., \textit{Hardison}, 432 U.S. at 92 n.6 (Marshall, J., dissenting) (noting that stipulations make clear that the accommodation would have cost TWA $150 for three months of overtime, at which time Hardison would have been eligible under the seniority system to transfer back to his previous department where accommodation would no longer be an issue); Baz v. Walters, 782 F.2d 701, 707 (7th Cir. 1986) (holding that administrative costs involved in transferring religious employee to another facility constituted undue hardship); EEOC v. BJ Servs. Co., 921 F. Supp. 1509, 1514 (N.D. Tex. 1995) (holding that monetary cost of transferring an equipment operator from another location was one of the bases for finding an undue hardship); Gibson v. Mo. Pac. R.R., 620 F. Supp. 85, 86–87 (E.D. Ark. 1985) (stating that employee's refusal to work on Saturdays constituted undue hardship because it would require employer to incur additional cost of $240 for overtime); Prenkert & Magid, supra note 20, at 468; Ruan, supra note 45, at 17; Zablotsky, supra note 34, at 547. But see Jolls, supra note 36, at 686; Kaminer, supra note 34, at 614 (arguing that because courts have not specifically articulated a rule that an accommodation requiring financial cost always constitutes undue hardship, the door has been left open so that in the future, some economic cost could be required); WOLF ET AL., supra note 82, at 130 ("Administrative costs expended by employers to accommodate an employee's religious beliefs are usually viewed as de minimis."). Professor Jolls argues that sometimes an employer may be injured financially by complying with even neutral rules of antidiscrimination—i.e., the prohibition on intentional discrimination—such as when an employer must hire women, for example, even though the employer is aware that its customers would be highly reluctant to work with a woman. Jolls, supra note 36, at 686. Jolls concludes that "even those aspects of antidiscrimination law that prohibit intentional discrimination . . . require employers to bear
accommodation can be reached that does not require any financial cost, courts have been extremely unwilling to find that an employer did not meet its accommodation obligation.109

In Hardison, TWA clearly demonstrated Financial Cost Hardship. The Hardison Court found that Hardison’s request to have Saturdays off so he could observe the Sabbath would be an undue hardship on his employer because TWA would be required to breach the seniority system, in contravention of its agreement with Hardison’s union, and, to do so, it would be required to pay premium overtime hours to other employees.110

The Supreme Court emphasized that Title VII did not require an employer to violate a valid seniority system to accommodate a religious

real financial costs associated with a particular group of employees and, in this respect, to ‘accommodate’ those employees, thus suggesting that the line between accommodation rules and neutrality rules of antidiscrimination is not all that clear. Id. at 698.

109. Zablotsky, supra note 34, at 544–51. A possible reason why courts have been reluctant to require employers to incur any expense to accommodate religious employees is the potential violation of the Establishment Clause of the Constitution’s First Amendment. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). Litigants have sometimes argued that § 2000e(j) is unconstitutional as a violation of the Establishment Clause; however, courts of appeals have uniformly rejected such challenges. Oleske, supra note 34, at 537; see EEOC v. Ithaca Indus., 849 F.2d 116, 119 (4th Cir. 1988) (en banc) (holding that Title VII poses no constitutional problem and noting that "[e]very court of appeals that has addressed this issue has held that [the accommodation provision] does not violate the First Amendment"); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 135 (3d Cir. 1986) (same); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1244–46 (9th Cir. 1981) (holding that Title VII does not violate the Establishment Clause). See generally Greenawalt, supra note 32, at 22 ("Enough cases have been decided since Hardison to give us reasonable assurance that requiring minimal cost accommodation is constitutionally permissible. But, that conclusion leaves open the issue of whether requiring more costly accommodations might violate the Establishment Clause.").

The Bureau of National Affairs handbook Religious Accommodation in the Workplace suggests that the Supreme Court’s opinion in Hardison avoided the constitutional issue by setting “a very low standard of what the statute could require.” BUREAU OF NAT’L AFFAIRS, INC., RELIGIOUS ACCOMMODATION IN THE WORKPLACE: A LEGAL AND PRACTICAL HANDBOOK 42 (1987) [hereinafter BNA HANDBOOK]. Commentators have also argued that the Supreme Court narrowly interpreted the duty to reasonably accommodate a religious employee due to First Amendment concerns. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 7 (1996) ("Apparently to avoid constitutional questions under the Establishment Clause, the Supreme Court interpreted the duty of reasonable accommodation narrowly . . . ."); Prenkert & Magid, supra note 20, at 482 ("[S]ome of the Court’s language hinted that it carefully balanced Free Exercise and Establishment Clause concerns."); Mark Tushnet, The Emerging Principle of Accommodation of Religion (Dubitante), 76 GEO. L.J. 1691, 1695 (1988) ("The Court has construed the ‘reasonable accommodation’ requirement narrowly, allowing it to avoid ruling on the provision’s constitutionality.").

However, Professor Karen Engle notes that although commentators often make the claim that Hardison construed the duty to accommodate narrowly to avoid the constitutional issue, no support is cited for the proposition and the Hardison Court did not offer the Establishment Clause as a reason for its decision. Engle, supra note 28, at 402 & n.373 (arguing that courts have “not consider[ed] the Establishment Clause as an obstacle to accommodation”). For a more detailed discussion of the Title VII religious accommodation duty and its constitutional implications, see Greenawalt, supra note 32, at 22.

employee, as doing so would be a burden on the employer.\textsuperscript{111} The Court held that "requir[ing] TWA to bear more than a \textit{de minimis} cost in order to give Hardison Saturdays off [was] an undue hardship."\textsuperscript{112} The Court also noted that the operation of the seniority system itself "represented a significant accommodation to the needs, both religious and secular, of all of TWA’s employees . . . [and was] a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."\textsuperscript{113}

\textbf{b. The Second Method of Showing Undue Hardship: Preferential Treatment Hardship}

In addition to the holding that an employer is not required to breach a bona fide seniority system\textsuperscript{114} or bear a financial cost in accommodating a religious employee,\textsuperscript{115} lower courts have identified another principle in the \textit{Hardison} decision.\textsuperscript{116} Courts have read \textit{Hardison} to hold that an undue hardship can be found where an accommodation requires preferential treatment of a religious employee over her coworkers.\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 81. The Court also relied on 42 U.S.C. § 2000e-2(h) of Title VII as support for its holding. Section 2000e(h) states that absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has a discriminatory impact. The Court noted that seniority systems are afforded special treatment under Title VII itself and, therefore, need not be contravened. \textit{Hardison}, 432 U.S. at 81–83.
  \item \textsuperscript{112} \textit{Id.} at 84.
  \item \textsuperscript{113} \textit{Id.} at 78. However, “the existence of a [bona fide] seniority system does not necessarily relieve the employer of its obligation to reasonably accommodate a religious employee . . . .” Kaminer, \textit{supra} note 34, at 617 n.294. If such an accommodation is possible without disrupting the seniority system or creating costs for the employer, courts tend to require accommodation. See Balint v. Carson City, Nev., 180 F.3d 1047, 1052–53 (9th Cir. 1999); \textit{see also} Kaminer, \textit{supra} note 34, at 617 n.294. For example, courts generally require that employers at least give the religious employee the chance to find a voluntary replacement for her shift. See \textit{Engle}, \textit{supra} note 28, at 396.
  \item \textsuperscript{114} \textit{Hardison}, 432 U.S. at 78–79; \textit{id.} at 91–97 (Marshall, J., dissenting) (arguing that although the majority’s analysis was erroneous, the seniority rights of all employees under the collective bargaining agreement should be preserved); EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 317 (4th Cir. 2008); Cook v. Chrysler Corp., 981 F.2d 336, 338 (8th Cir. 1992); see 42 U.S.C. § 2000e-2(h) (2006); 29 C.F.R. § 1605.2(e)(2) (2008); \textit{see also} \textit{Engle}, \textit{supra} note 28, at 395; Kaminer, \textit{supra} note 34, at 616–17; Kaminer, \textit{supra} note 47, at 89.
  \item \textsuperscript{115} \textit{See Hardison}, 432 U.S. at 84.
  \item \textsuperscript{116} \textit{See} \textit{Greenawalt, supra} note 32, at 19 (noting the principle that an employer need not bear more than a \textit{de minimis} cost in accommodating an employee). The author further notes that "\textit{Hardison} implies another point of some importance. The statutory provision is cast in terms of hardship on the employer’s business; the Court assumes that it includes undue hardship on fellow workers." \textit{Id.}
  \item \textsuperscript{117} \textit{See id.} Lower courts typically take the \textit{Hardison} decision to stand for the proposition that preferential treatment is tantamount to undue hardship regardless of whether the employees are subject to a collective bargaining agreement. See, e.g., \textit{Cook}, 981 F.2d at 338; Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 487 n.11 (2d Cir. 1985) ("\textit{Hardison} may be read as equating 'undue hardship' with preferential treatment."); \textit{aff'd on other grounds}, 479 U.S. 60 (1986); \textit{Tooley v. Martin-Marietta Corp.}, 648 F.2d 1239, 1243 (9th Cir. 1981); \textit{Yott v. N. Am. Rockwell Corp.}, 602 F.2d 904, 908–09 (9th Cir. 1979); \textit{Burns v. S. Pac. Transp. Co.}, 589 F.2d 403, 406 (9th Cir. 1978) ("The \textit{Hardison} Court found that the
This second way of showing undue hardship, by demonstrating preferential treatment, assumes that preferential treatment of a religious employee is tantamount to an undue hardship. Despite the lack of specific language in Hardison, § 2000e(j), or in the EEOC guidelines\(^{118}\) equating the term “preferential treatment” with “undue hardship,” courts have often inferred their equivalence.\(^{119}\) Lower courts, relying on Hardison, often find that an employer can demonstrate undue hardship by showing that an accommodation would adversely affect the religious employee’s coworkers, regardless of whether the coworkers are entitled to their preferred employment situation under a collective bargaining agreement.\(^{120}\) But circuit courts are split over what sorts of impact on other employees amount to such preferential treatment outside the context of a collective bargaining agreement; this is the conflict explored by this Note.\(^{121}\)

The lower courts’ inference of this principle from Hardison stems from the Supreme Court’s seeming unease with giving religious employees preferential treatment over their nonreligious coworkers.\(^{122}\) Indeed, the employer had demonstrated undue hardship where the accommodation requested by the employee . . . would have effectively required preferential treatment on the basis of religion . . .”; Aron v. Quest Diagnostics Inc., No. Civ.A.03-2581 JSH, 2005 WL 1541060, at *6-7 (D.N.J. June 30, 2005).

118. See 29 C.F.R. § 1605.2(e) (2008) (discussing undue hardship only in terms of financial cost and preservation of seniority rights).

119. See, e.g., Opuku-Boateng v. California, 95 F.3d 1461, 1469–70 (9th Cir. 1996) (“We have not read Hardison so broadly as to proscribe all differences in treatment. Instead, we have read it to bar ‘preferential treatment of employees.’” (quoting Tooley, 648 F.2d at 1243) (citing Yott, 602 F.2d at 908)).

120. See, e.g., EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 615–16 (9th Cir. 1988); Brenner v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 n.5 (5th Cir. 1982). But see Opuku-Boateng, 95 F.3d at 1470 (noting that in Hardison, unlike in the present case, the proposed accommodation would have interfered with the seniority rights under the collective bargaining agreement); EEOC, supra note 18 (“An employer can show undue hardship if accommodating an employee’s religious practices . . . infringes on other employees’ job rights or benefits . . .”)

The Hardison Court may have refused to grant Hardison’s accommodation because doing so would have violated the collective bargaining agreement in a way that would have denied other coworkers their contractual rights. However, in applying Hardison to cases that do not involve a collective bargaining agreement, lower courts often cite the following phrase:

> It would be anomalous to conclude that by “reasonable accommodation” Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Hardison, 432 U.S. at 81. But see supra note 118.

121. See infra Part II.

122. See Hardison, 432 U.S. at 79–85; see also Prenkert & Magid, supra note 20, at 482 (“[T]he Court was reluctant to interpret the accommodation requirement to require TWA to subject Hardison’s coworkers to ‘unequal treatment’ . . .”); Kaminer, supra note 34, at 579 (“[C]ourts are generally reluctant to require differential or preferential treatment based on any of the protected categories under Title VII.”).
importance of the other employees' rights is "echoed over and over" in many passages of the decision.\textsuperscript{123}

For instance, the \textit{Hardison} Court reasoned that the only way TWA could have accommodated Hardison's religious observances, short of financial expense, was by ordering a more senior employee to work in his place when Hardison had a work-religion conflict.\textsuperscript{124} However, doing this would deny the more senior employee his contractually guaranteed shift preference, effectively discriminating against that employee based on his different religion.\textsuperscript{125} Thus, accommodating Hardison would have been possible "only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends."\textsuperscript{126} The court concluded,

It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.\textsuperscript{127}

In the last line of the opinion, the majority again stated it would not construe the statute in such a way as to "require an employer to discriminate against some employees in order to enable others to observe their Sabbath."\textsuperscript{128}

Although the language of § 2000e(j) would seem to require an employer, in some circumstances, to impinge the rights or preferences of other employees if necessary to accommodate a religious observer,\textsuperscript{129} the

\textsuperscript{123} \textsc{Lex K. Larson, Employment Discrimination} § 56.03[1] (2d ed. 2009); see, e.g., \textit{Hardison}, 432 U.S. at 81 ("[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."); \textit{id.} ("The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities.").

\textsuperscript{124} \textit{Hardison}, 432 U.S. at 81. Earlier in the opinion, the Court dismissed the other possible methods of accommodating Hardison as imposing more than a de minimis cost on TWA. \textit{See id.} at 76–78. However, the dissent noted that the other methods of accommodation would not have involved the type of preferential treatment the majority was concerned about or amount to more than a de minimis cost to TWA, given its large size. \textit{See id.} at 91–92 (Marshall, J., dissenting). The dissent further argued that even if preferential treatment were required, it would not have presented an undue hardship on TWA. \textit{Id.} at 92 n.6.

\textsuperscript{125} \textit{Id.} at 80–81 ("TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.").

\textsuperscript{126} \textit{Id.} at 81.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} at 85.

\textsuperscript{129} \textsc{See 42 U.S.C § 2000e(j) (2006) (requiring that an accommodation not be an "undue hardship on the conduct of the employer's business" without any reference to interests of coworkers).}
Hardison majority did not interpret that section in such a fashion. Rather, the Court found that, at least in the context of a collective bargaining agreement, an employer is excused from accommodating a religious employee if doing so would be possible only by granting a privilege to that employee.

Noting the majority's implication that preferential treatment is not required, the dissenting Justices, Thurgood Marshall and William Joseph Brennan, Jr., read the majority opinion as barring any level of unequal or preferential treatment of the religious employee because such treatment would burden other employees and would thus amount to an undue hardship on the employer. They argued that the accommodation requirement of Title VII, in fact, called for some level of unequal treatment in favor of religious employees. Rejecting the majority's rationale, the dissent reasoned that "if an accommodation can be rejected simply because it involves preferential treatment, then the... statute, while brimming with 'sound and fury,' ultimately 'signif[ies] nothing.'"

Yet the de minimis language used by the majority might suggest that some unequal treatment could be allowed so long as it does not exceed a very low threshold. In fact, because de minimis, as a legal term, means nontrivial, it seems as though any preferential treatment of religious employees that is trivial should be acceptable under Hardison. However,

130. See Hardison, 432 U.S. at 81 ("The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."); see also BNA HANDBOOK, supra note 109, at 70.
131. See Hardison, 432 U.S. at 81; see also BNA HANDBOOK, supra note 109, at 70; Larson, supra note 123, § 56.03[1] (noting that Hardison's interest in having his religious practices accommodated was "pitted against" the interests of three other parties: the employer, the union, and the coemployees—of these the least important was the employer's interest); Kaminer, supra note 34, at 588 ("The Hardison Court's hesitance to require differential treatment of Hardison can be understood in the context of the courts' general reluctance to require much more than neutrality in interpreting Title VII."); Prenkert & Magid, supra note 20, at 482 ("[T]he Court was reluctant to interpret the accommodation requirement to require TWA to subject Hardison's coworkers to 'unequal treatment,' which would result from allowing Hardison to have Saturdays off and requiring a fellow employee to work in his place.").
132. Although the majority never explicitly held that an accommodation that requires preferential treatment is an undue hardship, the dissent clearly believed that preferential treatment was the basis of the holding. Hardison, 432 U.S. at 87 (Marshall, J., dissenting).
133. Id. at 86-87 (interpreting the majority's holding as not requiring an employer to grant "even the most minor special privilege to religious observers to enable them to follow their faith").
134. See id. at 87.
135. Id.
136. Larson, supra note 123, § 56.03[1] (noting that Hardison should be read to mean that any employer action that causes nontrivial discrimination between or among its employees on religious grounds, would constitute undue hardship on the employer).
137. See id. (noting that the term "de minimis" entered legal lexicon in the maxim "De minimis non curat lex," meaning, "the law does not care about trifles"). The term is not, in fact, a quantifiable unit of measurement, which can be pushed this way or that, but means
circuit courts are split over whether infringement on coworkers' shift preferences is considered more than a de minimis hardship when employees have no contractual rights to such preferences.\textsuperscript{138}

3. Post-\textit{Hardison} Decisions: Defining the Limits of an Employer's Accommodation Obligation

\textit{Hardison} answered some questions about an employer's accommodation obligation, but many questions remained unanswered. Although \textit{Hardison} did give some meaning to the term "undue hardship," it left the "reasonable accommodation" prong of § 2000e(j) undefined. Additionally, apart from indicating that preferential treatment of a religious employee is not required, \textit{Hardison} did not give much guidance for lower courts trying to determine what sorts of accommodations amount to preferential treatment.

Three cases that are discussed below, however, are helpful in understanding the level of accommodation an employer must provide to a religious employee. First, in \textit{Bhatia v. Chevron U.S.A., Inc.},\textsuperscript{139} the U.S. Court of Appeals for the Ninth Circuit held that an accommodation that forced the religious employee's coworkers to take on additional, physically hazardous work would amount to preferential treatment and would be an undue hardship on the employer.\textsuperscript{140} A year later, in \textit{Estate of Thornton v. Caldor, Inc.},\textsuperscript{141} the Supreme Court found that a state law that required an employer to accommodate a Sabbath observer's scheduling needs, regardless of any hardship on the employer or other employees, was unconstitutional.\textsuperscript{142} Finally, a year after \textit{Estate of Thornton}, the Court held in \textit{Ansonia Board of Education v. Philbrook}\textsuperscript{143} that once the employer has provided a religious employee with any reasonable accommodation, the employer has satisfied its accommodation obligation and need not show that the employee's desired accommodation would cause undue hardship.\textsuperscript{144}

This section first discusses \textit{Bhatia}, a case decided by the Ninth Circuit, which has been widely accepted by courts as defining the outer limit of an employer's accommodation obligation. Next, this section examines \textit{Estate
of Thornton and Ansonia, which are also helpful in fully understanding the specific conflict addressed in this Note.

a. Bhatia v. Chevron U.S.A., Inc.: Accommodations That Require Other Employees To Take On Added Hazardous Work Are an Undue Hardship

Seven years after the Hardison decision, the Ninth Circuit, in Bhatia, held that an accommodation that required a religious employee’s coworkers to take on additional, physically hazardous work would amount to an undue hardship on the employer. Courts seem to agree with this holding, and it is now generally accepted that an employer need not go so far as to implement an accommodation that would force coworkers to take over the religious employee’s dangerous job duties.

In Bhatia, the employer, Chevron, had a policy that required all employees whose duties involved potential exposure to toxic gases to shave any facial hair that prevented them from achieving a gas-tight face seal when wearing a respirator. Bhatia, a devout Sikh, informed Chevron that he could not comply with the requirement because his religion forbids the cutting or shaving of body hair. Chevron offered Bhatia three clerical jobs as possible accommodations to his work-religion conflict, and he refused all three. Chevron then suspended Bhatia without pay, although it had previously terminated his coworkers who refused to shave for nonreligious reasons. Chevron promised to return Bhatia to his position if a respirator was developed that would be safe for him to use.

The court held that retaining Bhatia in his position, unable to use a respirator, would cause Chevron an undue hardship. If it kept him in his position and assigned him duties that involved exposure to toxic gas, Chevron would risk liability for violating California Occupational Safety and Health Administration standards. If it retained Bhatia in his position but directed his supervisors to only assign him duties that involved no exposure to toxic gas, the burden on Chevron would be quite severe. First, Chevron would have to completely revamp its system of assigning

145. 734 F.2d at 1384.
146. See, e.g., Opoku-Boateng v. California, 95 F.3d 1461, 1468 (9th Cir. 1996); EEOC v. Oak-Rite Mfg. Corp., No. IP99-1962-C-H/G, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001); Kalsi v. N.Y. City Transit Auth., 62 F. Supp. 2d 745, 758 (E.D.N.Y. 1998); see also Sonne, supra note 21, at 1055–56 (citing Bhatia for the proposition that employers need not take any action that would impair the safety of the workplace to accommodate a religious employee); EEOC, supra note 18.
147. 734 F.2d at 1383.
148. Id.
149. Id. Bhatia eventually accepted transfer to a janitorial position, which was a seventeen percent decrease in income, although soon thereafter, he filed suit against Chevron for religious discrimination. Id.
150. Id.
151. Id.
152. Id.
153. Id. at 1384.
154. Id.
duties to predict when a duty would involve exposure to toxic gases.\(^{155}\) Also, because Bhatia would not be able to be exposed to the toxic gas, his coworkers would be required to assume his share of potentially hazardous work.\(^{156}\) The court stated that Title VII does not require an employer to go that far.\(^{157}\)

b. Estate of Thornton v. Caldor, Inc.

A year after *Bhatia*, the Supreme Court reaffirmed its concern about accommodations of a religious employee that may burden other employees in *Estate of Thornton*.\(^{158}\) Although not interpreting Title VII’s religious accommodation requirement, this case involved the constitutionality of a Connecticut statute that gave employees the unfettered right not to work on the Sabbath of their religious faith.\(^{159}\) In holding such a statute unconstitutional as a violation of the First Amendment’s Establishment Clause, the Court was careful to point out that a shortcoming of the statute was that it “[took] no account of the convenience or interests of the employer or those of other employees who [did] not observe a Sabbath.”\(^{160}\) The Court again showed its concern for the burden that such a statute could create for a religious employee’s coworkers by noting that there is no exception “when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer’s compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.”\(^{161}\) Read together, *Bhatia*, *Estate of Thornton*, and *Hardison* suggest that a “significant burden” on other employees is sufficient to show an undue hardship on the employer.\(^{162}\)

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155. *Id.*

156. *Id.*

157. *Id.*


159. *Id.* at 708–09.

160. *Id.* at 709. Quoting Judge Learned Hand, the Court noted that “‘The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.’” *Id.* at 710 (quoting *Otten v. Baltimore & Ohio R.R.*, 205 F.2d 58, 61 (2d Cir. 1953)).

161. *Id.* at 709–10. The Court also noted that “employees who have strong and legitimate, but nonreligious, reasons for wanting a weekend day off have no rights under the statute.” *Id.* at 710 n.9.

162. *Id.* at 710; see Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 641 (1999) (noting that under Title VII, an employer must accommodate a religious employee so long as the accommodation requires only a de minimis cost “and does not impose any significant burdens on coworkers”). A significant burden is one that is more than de minimis. Larson, *supra* note 123, § 56.03[1]. What amounts to a significant burden on coworkers is considered in Part II *infra*. 
In 1986, disregarding the EEOC Guidelines on Discrimination Because of Religion, the Supreme Court handed down its decision in Ansonia, which held that an employer is not required to accept any particular accommodation that the religious employee proposes. Instead, once the employer has provided any reasonable accommodation, the statutory inquiry is at an end and the employer need not show that the employee’s desired accommodation would cause undue hardship. Although not interpreting the undue hardship prong of § 2000e(j), the Ansonia Court reaffirmed the holding in Hardison and is useful in fully understanding the scope of an employer’s accommodation obligation.

Ronald Philbrook was a teacher and, like Larry Hardison, a member of the Worldwide Church of God. As part of his religious observance, Philbrook was required to celebrate six religious holidays each year that caused him to be absent from school. Under the terms of Philbrook’s collective bargaining agreement, teachers were given three paid days off each year for religious reasons as well as three personal days off each year. However, personal days could not be used for any purpose that already had a designated leave policy and, therefore, they could not be used for religious purposes.

For a period of time, Philbrook used the three religious days off and then took unauthorized days off (time off without pay) to satisfy the religious

163. The Supreme Court noted that the EEOC Guidelines are accorded less weight than administrative regulations that Congress has declared are entitled to the force of law. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69–70 n.6 (1986). However, in Justice Marshall’s Ansonia opinion, he noted that in the previous term, the Supreme Court relied on EEOC guidelines in interpreting Title VII. He argued that the Court’s refusal to rely on the EEOC’s interpretation in Ansonia “rests on nothing more than a selective reading of the express provisions of Title VII and the guidelines.” Id. at 74 (Marshall, J., concurring in part and dissenting in part); see also Kaminer, supra note 34, at 596.

164. 29 C.F.R. § 1605 (1985). In part, the 1985 guidelines that the Ansonia Court ignored stated that “when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.” 29 C.F.R. § 1605.2(c)(2)(ii).

165. Ansonia, 479 U.S. at 68.

166. Id.

167. See id. at 67 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)); see also Oleske, supra note 34, at 532.

168. Commentators suggest that the scope of an employer’s duty to accommodate a religious employee is quite limited, amounting to little more than a “dead letter.” See Prekert & Magid, supra note 20, at 468 (“[C]ourts have created muddled and ineffective doctrines and rules [relating to the religious accommodation requirement]. As a result, over time, the accommodation requirement is likely to continue its evolution into a dead letter.”); Kaminer, supra note 34, at 577–79.


170. Id. at 62–63.

171. Id. at 63–64.

172. Id. at 64.
requirement of celebrating the six holy days. However, after some time, Philbrook was dissatisfied with this arrangement and suggested an accommodation that the school board could make to allow him to observe his religion. Philbrook suggested that he be allowed to use the three personal days for religious reasons or, alternatively, pay for a substitute teacher himself for days when he could not work. However, the school board rejected both of these proposals.

In holding for the school board, the Supreme Court noted that neither the legislative history nor the plain language of Title VII required an employer to accept any particular accommodation requested by a religious employee. Once a reasonable accommodation was offered to the employee, the employer’s statutory duty was fulfilled and the employer was not required to prove that the proposed accommodations would have presented an undue hardship to the employer.

The Ansonia court found that, generally, unpaid leave would be a reasonable accommodation because the employee was merely giving up pay for time that he did not actually work. Although Philbrook would have preferred a different, and possibly also reasonable accommodation, the school board had fulfilled its obligation and was not required to accept his proposed accommodation.

The cases discussed in this section somewhat delineate the employer’s obligation to accommodate a religious employee. They teach that an employer is not required to implement a religious employee’s desired accommodation if a reasonable accommodation has already been offered. They also show clear judicial concern over accommodations that might

173. *Id.*
174. *Id.* at 64–65.
175. *Id.*
176. *Id.* at 65.
177. *Id.* at 68–71.
178. *Id.* at 68. *But see* Greenawalt, *supra* note 32, at 17 (“But an accommodation should not count as reasonable if supervisors should not have supposed it would resolve a worker’s religious conflict, given all the facts that the supervisors learned during their conversations with the worker.”).
179. *Ansonia*, 479 U.S. at 70–71. The Court was unable to address the reasonableness of this particular policy because the lower court applied an erroneous view of the law and neither explicitly considered the issue. *Id.* at 70. The Court stated that it had insufficient factual findings to judge the policy at issue but noted that generally, the school board’s policy would be a reasonable one. *Id.* at 71; *see also* Kaminer, *supra* note 34, at 594.
180. *Ansonia*, 479 U.S. at 68–69. It also should be noted that a reasonable accommodation need not be initiated by the employer in response to the employee’s protest of a religious conflict; thus, reasonable accommodations may be found in policies that the employer already has in place. *See* Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 144 n.2 (5th Cir. 1982) (“Hardison demonstrated that an employer’s reasonable accommodation of an employee’s religious observances need not be initiated in response to the employee’s protest. The seniority system and weekend work crew policy were established before Hardison made known his difficulties.”).
181. *See supra* notes 177–78 and accompanying text.
negatively affect other employees. But how far must an employer go when an accommodation would impact other employees?

The question of what sorts of burdens on coworkers amount to preferential treatment of the religious employee is still largely unanswered. Apart from stating that an accommodation that significantly burdens other employees is not required, the Court did not state what constitutes a significant burden. Thus, lower courts, citing Hardison as authority, have found that varying degrees of imposition on coworkers amount to preferential treatment and an undue hardship.

With these questions in mind, this Note will focus on circuit courts’ interpretation of “preferential treatment,” outside the context of a collective bargaining agreement. Part II of this Note will discuss the split in circuit courts’ interpretations of Hardison, giving rise to differing views of what constitutes preferential treatment. Specifically, Part II will examine at what point courts have found that a negative effect on other employees’ shift preferences amounts to preferential treatment and whether employee complaints or general unhappiness with an accommodation is sufficient to show such treatment.

II. CONFLICTING INTERPRETATIONS: WHAT CONSTITUTES PREFERENTIAL TREATMENT?

As discussed in Part I.E, the Hardison Court clearly demonstrated its concern with allowing a religious employee to have preferential treatment over his coworkers simply because the coworkers did not adhere to the same religion. This concern has become an underlying principle for

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183. Kaminer, supra note 34, at 611.
185. One way that courts have defined when an accommodation amounts to preferential treatment is by applying the Hardison de minimis standard. See, e.g., Turpen v. Mo.-Kan.-Tex. R.R., 736 F.2d 1022, 1026 (5th Cir. 1984) (“Hardison held that the statute does not require an employer to deviate from its seniority system in order to give an employee shift preference for religious reasons... and that accommodation that would require an employer to incur a greater than de minimis cost or would create a greater than de minimis imposition on co-workers constitutes undue hardship.” (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977))). If an accommodation is more than a de minimis burden on other employees, then it is “significant” and amounts to preferential treatment. Relying on the Hardison decision, courts have noted that an accommodation that results in more than a de minimis imposition on coworkers goes beyond differential treatment and can constitute preferential treatment. But the type of impact on coworkers that is more than de minimis, leading to preferential treatment, is not clear. See Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 451 (7th Cir. 1981) (explaining that the rationale underlying the determination that greater than a de minimis imposition on coworkers amounts to an undue hardship is that anything more than de minimis would result in discrimination against other employees, a result that Congress did not intend).
186. See infra Part II.A–B.
187. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977) (noting that to accommodate Hardison, “TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath”). Even before Hardison, the court in Dewey v. Reynolds Metals Co., 429 F.2d 324
lower courts when determining whether negative impact on coworkers amounts to an undue hardship on the employer.\textsuperscript{188} Lower courts agree that an employer can show that an accommodation causes an undue hardship if it would go beyond permissible differential treatment of the religious employee and amount to prohibited preferential treatment.\textsuperscript{189} However, courts seem to disagree over whether impact on coworkers’ shift preferences amounts to preferential treatment outside the context of a collective bargaining agreement. This Part examines that disagreement of authority.\textsuperscript{190}

The conflict over the scope of preferential treatment seems to stem from courts’ differing interpretations of \textit{Hardison} and the breadth of its authoritative value. Uneasy about allowing coworkers’ shift preferences to be infringed upon due to a religious accommodation, many courts cite

\begin{quote}
\textsuperscript{188} See, e.g., Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 487 n.11 (2d Cir. 1985) (noting that “Hardison may be read as equating ‘undue hardship’ with preferential treatment”), \textit{aff’d on other grounds}, 479 U.S. 60 (1986); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981) (“The religious accommodation provisions do not authorize preferential treatment of employees.”); \textit{see also} Reply Brief For Plaintiff-Appellant at 11, Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. Apr. 11, 1996) (No. 94-16542) (arguing that the trial court erred in finding preferential treatment because other employees did not have seniority rights and thus any impact on coworkers’ shift preferences was not preferential treatment); Engle, \textit{supra} note 28, at 394 (noting that the idea that an accommodation for a particular employee is often seen as discriminatory provides a background for courts in the religious discrimination context).
\end{quote}

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\textsuperscript{189} See \textit{Brown v. Gen. Motors Corp.}, 601 F.2d 956, 962 (8th Cir. 1979) (“The Court in \textit{Hardison} held that differential treatment resulting from accommodation runs afoul of \$2000e-2(a)(1) if it: (1) would compromise other employees’ contractual seniority rights as secured by a collective bargaining agreement; or (2) would confer a privilege, the cost of which was more than [de minimis], solely on the basis of the recipient’s religious beliefs.”); \textit{see also} EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 318 (4th Cir. 2008) (“If Firestone were not to apply the attendance policy to one, and only one, employee, it would risk lowering morale by displaying favoritism . . . .”); Opuku-Boateng v. California, 95 F.3d 1461, 1469–70 (9th Cir. 1996) (interpreting \textit{Hardison} as proscribing “‘preferential treatment of employees’” not as proscribing all differences in treatment of employees (quoting Tooley, 648 F.2d at 1243) (citing \textit{Hardison}, 432 U.S. at 81; Yott v. N. Am. Rockwell Corp., 602 F.2d 904, 908 (9th Cir. 1979)); \textit{Philbrook}, 757 F.2d at 487 n.11; Burns v. S. Pac. Transp. Co., 589 F.2d 403, 406 (9th Cir. 1978) (“The \textit{Hardison} Court found that the employer had demonstrated undue hardship where the accommodation requested by the employee . . . would have effectively required preferential treatment on the basis of religion . . . .”).
\end{quote}

\begin{quote}
\textsuperscript{190} See, e.g., Reply Brief For Plaintiff-Appellant, \textit{supra} note 188, at 10 (arguing successfully that the court should not extend the protection afforded to a bona fide seniority system to all accommodation alternatives that may cause an impact on coworkers, even in a de minimis way). \textit{But see} Weber v. Roadway Express, Inc., 199 F.3d 270 (5th Cir. 2000) (holding that the mere possibility that an accommodation would adversely affect coworkers is sufficient to constitute an undue hardship).
\end{quote}
language in Hardison\textsuperscript{191} as proof that such treatment is preferential and thus prohibited.\textsuperscript{192} However, other courts reserve such language for religious accommodations that would require breach of a bona fide seniority system or other violation of the coworkers' contractual rights.\textsuperscript{193}

Part II.A discusses the broader view of Hardison, which protects coworkers' shift preferences outside the context of a collective bargaining agreement. Courts adopting this view find that an accommodation that negatively impacts coworker shift preferences, regardless of whether the employees are subject to a collective bargaining agreement, amounts to preferential treatment. Part II.B discusses the narrower view of Hardison, which requires demonstration of a more severe impact on coworkers before preferential treatment will be found, indicating that infringement on shift preferences, outside the context of a collective bargaining agreement, does not in itself amount to an undue hardship.

A. The Fifth Circuit Approach

Noting the phrase "shift and job preference" in the Hardison language,\textsuperscript{194} some courts, such as the U.S. Courts of Appeals for the Fifth and Eleventh Circuits, hold that it is preferential treatment, and thus an undue hardship, to impinge upon the shift "preference" of other employees in order to accommodate a religious employee.\textsuperscript{195} Thus, these courts seem to imply a "right" to shift preferences that, if infringed upon, constitutes an undue

\textsuperscript{191} The language reads as follows:

\begin{quote}
It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

\end{quote}


\textsuperscript{192} See, e.g., Weber, 199 F.3d at 273; Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 (5th Cir. 1982).

\textsuperscript{193} See Opoku-Boateng, 95 F.3d at 1470 ("In Hardison, the proposed accommodation would have conflicted with the contractually-established seniority system, thus violating an employee's seniority rights . . . by denying him his shift preferences. By contrast, in this case, the scheduling of shifts was not governed by any collective bargaining agreement, and the proposed accommodation would not have deprived any employee of any contractually-established . . . rights or privileges of any kind." (citing Hardison, 432 U.S. at 80)).

\textsuperscript{194} Hardison, 432 U.S. at 81; see also supra note 191 and accompanying text.

\textsuperscript{195} Brener, 671 F.2d at 146 n.5 ("Brener argues that Hardison is distinguishable from this case because a collective bargaining agreement was involved, but the excerpt quoted above clearly indicates that the court's concern was not only with breach of the agreement, but also with the preferential treatment of some employees on the basis of religion."); id. at 147 ("Brener['] underestimates the actual imposition on other employees in depriving them of their shift preference at least partly because they do not adhere to the same religion as Brener."); see also Beadle v. Hillsborough County Sheriff's Dept., 29 F.3d 589, 593 (11th Cir. 1994) (citing Hardison and rejecting the plaintiff's argument that the Hardison Court intended its holding to apply only in the context of a collectively bargained agreement, not in the context of a neutral rotating system such as was used by his employer); id. ("Rather, our reading of Hardison suggests that the Court was concerned primarily with the neutrality of the system utilized."); WOLF ET AL., supra note 82, at 114–15.
hardship, regardless of whether employees have a contractually established right to such preferences.196

1. Brener v. Diagnostic Center Hospital

In Brener, the Fifth Circuit allowed proof of employee unhappiness and complaints about a proposed accommodation to be treated as evidence of preferential treatment and thus an undue hardship on the employer, even in the absence of a collective bargaining agreement.197 There, Brener, a pharmacist and Orthodox Jew, sought an accommodation so that he could observe his Sabbath from sundown Friday to sundown Saturday.198 After Brener indicated to his supervisor, Luther, that he could not work on the Sabbath, Luther directed shift trades with other employees for a few weeks.199 Thereafter, Brener had to arrange the shift trades himself.200 When Brener informed Luther that he needed to miss three days of work for Rosh Hashanah and Yom Kippur, Luther directed other employees to trade Christmas holidays with Brener for these holidays.201 Soon thereafter, Luther began receiving complaints from other pharmacists regarding Brener’s special treatment.202

When Brener made another request to have off for four days due to the holiday of Sukkos, Luther replied that because of a morale problem among the other pharmacists, he could not direct further shift trades.203 He indicated, however, that Brener was free to arrange such trades himself.204 Brener failed to arrange a shift exchange, however, and did not work as scheduled for two days during Sukkos.205 During a meeting regarding

196. See Weber, 199 F.3d at 273 (holding that a religious accommodation would force the employer to deny the shift and job preferences of the other employees, constituting an undue hardship on the employer, although noting the employees had no contractual entitlement to such preferences).

197. 671 F.2d at 146; see also BNA HANDBOOK, supra note 109, at 70 (noting the difference in treatment of employee grumbling among courts). Generally, courts hold that mere employee unhappiness with an accommodation does not justify refusing to make it, and virtually all courts use language endorsing that view. See Opoku-Boateng, 95 F.3d at 1470–71; EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988) (“[P]roof of coworkers’ ‘unhappiness with a particular accommodation’ is not enough to show undue hardship.” (quoting Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978))); Brener, 671 F.2d at 147 (noting that Brener mischaracterized the burden on coworkers as mere employee grumbling); Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978) (“If relief under Title VII can be denied merely because the majority group of employees . . . will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.” (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 775 (1976))); Lambert v. Condor Mfg., Inc., 768 F. Supp. 600, 603–04 (E.D. Mich. 1991).

198. Brener, 671 F.2d at 142–43.

199. Id. at 143.

200. Id.

201. Id.

202. Id.

203. Id.

204. Id.

205. Id. at 143–44.
Brener's failure to work when scheduled, Luther informed Brener that he would direct a shift trade for the last two days of Sukkos. However when shift trades were not scheduled, and Brener missed work again, he resigned.

The district court held for the hospital, noting that Luther had taken affirmative steps to alter his long-standing policy of not directing shift trades, demonstrating his willingness to reasonably accommodate Brener. The court concluded that the employee has a duty to cooperate with the employer's efforts to accommodate and, had Brener tried harder to arrange shift trades himself, he would have been able to reconcile his work-religion conflict. The court also concluded that accommodating Brener any further would have resulted in an undue hardship on the hospital and on Brener's coworkers.

The Fifth Circuit affirmed the district court and reached two conclusions. First, it held that Brener did not fulfill his duty to "fully explore the possibilities for accommodation within the pharmacy's flexible scheduling system" (i.e., arranging shift trades with other employees). Second, the court found that an "employer suffers undue hardship when required to bear greater than [de minimis] cost or imposition upon co-worker." Relying on Hardison, the court reasoned that continuing to direct shift trades would lower morale among the other pharmacists.

The court rejected Brener's characterization of the complaints as mere grumbling, insufficient to show preferential treatment, and noted that the imposition on other employees deprived them of their shift preferences at least in part because they did not adhere to the same religion as Brener. Brener pointed out that his coworkers were not subject to a collective bargaining agreement and their shift preferences were not rights as they were in Hardison. However, the court rejected this argument, stating that the Hardison court was also concerned with the preferential treatment of some employees on the basis of religion, even outside the context of a collective bargaining agreement. The court held that Hardison applied

206. Id. at 144.
207. Id.
208. Id.
209. Id.
210. Id.
211. Id. at 147.
212. Id. at 146.
213. Id. (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
214. Id. at 147.
215. Id.
216. Id. at 146 n.5; see also BNA HANDBOOK, supra note 109, at 45.
217. Brener, 671 F.2d at 146 n.5. The Hardison decision does not expressly address this conclusion, however. In fact, the Hardison Court seemed to direct its attention to the existence of a seniority system, which was in tension with Title VII's accommodation duty, and did not address a non-seniority-system scenario. See Hardison, 432 U.S. at 79 ("[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid [collective bargaining] agreement."); id. at 81 (supporting the holding with evidence that seniority systems are afforded special treatment under Title VII); id. at 83 n.14.
and that directing shift trades for Brener amounted to preferential treatment.\textsuperscript{218}

The Fifth Circuit’s holding echoed the \textit{Hardison} Court’s discomfort with preferential treatment of religious employees over their coworkers.\textsuperscript{219} Although the Fifth Circuit acknowledged that employee complaints and unhappiness are insufficient to show preferential treatment, commentators have argued that, in fact, the \textit{Brener} court primarily focused on these complaints as proof that accommodating Brener would involve preferential treatment and, thus, an undue hardship.\textsuperscript{220}

The court’s concern with coworker unhappiness can be seen by analyzing the inherent conflict in the court’s conclusions. On one hand, the court found that Brener could have potentially arranged voluntary shift trades on his own and that his failure to do so did not result, as Brener claimed, “[from] the reluctance of other employees to trade schedules with him.”\textsuperscript{221} Rather, the court found that this failure resulted from the fact that Brener made “only haphazard efforts to arrange schedule trades.”\textsuperscript{222} On the other hand, the court determined that it would be an undue hardship for Luther to continue directing the shift trades.\textsuperscript{223} It is not clear how the court could have determined that there were other employees willing to swap shifts with Brener yet also conclude that an employer-arranged shift swap would have negatively impacted other employees so as to cause undue hardship.\textsuperscript{224} If we accept that there were other employees who would have traded with Brener had he made a greater effort to swap shifts, then it would not have been a burden on the employer to direct those employees to trade with him.\textsuperscript{225} Since this finding seems to be contradictory, the court appears to have found that Brener’s accommodation amounted to preferential treatment based on the coworkers’ complaints that Brener’s accommodation was negatively impacting the other employees’ shift preferences.\textsuperscript{226}

\textsuperscript{218} See \textit{Brener}, 671 F.2d at 146.

\textsuperscript{219} Id. at 146 n.5 (noting that the \textit{Hardison} Court’s concern was not only with breach of the seniority system but also with preferential treatment of some employees on the basis of religion).

\textsuperscript{220} See \textit{Kaminer}, supra note 34, at 620; Lisa E. Key, \textit{Co-worker Morale, Confidentiality, and the Americans with Disabilities Act}, 46 DePaul L. Rev. 1003, 1017–18, 1020 (1997) (discussing \textit{Brener} and noting that the court used a low threshold of impact to coworkers’ to find an undue hardship).

\textsuperscript{221} \textit{Brener}, 671 F.2d at 145; see also \textit{Kaminer}, supra note 34, at 620–21.

\textsuperscript{222} \textit{Brener}, 671 F.2d at 145.

\textsuperscript{223} Id. at 146–47.

\textsuperscript{224} See \textit{Kaminer}, supra note 34, at 621.

\textsuperscript{225} See \textit{id}. at 620.

\textsuperscript{226} See \textit{id}. at 621.

In another Fifth Circuit decision, the court stated that coworker unhappiness was insufficient to prove undue hardship, but it nevertheless placed importance on coworker complaints in determining that a religious accommodation amounted to preferential treatment of a religious employee.\(^{227}\) In *Turpen v. Missouri-Kansas-Texas Railroad Co.*,\(^{228}\) the court concluded that accommodating Turpen, a Sabbath observer, would amount to preferential treatment.\(^{229}\) The court further held that the employer, a railroad company, was not required even to inquire about other employees' willingness to participate in a voluntary shift swap for Turpen.\(^{230}\) After noting that the employer had received some complaints about the proposed accommodation, the court found that the employer made a """reasonable assumption""... that 'such an inquiry... would have been futile.'"\(^{231}\)

This finding relied solely on the fact that Turpen's supervisor had received complaints from other employees about Turpen's desire to have his Sabbath off from work and thus believed that a job swap would be impossible.\(^{232}\) In so finding, the court noted that an "accommodation that would require an employer to incur a greater than de minimis cost or would create a greater than de minimis imposition on coworkers constitutes undue hardship."\(^{233}\) The Fifth Circuit found that complaints regarding the possible negative impact on coworkers surrounding a proposed religious accommodation were enough to demonstrate more than a de minimis burden on coworkers and, thus, preferential treatment of the religious employee.\(^{234}\)

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\(^{227}\) Turpen v. Mo.-Kan.-Tex. R.R., 736 F.2d 1022 (5th Cir. 1984).

\(^{228}\) 736 U.S. 1022.

\(^{229}\) *Id.* at 1028.

\(^{230}\) *Id.* at 1027.

\(^{231}\) *Id.* It should be noted that the employees in this case were subject to a collective bargaining agreement. *Id.* at 1024–25. Therefore, the employer was not required to breach the seniority system within that agreement. *Id.* at 1027. However, the finding that the employer was not obligated to even inquire as to whether other employees would be willing to swap shifts with the plaintiff, due to the complaints received about such an accommodation, is also relevant outside the context of a collective bargaining agreement. Cf. Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000) (holding that possible burden on coworkers constitutes an undue hardship). *But see* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1513 (9th Cir. 1989) (holding against an employer who refused to even ask for volunteers to work shifts for two employees who requested off to observe their Sabbath).

\(^{232}\) *Turpen*, 736 F.2d at 1025.

\(^{233}\) *Id.* at 1026 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

\(^{234}\) *Id.* (holding that the district court did not err when it found an undue hardship on the employer based on employee complaints about filling in for Turpen). The court further noted that the employer did not need to inquire about possible voluntary shift swaps because such an inquiry would have been futile due to such complaints. *Id.* at 1027.
More recently, the Fifth Circuit in *Weber v. Roadway Express, Inc.* again emphasized coworker unhappiness by holding that an accommodation that could have even a possibility of adversely impacting coworkers amounted to preferential treatment. Citing *Hardison*, the *Weber* court held that “[t]he mere possibility of an adverse impact on coworkers as a result of [an accommodation] is sufficient to constitute an undue hardship.” In that case, a truck driver, Weber, informed his employer, a trucking company, that his religious beliefs as a Jehovah’s Witness required him to refrain from making overnight driving trips with a female coworker who was not his wife. His supervisor told him that working with women was part of his job and that he would have to work with them or he would not receive any driving assignments. The district court granted summary judgment for Roadway, and held that accommodating Weber would force Roadway to deny the job preferences of Weber’s coworkers, which would constitute an undue burden.

The Fifth Circuit affirmed, holding that although Weber’s coworkers had no contractual right entitling them to a specific run preference, they were not excluded from *Hardison’s* coverage. On appeal, Weber argued that accommodating him by “skipping over” him when a job would require the drivers to have an overnight with a female coworker would not be an undue hardship because Roadway “skipped over” other drivers for various secular reasons. He also urged that Roadway’s defense—that accommodating him would deny other drivers their shift preferences—was a hypothetical burden and unlikely to occur. Additionally, Weber argued that his coworkers’ shift preferences were not contractually protected rights. The Fifth Circuit rejected Weber’s arguments, reasoning that skipping over Weber would be more than a de minimis hardship on coworkers because it would unduly burden them with respect to compensation and “time-off” concerns. To support this proposition, the court referenced hypothetical situations where after skipping over Weber, a substitute driver may have to accept a shorter run than he or she might otherwise have received, which would provide less pay. Additionally the substitute...
might also receive less rest and time off between runs than he or she might otherwise have received. The court found that the "mere possibility" of such impact on a coworker was enough to justify a finding of undue hardship. Rejecting Weber's argument that the negative impact was too hypothetical and remote, the court noted that federal law does not require the employer to wait until it feels the effect of a proposed accommodation before arguing that it is an undue hardship.

The court then addressed Weber's argument that he easily could be accommodated because Roadway often skipped over other employees for secular reasons. Rejecting this contention, the court accepted Roadway's argument that it only accommodated other employees for secular reasons by skipping over if business circumstances allowed it. Thus, because Weber's accommodation would be inflexible, it was not a de minimis burden even though the burden was, at the time, hypothetical.

Citing Hardison, the court stated that an accommodation amounts to an undue hardship if it would force changes in the schedules of other employees and alter the employer's otherwise neutral scheduling procedure. Yet in Hardison, the neutral scheduling procedure was a contractually guaranteed right that would have been denied had Hardison been accommodated. By contrast, the Weber system, while neutral, was not contractually guaranteed. Despite none of the drivers being contractually entitled to any specific run, the Weber court found that implementing an accommodation that had a possibility of adversely impacting coworkers amounted to preferential treatment sufficient to give rise to a finding of undue hardship on the employer.

B. The Ninth Circuit Approach

The U.S. Court of Appeals for the Ninth Circuit takes a different approach than that of the Fifth Circuit detailed in Part II.A. The Ninth Circuit approach tends to focus its determination of the existence of preferential treatment on whether other employees have any contractual

247. Id. It should be noted that the system utilized by Roadway for dispatching drivers such as Weber was based on the order in which they returned from runs. Id. at 272. However, it is not clear that the "time off" between runs was always constant and equal among drivers.

248. Id. at 274 (noting that the Hardison Court frowned upon a proposed accommodation that affected the possible job preferences of other employees).

249. Id. at 274–75 (citing Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1995)).

250. Id. at 273. The court noted that Roadway allowed drivers to submit a "refuse-to-ride" letter when the driver does not want to be paired with another specific driver with whom he has previously ridden. Also drivers are allowed to "divorce" other drivers if they no longer wish to ride together. Id. at 273 n.1.

251. Id. at 275.

252. Id.

253. Id.

254. See id. at 273.

255. Id.

256. Id. at 274.
entitlement to shift and job preferences that may be infringed upon because of a religious accommodation.\textsuperscript{257} The Ninth Circuit, as well as the Eighth Circuit,\textsuperscript{258} interpret \textit{Hardison} as applying primarily in the context of a collective bargaining agreement or when an accommodation would interfere with employees' contractual rights.\textsuperscript{259} According to the Ninth Circuit, because \textit{Hardison} does not apply outside the context of a collective bargaining agreement, an accommodation infringing upon the shift preferences of employees is not a legally significant burden because the employees never had any contractually established right to have such preferences in the first place.\textsuperscript{260} In such a situation, no preferential

\textsuperscript{257} See \textit{Opuku-Boateng} v. California, 95 F.3d 1461 (9th Cir. 1996); see also \textit{Balint} v. Carson City, Nev., 180 F.3d 1047, 1054–55, 1055 n.5 (9th Cir. 1999) (distinguishing \textit{Opuku-Boateng} v. California based on the existence of a bona fide seniority system and holding that the city was not required to breach such a system to accommodate Balint); \textit{id.} at 1054 (noting that "[u]ndue hardship may . . . be present when an accommodation would cause more than a de minimis impact on coworkers, such as depriving coworkers of seniority rights"); cf. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403–05 (2002); \textit{Wolkinson}, \textsuperscript{supra} note 87, at 150 (noting that the \textit{Hardison} Court stated that the duty to accommodate does not "justify the denial of shift and job preference rights of other workers"); \textit{Oleske}, \textsuperscript{supra} note 34, at 532–33 (noting that the \textit{Hardison} "Court held that a requested accommodation is not reasonable if it would require an employer to infringe on the rights of other employees" (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79–81 (1977))).

\textsuperscript{258} Brown v. Gen. Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979). The U.S. Court of Appeals for the Eighth Circuit rejected the district court's finding that accommodating Brown was impermissible because it "would in effect discriminate against all employees who did not adhere to [the plaintiff's] religion." Instead, the court stated, Such an application of \textit{Hardison} would provide a per se proscription against any and all forms of differential treatment based on religion.

Carried to its logical conclusion the [district] court's application of the quoted language [from \textit{Hardison}] would preclude all forms of accommodation and defeat the very purpose behind § 2000e(j).

\textit{id.} at 961–62.

\textsuperscript{259} See \textit{Opuku-Boateng}, 95 F.3d at 1470 ("In \textit{Hardison}, the proposed accommodation would have conflicted with the contractually-established seniority system, thus violating an employee's seniority rights under the collective bargaining agreement by denying him his shift preferences. By contrast, in this case, the scheduling of shifts was not governed by any collective bargaining agreement, and the proposed accommodation would not have deprived any employee of any contractually-established seniority rights or privileges, or indeed of any contractually-established rights or privileges of any kind." (citing \textit{Hardison}, 432 U.S. at 80)). The \textit{Opuku-Boateng} court also cited its previous decision, \textit{EEOC v. Hacienda Hotel}, 881 F.2d 1504, 1513 (9th Cir. 1989), which interpreted \textit{Hardison} as addressing only the "the degree of accommodation that was required of an employer within the framework of a [collectively bargained] seniority system." \textit{Opuku-Boateng}, 95 F.3d at 1470 n.15 (quoting \textit{Hacienda Hotel}, 881 F.2d at 1513); see also \textit{Wolf et al.}, \textsuperscript{supra} note 82, at 114 (discussing \textit{Opuku-Boateng} and noting that the court found that without the loss of contractual rights, the changes in shift schedules requested by Opuku-Boateng imposed no more than a de minimis burden on other employees).

\textsuperscript{260} See \textit{Balint}, 180 F.3d at 1055 n.8 (citing \textit{Opuku-Boateng} and distinguishing \textit{Balint} because there, the seniority system determined which employees had to work the most undesirable shifts. Comparatively, in \textit{Opuku-Boateng}, all employees had to work the same number of undesirable shifts and thus no one had the right to choose which undesirable shifts they wanted to work); see also \textit{Reply Brief For Plaintiff-Appellant}, \textsuperscript{supra} note 188, at 11 (arguing that the impacts on other employees "do not relate to scheduling rights guaranteed
treatment in favor of the religious employee occurs; rather, differential treatment occurs because when there is no contractual right to have certain selected shifts, each employee is required to work the same amount of undesirable shifts.261

The Ninth Circuit has found that employee complaints regarding scheduling preferences and a lowering in employee morale are not enough to constitute preferential treatment.262 In Opuku-Boateng v. California,263 the Ninth Circuit held that an employer’s claim of undue hardship must be supported by more than mere proof of coworkers’ unhappiness with a particular religious accommodation.264

In Opuku-Boateng, the court refused to rely on employee complaints as evidence of preferential treatment and undue hardship.265 There, the court was faced with the issue of whether the religious needs of Opuku-Boateng, a Seventh Day Adventist, could be accommodated by his employer without enduring an undue hardship.266

After Opuku-Boateng applied for and received a job as a plant inspector, he informed his employer that he would not be able to work from sundown Friday to sundown Saturday due to his religious observance of the Sabbath.267 After attempting to negotiate a schedule in which Opuku-Boateng would not be required to work on his Sabbath, his employer notified him that his request to have off during this time was not reasonable and, therefore, if Opuku-Boateng wanted to work as a plant inspector, he would be required to work as scheduled.268 Opuku-Boateng offered to

by a seniority system or collective bargaining agreement and would not result in more than a de minimis ... economic cost”.

261. Opuku-Boateng, 95 F.3d at 1470 (noting that under the seniority system in Hardison, some of the TWA employees had the contractual right to choose to work fewer undesirable shifts than others). However, the employees in Opuku-Boateng had no seniority rights and were required to work “an equal number of undesirable weekend, holiday, and night shifts.” Id. So long as Opuku-Boateng worked an equal amount of undesirable shifts, the court posited, he would not have been granted any preferential treatment, nor would any burden have been imposed on his coworkers, who would merely be given one undesirable shift instead of another. Id.

262. See id. at 1473; cf. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607 (9th Cir. 2004). The court in Peterson v. Hewlett-Packard Co. noted that accommodating an employee’s religious beliefs did not create undue hardship for an employer merely because the employee’s coworkers found his conduct unwelcome. Id. Indeed, “complete harmony in the workplace is not an objective of Title VII. ‘If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.’” Id. (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 775 (1976)). The court also stated that “Hewlett-Packard must tolerate some degree of employee discomfort...” Id.

263. 95 F.3d 1461 (9th Cir. 1996).

264. See id. at 1473; EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 616 (9th Cir. 1988).

265. See Opuku-Boateng, 95 F.3d at 1469–70.

266. Id. at 1464–66.

267. Id. at 1465.

268. Id. at 1465–66.
trade shifts with other employees and take their equally undesirable shifts, such as holidays and overnights, in exchange for having his Sabbath off. However, the employer claimed that it had done a poll to determine whether any other employees would be willing to trade shifts with Opuku-Boateng, and, although a few employees had indicated that they would be willing to trade occasionally, no one responded that they would be willing to accommodate him permanently. A week later, the employer notified Opuku-Boateng that he would not be appointed as a plant inspector due to his unavailability from sundown Friday to sundown Saturday. The district court found that scheduling Opuku-Boateng to be off every Sabbath was an unreasonable accommodation "because it would have had a discriminatory impact on other employees and more than a de minimis impact on the operation" of the business of the State. The court determined that accommodating Opuku-Boateng would have required "other employees to work more than their fair share of Friday night[s] and Saturday[s]," resulting in a substantial morale problem.

However, the Ninth Circuit reversed, finding that the district court erred with respect to the purported impact on Opuku-Boateng's coworkers. The court delved deeper into whether the supposed burden on coworkers and the complaints surrounding the accommodation actually justified a finding of undue hardship. The court noted that Hardison does not proscribe all differences in treatment among employees; instead, it only bars "preferential treatment of employees." None of the other employees were subject to a seniority system and, thus, all employees were required to work an equal number of undesirable shifts. Since Opuku-Boateng was willing to work an equal number of undesirable shifts as his coworkers, the court found that an accommodation in this case would only result in a difference in treatment, not preferential treatment, and, therefore, it would not be an undue hardship.

The court, citing Hardison, suggested that more than interference with coworker shift preferences would be necessary to find that there was an undue hardship, relieving the employer of accommodating Opuku-

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269. Id. at 1465.  
270. Id. at 1466.  
271. Id.  
272. Id. at 1469.  
273. Id.  
274. Id.  
275. See Kaminer, supra note 34, at 618–19.  
276. Opuku-Boateng, 95 F.3d at 1469–70 (quoting Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981)). The court noted that if Hardison proscribed all differences in treatment among employees, then the decision would preclude all accommodation and defeat the purpose of § 2000e(j). Id. at 1470 n.14 (citing Brown v. Gen. Motors Corp., 601 F.2d 956, 962 (8th Cir. 1979)).  
277. See id. at 1470.  
278. Id.  
279. Id. (noting that unlike in Hardison, there was "no evidence that the proposed shift-scheduling arrangement would, in the end, have granted Opuku-Boateng a privilege or
To support its holding, the court distinguished Opuku-Boateng from two situations where an accommodation would, in fact, have a significant discriminatory effect on coworkers sufficient to show preferential treatment: first, where the coworkers’ contractual rights would be denied by accommodating Opuku-Boateng and, second, where the coworkers would be required to undertake Opuku-Boateng’s potentially hazardous work. Since the impact on the coworkers did not relate to scheduling rights guaranteed by a seniority system, any complaints or lowering of morale among the other employees were not justified since there was no preferential treatment of Opuku-Boateng over his coworkers.

As the Ninth Circuit noted in an earlier case, “[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.” The court thus seemed to find that an accommodation’s impact on coworker preferences was not legally significant in determining whether an undue hardship existed.

III. STRIKING A BALANCE: OUTSIDE THE COLLECTIVE BARGAINING AGREEMENT CONTEXT, SHOULD A COWORKER’S FAVORED SCHEDULE EVER MATTER?

Discrimination against the majority in favor of the religious employee clearly troubled the Hardison court and was perhaps the largest reason for its holding, despite the fact that the language of § 2000e(j) would seem to require an accommodation to be balanced only against the hardship imposed more than a de minimis burden on other employees” (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977))); see WOLF ET AL., supra note 82, at 110 (noting that “while Hardison protects coworkers from an infringement of their seniority rights, it does not permit them to veto a religious accommodation merely because of generalized disgruntlement”).

280. See Opuku-Boateng, 95 F.3d at 1470. The court compared this case to two cases where it found that accommodating the religious employee would have resulted in significant discriminatory impact. It distinguished this case, where there were no contractually established rights that would be violated as a result of accommodating Opuku-Boateng, from Hardison, where collectively bargained seniority rights would have been undermined. It also distinguished Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984), from the present case, noting that in Bhatia, accommodation would have required coworkers to assume the plaintiff’s share of potentially hazardous work. Opuku-Boateng, 95 F.3d at 1468 n.12; see also Kaminer, supra note 34, at 618–19.

281. Opuku-Boateng, 95 F.3d at 1470.

282. Id. at 1468 n.12 (distinguishing Hardison and Bhatia from Opuku-Boateng and noting that the absence of a collective bargaining agreement in this case may differentiate the cases).

283. See id. at 1470; see also Kaminer, supra note 34, at 618.


285. Opuku-Boateng, 95 F.3d at 1468 (“It is less clear what type of impact on coworkers, apart from a significant discriminatory impact, constitutes an undue hardship.”).
imposed on the employer. Although the Hardison Court was rightly concerned with the preferential treatment of religious employees over their secular coworkers, ambiguity in the decision has led to confusion over whether negative impact on coworkers’ shift preferences amounts to preferential treatment outside the context of a collective bargaining agreement. Due to this confusion, many courts have set the bar on what constitutes preferential treatment very low, effectively allowing an employer to show minimal impact on coworkers to be relieved of its accommodation obligation.

Judicial discomfort with requiring accommodations that cause negative impact on other employees has made the interests of the coworkers a third interest that must be balanced along with the interests of the religious employee and the employer. This “trilogy of interests” approach has become a typical method of balancing competing interests in these cases, despite the fact that there is no language in the text of § 2000e(j), the legislative history of the statute, or the EEOC guidelines to support giving any weight to coworkers’ interest. Professor Karen Engle insightfully noted the problem with including coworkers’ interests in the balance when she wrote,

> Although Title VII is largely about balancing employer... and employee interests, and section [2000e(j)] specifically calls for such a balance through the reasonable accommodation and undue hardship language, the religious accommodation cases often upset that equation. They do so when they weigh employees’ interests against each other. Once the interests of employees who do not require religious accommodation are brought into the equation, it is difficult for courts to require accommodation, since all accommodation requires disparate treatment.

This Part argues that although it seems attractive to give the interests of a religious employee’s coworkers weight in the balancing of interests, in fact some level of unequal treatment is what was intended by the drafters of § 2000e(j) and it is exactly what is required if any meaning is to be given to the provision. This Part, however, does not advocate for accommodation

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286. See Larson, supra note 123, § 56.03[3]; see also supra notes 122–31 and accompanying text.
287. See supra Part II.A–B; see also Wolf et al., supra note 82, at 114–15.
288. See supra notes 32, at 19 (“The Supreme Court has not demanded much in respect to undue hardship.”).
289. See supra Part II.A; see also Prenkert & Magid, supra note 20, at 468–69, 481 (“The Supreme Court interpreted Section [2000e(j)] to place a low evidentiary burden on employers to satisfy the undue burden standard.”).
290. See supra note 28, at 406–07; see also Wolf et al., supra note 82, at 115 (“Courts are reluctant to approve an accommodation that has a provable adverse impact upon other employees.”).
291. See supra note 28, at 394.
292. See supra Part I.A.
293. See supra note 28, at 405–06.
294. See supra notes 133–35 and accompanying text.
without any regard to preferential treatment of religious employees over other employees. Rather, it argues that impact on coworkers becomes preferential treatment and an undue hardship on the employer when (1) it manifests as a tangible economic burden on the employer or (2) it would require the coworker to perform additional physically hazardous tasks, constituting a severe discriminatory burden on the coworker. Any impact on coworkers that does not interfere with their contractual rights is de minimis, and not legally cognizable, until this point. This Part argues that, to promote this standard, Congress should clarify that the *Hardison* holding concerning preferential treatment should only apply in the context of a collective bargaining agreement. Outside that context, infringement on coworkers’ shift preferences must result in either economic cost to the employer or cause another employee to take on additional hazardous work to constitute an undue hardship.

The remainder of this Part outlines some of the problems that arise when courts inject notions of fairness and neutrality into their religious accommodation determinations and argues that such considerations should be excluded from the religious accommodation balancing equation. To support this assertion, Part III.B discusses § 2000e(j)’s legislative history and the EEOC guidelines, which exclude any reference to coworker preferences. This Part then proposes a framework that courts should employ when faced with a religious accommodation that would negatively impact coworkers. Finally, this Part details policy concerns in support of the proposed framework.

**A. Judicial Concern with the Unfairness of Accommodations**

Due to conflicting interpretations regarding what type of imposition on coworkers amounts to preferential treatment, courts have been relatively inconsistent when adjudicating failure-to-accommodate claims that hinge on negative impact on coworkers’ shift preferences. Some courts, employing societal notions of fairness, have placed emphasis on employee unhappiness while others tend to require a showing of more than mere unhappiness or a decrease in morale before determining that a negative impact on coworkers amounts to preferential treatment and undue hardship.

As Part II.A discussed, the Fifth Circuit seems to place excessive emphasis on the lowering of morale and coworker unhappiness surrounding a proposed accommodation. Under the Fifth Circuit approach, even if there is no financial cost to the employer, pointing to other employees’ unhappiness with the accommodation will virtually always relieve an

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295. See supra Part II.A–B; see also note 191 and accompanying text.
296. See supra Part II.A–B.
297. See supra Part II.A; see also Silbiger, supra note 106, at 851–52.
298. See supra Part II.B.
299. See supra Part II.A.1–3.
employer of the duty to accommodate. Finding preferential treatment because an accommodation makes other employees unhappy thus lowers the undue hardship standard to an almost unworkable level.

Additionally, since courts construing Title VII distinguish personal preferences from religious beliefs, it seems anomalous that courts are in fact balancing personal preferences of employees on the same scale as the needs of religious employees. Although the Fifth Circuit and courts holding similarly cannot be faulted for their conclusions, as they were attempting to interpret serious ambiguity in the Hardison decision, such holdings demonstrate judicial skepticism of religion and a reluctance to require accommodation that would have even a minimal effect on the religious employee's coworkers.

Including fairness concerns of an accommodation's impact on coworkers may undermine the purpose of § 2000e(j) and systematically relieves employers of the duty to accommodate whenever even the slightest impact on coworkers may result. Furthermore, imposing societal notions of fairness into the balancing of interests creates unpredictable results possibly dependent on a given judge's idea of equity, and can lead to a loss of meaningful religious protection for a large portion of religious observers, an end result that was surely not intended by the drafters of § 2000e(j).

B. Statute, EEOC Guidelines, and Legislative History: No Requirement of Consideration of Coworker Impact

Although it may appeal to judicial sensibilities to prohibit preferential treatment of religious employees that disadvantages their coworkers, such unequal treatment seems to be required by the plain language of § 2000e(j). Although courts often point to the purpose of Title VII, which is to eliminate discrimination in the workplace, as a justification for not requiring an accommodation that negatively impacts coworkers, religion is specifically treated differently than other protected classes under Title VII. While race, national origin, color, and gender require neutral

300. See supra Part II.A.1–3.
301. See supra notes 231–34 and accompanying text.
302. See Larson, supra note 123, § 54.05[4] (distinguishing personal preferences from religious beliefs).
303. See Kaminer, supra note 34, at 631.
304. See Wolf et al., supra note 82, at 115.
305. See supra Part II.A.2–3.
306. See supra Part II.A.1, B.1. Although the facts of these cases are remarkably similar, their outcomes are quite different.
307. See Kaminer, supra note 34, at 631.
308. See supra notes 25–32 and accompanying text.
309. See supra note 111 and accompanying text.
310. See supra Part I.B.
treatment, Title VII requires employers to affirmatively treat religion differently, and even, to some extent, unequally.\footnote{111}{See supra Part I.B; see also Jamar, supra note 25, at 742.}

The EEOC guidelines stand in sharp contrast to many courts’ concern with the treatment of coworkers and seem to endorse the exclusion of coworkers’ interests from the equation.\footnote{112}{See Larson, supra note 123, § 56.03[1].} Nowhere in the guidelines’ discussion of employer hardship is the impact on coworkers even mentioned.\footnote{113}{See 29 C.F.R. § 1605.2(e) (2008); see also supra note 118.}

Likewise, the legislative history of § 2000e(j) makes no reference to a concern that some accommodations may infringe on the shift preferences of other employees.\footnote{114}{See 118 Cong. Rec. 705–06 (1972) (statement of Sen. Randolph).} In fact, the legislative history seems to indicate that impact on coworkers was considered a permissible method of accommodation.\footnote{115}{See id. at 706 (noting that any problems arising from an accommodation that required deviation from the employer’s set schedule could typically be handled by an employer’s other employees).} Instead of incorporating three interests into the balance, the congressional discussion focuses on possible negative impact on only the employer.\footnote{116}{See id.} This demonstrates that Congress, rightly or wrongly, did not contemplate that the coworkers’ happiness and morale should be balanced against the religious employee’s right to an accommodation and the employer’s interest to be free from undue hardship. It is not the courts’ place to effectively rewrite the statute to incorporate coworkers’ interests in the religious accommodation balancing equation because Congress, for whatever reason, omitted it as a consideration.

However, it would seem overly harsh, and perhaps not in the spirit of Title VII, to require an employer to accommodate a religious employee regardless of any burden it may place on the coworkers.\footnote{117}{See supra note 35 and accompanying text.} For example, an employer demanding that an employee put his physical well-being in danger to accommodate a religious coworker seems almost incomprehensible. Yet a strict adherence to the plain language of § 2000e(j) would seem to compel such a result. Courts and commentators, however, agree that an employer is not required to go this far.\footnote{118}{See supra Part I.E.3.a.} Lending support to this assumption, the legislative history of the 1972 amendment to Title VII emphasized the importance of flexibility and discretion in dealing with religious accommodation.\footnote{119}{See supra Part I.E.3.a.} These values require courts to have some leeway in cases where although no financial cost to the employer would result, an accommodation would cause a significant discriminatory effect on other employees in the form of imposition on their physical safety.
C. Proposed Framework: Impact on Coworkers Becomes Preferential Treatment When It Imposes an Economic Cost on the Employer or Involves Taking On Additional Hazardous Work

Generally, courts should take into account impact on coworkers only when a religious accommodation would infringe upon the coworkers’ rights—not merely their preferences—to have a certain schedule. Employees who do not have a contractual right to a certain schedule have no entitlement to their preferences and any expectation that they may have regarding these preferences, although understandable, is not legally cognizable.\textsuperscript{320} Therefore, if the other employees have not been legally burdened, an employer that has to readjust its schedules to accommodate a religious employee cannot be said to have suffered an undue hardship on the conduct of its business.

1. A Focused Approach: Framework for Analyzing an Accommodation That Burdens Coworkers

At a certain point in exceptional cases, however, even if employees have no contractual right to certain shift preferences, an impact on employee preferences may become an undue hardship on the employer’s business conduct.\textsuperscript{321} Examples of circumstances when this may occur are religious accommodations that lead to a disruption in work routines, loss of valued or specially skilled employees, or a decrease in efficiency.\textsuperscript{322} When coworkers’ preferences are implicated, a decrease in morale among coworkers should be insufficient to show an undue hardship unless that decrease in morale (1) has an evincible economic effect on the operation of the employer or (2) would actually require another employee to take on additional potentially hazardous work.

The first alternative can be demonstrated by evidence that an accommodation so severely lowers morale that it is, for instance, causing a decrease in efficiency or would lead to a loss of valued employees. The second alternative should be reserved for situations, such as the Bhatia case,\textsuperscript{323} where an accommodation would likely place other employees in physical danger.

The evidentiary burden on an employer seeking to use impact on coworkers as a means of demonstrating undue hardship should be quite high. Employers must present a preponderance of evidence that either of the two above results will occur if accommodation is required. Although an

\textsuperscript{320} It has been suggested that courts should distinguish between invasion of actual rights, recognized by the law, and imposition of negative externalities, some of which should be considered as too small or otherwise legally irrelevant, in order to promote a legal regime committed to protection of individual liberties. Volokh, supra note 162, at 621.

\textsuperscript{321} Volokh notes that the legislature may constitutionally create preferential treatment for religion even if there is a disproportionate cost imposed on other people or activities. See id. at 607–08.

\textsuperscript{322} See Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978).

\textsuperscript{323} See supra Part I.E.3.a.
employer need not actually endure the hardship if it is more than likely to occur;\textsuperscript{324} it should present evidence that affirmatively shows that it cannot accommodate the religious employee without undue hardship as defined above. An example of evidence that may demonstrate a likely result of undue hardship is a tentative schedule that unambiguously shows that there is no possible way to accommodate the employee’s religious observances while still meeting the employer’s scheduling needs.\textsuperscript{325} This proposal, if adopted, would effectively overrule the \textit{Weber} holding that even the mere possibility of a burden on coworkers as a result of an accommodation is sufficient to constitute an undue hardship.\textsuperscript{326}

2. Policy Concerns in Favor of Adopting the Proposed Framework

The framework outlined above is a more truthful interpretation of § 2000e(j) and yet is sufficiently flexible to provide protection for employers and coworkers when a religious accommodation would result in preferential treatment that is significantly discriminatory towards other employees. Without placing emphasis on coworkers’ happiness, the framework sufficiently protects coworkers’ interest to be free from preferential treatment. When an accommodation becomes significantly discriminatory, a lowering of morale will often create an economic effect on the employer, such as a decrease in efficiency, which would release the employer from its accommodation obligation.

Although courts are rightly concerned with preferential treatment of religious employees over their coworkers, they seem to have forgotten that because the statute mandates accommodation, religious employees in need of accommodation will necessarily have a benefit that their coworkers do not enjoy. Whether that benefit involves not working certain shifts,\textsuperscript{327} having facial hair when an employer’s dress code forbids it,\textsuperscript{328} or not attending devotional services required by a Christian-faith-operated employer,\textsuperscript{329} the fact that an accommodation is given to some employees and not others already confers a benefit unequally based on religion. By focusing too heavily on the unequal treatment of employees, courts have essentially made it impossible for any accommodation not to constitute an

\textsuperscript{324} See \textit{supra} notes 104–05 and accompanying text.

\textsuperscript{325} The preparation of a tentative schedule was proposed by the Ninth Circuit as a method of determining whether a speculative hardship would in fact occur. See Opuku-Boateng v. California, 95 F.3d 1461, 1470–71 (9th Cir. 1996).

\textsuperscript{326} See \textit{supra} Part II.A.3.

\textsuperscript{327} See, e.g., \textit{supra} Part II.A.1.

\textsuperscript{328} See \textit{supra} Part I.E.3.a. Although the court ultimately found that allowing Bhatia to keep his beard would be an undue hardship because it would require other employees to take on his share of potentially hazardous work, the court noted that the employer made other employees, who had no religious reason for their facial hair; shave their beards months before Bhatia was ultimately terminated. Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984).

\textsuperscript{329} See EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).
undue burden, ignoring the fact that an accommodation, by its nature, requires a certain level of unequal treatment.

CONCLUSION

Accommodation of a religious employee requires a balancing of interests. Although § 2000e(j) seems to only require attention to the interests of the religious employee and her employer, courts often inject the interests of the religious employee’s coworkers into the balance. Although it is understandable that in the Title VII context courts are uneasy about allowing a religious employee to be accommodated at the expense of her coworkers, incorporating notions of fairness has led to uncertainty of expectations about what sorts of accommodations are required. Therefore, it seems beneficial to employ an adjudicative framework that takes into account severe discriminatory treatment on coworkers yet still provides adequate protection for the religious observer’s needs. It may be argued that this framework obviates any protection from serious, although not severe, discriminatory treatment for the nonreligious employee. However, an inquiry into the purpose, history, and legislative intent of § 2000e(j) seems to compel at least a scaling back of the incorporation of coworkers’ interests into the religious accommodation balancing equation. Differential treatment of religion-observing employees not only affords them equal access to employment but also encourages integration and interaction between religious groups in the workplace, a value that should be paramount in our religiously diverse society.
Notes & Observations