“DISCRIMINATION” ON THE BASIS OF RELIGION: AN EXAMINATION OF ATTEMPTED VALUE NEUTRALITY IN EMPLOYMENT

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INTRODUCTION

In recent years, conflicts among religion, government, and individual rights have become increasingly litigated national issues. The existence of traditional and nontraditional religious employers has involved the workplace in these conflicts.1 Employers who believe that religious beliefs cannot be separated from secular activities, and who therefore see all of their employment policies and practices as an extension of their religious beliefs, present a partic-

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1. A recent article discussed the rise of nontraditional, particularly fundamentalist Christian, religious employers:

   In the midst of a strong resurgence of forms of Christianity that adhere strictly to the Bible, a growing number of believers are ... seeking to apply their spiritual convictions in the workplace. "There definitely has been an increase in the number of firms run with some kind of Christian orientation," says Sylvia Neil, Midwest legal director for the American Jewish Congress. "It's all tied to the return back to religion that we've seen in recent years.

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   While outside figures aren't available because of the relative newness of the trend, there is plenty of anecdotal evidence about its scope. A national committee of churchmen recently identified some 150 Christian workers' groups, ranging from the Christian Dental Society to the Rodeo Riders Fellowship. At Seattle's Boeing Co., about 200 employees in a group called Good News at Work gather in corporate cafeterias for breakfast and lunchtime Bible studies and inspirational talks. . . .

   "It used to be that you had to crawl up in a corner to have a Bible study," says Jim Hodges, founder of the Kelso, Wash.-based Hard Hats for Christ, which ministers to itinerant construction workers. "Now there are some jobs where you have to attend a study to be a part of the 'in' group."


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ular challenge. In a constellation of recent cases, employees have challenged these employers under civil rights laws, contending that such religiously permeated work environments are inherently discriminatory. Employers as diverse as fundamentalist Christians, Agudath Israel, and the Roman Catholic Church have resisted the enforcement of state and municipal civil rights laws prohibiting discrimination on the basis of religion, sex, marital status, or affectional preference, arguing that acquiescence would be contrary to the free exercise of the employers’ religious beliefs.

An extensive body of statutory provisions, case law, and commentary has developed around the issues involved in determining permissible religious discrimination by traditional religious institutions and organizations. In these cases, the employer’s fundamental right to implement religious beliefs or practices has been assumed; the only question has been whether, in a particular case, the employer has overstepped its legitimate boundaries in the pursuit of a particular employment policy or practice. Employment issues involving nontraditional religious employers, however, have provoked deeper questions. When an employer’s sole identification as a religious entity is its implementation of religious beliefs or values, what should “discrimination” on the basis of religion be? Should the distinction, however determined, between religious and nonreligious beliefs, practices, or policies be the line of demarcation between permissible and impermissible employment practices? Is the employee, in short, entitled to a “religiously-neutral” employment atmosphere? What is such an atmosphere? To what extent should the state, through its civil rights laws, attempt its creation or enforcement?

Several recent cases illustrate these questions. The first case, State v. Sports & Health Club, Inc., involved fundamentalist Christians implementing their religious beliefs and practices in the workplace. The defendants, owners and operators of a closely-held business corporation, ran all aspects of their business in accor-

3. See infra notes 54-68 and accompanying text.
dance with their religious beliefs. In employment interviews, applicants were asked questions based upon the defendants' religious beliefs and values. The defendants justified this inquiry as an attempt to advise prospective employees of the defendants' beliefs and to help the defendants determine if the applicants possessed "teachable spirit[s]" and followed "disciplined life style[s]," as Biblically defined. The management also freely discussed its religious beliefs with employees after hiring. Bible studies were held on the premises, which were voluntary for nonmanagerial employees and mandatory for management. The defendants' religiously based views about proper attitude and lifestyle also dominated their termination decisions. Employees who violated Biblically based work rules requiring a high degree of discipline and submissiveness, or who displayed "back biting" or "non-joyful" attitudes, were terminated.

The State of Minnesota, acting on behalf of prospective, current, and past employees, charged that these practices constituted discrimination on the basis of religion under the Minnesota Human Rights Act. The defendants admitted that "their religious practices and beliefs spill[ed] over into, and in fact require[d], their employment practices." The Minnesota Supreme Court acknowledged that "[t]he religious beliefs of the [defendants] are clearly legitimate." The court also conceded that "[d]espite all the dis-

5. The court stated that "[i]n those interviews, applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations, believe in God, heaven or hell, and other questions of a religious nature." Id. at 847. The dissent questioned the factual accuracy of this characterization of the employee's interviews. Id. at 868-73 (Peterson, J., dissenting).
6. Id. at 847.
7. According to the court, [b]ased on an interpretation of the Bible, Sports and Health will not hire, and will fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is 'antagonistic to the Bible,' which according to Galatians 5:19-21 includes fornicators and homosexuals.
Id.
8. Id.
9. Id. at 846. The state also contended that these practices constituted discrimination on the basis of sex and marital status.
10. Id.
11. Id. at 846 n.3.
crimination allegations asserted in this case[,] Sports and Health has employed, and continues to employ, married persons, male and female unmarried persons, and divorced males and females of various races.” The defendants have also employed, and continue to employ, persons of various religious faiths—Jews, Roman Catholics, Protestants of various denominations, and others—so long as such other persons are not offended by the owners’ faith, are not antagonistic toward the Christian gospel and will comply with management’s work rules in a cheerful and obedient spirit.

The court went on to hold, however, that all of the defendants’ religiously based employment actions constituted discrimination on the basis of religion. The court enforced an injunction, issued previously by an administrative law judge.

The court did not discuss how the particular actions of the defendants constituted “discrimination” on the basis of religion. Rather, the conclusion that discrimination occurred apparently was based on a belief that the employment environment was so “religiously permeated” that speech and actions, which might otherwise be lawful, were unlawful in this context. One dissenting

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12. *Id.* at 848.

13. *Id.* Only managerial personnel were required to be “born-again” Christians. *Id.* at 847.

14. *Id.* at 849-50. The court characterized these actions as failure to hire because of religious beliefs; “terminating employees because of a difference in religious beliefs; refusing to promote employees because of differing religious beliefs; and failing to provide ‘open’ public accommodations.” *Id.* at 846. The last conclusion was based, in part, on evidence that one complainant was forced to give up her membership in one of the clubs because “Sports and Health, through its insistence on displaying fundamentalist Christian religious literature in the literature racks and on the walls of the sports club, engaged in conduct that was offensive to her.” *Id.* at 849.

15. The injunction prohibited the defendants from refusing to hire any person because of that person’s religious beliefs or practices; refusing to hire any person because of that person’s objection or hostility to the defendants’ religious beliefs or practices, or to the religious beliefs or practices of any other employee; taking any adverse action against any employee because of that employee’s religious beliefs or practices; refusing to take into management any person based upon that person’s religious beliefs or practices; requiring, soliciting, or suggesting that any employee attend Bible studies or participate in any other religious exercise or practice; or taking any adverse action against any employee who objected or was hostile to the religious practices or exercises of management or of any other employee. *Id.* at 867 n.25 (Peterson, J., dissenting).

16. See, e.g., *id.* at 850.
judge questioned the adequacy of this analysis. In discussing the alleged illegality of the preemployment interviews, he stated:

There is remarkable vagueness in the [hearing] examiner's assessment of questions . . . about reading the Bible, prayer, and church attendance. None of them identifies a particular religion, although they concededly may distinguish the religious from the nonreligious. If, however, it is impermissible to ask whether a person reads the Bible, which is itself a library of books, would it be impermissible to inquire whether a person has read such other classics as John Bunyan's Pilgrim's Progress or John Milton's Paradise Lost or Paradise Regained? Or would a conversation about . . . Faith & Ferment . . . be impermissible in an employment context? 17

The [hearing] examiner's disposition of the basic issue in this case was as sweeping as it was superficial: [the defendant's] religious beliefs are sincere but, when put into practice in a commercial service business, simply irrelevant. To say, as the examiner said, that "[t]he essence of the employer's business is not a 'discipleship for Christ' . . . but rather the operation of an exercise emporium" is impermissibly to substitute the examiner's business judgment for [the defendants'] business judgment. The examiner . . . decrees a dichotomy between [the defendants'] beliefs and practices, divorces the sacred from the secular, does not distinguish praying on one's knees on Sunday from praying on other persons in the marketplace on Monday, and perceives no significant difference between the commitment of conviction and the detachment of a possibly more casual Sabbath ceremony or community convention. 18

In the second case, Young v. Southwestern Savings & Loan Association, 19 an atheist employed as a teller in the defendant's insti-

17. Id. at 870 (Peterson, J., dissenting).
18. Id. at 859 (footnote omitted). Judge Yetka also dissented:

Here is an act which has as its stated purpose the elimination of discrimination in employment. It has been rightly invoked to protect minorities—in color, gender, and religion. Yet, it would discriminate against the majority religion in the United States since the nation's founding, namely, Christianity. This decision would deny a Christian the right to practice his belief in the marketplace. . . . I find the findings so repugnant that it reaches the stage of being ridiculous.

Id. at 876 (Yetka, J., dissenting).
19. 509 F.2d 140 (5th Cir. 1975).
tution refused to attend monthly staff meetings that were opened with a short religious talk and a prayer delivered by a local minister. She contended that these activities were offensive to her, and that compelled attendance constituted employment discrimination on the basis of religion in violation of Title VII of the Civil Rights Act of 1964.\textsuperscript{20} The United States Court of Appeals for the Fifth Circuit held that the plaintiff was “discharged on account of her religious beliefs,” in violation of the Act.\textsuperscript{21} The majority failed to explain how, or why, the facts gave rise to religious discrimination, focusing instead on whether the defendant’s efforts at accommodation of the plaintiff’s beliefs were legally sufficient.\textsuperscript{22} The dissenting judge apparently also assumed that religious discrimination occurred. He stated that he

would not hesitate for a moment . . . in finding an employer liable for imposing or attempting to impose “forced religious conformity” . . . . [T]o prove discrimination here Mrs. Young needed to show that her employer required or tolerated practices so inconsistent with her religious beliefs that she could not continue working and remain true to those beliefs.\textsuperscript{23}

Two reported decisions of the Equal Employment Opportunity Commission reflect a similar approach. In the first case,\textsuperscript{24} the employer conducted weekly religious meetings on its premises and during regular working hours. The employer required the attendance of all employees, regardless of their religious persuasions. Af-

\textsuperscript{20} Id. at 141-42.
\textsuperscript{21} Id. at 143-44.
\textsuperscript{22} Id. at 144-45. The issue of religious accommodation arose in connection with the employer’s defense. The court stated that

[a]s we have concluded that Mrs. Young made out a prima facie case of religious discrimination . . . we must now determine whether Southwestern presented evidence sufficient to rebut plaintiff’s showing of unlawful employment practices. At the time of plaintiff’s termination, Southwestern had an obligation to accommodate her religious beliefs and observances unless it could show that “an undue hardship” to its business rendered the accommodation of Mrs. Young’s objections unreasonable.

The court found that the defendant’s attempts at accommodation were insufficiently communicated to her. \textit{Id.}

\textsuperscript{23} Id. at 145 (Thornberry, J., dissenting). In his view, the testimony of management that attendance at the devotional portions of the meeting was not required resulted in the plaintiff’s failure to show that she was constructively discharged. \textit{Id.} at 145-46.

\textsuperscript{24} Decision No. 72-0558, 4 Fair Empl. Prac. Cas. (BNA) 434 (1971).
ter one such meeting, a supervisor reprimanded two employees for failing to attend. One employee witnessed the reprimand and voiced her objection to the supervisor; she was later discharged. She brought suit under Title VII, claiming that she was discharged "because of her religious beliefs and because she attempted to defend the civil rights of employees." 25 The Commission agreed, stating in conclusory terms that the employer fired her "at least in part because of her religion . . . and also because she opposed practices made unlawful under Title VII." 26 In the other case, 27 a supervisor occasionally discussed his religious convictions with employees. Two employees alleged that the employer "violated Title VII by allowing their supervisor to preach religion while on the job." 28 The Commission found that the two employees, "subjectively, felt intimidated by the conduct of their supervisor." 29 It concluded that the first employee, "whether erroneously or not, believed that his job security could be affected by his reaction" to his supervisor's views, 30 and that the second employee "believed that his supervisor was attempting to 'convert' him." 31 The Commission held that "Title VII obligates an employer to maintain a working atmosphere free of intimidation based upon race, color, religion, sex or national origin. . . . Respondent's failure to provide a working environment free of religious intimidation is violative . . . of Title VII." 32

In another recent Title VII case, 33 the plaintiff was told, when he began work, that Metals Trades was a "Christian company" and that its business manual was the Bible. At the time, he was eager to work for a company with a Christian orientation, because he was an evangelical Christian. His subsequent job performance was less than satisfactory, however, and he was fired. The district court found that the religious beliefs shared by the plaintiff and the

25. Id. at 434.
26. Id. at 435.
28. Id.
29. Id. at 843.
30. Id.
31. Id.
32. Id. (citation omitted).
company’s owners were an element of their personal relationship, and that the deterioration of this personal relationship led to the plaintiff’s termination. The court agreed that religion was an important aspect of the parties’ relationship, but held that the plaintiff’s termination did not constitute discrimination on the basis of religion.\textsuperscript{34} The United States Court of Appeals for the Sixth Circuit reversed, holding that “religion played a role in [the plaintiff’s] discharge. . . . [He was] treated . . . differently at different times depending upon [his] current religious views. This is the essence of discrimination.”\textsuperscript{35} According to the appellate court, “[w]hen an employer expresses an enhanced tolerance of an employee’s performance because of his religion, but lowers its level of tolerance when the employee’s previously agreeable religious views change, the employer has engaged in intentional differential treatment based on religion.”\textsuperscript{36}

What is striking about these cases, and others like them, is their underlying assumption that the implementation of religious policies, practices, or values by the employer is inherently discriminatory. Little analysis is offered as to what constitutes, in this particular context, “discrimination” on the basis of religion. Rather, courts simply assume that a discriminatory practice has occurred. This assumption has two parts:

1. That individual decision making can be “religiously neutral,” or free of religious influence.

2. That absent statutory or constitutional exemption, the implementation of religious beliefs, policies, or practices by the employer in the workplace is discrimination on the basis of religion and should be prohibited.

This Article examines these assumptions. It concludes that the state cannot and should not choose between permissible or impermissible employment philosophies or practices based upon their religious or nonreligious source. The civil rights laws never intended to eradicate religious values from individual decision making, or from the workplace. Indeed, such eradication is an impossi-

\textsuperscript{34} Id. at 708.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 709. The case was remanded, however, for determination of whether “even in the absence of discrimination,” the plaintiff would have been discharged. Id. at 713.
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ble task, fraught with discriminatory potential. An employer’s implementation of religious policies or practices should be considered discriminatory only when it precludes an employee, because of his or her religious affiliation or identity, from equal employment opportunity. To the extent that an employee further objects to exposure to a religious work environment or work rules, his or her claim should be handled under general rules governing an employer’s duty to accommodate an employee’s religious beliefs. Any other approach is based upon a false assumption that “religious neutrality” in employment can or should be achieved as a matter of public policy.

I. THE STATUTORY FRAMEWORK: CLAIMS AND DEFENSES

Federal, state, and local statutes and ordinances, as well as the equal protection clause of the fourteenth amendment to the

37. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). Title VII provides in part: (a) It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id. § 2000e-2.


United States Constitution, have long afforded employees protection against discrimination on the basis of religion. The primary


39. An employee may bring an action for violation of the equal protection clause against some governmental employers under 42 U.S.C. § 1983 (1982), which provides a federal cause of action against any person who, acting under color of state law, deprives another person of any federal constitutional or statutory right. Lower federal courts are divided on the question of whether Title VII provides the exclusive remedy for causes of action that fall within the scope of that statute. See Gudel, *Title VII Preemption of Employment Discrimination Actions Under 42 U.S.C. Section 1983*, 1987 ILL. B.J. 910. Commentators have argued that suit under § 1983 should be required only when the federal right that the employer allegedly violated is a right created by Title VII. See id.; Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII*, 35 AM. U.L. REV. 93 (1986).

Violations of the equal protection clause may also be actionable in federal court under 42 U.S.C. § 1985(3) (1982), which provides a remedy against conspiracies to deprive any person of “the equal protection of the laws, or of equal privileges or immunities under the laws.” This statute provides a remedy against private conspiracies to violate constitutional rights. Griffin v. Breckenridge, 403 U.S. 88, 96 (1971). However, when Title VII creates the substantive rights that form the basis of the action under § 1985(3), the plaintiff must proceed under that statute. Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979). It is unclear, under Novotny, whether this statutory preemption applies to situations in which the substantive rights involved are theoretically covered by Title VII but a violation of that statute is not alleged. Justice Powell, in a concurring opinion, stated that the Court's decision does not affect the use of § 1985(3) to redress violations of preexisting constitutional rights. Id. at 379 (Powell, J., concurring). Compare Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985) (plaintiff may sue for violation of the fourteenth amendment through § 1985(3), even if the same facts suggest a violation of Title VII), with Culler v. South Carolina Dep't. of Social Serv., 33 Fair Empl. Prac. Cas. (BNA) 1590 (D.S.C. 1984) (Novotny precludes use of § 1985(3) to bring what is essentially a Title VII claim).

federal statute prohibiting religious discrimination in employment is Title VII of the Civil Rights Act of 1964 (the "Act"). Because the vast majority of federal employment discrimination claims raising religious issues have been brought under this statute, and the elements of proof under state civil rights laws are usually quite similar, this Article will examine the provisions of Title VII as illustrative.

By enacting Title VII, Congress "clearly targeted the elimination of all forms of discrimination as a 'highest priority.'" The Act prohibits employers from discriminating against employees or prospective employees on the basis of race, color, religion, sex, or national origin. The three primary theories of employment discrimination under Title VII are: disparate treatment, disparate impact of otherwise neutral policies or practices, and the perpetuation of the effects of past discrimination through the use of facially neu-

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41. Proof of a disparate treatment claim brought under the equal protection clause and § 1983 is, in any event, very similar to that required under Title VII. See Williams v. Anderson, 562 F.2d 1081, 1086-88 (8th Cir. 1977).
42. See state statutes supra note 38.
43. The statutory scheme of Title VII contemplates the enactment of complementary state laws. See, e.g., 42 U.S.C. § 2000e-5(c) & (d) (1983) (complaintant must exhaust available state remedies prior to commencement of federal proceedings). State laws are preempted by the federal system only to the extent that they are inconsistent with the purpose of the federal statutes or purport to require or permit an act which would constitute an unlawful employment practice under federal law. 42 U.S.C. § 2000e-7 (1982). See also Sheikh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711 (D.C. Cir. 1979); Ridinger v. General Motors Corp., 525 F. Supp. 1089 (S.D. Ohio 1981), rev'd on other grounds, 474 F.2d 949 (6th Cir. 1972).
45. 42 U.S.C. § 2000e-2(a). See supra note 37. The only definition of "religion" found in the Act is contained in 42 U.S.C. § 2000e(f). This definition, which by its context appears to be limited to accommodation questions, states:

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

tral devices. An employer may defend on the ground that its action, although discriminatory under one of these theories, is required by business necessity or is a bona fide occupational qualification. The defense of business necessity, most well known in the context of an adverse impact theory, can be a defense in disparate treatment cases as well. Section 703(e)(1) of Title VII provides that an employer may consider religion, sex, or national origin when one of those characteristics is a bona fide occupational

46. The essence of a disparate treatment claim is that the employer has treated the claimant less favorably than another because of his or her race, color, religion, sex, or national origin. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The order and allocation of proof are as follows: (1) the plaintiff must present evidence that is sufficient to establish a prima facie case of discrimination; (2) the defendant must then articulate a legitimate, nondiscriminatory reason for its employment action; and (3) the plaintiff must then prove that the assigned reason is a pretext or is discriminatory in its application. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973). See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-57 (1981).

The other two theories of employment discrimination are described in B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1-2 (2d ed. 1983). The Supreme Court first enunciated the disparate impact theory in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under this theory, the plaintiff must show that a facially neutral employment practice has a significantly adverse impact on a protected group. Once that showing is made, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question and is justified by business necessity. If the employer meets this burden, the plaintiff may then show that other practices, which lack a similarly discriminatory effect, would satisfy the employer's legitimate interests. See Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); Griggs, 401 U.S. at 430-32. Proof of discriminatory motive is not required under a disparate impact theory. See International Bhd. of Teamsters, 431 U.S. at 335 n.15. The third theory—perpetuation of the effects of past discrimination through devices that are neutral on their face—also assumes a lack of any intent to discriminate on the part of the employer. See, e.g., Quarles v. Philip Morris, Inc., 278 F. Supp. 505 (E. D. Va. 1968).

47. See Albemarle Paper Co. v. Moody, 422 U.S. 406, 425 (1976); Griggs, 401 U.S. at 431-32.

qualification reasonably necessary to the normal operation of the business.\textsuperscript{49}

Religious discrimination claims generally fall into one of three broad categories: the employee seeks exemption from “neutral” work rules because of the requirements of his or her religious beliefs; the employee claims that he or she has been treated less favorably than others because of his or her religious affiliation or beliefs; or the employee challenges the employer’s implementation of religious beliefs or practices on the ground that they constitute discrimination on the basis of religion. Cases of the first type are based upon statutory requirements that an employer make a reasonable effort to accommodate its employees’ religious beliefs.\textsuperscript{50} Cases of the second and third types can be brought under any of the three primary theories of employment discrimination: disparate treatment, perpetuation of the effects of past discrimination through the use of facially neutral devices, or disparate impact of otherwise neutral policies or practices upon members of a protected class. Religious discrimination cases based on the employer’s implementation of religious beliefs or practices may also


\textsuperscript{50} \textit{See}, e.g., § 701(j) of Title VII, 42 U.S.C. § 2000e(j). To establish a prima facie case of religious discrimination under this section, the plaintiff must plead and prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he informed his employer or prospective employer about the conflict; and (3) he was denied employment, or privileges of employment, because of his refusal to comply with the employment requirement. \textit{See} Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984); Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978), \textit{cert. denied}, 442 U.S. 921 (1979). The question then becomes whether the employer can accommodate the requirements of the employee’s religious beliefs without undue hardship. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). An accommodation causes “undue hardship” whenever it results in “more than a de minimis cost to the employer.” \textit{Id. See also} Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986) (undue hardship is at issue only when the employer claims that he is unable to offer reasonable accommodation without such hardship).
involve a failure to accommodate the employee’s conflicting religious, or nonreligious, needs. 51

Available defenses in religious discrimination cases include the general defenses of business necessity and bona fide occupational qualification. 52 In addition, if the employer is a religious institution, 53 other defenses may be available. When the employer is a church or other religious institution, and the employee is a member of the clergy, courts generally hold employment issues to be ecclesiastical matters beyond the authority of the civil courts. 54 Courts base this decision on the free exercise and establishment

51. See, e.g., Young v. Southwestern Sav. & Loan Ass’n, 509 F.2d 140 (5th Cir. 1975) (employer’s requirement that plaintiff attend staff meetings that included religious content challenged on the basis that it constituted a failure to accommodate the plaintiff’s atheist beliefs). This approach, however, is far more cumbersome for the plaintiff. The plaintiff must show each policy or practice of the employer to be contrary to his or her beliefs—a daunting task when the working environment is pervasively religious. In addition, massive systemic changes in the employer’s management philosophy or operations would almost always exceed the de minimis burden required to defeat a claim for accommodation. See supra note 50. Cf. EEOC v. Sambo’s of Ga., Inc., 530 F. Supp. 86, 92-93 (N.D. Ga. 1981) (Title VII does not permit maintenance of a case based upon disparate impact when the claim is the employer’s failure to accommodate the plaintiff’s religious beliefs, because § 701 sets forth the exclusive method of proof for this claim).

52. See supra text accompanying notes 47-49.


54. See Serbian E. Orthodox Diocese for the United States & Can. v. Millivojevich, 426 U.S. 696, 713 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 107-08 (1952) (“[t]he regulation that regulates church ... appointment of clergy ... prohibits the free exercise of ...”); Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) (“[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise”); Watson v. Jones, 80 U.S. 679, 710 (1871) (“civil courts ... may not take cognizance of purely spiritual or ecclesiastical questions”); Simpson v. Lamont Corp., 494 F.2d 490, 492-93 (5th Cir. 1974); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.), cert. denied, 409 U.S. 896 (1972). Civil courts or regulatory agencies may have authority to determine whether the defendant is a religious organization or whether the employee’s dismissal implicated ecclesiastical matters. See Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc., 477 U.S. 619, 628 (1986) (a state civil rights commission does not violate the constitutional rights of a religious organization by “merely investigating the circumstances” of a lay employee’s discharge, “if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge”); Ninth & O Street Baptist Church v. EEOC, 616 F. Supp. 1231 (W.D. Ky. 1985), aff’d, 802 F.2d 459 (6th Cir. 1986); Note, Serving God or Caesar: Constitutional Limits on the Regulation of Religious Employers, 51 Mo. L. Rev. 775, 782-84 (1986).
clauses of the first amendment. If the employee is a lay worker employed by a religious institution, the first amendment implications depend on the employee's function. If the employee performs essentially nonreligious or secular tasks, civil courts will review the claim. If, however, the lay employee performs religious duties, courts have held that the first amendment precludes interference by civil authorities.

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55. See Kedroff, 344 U.S. 94; McClure, 460 F.2d 553; NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (application of the National Labor Relations Act to religious schools implicates the guarantees of the religion clauses). See also Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981); Note, supra note 54, at 786. The overriding concern in such cases seems to be the reluctance of the civil courts to become involved in matters of church doctrine, orthodoxy, or internal management. See, e.g., Serbian E. Orthodox Diocese, 426 U.S. at 713 ("religious controversies such as the dismissal of clergy are not the proper subject of civil court inquiry, and . . . a civil court must accept the ecclesiastical decision of church tribunals as it finds them"); Kedroff, 344 U.S. at 116 (calling for a "spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

56. See, e.g., EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (labor dispute with maintenance workers did not implicate first amendment concerns because the workers, although ordained ministers, were "not engaged in activities traditionally considered ecclesiastical or religious"), cert. denied, 456 U.S. 909 (1982); Dolter v. Wahlert High School, 483 F. Supp. 266, 269-70 (N.D. Iowa 1980) (assertion of Title VII jurisdiction over a lay teacher's claim of sex discrimination would not entail excessive entanglement in the religious mission of defendant's school, because it would not entangle the court in defendant's religious mission, doctrines, or activities); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1383, 1365 (S.D.N.Y. 1975) (discharge of clerk-typists does not implicate first amendment concerns, because the discharge was not based on doctrinal policies of the church, and no other evidence indicated the involvement of ecclesiastical concerns). Cf. Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (the first amendment does not bar application of the Fair Labor Standards Act to the commercial activities of a religious foundation); Denver Post of the Nat'l Soc'y of the Volunteers of America v. NLRB, 732 F.2d 769 (10th Cir. 1984) (exercise of jurisdiction by the NLRB over the social service employees of a religious organization would not threaten first amendment guarantees when the organization did not require the employees to have any particular religious background or training, no religious activities were conducted at the program's facilities, neither clients nor employees were the subject of religious proselytization, and the employees testified that religion played no part in their work).

57. See, e.g., Southwestern Baptist Theological Seminary, 651 F.2d at 284 (Title VII does not apply to the relationship between a theological seminary and its teachers, who act as intermediaries between the central church authorities and local Baptist churches, and who instruct seminarians in religious doctrine); Maguire v. Marquette Univ., 627 F. Supp. 1459, 1507 (E.D. Wis. 1988) (first amendment precludes civil court adjudication of whether an individual is qualified to teach in the theology department of a religious university), aff'd, 814 F.2d 1213 (7th Cir. 1987). Cf. Ritter v. Mount St. Mary's College, 495 F. Supp.
Traditional religious employers are also the beneficiaries of special statutory exemptions under Title VII. Section 702 permits "a religious corporation, association, educational institution, or society" to employ persons of a particular religion for the performance of work "connected with the carrying on by such [organization] . . . of its activities."

Courts interpret this section as a limited exemption, for religious discrimination alone; discrimination on another basis (race, color, sex, national origin) is not protected. The section's scope encompasses employees who are engaged in both religious and nonreligious work. Under section 703(e)(2), an em-

734, 739 (D. Md. 1980) (if a priest was granted tenure instead of plaintiff (a lay teacher) because of the defendant's religious policies, application of Title VII could violate the first amendment). One commentator has suggested that a compelling governmental interest must justify any intrusion by civil courts into a religious institution's employment relationships. See Laycock, supra note 55, at 1417.


60. Originally, section 702 provided that the Act's prohibitions "shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities." Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 265 (codified as amended at 42 U.S.C. § 2000e-1 (1982)) (emphasis added). The word "religious" before the word "activities" was deleted by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-661, § 3, 86 Stat. 103, 104 (codified as amended at 42 U.S.C. § 2000e-1 (1982)). For an excellent discussion of the legislative history surrounding this amendment, see Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 594 F. Supp. 791, 803-12 (D. Utah 1984), rev'd, 107 S. Ct. 2862 (1987). Existing legislative history shows that the change was intended to allow religious organizations to discriminate against employees on religious grounds with respect to all of their activities, not just those that are religious in nature. The legislative purpose behind the change was to prevent the involvement of government in religious affairs. See id.

The United States Supreme Court recently upheld the constitutionality of this section, as applied to the employees of nonprofit religious organizations. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862 (1987). The Court limited its holding, however, to nonprofit activities; the constitutionality of its application to profit-making activities of religious organizations was left undecided. See id. at 2870; id. at 2875 (O'Connor, J., concurring).
ployer may employ persons of a particular religion if the employer is an educational institution that is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or a particular religious organization, or if the curriculum of the institution is directed toward the propagation of a particular religion. This exemption, like section 702, is not restricted to the religious activities of these institutions or their employees. Any activities, no matter how secular, are exempt from the purview of the Act.

Traditional and nontraditional religious employers may also claim protection under the free exercise or establishment clause of the first amendment. If the employer is an artificial person, a threshold question is whether it can claim a constitutional right under the first amendment. A nonprofit religious corporation or association engaged in religious activities has clear first amendment rights to free exercise and to freedom from excessive government involvement in its operations. The answer is less clear when the

61. 42 U.S.C. § 2000e-2(e)(2). One court held that when a university defends an employment discrimination suit under this section, it must prove "that all or a considerable amount of its support, control, or management comes from or is in the hands of the religious society." Pime v. Loyola Univ., 585 F. Supp. 435, 440 (N.D. Ill. 1984), aff'd, 803 F.2d 351 (7th Cir. 1986).


The employer may also contend that its speech, in connection with its employment actions, is protected by the free speech clause of the first amendment. See, e.g., Sports & Health Club, Inc., 370 N.W.2d at 846 (the employer unsuccessfully asserted freedom of speech as a defense to the application of the Minnesota Human Rights Act). See also Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 61 Minn. L. Rev. 545 (1983) (discussing the extent to which the freedom of expression guarantee pervades the area of religious exercise).

64. See Laycock, supra note 55, at 1386, and cases cited therein (holding that no viable distinction exists between individuals and religious institutions in the assertion of free exercise rights). Cf. Lupu, Keeping the Faith: Religion, Equality and Speech in the U.S. Con-
employer is a religious organization involved in commercial activities, or a profit-making enterprise run by religiously oriented individuals. Because the United States Supreme Court has recognized first amendment rights of corporations in another context, the better answer is that such employers can assert defenses based upon the religion clauses as long as they can show the requisite connection to religious mission or religious exercise.

Consideration thus far has been limited to cases involving claims of unlawful religious discrimination. Religious issues may also arise when the plaintiff claims to be a victim of discrimination on another basis (race, color, sex, national origin, or—in the case of some state laws or municipal ordinances—marital status or affectional preference), and the employer responds with a religious defense based upon constitutional guarantees or statutory exceptions or exemptions. For instance, an employer accused of sex discrimination may claim that it bases employment criteria on a religiously grounded business necessity or bona fide occupational qualification; that it is a religious institution entitled to the statutory ex-

stitution, 18 CONN. L. REV. 739, 766 (1986) (arguing that all institutional claims to free exercise should be rejected, because “[b]y their nature, institutions cannot have a conscience or faith” and “institutional exemptions could easily be used to disguise other, secular motivations for institutional conduct.”).

65. See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305 (1985) (application of the Fair Labor Standards Act to a religious foundation will not violate the establishment clause when the Act’s requirements apply only to commercial activities undertaken with a “business purpose,” and therefore have no impact on the foundation’s evangelical activities); cf. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862, 2873 n.6 (1987) (Brennan, J., concurring) (“It is . . . conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases.”).

66. See Sports & Health Club, Inc., 370 N.W.2d at 850-51. The court framed the issue as whether a profit-making corporation has “standing” to assert the first amendment as a defense to claims of discrimination. Although indicating an affirmative answer, the court declined to explicitly decide the question because the administrative hearing examiner pierced the “corporate veil” to impose liability on the individual owners of the closely held corporation. Under these circumstances, those individuals clearly had a right to assert a first amendment defense. See id.


68. See Tony & Susan Alamo Found., 471 U.S. at 303-06.

emptions from liability provided by sections 702 and 703(e)(2) of Title VII, or that its actions are protected by the free exercise or establishment clause.

Religious issues in employment discrimination cases, therefore, may arise as part of the plaintiff's case or as part of the defense. The plaintiff often bases his or her case on the claim that religious discrimination resulted from the employer's implementation of religious beliefs or practices. That claim, and the courts' response to it, have reflected certain assumptions about the nature of religion and its role in the workplace. This Article now turns to those issues.

II. RELIGION AND NEUTRAL VALUES: THE MYTH OF "VALUE NEUTRALITY" IN EMPLOYMENT

In Sports & Health Club, Inc., Young, Blalock, and the EEOC cases, it was assumed that a functional difference exists between the implementation of religious and nonreligious values in the workplace, and that this functional difference could be used to identify discriminatory employment practices. In short, courts as-

70. See, e.g., EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981); EEOC v. Fremont Christian School, 609 F. Supp. 344 (N.D. Cal. 1984), aff'd, 781 F.2d 1362 (9th Cir. 1986); Dolter, 483 F. Supp. 266. Some courts have resolved these cases by stating broadly that § 702 only exempts religious employers from religious discrimination, not from discrimination based upon race, color, sex, or national origin; when the plaintiff's claim is not based upon religious discrimination, § 702 is automatically inapplicable. See, e.g., Ritter v. Mount St. Mary's College, 495 F. Supp. 724, 726-27 (D. Md. 1980). This distinction ignores the fact that actions that are discriminatory on another basis may be an exercise of the employer's religious beliefs. See supra notes 59, 60. Cf. Mississippi College, 626 F.2d at 485-86 (factual inquiry into the basis of the employer's action is necessary for the application of § 702).


sumed that values the state enforces, through legislation, are "neutral," and that religious values lack that neutrality. The employers in those cases challenged that assumption, as have other individuals and employers. Although the full range of this debate is far beyond the scope or purpose of this Article, several observations are necessary.

The formulation of a workable definition of religion has presented an unparalleled conundrum for the courts. Early opinions viewed religion in traditional, theistic terms. United States v. Ballard signaled a movement toward a far broader approach. In Ballard, the Supreme Court indicated that the boundaries of religious belief were subjective, understood and defined only by the individual adherent:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and the hereafter which are rank heresy to followers of orthodox faiths. . . . Men may believe what they cannot prove. . . . Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

73. See Sports & Health Club, Inc., 370 N.W.2d at 859-62 (Peterson, J., dissenting) (discussing current views of Christian religious beliefs and secular life); Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities, 90 Yale L.J. 350, 364 n.81 (1980) (Jehovah’s Witnesses and Jews, among others, see a broad role for religious beliefs in areas of life often considered to be secular).

74. See, e.g., Gedicks & Hendrix, Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America, 60 S. Cal. L. Rev. 1579 (1987).

75. Most of these efforts have occurred in the course of the interpretation of the first amendment.

76. See, e.g., United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("The essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation."); Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."); see generally Note, The Sacred and the Profane: A First Amendment Definition of Religion, 61 Tex. L. Rev. 139, 143 (1982).

77. 322 U.S. 78 (1944).

78. Id. at 86-87 (citation omitted).
Later, in Torcaso v. Watkins,79 the Court held that the first amendment did not permit the state to favor believers in theistic religions over nonbelievers or subscribers to nontheistic religions. In a now-famous footnote, the Court stated that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”80 The Court subsequently defined religious belief, in the context of statutory interpretation,81 as a belief that is “sincere and meaningful” and “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”82 A belief meets this test when it is “based upon a power or a being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.”83

Since the advent of these cases, scholars have attempted to capture the essence of religion, which they believed to be hidden somewhere in these tests. One commentator proposed that religion be defined as an individual’s “ultimate concern,” which might be political, economic, or cultural.84 Another defined religious belief as “the affirmation of some truth, reality, or value” that “address[ed] itself to basic questions to which man has always sought an answer, questions about the meaning of human existence, the origin of being, the meaning of suffering and death, and the existence of a spiritual reality.”85 Yet another suggested that religion consists of beliefs or practices based on a perception of reality composed of both “sacred” (that which transcends experience in the natural environment) and “profane” (natural) elements.86 Although all of these definitions are admirable attempts to delimit the outer

80. Id. at 495 n.11.
81. At issue was the meaning of the phrase “religious training and belief” as used in the Universal Military Training and Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, 612-13 (1948) (current version at 50 U.S.C. app. § 456(j) (1982)).
83. Id. at 176. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court stated that religious belief is more than personal philosophic conviction. Id. at 215-16. However, the Court did not explain just how religious beliefs differ from philosophical ones.
86. See Note, supra note 76, at 164-65.
boundaries of a difficult concept, they do little to illuminate the difference between religion and other "secular," philosophical or moral, belief systems.

Problems in the formulation of a definition of religion are endemic to pluralist conceptions of state toleration of a wide diversity of religious beliefs. One tenet of American pluralism involves attempted state neutrality with regard to religious beliefs and practices. With few exceptions, courts have left the definition or existence of religious beliefs to the individual adherent. This approach has been founded on notions of individual freedom and autonomy, and on a recognition that state evaluation of the validity of asserted religious beliefs would run afoul of prohibitions against state-imposed orthodoxy and would involve the courts in the dif-

87. For criticisms of these efforts, see Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Prrt. L. Rev. 673 (1980); Freeman, The Misguided Search for the Constitutional Definition of "Religion," 71 Geo. L.J. 1519 (1983); Note, supra note 76.

Administrative and judicial efforts to define "religion" in the employment context have been no less imprecise. The EEOC defines religion, for the purposes of Title VII, as "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (1987). One court stated that to determine what is religious within the meaning of the statute, the proper questions are (1) whether the belief or practice asserted is "religious" in the "person's own scheme of things," and (2) whether it is "sincerely held." Redmond v. GAF Corp., 874 F.2d 897, 901 n.12 (7th Cir. 1989).

88. See supra notes 79-87 and accompanying text. But cf. Theriault v. Carlson, 495 F.2d 380, 395 (5th Cir.) (first amendment religious protection is not extended to "so-called religions that tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity."); cert. denied, 419 U.S. 1003 (1974); Brown v. Penza, 441 F. Supp. 1382 (S.D. Fla. 1977) (plaintiff's "personal religious creed" which required the ingestion of "Kooky Kitten Cat Food" held to be a personal preference not entitled to protection.), aff'd without opinion, 589 F.2d 1113 (5th Cir. 1979).

89. Canseva, The Pluralist Game, 44 Law & Contemp. Probs. 23, 28 (1981) ("[A] liberal society has a permanent bias in favor of neutrality.... The liberal state aims only at equal liberty for all under impartial general laws.... Any attempt by society or its agent, the state, to make the decision for them must be rejected as an effort by some citizens to impose their conception of excellence, virtue or happiness on others."). See also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...."); Weiss, Privilege, Posture and Protection "Religion" in the Law, 73 Yale L.J. 593, 622 (1964) (assessment of the validity of religious beliefs intrudes into individual religious freedom).

90. Any definition of religion risks "establishing a notion respecting religion" in violation of the establishment clause. See Weiss, supra note 89, at 604. One commentator has de-
difficult and unseemly task of external validation. The approach may have been workable in a time of more commonly shared religious beliefs and traditions, the decline of such shared assumptions has led to an ever-broadening—and thinning—concept of the religious. The expansion of the concept of the religious has led to an increasing merger of the “religious” and the “secular” spheres. If religious beliefs have little in the way of irreducible content and are, in fact, left to individual identification or definition, little differentiates religious beliefs or values from secular ones, including those reflected in legislation or enforced by the state. “Value neutrality,” in the sense of assured eradication of religious values or beliefs, becomes a perpetually elusive concept.

scribed the permissible conception of religion under pluralist principles as “a diffuse religiosity.”

[We] are allowed, and may be encouraged, to bolster our positions by reference to a deity. But we cannot derive policy positions from religion. . . . The pluralist theory of the establishment clause prevents this from happening by providing innumerable locations in which people can create or verify their relationship to a god whom they imagine in many different ways.


92. See Canavan, supra note 89, at 24-25; cf. Hitchcock, Church, State, and Moral Values: The Limits of American Pluralism, 44 LAW & CONTEMP. PROBS. 3 (1981): Although moral values are notoriously elusive of investigation, it . . . appears to be the case that until the 1960’s Americans held to a fairly general consensus on such values, a consensus which was celebrated in political and civic rhetoric, extolled from a wide variety of pulpits, honored in the mass media, and to a great extent perpetuated through formal education, both public and private. . . . However dishonored in practice, these virtues received consistent public affirmation, and were usually thought of as based on religious belief.

Id.


93. Any concept of the public good, recognized by government, destroys the notion of complete state neutrality between competing values. See Canavan, supra note 89, at 29-31, 36:
The difficulties inherent in the use of value neutrality or "religious neutrality" as a viable concept for the evaluation of state action hold true for the evaluation of private conduct as well. Under any of the "religion tests" described above, the creation of a "religiously neutral" work environment would be a virtual impossibility. A belief system that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God,"94 or that constitutes the individual's "ultimate concern,"95 could conceivably encompass any value system, including one based entirely on economic criteria. Perhaps the Supreme Court's famous footnote in Torcaso presents the ultimate extension of the problem.96 If, as the Court indicated, nontheistic belief systems such as Taoism, Ethical Culture, and Secular Humanism are religions, it would be difficult to conceive of an employment environment or set of work rules that would not be some sort of "religious" choice. Secular humanism includes the rejection of supernaturalism, the assertion of the dignity and worth of each human being, and commitment to the achievement of individual self-realization and human welfare through human effort.97 Devotions addressed to a deity, then, would not be the sole subject of complaint. A philosophy encouraging employees to believe in themselves or to look within themselves

95. Note, supra note 84, at 1071.
97. See Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1536 n.5 (9th Cir.) (Camby, J., concurring), cert. denied, 474 U.S. 826 (1985). The Supreme Court's inclusion in Torcaso of secular humanism as an example of a nontheistic religion has sparked intense debate. See id. at 1536-37 (Camby, J., concurring); see also Smith v. Board of Comm'rs., 655 F. Supp. 939 (S.D. Ala.) (parents claim that public school textbooks advance the religion of secular humanism), rev'd, 827 F.2d 684 (11th Cir. 1987); Pfeffer, Issues That Divide: The Triumph of Secular Humanism, 19 J. or Church & Sr. 203, 207 (1977) ("strong, if somewhat indefinable, spirit of secular humanism . . . permeates American cultural and political life"). But cf. Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985) (it is a "mistaken impression that an idea or belief cannot be both secular and religious.").
for the source of inspiration, motivation, or change would be objectionable on the ground that it reflects secular humanism, a religious system antithetical to some employees' religious beliefs. Concepts such as honesty, discipline, hard work, or obedience to authority would also be religious or secular, depending on the individual and the nature of his or her belief system. Under these circumstances, the only factor distinguishing religious from nonreligious beliefs or values is whether the individual declares them to be the product of a religious or nonreligious source.

*Sports & Health Club, Inc.*\(^9^8\) illustrates the difficulty of distinguishing the religious from the nonreligious in the employment context. No one would quarrel with an employer's general right to hire employees who possess "teachable spirits" and follow "disciplined lifestyles,"\(^9^9\) however defined; nor is there any general prohibition upon management requiring compliance with work rules in a "cheerful and obedient spirit." The framing of these requirements in religious terms created objection. Similarly, in *Blalock*, the general right of an employer to terminate an employee because of a deterioration in personal rapport was unquestioned; the religious nature of the disagreements causing this deterioration resulted in the problem.\(^1^0^0\) Had the same issues been labeled "moral" or "personal," no cause of action would have existed.

One response to this dilemma might be to use a more restrictive definition of religion for employment discrimination statutes than for first amendment questions.\(^1^0^1\) Assuming that some agreement

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98. 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of juris.*, 478 U.S. 1015 (1986).
99. Obviously, if these employment criteria were a mere subterfuge for discrimination on the basis of the employee's religious affiliation or identity, a different question would be presented. See infra text accompanying notes 147-149.
100. Blalock v. Metal Trades, Inc., 775 F.2d 703, 708-09 (6th Cir. 1985).
101. Precedent for the idea of a differing definition of religion, depending on the term's use, can be found in the first amendment area, where some commentators advocate different definitions of religion for the free exercise and establishment clauses. *See L. Tribe, American Constitutional Law* 827-28 (1st ed. 1978); *Note, supra note 84, at 1084. But cf. Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting) ("'Religion' appears only once in the [First] Amendment. . . . It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'").

Most courts that have considered the question have assumed that first amendment definitions of religion apply to questions arising under Title VII. *See, e.g., Philbrook v. Ansconia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985), remanded, 479 U.S. 60 (1986); Redmond v. GAF
about the nature of a more restrictive definition could be reached, this approach might limit the scope of disparate treatment cases to more manageable proportions. The approach would, however, also limit the scope of the religious accommodation cases. Title VII contains only one reference to "religion" in connection with unlawful employment practices. Any definition of religion must therefore govern cases involving the employer's failure to accommodate the religious beliefs of the employee, as well as cases involving the employer's beliefs or practices. A narrow definition of religion would violate the implicit spirit of the language of the Act, and would contradict the current administrative interpretation of "religion" in that context. Problems of parallelism would also result;


The EEOC has suggested that the definition of religion used in interpreting Title VII must be coextensive with that of the first amendment:

The Commission has recognized that the protections against religious discrimination under the Act must not conflict with the first amendment as interpreted by the Supreme Court. . . . [T]he Commission has stated that "[i]f 'religion' were construed more narrowly for Title VII purposes . . ., then Title VII's proscription of religious discrimination would conflict with the First Amendment's Establishment Clause."

. . . It is clear from the Legislative History of the Equal Employment Opportunity Act of 1972 that "[t]he term 'religion' as used in the Civil Rights Act of 1964 encompasses . . . the same concepts as are included in the first amendment. . . . [Congress] thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments."

. . . Therefore, it is the Commission's view that the protections of the Act against religious discrimination can be no broader or narrower than the protections afforded by the first amendment.


104. In response to Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), the EEOC defined religion to be "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." See supra note 87.
if a narrower definition of religion were used to establish a plaintiff’s prima facie case, it would also have to be used to establish the defenses of business necessity,\textsuperscript{105} bona fide occupational qualification,\textsuperscript{106} or the religious organization\textsuperscript{107} or religious educational institution\textsuperscript{108} exemptions under the Act. A narrower definition of religion, particularly as applied to the religious organization and educational institution exemptions, would undoubtedly encounter strong establishment clause and equal protection clause challenges.\textsuperscript{109}

Even if the definition of religion were restricted in employment discrimination cases to the more traditionally recognized religious beliefs,\textsuperscript{110} and such restriction did not conflict with the underlying source of the equal employment guarantee,\textsuperscript{111} other problems remain. Focus on the religious or nonreligious source of employment policies or practices as the determining factor for their legitimacy would lead to inherently arbitrary results. If a particular hiring criterion, such as disciplined lifestyle, had a religious source, it would be prohibited; if, on the other hand, it were merely an exercise of secular subjectivity, it would not.\textsuperscript{112} If the Bible were used as the employer’s “business manual,” and as an expression of the employer’s religious convictions, its use would be a prohibited prac-

\textsuperscript{105} See supra text accompanying notes 47-48.
\textsuperscript{106} See supra text accompanying note 49.
\textsuperscript{107} See supra text accompanying notes 58-60. Courts that have considered this exemption and the religious educational institution exemption, see supra text accompanying notes 61-62, have used concepts of “religion” that were developed in the first amendment context. See, e.g., Amos v. Corporation of the Presiding Bishop, 613 F. Supp. 1013, 1026-27 (D. Utah 1985), rev’d on other grounds, 107 S. Ct. 2862 (1987).
\textsuperscript{108} See supra text accompanying notes 61-62.
\textsuperscript{109} The reverse side of this coin would be applying broad first amendment definitions to these statutory exemptions. Such application would seem to make the exemptions potentially all-encompassing and unworkable.
\textsuperscript{110} See, e.g., Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622, 631 (W.D. Pa. 1979) ("only religious beliefs which are part of a recognized creed are protected"), vacated on other grounds, 613 F.2d 482 (3d Cir. 1980).
\textsuperscript{111} Employment discrimination cases based on the equal protection clause presumably would require a definition derived from constitutional jurisprudence. See supra note 39 and accompanying text.
\textsuperscript{112} Subjective employment criteria are not per se violations of Title VII, see Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1270 (9th Cir. 1980), although they are carefully scrutinized to be sure that they are not pretexts for discriminatory practices. See Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981).
tice; if, on the other hand, it were used solely as a secular aid, it would not.\(^{113}\) The clear permissibility of “nonreligious” moral values or work rules in other contexts underscores the current determinative role of the religious source in identifying prohibited practices.\(^{114}\)

Determining the permissibility of work rules, employment philosophies, or hiring criteria according to the nature of their source is not only difficult and necessarily arbitrary, it is also discriminatory. If the sole reason for the permissibility of particular beliefs or values is their secular or religious source, one can certainly make a facially compelling case that religious individuals and institutions are being denied equal protection of the laws.\(^{115}\)

\(^{113}\) Cf. Canavan, *supra* note 89, at 36:

The state, under our Constitution, is not permitted to enforce the Ten Commandments on the ground that they have been revealed by God. On the other hand, the state is not barred from enforcing certain principles of the Ten Commandments for the reason that some of its citizens believe that they have been revealed by God.

*Id.*

\(^{114}\) See, e.g., Shawgo v. Spradlin, 701 F.2d 470 (5th Cir.), cert. denied, 464 U.S. 965 (1983); Glenn v. Newman, 614 F.2d 467, 473 (5th Cir. 1980); United States v. City of Chicago, 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977); Allen v. City of Greensboro, 452 F.2d 489, 491 (4th Cir. 1971) (character and conduct requirements of police departments); Sullivan v. Meade Indep. School Dist. No. 101, 530 F.2d 769 (8th Cir. 1976); Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611, 614 (5th Cir. 1975) (standards of character and morality required of school teachers); Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986), aff'd, 834 F.2d 697 (8th Cir. 1987); Harvey v. Young Women's Christian Ass'n, 533 F. Supp. 949 (W.D.N.C. 1982) (conduct requirements for those involved in work with children). Even when the moral inquiries or requirements have no apparent connection to the job to be performed, the courts have recognized that the law presents no general prohibition against such employment criteria as long as they do not run afoul of other legal or constitutional guarantees. See Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977) (dismissal of library employees on the ground of living in “open adultery” upheld, on the ground that it violates no constitutional or statutory right), aff'd, 576 F.2d 1374 (3d Cir.), cert. denied, 439 U.S. 1052 (1978). Such guarantees might be statutory prohibitions against discrimination on the basis of race or sex. See *City of Chicago*, 549 F.2d 415; *Chambers*, 629 F. Supp. 925, and Doe v. Osteopathic Hosp. of Wichita, Inc., 533 F. Supp. 1357 (D. Kan. 1971). The guarantee can also be a constitutional prohibition against denial of equal protection. See, e.g., *Andrews*, 507 F.2d 611. If discrimination on some protected basis is shown, the employer must prove that the requirement is rationally related to some valid employment objective and that reasonable alternative means are not available. See *Andrews*, 507 F.2d at 614-16; *Chambers*, 629 F. Supp. at 949-50.

\(^{115}\) “The State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (quoting
Christian fundamentalists, of the type involved in *Sports & Health Club, Inc.*, Blalock, and *Young*, present the most extreme cases because of the all-pervasive, uncompromising and (to some) unpopular nature of their views. Their belief that religion cannot be separated from secular activities, and that the religious imperative transcends conflicting governmental norms, presents a disquieting challenge to the larger social and governmental order. The extreme implications of their views, however, should not detract from the fundamental issues that their claims present. These issues affect any individual or organization—whether Christian, Jewish, Moslem, or any other religious orientation—that refuses to accept a complete dichotomy between the religious and secular spheres of life, and therefore attempts to implement religious beliefs or practices in the workplace. For many individuals, the religious and the nonreligious are not easily separable, in theory or in daily life. Our diverse religious traditions have long informed concepts of public morality and acceptable private conduct.\(^{116}\) Those traditions, no less than explicitly secular conceptions of public or private good, can and should be expressed in the workplaces where most people spend the majority of their lives. The idea that religious speech, religious values, or religious practices cannot be a part of the workplace contradicts our own experience of the partial, if not complete, identity of the religious and the nonreligious spheres. It also deprives the workplace of one of the richest sources of humane values and conduct.\(^{117}\) To say that employment deci-

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\(^{116}\) *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Cf. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (granting of paid employee leave for nonreligious purposes but denying it for religious ones constitutes "a discrimination against religious practices that is the antithesis of reasonableness."); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2869-70 (1987) ("laws discriminating among religions are subject to strict scrutiny"); laws that benefit all religions, and that pass establishment clause challenge, need only be rationally related to a legitimate governmental objective. Query whether a law that imposes uniform disabilities on religious beliefs or practices falls under the strict scrutiny or rational relationship analysis.


"[D]enial or marginalization of the spiritual dimension of existence" denies "the human need for deep and lasting emotional commitments embodied for most people in the idea of family, and . . . for continuous forms of community rooted in an ethical vision of a good and decent way of life." *Gabel, Creationism and the Spirit of Nature*, 2 *TIKKUN*, No. 6, at 55, 59 (1986).
sions made on the basis of neutral principles of economic utility are acceptable, but that those made on the basis of religious values and traditions are not, is inherently arbitrary and poor public policy.

Some approach, other than the attempted eradication of the religious from the workplace, must be found to resolve the conflict between the employee's right to equal employment opportunity, and the employer's right to the implementation of religious values. A proposal for the adjustment of these conflicting claims is set forth below.

III. The Adjustment of Conflicting Claims: A Proposal

Religion is unique among the prohibited classifications found in Title VII and other civil rights statutes. Only religious speech, exercise, and expression have intrinsic, societally recognized and constitutionally enunciated value. At best, racist speech is constitutionally tolerated; the practice of racism, in employment or elsewhere, "violates deeply and widely accepted views of elementary justice."\(^{118}\) The same can be said of practices that involve sexism or discrimination on the basis of national origin. Religion is different. Although the elimination of religious discrimination in employment is a matter of the highest public policy, that goal must be achieved in a manner that is cognizant of the explicit, affirmative value of religious speech, practice, and expression by all parties—employers as well as employees.

Religious discrimination claims are also unique, in that the employee's assertion of his or her rights constitutes the potential infringement upon the identical rights of the employer. The first amendment and the civil rights laws protect an individual's right to irreligion, as well as religious beliefs or practices.\(^{119}\) The mirror image of the assertion of rights by one party is therefore the denial of the rights of the other. The employee's asserted right to be free of an offensive, religiously permeated work environment becomes


\(^{119}\) See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961); see supra text accompanying note 79.
the denial of the employer's right to exercise its religious beliefs. Reciprocal protection means, in the case of a religious employer, inevitable violation.

The existence of these conflicting claims is unavoidable. The question is how they should be resolved in the particular context of the application of the civil rights laws. A claim of employment discrimination resting on an employee's objection to an employer's religious beliefs or practices requires a bipartite analysis. A court must first determine whether the employer's actions constitute discrimination on the basis of religion; and second, if so, whether they are protected by statutory exemptions or constitutional guarantees. The second half of this inquiry has received much attention; almost none has been given to the first. The thesis of this Article is that the primary resolution of these conflicting claims should be made within the first inquiry.

Religious discrimination cases tend to fall into four broad categories:

1. **Claims involving a conflict between a nonreligious work environment, or an employer's nonreligious employment requirements, and an employee's religious beliefs.** In these cases, the employee seeks exemption from "neutral" work rules because of their incompatibility with his or her religious beliefs. These cases are based on statutes such as section 701(j) of Title VII, which requires an employer to reasonably accommodate an employee's religious observances or practices unless that accommodation would create an undue hardship on the employer's business.

2. **Claims based on the employer's refusal to hire, promote, or otherwise provide equal terms or conditions of employment be-

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120. The situation is much like the tension between the free exercise and establishment clauses of the first amendment, such that state-required accommodation of individual free exercise is seen as an "establishment" of religion in violation of the establishment clause. See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972). See also Edwards v. Aguillard, 107 S. Ct. 2573, 2595 (1987) (Scalia, J., dissenting) ("We have not yet come close to reconciling [the prohibition upon intentional governmental advancement of religion in] Lemon and our Free Exercise cases, and typically we do not really try.").

121. See, e.g., EEOC v. Sambo's of Georgia, Inc., 530 F. Supp. 86 (N.D. Ga. 1981) (employee plaintiff, a member of the Sikh religion, was unable to comply with the defendant's grooming requirements).

cause of the employee’s religious affiliation or identity. These cases, which are generally brought under a disparate treatment theory, include an employer’s failure to promote individuals who are not “born-again Christians” into management positions, \textsuperscript{123} failure to offer a lawyer partnership because he is a Catholic, \textsuperscript{124} failure to hire a college professor because he is not a Jesuit, \textsuperscript{125} or failure to hire a helicopter pilot because he will not convert to the Moslem religion. \textsuperscript{126} In all of these cases, the employer’s acts allegedly are based on the plaintiff’s religious or nonreligious status.

3. Claims based on the existence of a work environment or a work atmosphere that reflects hostility to the employee’s religion or religious beliefs. These cases, based on a theory of religious harassment, are brought under a disparate treatment theory. They often involve an intimidating or offensive work environment, such as one that involves repeated religious comments or slurs. \textsuperscript{127} In these cases, the religious beliefs or status of the employee remain the focus of the employer’s action.

4. Claims based on the religious beliefs, practices, or values of the employer. In these cases, the employer’s beliefs or practices are offensive to the employee or contrary to the employee’s religious or nonreligious beliefs. Examples include the employer’s implementation of religiously derived work rules or requirements, the employer’s open discussion of religious faith in employment decisions, and the conduct of religious services or practices as a part of the workplace environment or regimen. These cases may be brought under a disparate treatment theory, in which the employee directly attacks the religiously permeated workplace as inherently discriminatory. \textsuperscript{128} Alternatively, these cases may be framed in terms of the


\textsuperscript{125} Pime v. Loyola University, 585 F. Supp. 435 (N.D. Ill. 1984), aff’d, 803 F.2d 351 (7th Cir. 1986).


\textsuperscript{128} See, e.g., State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), dismissed for lack of juris. 478 U.S. 1015 (1986); Blalock v. Metal Trades, Inc., 775 F.2d 703 (6th Cir. 1985). See also Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm’n, 766
religious employer's failure to accommodate the employee's religious or nonreligious beliefs.\textsuperscript{129}

A valid claim of religious discrimination in employment should be limited to situations in which the employee's religious status (religious affiliation or identity, or lack thereof) is the reason for the employer's action. Further relief should be available only when the employee seeks exemption from the employer's work rules or requirements under a statutorily mandated accommodations analysis. In that instance, although the employee is not treated differently because of his or her religious status, that status remains the focus of the claim. Cases that are not based on the employee's religious status, or that do not fall within the statutorily established accommodations exception to that general requirement, should not state a claim for religious discrimination under the civil rights laws.

The goal of Title VII is "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."\textsuperscript{130} The purpose of other state statutes and municipal ordinances prohibiting discrimination in employment is likewise to afford all employees and prospective employees equal employment opportunity. In the case of discrimination on the basis of race, sex, or national origin, the denial of equal employment opportunity on the basis of the plaintiff's status is the target of the legislation.\textsuperscript{131} The prohibition against discrimination on the basis

\textsuperscript{129} See, e.g., Young v. Southwestern Sav. and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).


\textsuperscript{131} Senators Clark and Case were the floor managers for H.R. 7152, which contained what later became Title VII of the Civil Rights Act of 1964. In an interpretative memorandum, they stated:

\ldots Section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact[,] it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor
of religion should be similarly limited.\footnote{132} "Discrimination on the basis of religion" should mean that the employer has subjected an employee or potential employee to differing treatment, or disadvantage, because of his or her religious affiliation or identity, or has failed to reasonably accommodate an employee's religious or non-religious beliefs. In either situation, the employee's religious affiliation or beliefs, or lack thereof, is the focus of the complaint. The reasons for the employer's hostility to the employee's religious status, or for its choice of work requirements or work rules, is irrelevant to the plaintiff's claim.\footnote{133}

Under these principles, cases in the first category above—those in which a nonreligious work environment, or an employer's non-religious employment criteria, conflict with an employee's religious requirements—state a claim of religious discrimination under a statute that mandates an employer's accommodation of an employee's religious beliefs or practices.\footnote{134} Cases within the second category above do as well. If an employer treats an individual differently because of his or her religious affiliation or identity, that individual may assert a claim of religious status discrimination. In such a case, the employee is ready, willing, and able to perform the job at issue; his or her religious affiliation or identity is, from the employee's point of view, irrelevant. The differing treatment that the employee receives at the hands of the employer, because of the employee's religious affiliation or identity, however, creates the problem. This treatment clearly constitutes discrimination on the

\footnote{110 Cong. Rec. 7213 (1964), reprinted in id. at 3042-43.}

\footnote{132. During the House debate on § 703(a)(2) of Title VII, which permits church-affiliated schools and colleges to hire employees of a particular religion, the participants appeared to assume that "religious discrimination" referred to religious affiliation and religious beliefs. See 110 Cong. Rec. 2585-88, reprinted in EEOC, supra note 130, at 3197-212.}

\footnote{133. The reasons for the employer's actions could be relevant to the employer's defense, such as business necessity, bona fide occupational qualification, or undue hardship under a statutorily mandated accommodations analysis.}

\footnote{134. See, e.g., 42 U.S.C. § 2000e(j) (1982). See supra note 45.}
basis of religion, and is within the contemplated prohibition of the civil rights laws. 136

Cases falling within the third and fourth categories—those based on the existence of a work environment or work atmosphere that reflects hostility to the employee’s religion or religious beliefs, and those based on religious beliefs, practices, or values of the employer that are offensive to the employee—are more complex. In both cases, the legal touchstone must be whether the employer denies the employee or prospective employee equal terms, conditions, or privileges of employment because of his or her religious status. A claim for discrimination on the basis of religion clearly exists when the employee’s religious affiliation or identity is the subject of the employer’s overt hostility, such as when the employee or his religion is the target of derogatory comments or religious slurs. Under these circumstances, the employer denies the employee equal terms, conditions, or privileges of employment because of his or her religious status.

A different situation is presented if the employee’s religious affiliation or identity is not the focus of overt hostility. Whether the incompatibility of the employee’s religious or nonreligious beliefs with those of superiors or coworkers presents a claim for discrimination on the basis of religious status depends on the closeness of the particular belief in issue to the definition of religious affiliation or identity. If the belief in question is critical to the definition of the employee’s religious affiliation or identity, 136 then the employer’s action on the basis of that belief would present a claim for religious discrimination because the professed basis for the employer’s action is a subterfuge for discrimination on the basis of religious status. 137 However, when the particular belief is not critical to the employee’s religious affiliation or identity, the incompatibility of that belief with those of the employer would be actionable only under a statutorily defined accommodations analysis. The role

136. If the employer requires a particular religious affiliation or identity, then the legitimacy of that requirement must be tested under the standards for business necessity or for a bona fide occupational qualifications. See supra text accompanying notes 47-49.

136. An example would be the employee’s belief, or absence of belief, in the existence of God.

137. The defenses of business necessity and bona fide occupational qualification would, of course, remain available to the employer. See supra text accompanying notes 47-49.
of the employer’s religious beliefs in its actions would, in either situation, be irrelevant.

Refusal to predicate a claim for religious discrimination solely on the existence of an employer’s religious policies, practices, or beliefs accords with the purpose of the civil rights laws. Statutes prohibiting discrimination in employment do not mandate the creation of a religiously neutral work environment. Indeed, such a work environment would be almost, if not entirely, impossible to achieve.\(^{138}\) The issue should not be whether religiously based or religiously motivated beliefs or values (however defined) are motivating the employer’s actions; rather, it should be whether the employee’s employment opportunities are curtailed because of his or her religious affiliation or identity. Employment actions or requirements that have a religious motivation or source should not be forbidden as long as they are applied equally to all, and all have equal opportunity and ability to meet those requirements. The issue should be whether the employee has equal opportunity to meet the requirements for employment, whatever they are—not whether the employer’s requirements are those which the employee would choose, or with which he or she personally agrees.

Employee complaints regarding exposure to allegedly offensive values, policies, or practices are analogous to first amendment cases involving parental objection to “secularized” public school curricula. In \textit{Mozert v. Hawkins County Board of Education},\(^{139}\) the plaintiffs contended that the use of a prescribed set of reading textbooks in the public schools violated their right to the free exercise of religion protected by the first and fourteenth amendments. They argued that the textbooks contained beliefs and values, such as the acceptance of evolution, “secular humanism,” “futuristic supernaturalism,” and pacifism, which were offensive to their fundamentalist Christian beliefs. The question was “whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person’s religion.”\(^{140}\) The court rejected this contention, stating:

\(^{138}\) See supra notes 73-117 and accompanying text.
\(^{140}\) \textit{Id.} at 1068.
In Sherbert, Thomas, and Hobbie there was governmental compulsion to engage in conduct that violated the plaintiffs' religious convictions. That element is missing in the present case. The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.141

In Mozart, the court required a finding of compulsion to avoid the invalidation of any public school curriculum as incompatible with a particular student's asserted religious or nonreligious beliefs;142 it is similarly required to avoid the invalidation of virtually any work environment under the religious discrimination provisions of the civil rights laws. Exemption from religious work rules or exposure to an religious work atmosphere should be limited to those situations when the employee is entitled to relief under a statutorily defined accommodations analysis.143


142. 827 F.2d at 1064; see Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1542 (9th Cir.) (Camby, J., concurring) ("Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible."), cert. denied, 474 U.S. 825 (1985).

143. Title VII requires an employer to accommodate an employee's religious or nonreligious beliefs or practices only if the accommodation would impose a de minimis burden upon the employer. See supra note 50. When the beliefs are religious in nature, the courts have clearly held that the employer need not remake the workplace to accommodate them. In Ali v. Southeast Neighborhood House, 519 F. Supp. 489 (D.D.C. 1981), the plaintiff sought accommodation of far-reaching religious beliefs. The court held that this accommodation would impose an unnecessary burden upon the employer, stating:

Ali would impose his personal perception, from conscience, religion, or philosophy, on each and every day-to-day aspect of his employment while ignoring the basic responsibilities of that position, . . .

. . . .

Ali's religious beliefs enveloped every facet of his life, personal or business. It must be evident that in [the defendant's] employment no "reasonable accommodation," indeed, no accommodation at all, could make way for those religious beliefs as Ali envisioned them . . . . Only a complete reversal of the employer-employee roles, with Ali in the former, rather than the latter, might provide the plaintiff the absolute power he requires to satisfy those beliefs.
These standards would require an entirely different analysis in the *Sports & Health Club, Inc.* case.\(^{144}\) The religious basis of defendants’ actions would be irrelevant to the question of whether, in the first instance, discrimination on the basis of religion occurred.\(^{146}\) Rather, the question would be whether the defendants’ actions deprived the complaining parties of equal employment opportunity because of religious status (religious affiliation or identity). The employer’s practice of restricting managerial positions to persons who were born-again Christians would constitute discrimination on the basis of religion, because it represented status discrimination on the basis of the employee’s religious affiliation or identity. Pre-employment questions, or the defendants’ work rules, would be evaluated individually to determine if they were a subterfuge for religious status discrimination.\(^{146}\) In this connection, the diverse backgrounds and religious affiliations of individuals the defendants employed would be relevant in determining whether the

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Accommodation is not abdication. Title VII cannot and will not be so construed.

*Id.* at 496-97. When the situation is reversed, and the employee is asserting protection for nonreligious beliefs, there is no reason for imposing a greater burden upon the employer.

144. 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of juris.*, 478 U.S. 1015 (1986). The completely unworkable nature of the Minnesota Supreme Court's approach to that case is apparent in the scope of the injunction it enforced. In a sweeping effort to "eradicate" religion from the workplace, the court prohibited the defendants from refusing to hire any person because of that person's religious beliefs or practices (no matter how unreasonable or offensive those beliefs or practices might be to management, fellow workers, or business customers); refusing to hire any person because of that person's objection or hostility to the defendants' religious beliefs or practices, or to the religious beliefs or practices of any other employee (thus requiring the defendants to hire persons who treat their beliefs, or those of fellow employees, with derision or contempt); and "taking any adverse action against any employee because of that employee's religious beliefs or practices" (presumably, an employee could define his or her "religious beliefs or practices" any way that he or she desired, and could foist absolute accommodation of those beliefs upon the employer). *Id.* at 867 n.25 (Peterson, J., dissenting).

145. The religious basis of the defendants' actions would be relevant to the availability of statutory or constitutional defenses. *See supra* notes 52-88 and accompanying text.

146. Pre-employment questions of a religious nature, such as whether the applicant attended church, read the Bible, prayed or believed in heaven or hell, would be the most suspect, if evidence suggested that "incorrect" answers to these questions led to a refusal to hire. If, however, applicants of all persuasions were given equal employment opportunity as long as they exhibited the "teachable spirits" and "disciplined lifestyles" required, and were not offended by the defendants' views, the religious basis of these qualities or of the defendants' views would be irrelevant.
defendants’ religiously based employment criteria or work rules were a subterfuge for religious status discrimination.

The existence of religious speech or practices by the employer should be treated similarly. The holding of Bible studies, as in *Sports & Health Club, Inc.*, or religious devotions, as in *Young*, or weekly religious meetings, as in Decision No. 72-0528 of the Equal Employment Opportunity Commission,\(^\text{147}\) should not, in themselves, be discriminatory practices. If employees of any religious faith are allowed to attend, no active participation is required, and no inquiry is made as to employees’ personal agreement or disagreement with the religious truth of the proceedings, no discriminatory practice has occurred. Religious speech by employers or supervisors also would not be a discriminatory practice per se. The open discussion of religious views by the employer in *Sports & Health Club, Inc.* and by the supervisor in Decision No. 72-1114 of the Equal Employment Opportunity Commission,\(^\text{148}\) would not constitute a discriminatory practice in the absence of objective evidence that it was an indirect attempt to deprive the employee of equal terms, conditions, or privileges of employment on the basis of religious status. Findings that an employee “subjectively” felt intimidated by this, and that he or she “erroneously or not” believed that his or her job security could be affected, would be insufficient.\(^\text{149}\) If such an employee were entitled to relief, it would be under the theory (with all of the statutory limitations) that the employer failed to accommodate the employee’s religious beliefs.\(^\text{150}\)

Arguably a broad concept of religious discrimination causes no damage to the employer’s legitimate interests, because those interests are protected by defenses based on the first amendment and, in the case of Title VII, the sections 702 and 703 exemptions. However, even if a court found the employer’s actions to be the exercise of religion under existing constitutional tests, the free exercise clause does not provide automatic protection. Only religious exercise not outweighed by compelling state interests is constitution-

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\(^{147}\) See *supra* notes 24-26 and accompanying text.

\(^{148}\) See *supra* notes 27-32 and accompanying text.

\(^{149}\) See *id*.

\(^{150}\) See *supra* note 51 and accompanying text.
ally protected.\textsuperscript{151} The state's interest in eradicating discrimination in employment may outweigh free exercise claims.\textsuperscript{152} Statutory exemptions, such as sections 702 and 703, are confined to the employment decisions of religious organizations and, possibly, to the nonprofit activities of those organizations.\textsuperscript{153} None of these defenses would answer the problems created by an overly inclusive definition of employment discrimination on the basis of religion in the first instance.

Two objections could be made to this approach to religious discrimination claims. First, one could argue that religiously derived employment criteria or work rules may serve as a mere subterfuge for discrimination on the basis of an employee's religious affiliation or identity.\textsuperscript{154} Religiously based employment requirements, like any other employment requirements, that function as a means for the accomplishment of status discrimination obviously should be forbidden.\textsuperscript{155} Presumably, courts would be as capable of determining the existence of pretext or subterfuge in this context as they are in any other. The possibility that employers may use religiously based requirements or work rules, like those with any other philosophic basis, in an illegal manner does not justify their prophylactic prohibition.


\begin{quote}
It is well established that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." . . . We have implied that voluntary governmental accommodation of religion is not only permissible, but desirable. . . . Thus, few would contend that Title VII of the Civil Rights Act of 1964, which both forbids religious discrimination by private-sector employers . . . and requires them reasonably to accommodate the religious practices of their employees . . . violates the Establishment Clause, even though its "purpose" is, of course, to advance religion, and even though it is almost certainly not required by the Free Exercise Clause.
\end{quote}

\textsuperscript{152} Cf. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (governmental interest in eradicating racial discrimination in education outweighs right to free exercise of religious beliefs).

\textsuperscript{153} See supra text accompanying notes 55-62.

\textsuperscript{154} See, e.g., supra text accompanying note 146.

\textsuperscript{155} This type of discrimination could arise in the form of pretext in a case based on disparate treatment, or in the form of disparate impact of facially neutral criteria on a protected group. See supra text accompanying note 51.
Definition of religious discrimination in terms of the status of the individual would not restrict inquiry into the methods, guises, or other means by which such discrimination might be effected. The courts have on occasion been reluctant to define the phrase, for fear that any definition would result in failure to meet the varied and subtle ways that such discrimination might be accomplished.\textsuperscript{156} Latitude in proof of unlawful methods or means of accomplishing unlawful discrimination is not, however, incompatible with a definite or limited concept of what in fact constitutes the alleged discrimination. Litigants and courts have been successful in exposing pretext and proving disparate impact in connection with discrimination on the basis of other kinds of protected status; discrimination on the basis of religion would not be any more difficult to prove.

One could also argue that religiously based work rules or requirements, or the existence of religious workplace practices, may have the practical effect of status discrimination because employees—due to their own religious requirements—may be unable to meet them. Upon scrutiny, however, this objection also lacks substance. An employee’s inability to achieve equal employment opportunity, due to the employer’s exclusion of persons with the employee’s religious affiliation or identity, is unlawful discrimination which, in the absence of a valid defense, should be sanctionable. However, a case involving an employee’s inability to comply with the employer’s requirements due to the employee’s own determination that those requirements are incompatible with the tenets of his or her religion, is simply like any other case in which the employer is asked to accommodate the employee’s religious practices or beliefs.\textsuperscript{157}


If “discrimination on the basis of religion,” when a part of the plaintiff’s case, is limited to discrimination on the basis of religious status, a question arises whether the employer’s statutory defenses, which utilize this concept, are limited as well.\textsuperscript{158} Because a defense of business necessity or bona fide occupational qualification is a mirror image of the plaintiff’s charge, the employer would have to assert valid reasons why the plaintiff’s religious status (affiliation or identity) was necessary to safe and efficient job performance, had a manifest relationship to the job in question, or substantially promoted the proficient operation of the business.\textsuperscript{159} As such, the defense would be severely limited. Where non-Moslems flying helicopters into Mecca are executed if caught, an employer can assert that Moslem religious affiliation is legitimately linked to job performance.\textsuperscript{160} The employment of a teacher who reflects a particular religious tradition, in training and in personal identity, by a religiously affiliated school might be another example.\textsuperscript{161} The outer boundaries of such cases, however, must be carefully circumscribed. If the employer’s self-definition and its definition of the job were sufficient, alone, to establish a bona fide occupational qualification, there would be no limit to permissible discrimination on the basis of religious status. Any claim that a particular religious affiliation or religious identity is a requirement for job performance must be subject to the court’s independent assessment.\textsuperscript{162}

Defenses under sections 702 and 703 of Title VII are more problematic. Both sections permit religious organizations or institutions to discriminate on the basis of religion with regard to some or all

\textsuperscript{158} The employer’s constitutional defenses, of course, would remain a distinct and separate issue. See supra text accompanying notes 65-68.

\textsuperscript{159} See supra text accompanying notes 47-49.

\textsuperscript{160} See Kern v. Dynatelectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), aff’d, 746 F.2d 810 (5th Cir. 1984).

\textsuperscript{161} See Pime v. Loyola Univ., 885 F. Supp. 435 (N.D. Ill. 1984), aff’d, 803 F.2d 351 (7th Cir. 1986), in which the court held that preference of a Jesuit for a teaching position in the university’s department of philosophy was permissible, because the university held itself out to the public as a Jesuit and Catholic institution of higher learning, and members of the Society of Jesus receive unique training and experience which is necessary for the continuance of a “Jesuit presence.” Id. at 443.

\textsuperscript{162} For instance, courts should reject employer claims based upon religious stereotypes or customer preference. See Abrams v. Baylor College of Medicine, 581 F. Supp. 1570, 1579 (S.D. Tex. 1984); Kern, 577 F. Supp. at 1201.
employees.\textsuperscript{163} When the plaintiff claims that he or she is the victim of discrimination on another basis (sex, race, or national origin), employers have sought an interpretation of religious discrimination that is broader than decision making based upon an employee's religious affiliation or identity.\textsuperscript{164} Courts addressing this issue have generally rejected a broader reading of these exemptions.\textsuperscript{165} Substantial legislative history indicates that congressional concern about the autonomy of religious organizations led to the enactment and subsequent amendment of these sections.\textsuperscript{166} Sufficient protection of the first amendment rights of religious institutions and organizations, as embodied in sections 702 and 703, may justify a broader understanding of discrimination in that context.\textsuperscript{167} To the

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\textsuperscript{163} See supra text accompanying notes 58-62.
\textsuperscript{164} See, e.g., EEOC v. Fremont Christian School, 609 F. Supp. 344 (N.D. Cal. 1984), aff'd, 781 F.2d 1382 (9th Cir. 1986) (restriction of health insurance to male "heads of household" claimed to be an exercise of the employer's religious beliefs, and therefore religious discrimination protected by § 702); Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980) (discharge of pregnant, unmarried teacher by a Roman Catholic High School claimed to be based on the moral and religious precepts of the Roman Catholic Church, and thus within § 702).
\textsuperscript{165} See, e.g., EEOC v. Mississippi College, 626 F.2d 477, 485-86 (5th Cir. 1980) (section 702 would apply if the district court determined, on remand, that the College's action was an application of its policy of preferring Baptists over non-Baptists in faculty hiring), cert. denied, 453 U.S. 912 (1981); Fremont Christian School, 609 F. Supp. at 350 (religious school is entitled "to hire only members of its faith for teaching positions and the like, but may not, under the § 702 exemption, discriminate against its employees thereafter."); Dolter, 483 F. Supp. at 269 n.2 (section 702 interpreted to apply only to actions based upon the employee's religious affiliation: "Wahlert High School does not contend that Ms. Dolter was discharged because she was not a Catholic. . . . Nor does Wahlert High School contend that her alleged violation of Catholic moral precepts caused her to be excommunicated or otherwise expelled from membership in the Catholic Church. The court, therefore, notes that at all times material Ms. Dolter was, and continues to be, a Roman Catholic."). The proper scope of these exemptions has been extended to include questions about the content of religious doctrine or the meaning of religious affiliation, as well as the fact of affiliation. See Maguire v. Marquette Univ., 627 F. Supp. 1499, 1503 (E.D. Wis. 1986) (section 703(e)(2) precludes court inquiry into whether plaintiff "is or is not a Catholic," because of her beliefs), aff'd, 814 F.2d 1213 (7th Cir. 1987); Larsen v. Kirkham, 499 F. Supp. 960, 966 (D. Utah 1980) (rejection of § 703(e)(2) exemption to "preference for those ostensibly affiliated with the religion . . . ignores both reason and policy"), cert. denied, 464 U.S. 849 (1983). Cf. Mississippi College, 626 F.2d 477 (if a religious institution presents convincing evidence that a challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine if the religious discrimination was a pretext for another form of discrimination).
\textsuperscript{166} See supra note 60.
\textsuperscript{167} See Note, supra note 59.
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extent that these concerns are present in cases involving the employee’s right to be free of religious discrimination, they militate against a broad definition of discrimination.

The elimination of discrimination on the basis of religion, like the elimination of all barriers to equal employment opportunity, is a goal of the highest priority. It should not, however, require the elimination of the religious from the workplace or the artificial severance of our religious and secular lives. Religious, as well as non-religious, persons and institutions in our society should be given recognition and proper protection. During congressional debate on the exemption for religious education institutions that now appears in Title VII, Congressman Gary stated:

We are talking about rights in this bill. I believe we ought to respect the rights of all of our people. I do not believe we should pass legislation aimed solely at rights for a certain group or class of people. I believe it should protect the rights of all the people of the United States.\(^{168}\)

Restricting valid claims of religious employment discrimination to those involving discrimination on the basis of the employee’s religious status would serve these rights. The restriction would preserve the employee’s right to be free of artificial barriers to equal employment opportunity. It would relieve the state, through its civil rights laws, of the hopeless and arbitrary task of distinguishing religious from nonreligious work rules or employment philosophies, with the same policy, belief, or practice sanctioned or condemned according to its source. It would also avoid what otherwise is, in essence, invidious discrimination against the religious in human affairs.

**Conclusion**

The state cannot and should not be in the position of choosing between permissible or impermissible values or philosophic systems, based upon their religious or nonreligious source. The eradication of religious values from the workplace—the guarantee of a “religiously neutral” work environment—was never intended by the civil rights laws. Indeed, the broad definition of religion re-

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\(^{168}\) 110 Cong. Rec. 2592 (1964), reprinted in EEOC, supra note 130, at 3210.
quired by our pluralistic society would make this an impossible task, fraught with discriminatory potential. No work rule, employment philosophy, or personal philosophy is "value free." Value judgments involve moral choices; moral choice is an essential component of religious systems. The workplace, as a small reflection of the larger society of which it is a part, cannot be isolated or torn from the larger social fabric. Private decision making cannot avoid the larger identity of values, moral choices, and religious beliefs. As Richard John Neuhaus recently stated:

In law, in political theory, in education, and in the sciences it is increasingly recognized that few judgments of consequence are value-neutral. The myth of value-neutrality . . . invites the dominance of a sterile secularism that is hostile to moral debate and religious belief. . . . The public philosophy that is needed must be based upon a political ethic that is informed by our religious traditions.169

Laws prohibiting religious discrimination in employment must be interpreted in a manner that recognizes the legitimacy of religious values and practice, and that targets the valid purpose of those laws: the eradication of barriers to equal employment opportunity due to religious status discrimination.
