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BAD NEWS FOR THOSE PROCLAIMING THE GOOD NEWS?: THE EMPLOYER'S AMBIGUOUS DUTY TO ACCOMMODATE RELIGIOUS PROSELYTIZING

Michael D. Moberly*

Then he told them: "Go into the whole world and proclaim the good news to all creation."1

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII" or the "Act")2 was this country's first comprehensive federal employment discrimination legislation.3 It has since served as a

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1. Mark 16:15 (New American). Although the quoted passage reflects the Christian call to evangelism, the practice is also a tenet of other religious faiths. See, e.g., Thompson v. Clarke, 848 F. Supp. 1452, 1453 (D. Neb. 1994) ("The tenets of Al-Islam encourage its adherents to propagate the faith, proselytize to nonbelievers, and generally engage in activities intended to benefit others."). See generally Thomas C. Berg, Religious Speech in the Workplace: Harassment or Protected Speech?, 22 HARV. J.L. & PUB. POL'y 959, 964 (1999) (noting that "many widespread religions in America proselytize").

This article addresses the legal ramifications of workplace proselytizing. Although both a practicing attorney and a practicing Catholic, the author expresses no view of the religious implications of the issue. See Marc D. Stern, The Attorney as Advocate and Adherent: Conflicting Obligations of Zealousness, 27 TEX. TECH. L. REV. 1363, 1367 (1996) (observing, apparently without irony, that "the lawyer. . . is not necessarily a religious expert"). Several insightful discussions of the religious aspects of proselytizing are collected in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM (John Witte Jr. & Richard C. Martin eds., 1999).


3. See Piva v. Xerox Corp., 376 F. Supp. 242, 246 (N.D. Cal. 1974) (describing Title VII as "the first comprehensive federal legislation in the field of
model for a number of other state and federal antidiscrimination laws. Enacted to address discrimination that had been experienced by various minority groups, Title VII prohibits employers from discriminating against employees and applicants on a number of bases, including their religious observances, practices, and beliefs.

Concern over the issue of race discrimination was the primary motivating force behind the enactment of Title VII, with religion arguably included as a protected class "only by virtue of the nation's long history of considering [religious ob-

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5. See Tanca v. Nordberg, 98 F.3d 680, 683 (1st Cir. 1996) (discussing "other employment statutes modeled after Title VII"); McDonnell v. Cisneros, 84 F.3d 256, 258 (7th Cir. 1996) (referring to "other federal employment discrimination statutes that are modeled on Title VII").

6. See EEOC v. Wilson & Co., 387 F. Supp. 1224, 1228 (D. Colo. 1975) ("The focus of Title VII, as originally enacted in 1964, was the prompt vindication of individual minority rights in employment."); rev'd on other grounds, 535 F.2d 1213 (10th Cir. 1976); Warshafsky v. Journal Co., 216 N.W.2d 197, 203 (Wis. 1974) ("Title VII of the Civil Rights Act of 1964 was enacted in response to the social and economic injustices suffered by women and other minority groups in employment.").


9. See Contreras v. City of L.A., 656 F.2d 1267, 1277 (9th Cir. 1981) ("Congress' primary objective in passing Title VII was to eliminate race-related employment criteria."); Anderson v. Gen. Dynamics Convair Aerospace Div., 489 F. Supp. 782, 784 (S.D. Cal. 1980) ("Congress enacted the Civil Rights Act of 1964 primarily to prohibit various forms of racial discrimination throughout the nation. Specifically, Title VII of the Act was designed to eliminate such discrimination in employment practices.") (footnotes omitted), rev'd on other grounds, 648 F.2d 1247 (9th Cir. 1981).
servance] a fundamental right.\textsuperscript{10} Nevertheless, religious discrimination can be as pernicious as discrimination on the basis of race\textsuperscript{11} or discrimination based on “any other characteristic which ignores a person’s unique status as an individual and treats him or her as a member of some arbitrarily-defined group.”\textsuperscript{12} Thus, race and religion are generally treated similarly for Title VII purposes.\textsuperscript{13}

In fact, employees claiming to have been discriminated against on the basis of their religious beliefs and practices actually receive more favorable treatment than other classes of employees protected by Title VII in one important respect.\textsuperscript{14} Specifically, the Act not only proscribes religious discrimination to the same extent it prohibits discrimination on the ba-
sis of race and other protected characteristics, but it also places an affirmative obligation on employers to attempt to accommodate their employees' religious beliefs and practices. There is no comparable obligation in the case of race or any other protected Title VII class, although both the Americans with Disabilities Act ("ADA") and the Rehabilitation Act impose roughly analogous obligations in the dis-

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15. See Chalmers, 101 F.3d at 1018; cf. Theresa M. Beiner & John M. A. DiPippa, Hostile Environments and the Religious Employee, 19 U. ARK. LITTLE ROCK L.J. 577, 590 (1997) ("While some commentators have distinguished religion claims because they are based on 'chosen' beliefs as opposed to innate characteristics such as race or sex, Title VII makes no such distinction.") (footnote omitted).


17. See Deane v. Pocono Med. Ctr., 7 Am. Disabilities Cas. (BNA) 198, 208 n.21 (3d Cir. 1997) (noting that "protection [from race discrimination] ... does not include any form of 'accommodation'"), rev'd, 142 F.3d 138 (3d Cir. 1998); Vikram David Amar, State RFRAs and the Workplace, 32 U.C. DAVIS L. REV. 513, 515 (1999) ("Unlike Title VII's race ... discrimination provisions, the anti-discrimination provision concerning religion expressly requires 'reasonable accommodation.'") (footnote omitted).

18. See Larsen v. Kirkham, 499 F. Supp. 960, 966 (D. Utah 1980) ("[T]he duty to accommodate applies only to those employers who are prohibited from religious discrimination."); Ferguson v. Kroger Co., 16 Fair Empl. Prac. Cas. (BNA) 773, 777 (S.D. Ohio 1978) (describing the "failure to make a reasonable accommodation" to an employee's "religious needs" as a "special category of discrimination . . . which is not like any other prohibition in Title VII"); Frantz, supra note 10, at 212 ("The employer's duty to reasonably accommodate an employee's beliefs only arises in a situation where religious discrimination is involved."); Estella J. Schoen, Note, Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems, 82 MINN. L. REV. 1391, 1417 (1998) (observing that "Title VII's reasonable accommodation requirement ... applies only to religion").


21. See 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1614.203(c) (1999); see also Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1155 n.5 (10th Cir.
ability discrimination context.  

In some cases, employers must accommodate employees who wish to proselytize in the workplace.  

For example, Meltebeke v. Bureau of Labor & Industries, a prominent state court employment discrimination case, involved an evangelical Christian who believed he had "a religious duty to tell others, especially non-Christians, about God and sinful conduct." The person believed that this duty included initiating conversations about religion, "preaching" and "witnessing" that might be objectionable to his listeners, and,
when he deemed it appropriate, the denunciation of sin "by telling others that they are sinners."27

When an employee sincerely holds such a belief,28 the employer may be required to accommodate it,29 even in the face of opposition from other employees.30 This article addresses that obligation,31 with a particular focus on the potential conflict between an employee’s right to proselytize32 and the right of other employees to work in an environment free of religious harassment.33

27. Meltebeke, 903 P.2d at 353.
28. In order to prevail on a Title VII religious discrimination claim, the employee must hold "a bona fide religious belief, the practice of which conflicted with an employment duty." Tiano v. Dillard Dep’t Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998). "To be bona fide, a belief must be sincerely held and, within the believer’s own scheme of things, religious.” McGinnis v. United States Postal Serv., 512 F. Supp. 517, 519 (N.D. Cal. 1980) (internal quotation marks and citations omitted).
29. The proselytizing individual in Meltebeke was actually the employer. See Meltebeke, 903 P.2d at 353. One commentator noted that “[t]his situation raises special considerations and issues that may . . . change the [accommodation] analysis.” Berg, supra note 1, at 961.
32. The Supreme Court has observed that the “exercise of religion” protected from governmental interference by the First and Fourteenth Amendments “often involves . . . proselytizing.” Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990). Although that constitutional protection is not directly applicable in the private employment setting, see Brown v. Polk County, 61 F.3d 650, 654 (8th Cir. 1995), the Court’s observation is pertinent in Title VII cases because “the [Act’s] religious accommodation provision promotes the free exercise of religion.” Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027, 1030 (D. Or. 1979), aff’d, 648 F.2d 1239 (9th Cir. 1981).
33. See WOLF, supra note 23, at 59 (referring to “the potential for conflict when one employee decides to proselytize during work, notwithstanding objections by coworkers”); Kaminer, supra note 30, at 109 (discussing “the direct conflict between an employee’s . . . right to religious expression in the workplace and the right of other employees to be free from religious harassment”).
The article begins with a discussion of the legislative history of Title VII's prohibition of religious discrimination, including the 1972 statutory amendment that affirmed the employer's duty to accommodate religious beliefs and practices. The article then discusses the impact of the employer's obligation to provide employees with a working environment free from religious harassment on its duty to accommodate religious proselytizing.

Ultimately, the article concludes that while the extent of an employer's duty to accommodate in this situation is uncertain, significant guidance can be drawn by analogizing religious proselytizing to union solicitation, another form of statutorily protected speech on which there is considerably more existing legal authority. Under this approach, employers generally could prohibit proselytizing during working time, but absent demonstrable evidence of workplace disruption, would not be entitled to restrict this religious practice.

34. One commentator described this history as "deeply ambiguous." Russell S. Post, Note, The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate, 83 Va. L. Rev. 177, 181 (1997); cf. Am. Motors Corp. v. Dept of Indus., Labor & Human Relations, 305 N.W.2d 62, 72-73 (Wis. 1981) ("In view of the lack of guidelines by specific legislation or meaningful debate, the precise legislative intent of congress [sic] in terms of implementation of religious freedom by the control of employment practices is vague indeed.").


36. See generally Beiner & DiPippa, supra note 15 at 595 ("It... is not clear how religious accommodation law might interplay with issues of religious harassment and religious employees.").


38. See Webco Indus., Inc., 327 N.L.R.B. 172, 186 n.10 (1998) (finding "union organizational solicitation... to be akin to proselytizing"), enforced, 217 F.3d 1306 (10th Cir. 2000); cf. Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1095 (8th Cir. 1969) (Lay, J., dissenting) (criticizing an attempt to distinguish "union solicitation... from other forms of [protected] speech").

39. See generally Riesbeck Food Mktts., Inc., 315 N.L.R.B. 940, 941 (1994) (referring to the "well-established precedent" governing union solicitation); Winn Dixie Stores, Inc., 224 N.L.R.B. 1418, 1428 & n.7 (1976) (referring to the "settled authority" establishing the permissible employer limitations on workplace union solicitation).


41. The disruption could, but need not, take the form of potentially action-
even on company premises, during an employee's nonworking time.\textsuperscript{42}

II. THE HISTORY OF TITLE VII'S PROHIBITION OF RELIGIOUS DISCRIMINATION

Title VII was enacted in 1964 as one component of comprehensive civil rights legislation\textsuperscript{43} aimed primarily at eliminating racial discrimination in various aspects of society,\textsuperscript{44} including voting, education and public accommodations.\textsuperscript{45} In fact, as originally proposed, the employment discrimination prohibitions contained in Title VII\textsuperscript{46} were directed solely at race discrimination.\textsuperscript{47} Nevertheless, religion was also ulti-
mately (if somewhat mysteriously) included as a protected Title VII class, although perhaps as "more [of] an afterthought than an imperative of public policy." In any event, the Act undisputedly "has, from its enactment, prohibited discrimination against an individual with respect to his conditions of employment because of such individual's religion."

However, prior to 1972, there was no explicit statutory requirement that employers accommodate the religious practices of their employees. Without defining the term "religion."; cf. Edwards & Kaplan, supra note 10, at 602 (referring to "the addition of religious discrimination as an unlawful employment practice under title VII") (emphasis added).

48. One commentator noted that Title VII's legislative history "contains no explanation or debate concerning the inclusion of religion as a protected class under the statute." Post, supra note 34, at 180 n.10; see also Edwards & Kaplan, supra note 10, at 602 (stating that religious discrimination received "scant legislative consideration" in the debates that led to the enactment of Title VII); Frantz, supra note 10, at 234 n.142 (referring to the "lack of congressional concern over religious discrimination when the Act was being drafted").


50. Post, supra note 34, at 181. Commentators have suggested that Title VII's prohibition of discrimination on the bases of both religion and national origin (for which there is also relatively little legislative history, see Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88-89 (1973)) reflects Congress's adoption of "boilerplate" language contained in earlier nondiscrimination laws. Compare Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 WM. & MARY L. REV. 805, 807 (1994) ("The national origin term ended up in Title VII because it was part of the 'boilerplate' statutory language of fair employment in executive orders and legislation preceding the Civil Rights Act of 1964."), with Post, supra note 34, at 181:

[The] pervasive [legislative] silence suggests that religion was included in Title VII as boilerplate language to ensure uniformity of the antidiscrimination principle, not as a function of any compelling policy rationale. This inference is supported by the fact that the earliest antecedents of Title VII, New Deal employment measures, often included prohibitions against discrimination on account of "race, color, or creed," offering easy templates for the drafters of Title VII to adopt verbatim.

(footnotes omitted).


52. See Yott v. N. Am. Rockwell Corp., 501 F.2d 398, 402 (9th Cir. 1974);
tion," Title VII instead merely purported to prohibit religious discrimination to the same extent it prohibits discrimination against other statutorily protected classes. One set of commentators summarized this situation as follows: "As originally enacted, Title VII imposed a nondiscrimination obligation with respect to religion, but the duty to accommodate was not reflected in the statute."

The federal agency charged with primary responsibility for enforcing Title VII, the Equal Employment Opportunity Commission ("EEOC" or "Commission"), first suggested the Act's reasonable accommodation requirement. Specifically,


54. See EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988) ("As originally enacted, Title VII of the Civil Rights Act of 1964 simply prohibited employment discrimination on the basis of religion."); Smith v. Pyro Mining Co., 827 F.2d 1081, 1087 (6th Cir. 1987) ("Title VII, as enacted in 1964, prohibited religious discrimination in employment, but went no further."); Kaminer, supra note 30, at 87 ("As originally passed, with regard to prohibitions on employment discrimination, Title VII treated religion the same as race, color, sex or national origin.") (internal quotation marks omitted).

55. BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 224 (3d ed. 1996). Nor did the Act's original legislative history indicate that there was a statutory duty to accommodate. For example, the witnesses appearing before the Education and Labor Committee dealt only with the easy cases of alleged religious discrimination - i.e., willful discriminatory hiring and promotion practices - and then mostly with respect to discrimination against Jews. No testimony was given concerning the less well-known religions such as Seventh Day Adventism, and the discussion of religious discrimination was not broadened to include problems such as work assignments that conflict with religious holidays. Edwards & Kaplan, supra note 10, at 602 n.10.

56. See McIntyre-Handy v. West Telemktg. Corp., 97 F. Supp. 2d 718, 725 (E.D. Va. 2000) ("In addition to creating the substantive rights set forth in Title VII, Congress empowered the EEOC to enforce Title VII by acting on individual complaints."); Chacon v. Ochs, 780 F. Supp. 680, 682 (C.D. Cal. 1991) (observing that "the EEOC . . . is charged by Congress with the duty of interpreting, administering, and enforcing Title VII").

the Commission included the requirement in interpretative guidelines issued two years after the Act was adopted, and again in modified guidelines issued the following year. One jurist observed that the "cornerstone" of these EEOC guidelines was the employer's obligation to accommodate the religious needs of its employees if the accommodation could be made without undue hardship on the conduct of its business.

Although issuing such interpretive guidelines falls within the Commission's statutory mandate, its interpretation of

58. See Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1048 (7th Cir. 1996) (observing that the reasonable accommodation obligation "[i]nitially . . . emerged within 1966 EEOC guidelines interpreting Title VII"); Hiatt v. Walker Chevrolet Co., 837 P.2d 618, 621 (Wash. 1992) ("Shortly after the federal statute was enacted, the [EEOC] interpreted [Title VII] to impose a duty on the part of employers to accommodate the religious practices and beliefs of employees."). As one federal appellate judge explained, [the initial guidelines issued in 1966 by the Equal Employment Opportunity Commission (EEOC) interpreted the Act's prohibition against discrimination on religious grounds as imposing a duty on employers to accommodate the "reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business." Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 174 (5th Cir. 1976) (Rives, J., concurring in part and dissenting in part) (quoting 29 C.F.R. § 1605.1(a)(2) (1966)) (footnote omitted), rehe'd denied, 537 F.2d 1143 (5th Cir. 1977).

59. See Cooper, 533 F.2d at 174 (Rives, J., concurring in part and dissenting in part) ("In 1967 the EEOC adopted new guidelines reinterpreting the employer's duty not to engage in religious discrimination. These new regulations . . . included a provision placing on the employer the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employees unreasonable.") (citing 29 C.F.R. § 1605.1(c) (1967)).

60. Dewey v. Reynolds Metals Co., 429 F.2d 324, 333 (6th Cir. 1970) (Combs, J., dissenting), aff'd by an equally divided Court, 402 U.S. 689 (1971). But see id. at 336 (asserting that "[u]nder the [original guidelines], . . . the employer was under no obligation to accommodate").

61. See Air Transp. Ass'n of Am. v. Hernandez, 264 F. Supp. 227, 228 & n.3 (D.D.C. 1967) ("The Act . . . provides[ ] that the Commission [can], within its own discretion, issue written interpretations or opinions . . . .") (citing 42 U.S.C. § 2000e-12(b) (1994)). As one court has stated, Congress intended that the Commission should have the authority to issue and publicize its interpretations of the meaning of the provisions of Title VII. The promulgation of interpretive guidelines is a necessary function of an agency which is entrusted with the duty of administering a statute. In the case of a statute such as Title VII, where emphasis is placed on voluntary compliance with the requirements of non-discrimination, . . . the promulgation of reasonable interpretive guidelines has the salutary effect of informing the public of the Commission's interpretation of the statute.

Title VII's prohibition of religious discrimination to include a reasonable accommodation requirement was not universally embraced, and did not have the force of law. Nevertheless, that interpretation was ultimately incorporated into the Act in 1972, when Congress amended Title VII in response to the Supreme Court's affirmation of the Sixth Circuit's controversial decision in Dewey v. Reynolds Metals Co.

The plaintiff in Dewey was discharged for failing to perform overtime work on Sundays as required by the terms of a collective bargaining agreement. He claimed that such work would violate his religious beliefs, and that his right to continued employment while following his religious beliefs was

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62. See, e.g., Reid v. Memphis Publishing Co., 468 F.2d 346, 348-49 (6th Cir. 1972) (quoting lower court's conclusion that there is "no duty on the part of an employer to accommodate an employee's or potential employee's religious belief"); Dawson v. Mizell, 325 F. Supp. 511, 514 (E.D. Va. 1971) ("Religious discrimination should not be equated with failure to accommodate.").


64. See Smith v. Pyro Mining Co., 827 F.2d 1081, 1087-88 (6th Cir. 1987) ("[W]hen Congress amended Title VII in 1972, it added the reasonable accommodation requirement, thereby explicitly adopting the EEOC's interpretation of Title VII."); Mich. Dep't of Civil Rights v. Gen. Motors Corp., 317 N.W.2d 16, 20 (Mich. 1982) (observing that "the duty first enunciated in 1967 by the EEOC subsequently [was] enacted in 1972 into Title VII").

65. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971). Dewey has been described as "the first key case concerning the employer's duty to accommodate." Frantz, supra note 10, at 214; see also Mich. Dep't of Civil Rights, 317 N.W.2d at 24 (stating that Dewey was the "first major case to face this issue").

66. Dewey, 429 F.2d at 327-28, 329. Absent evidence of pretext or the existence of an affirmative duty to accommodate, "refusing to... work overtime" is a "legitimate, nondiscriminatory reason for a firing." EEOC v. Ackerman, Hood & McQueen, 758 F. Supp. 1440, 1452 (W.D. Okla. 1991), aff'd, 956 F.2d 944 (10th Cir. 1992).

67. See Dewey, 429 F.2d at 328, 329.
The Sixth Circuit held that there had been no discrimination on the basis of the plaintiff's religion within the meaning of Title VII, because all of the company's employees had been treated similarly with respect to overtime scheduling.

However, this conclusion did not end the court's inquiry, because under the EEOC's interpretive guidelines an employee claiming that his employer failed to accommodate his religious beliefs could prevail even if other employees had not been treated more favorably. With respect to that issue, the Dewey court concluded that even if the EEOC's interpretation of Title VII were correct, the employer offered the plaintiff a reasonable accommodation by instituting a system whereby

68. See id. at 327. See generally Mathewson v. Fla. Game & Fresh Water Fish Comm'n, 693 F. Supp. 1044, 1050 (M.D. Fla. 1988) (holding that an employer has "an obligation to reasonably accommodate employees who, because of their specific beliefs and practices, refuse to work on particular days of the week"), aff'd, 871 F.2d 123 (11th Cir. 1989).

69. See Dewey, 429 F.2d at 329 ("We find nothing discriminatory in the provisions of the collective bargaining agreement or in the manner in which [the employer] executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them.").

70. The court stated that "[t]he legislative history of [Title VII] is clear that it was aimed only at discriminating practices." Id. at 328 (referring to 110 Cong. Rec. 13079-80 (1964)).

71. See id. ("Reference to the collective bargaining agreement indicates rather clearly that the provisions with respect to . . . overtime work apply to all employees equally and do not discriminate against [the plaintiff] or any other employee.").

72. See Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1362 (S.D. Fla. 1999) (noting that the employer's articulation of a legitimate nondiscriminatory reason for its actions "does not end the Court's analysis" where the plaintiff "is proceeding under the accommodation theory"); Drzewowski v. Waukegan Dev. Ctr., 651 F. Supp. 754, 759 (N.D. Ill. 1986) ("In the context of religious beliefs, it is not enough that an employer has adopted certain practices which are facially neutral.").

73. See Hellinger, 67 F. Supp. 2d at 1362; Breech v. Alabama Power Co., 962 F. Supp. 1447, 1459 n.15 (S.D. Ala. 1997), aff'd, 140 F.3d 1043 (11th Cir. 1998); cf. Berg, supra note 1, at 977 ("An employer might be held liable under Title VII for prohibiting an employee's religious practice even pursuant to a neutral, across-the-board work rule.").

74. In its initial decision, the court did not specifically reach this issue, but stated that "[t]he authority of [the] EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted." Dewey, 429 F.2d at 331 n.1; cf. Frantz, supra note 10, at 208 (stating that "the court in Dewey . . . questioned the validity and binding effect of these regulations on the courts").

75. See Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970),
an employee could find a replacement to work objectionable or inconvenient hours. The court reasoned that accommodating the plaintiff's request that the employer instead find his replacement could have resulted in unlawful discrimination against other employees "by requiring them to work on Sundays in the plaintiff's place."

This aspect of Dewey has since been rejected by the EEOC, and was effectively overruled by the Sixth Circuit itself in Smith v. Pyro Mining Co. However, the Dewey court also made the following observation that, although dictum,

("[E]ven if the [EEOC] regulations are applied, we think that [the employer] complied... by making a reasonable accommodation to the religious needs of its employees when it permitted [the plaintiff, by a] replacement system, to observe Sunday as his Sabbath.").

76. See id. at 329 (noting that the employer had "issued an interpretation [of the collective bargaining agreement] that any employee assigned to overtime could be relieved from the assignment simply by arranging for another qualified employee to replace him"); see also Breech v. Alabama Power Co., 962 F. Supp. 1447, 1460 (S.D. Ala. 1997) ("Employer authorizations of... voluntary shift swaps constitute reasonable accommodations under Title VII.") (citing Beadle v. Hillsborough County Sheriff's Dep't, 29 F.3d 589, 593 (11th Cir. 1994)), aff'd, 140 F.3d 1043 (11th Cir. 1998).

77. See Dewey, 429 F.2d at 330; cf. Claybaugh v. Pac. Northwest Bell Tel. Co., 355 F. Supp. 1, 5 (D. Or. 1973) ("The burden is on the employer and not the employee asking for an accommodation to seek out the cooperation of other employees if... this would be a reasonable accommodation.").

78. Dewey, 429 F.2d at 330; cf. Kaminer, supra note 30, at 97 (observing that "employers are not required to violate valid statutes in accommodating a religious employee"). A dissenting judge maintained that the employer's replacement system was "no solution" to the plaintiff's problem, because his refusal to find his own replacement "was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place." Dewey, 429 F.2d at 333 (Combs, J., dissenting).

79. The Commission's "Guidelines on Discrimination Because of Religion" contain the following discussion of this issue:

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers... facilitate the securing of a voluntary substitute with substantially similar qualifications.


80. 827 F.2d 1081 (6th Cir. 1987); cf. Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975) ("Just because... Sabbath observance by one employee forces other employees to substitute during the weekend hours does not demonstrate an undue hardship on the employer's business.").

ultimately had even greater significance for Title VII jurisprudence:

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.82

The Dewey court’s controversial rejection of the EEOC’s interpretation of Title VII83 was subsequently affirmed by an equally divided Supreme Court.84 Another federal appellate court asserted that this course of events “had the potential to exclude all religious practices from coverage by Title VII.”85 However, Congress promptly responded to the Dewey decision86 by adding a definition of “religion” to Title VII87 that

82. Dewey, 429 F.2d at 334; see also Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972) (“The EEOC regulation imposing a duty to... accommodate unless there is an undue hardship on the employer goes beyond the Congressional mandate...”). See generally Mungen v. Choctaw, Inc., 402 F. Supp. 1349, 1352 (W.D. Tenn. 1975) (“While E.E.O.C. has the authority to promulgate regulations to carry out Title VII, it cannot subvert the meaning of the Statute by its implementation of those regulations.”); White, supra note 61, at 93 (“The EEOC is without power to impose new duties or obligations not found in Title VII.”).

83. See Smith, 827 F.2d at 1093 (Krupansky, J., dissenting) (noting that “the Dewey decision attracted widespread legal notoriety subsequent to its publication,” and that the Sixth Circuit’s rejection of the EEOC’s interpretation of Title VII “stimulate[d] debate among legal commentators and the judiciary”); cf. Mich. Dep’t of Civil Rights v. Gen. Motors Corp., 317 N.W.2d 16, 24 (Mich. 1982) (noting that “the original opinion of the Sixth Circuit panel is of doubtful precedential value due, in part, to its variety of rationales”).


85. EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 613 n.4 (9th Cir. 1988). But see Mich. Dep’t of Civil Rights, 317 N.W.2d at 24 (asserting that “the affirmation by an equally divided Supreme Court entitles Dewey to no precedential weight”); Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) (“The Supreme Court affirmed the Dewey case by an equally divided court. Of course, this added nothing to the jurisprudence.”) (citation omitted).

86. See Townley Eng’g, 859 F.2d at 613 n.4 (“The amendment was in direct response to the decision in Dewey.”) (citation omitted); Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 167 (5th Cir. 1976) (noting that Congress was “acting in what can only be viewed as a direct response to the Sixth
Specifically extended the Act’s protection to employees and applicants in connection with “all aspects of religious observance and practice,” unless the observance or practice at issue could not be accommodated “without undue hardship on the conduct of the employer’s business.”

Several courts have asserted that this amendment confirmed the EEOC’s interpretation of Title VII as reflected in its religious discrimination guidelines. On the other hand, at least one court has stated that the amendment “cannot be relied on to establish a Congressional intent with respect to the [original] statute, which was not expressed in that statute.”

In either event, the amendment resulted in the imposition of an affirmative obligation on the employer to accommodate an employee or applicant’s religious practice unless it

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Circuit’s expressed doubts in *Dewey* about the EEOC’s power to adopt such regulations as its revised guidelines*), reh’g denied, 537 F.2d 1143 (5th Cir. 1977); *Riley*, 464 F.2d at 1116 (observing that the amendment “was designed to resolve the issue left open by the equal division of the Supreme Court of the United States in *Dewey*”).

87. See *Bruton v. Diamond State Tel. Co.*, 623 F. Supp. 939, 940 n.1 (D. Del. 1986) (“In 1972, Title VII was amended to add a definition of religion which expounds on employers’ duties with respect to employees’ religious beliefs.”).

88. 42 U.S.C. § 2000e(j) (1994); see also *Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991) (noting that the definitional amendment “broaden[ed] the prohibition against discrimination . . . so that religious practice as well as religious belief and affiliation would be protected”).


90. *Reid v. Memphis Publ’g Co.*, 521 F.2d 512, 520 (6th Cir. 1975), reh’g denied, 525 F.2d 986 (6th Cir. 1976); cf. *Am. Motors Corp. v. Dep’t of Indus., Labor & Human Relations*, 305 N.W.2d 62, 74 (Wis. 1981) (“[T]he federal courts had great difficulty in concluding that the 1967 EEOC guidelines interpreting the federal law constituted a cognizable declaration of the legislative intent of the Civil Rights Act of 1964.”).

91. See *Mich. Dep’t of Civil Rights*, 317 N.W.2d at 25 (“[T]he passage of the amendment . . . was hailed . . . as having laid to rest any doubts as to the effect of the EEOC guidelines. Indeed, the 1972 amendment was characterized as having validated or affirmed the guideline’s interpretation of Title VII’s ban on religious discrimination.”) (citations omitted); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1288 (D. Vt. 1974) (concluding that “the 1972 definition of ‘religion’ is declarative of Congress’ intent in 1964”).

92. See *Mich. Dep’t of Civil Rights*, 317 N.W.2d at 22-24; see also *Int’l Ass’n of Machinists v. Boeing Co.*, 833 F.2d 165, 168 (9th Cir. 1987) (“The 1972 amendment requires employers to take reasonable steps to accommodate their employees’ religious beliefs.”); *Wangsness v. Watertown Sch. Dist. No. 14-4*, 541 F. Supp. 332, 335 (D.S.D. 1982) (“An employer’s obligation to reasonably ac-
cannot do so without undue hardship on its business.\textsuperscript{93} It is primarily this aspect of Title VII that exposes employers to potential liability for limiting or prohibiting workplace religious proselytizing.\textsuperscript{94} Indeed, absent the statutory duty to accommodate reflected in the 1972 amendment, an employer's potential liability for religious harassment under Title VII\textsuperscript{95} might create a compelling incentive for restricting religious speech in the workplace.\textsuperscript{96}

III. THE EMPLOYER'S POTENTIAL LIABILITY TO OTHER EMPLOYEES FOR PERMITTING WORKPLACE RELIGIOUS PROSELYTIZING

The Supreme Court has held that the scope of Title VII is not limited to "tangible" or "economic" discrimination.\textsuperscript{97} The Act also prohibits noneconomic workplace discrimination or harassment based upon an individual's religious beliefs\textsuperscript{98} or lack of religious beliefs.\textsuperscript{99} Under this interpretation of the

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Act, workplace religious proselytizing could be actionable under Title VII in certain circumstances as demonstrated below.100

A. The Employer's Potential Liability for Proselytizing by Supervisors

The prospect of employer liability for religious proselytizing is particularly significant where a supervisor engages in the conduct101 because the employer in that situation is more likely to appear to be imposing its own religious views on its employees.102 As one federal appellate court has stated: "Protecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination."103

This is hardly a new concept.104 As early as 1972,105 the EEOC applied this reasoning to conclude that an employer violated Title VII by permitting a supervisor to "preach relig-


100. See Brown v. Polk County, 832 F. Supp. 1305, 1314 (S.D. Iowa 1993) (observing that “religious activity may lend itself to the type of conduct prohibited by... laws forbidding religious harassment”), aff’d in part and rev’d in part, 61 F.3d 650 (8th Cir. 1995); Estlund, supra note 96, at 697 (“In some cases, professions of religious belief and religious proselytizing have contributed to findings of religious harassment.”). But see Schopf, supra note 37, at 45 (“Whether proselytization is considered to create a hostile work environment is not clear.”).

101. See generally Schopf, supra note 37, at 44 (describing “attempts by... supervisors to bring a religious element into the workplace in a potentially offensive manner” as a “type[] of religious harassment”).

102. See Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996). See generally Beiner & DiPippa, supra note 15, at 615 (“Courts have... found a religious hostile environment in cases where the employer used the workplace to engage in religious discussion, proclamation, or proselytization.”).


104. See LINDEMANN & GROSSMAN, supra note 55, at 247 (“Harassment based on religion is not a new issue, and lower courts have long recognized a cause of action under Title VII to redress it.”) (footnotes omitted).

105. One commentator has described the EEOC’s 1972 decision as “the earliest religious harassment decision.” Post, supra note 34, at 183 n.23.
cion while on the job." Relying on a prior Commission decision holding that "Title VII obligates an employer to maintain a working atmosphere free of intimidation based upon race, color, religion, sex or national origin," the EEOC explained that because a supervisor's religious proselytizing has the potential to intimidate other employees, it may constitute unlawful religious harassment.

Although the analysis in the EEOC's 1972 religious harassment decision has been criticized, several courts have since reached the same conclusion. In Turic v. Holland Hospitality, Inc., for example, a federal district court cited the EEOC decision with apparent approval for the proposition that a supervisor who discusses his or her religious convictions in the workplace violates Title VII's requirement that the employer provide a working environment free from relig-

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107. No court appears to have recognized a religious harassment claim until 1976, when the court in Compston v. Borden, Inc., 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) held that an employer may be liable under Title VII "[w]hen a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views." See Beiner & DiPippa, supra note 15, at 584 n.45 ("The Court in Compston was the first to recognize a religious harassment claim."); Dworkin & Pierce, supra note 103, at 78 (describing Compston as "the first case to recognize religious harassment").
109. For example, the Commission described one employee who "believed that his job security could be affected by his reaction to the religion oriented statements by his supervisor." Id.
110. See id. The Commission added: "Clearly, an employer is responsible for the actions of its supervisors." Id.
111. See Post, supra note 34, at 182 (asserting that the EEOC "articulated no analytical framework" for resolving the type of religious harassment claim it was recognizing).
112. However, "the courts are not bound by the EEOC's interpretation of Title VII." Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 750 (4th Cir. 1996); see also Reeb v. Econ. Opportunity Atlanta, Inc., 516 F.2d 924, 931 n.5 (5th Cir. 1975) ("Although we do not regard [an] individual decision of the EEOC as dispositive, we do regard it as a useful and persuasive guide."); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 191 (E.D. La. 1968) (observing that an "interpretation of [Title VII] by the Commission is not conclusive"). But cf. Air Transp. Ass'n of Am. v. Hernandez, 264 F. Supp. 227, 229 (D.D.C. 1967) (noting that "the Commission's interpretative rulings . . . have the effect of law").
ious intimidation.  

Additionally, in *Kallas v. Department of Motor Vehicles,* a state court likewise cited the EEOC’s decision for the proposition that “an employer violate[s] Title VII of the Civil Rights Act by allowing a supervisor to propound his religious beliefs while on the job.” Like the *Turic* court, the court in *Kallas* indicated that permitting a supervisor to engage in religious proselytizing may result in a finding that the employer failed to provide its employees with a working environment free from religious intimidation.

These are not the only courts that have cited the EEOC’s seminal 1972 religious harassment decision with approval, and several commentators have also noted the significance of the Commission’s decision. In addition, other courts have reached similar results without specifically relying upon the EEOC’s view of the issue.

For example, in *Brown Transport Co. v. Pennsylvania Human Relations Commission,* the court held that a Jewish employee had been subjected to unlawful religious harassment as the result of his employer’s occasional inclusion of religious articles in an employee newsletter. The court re-

114. See id. at 551.
116. Id. at 711.
117. See supra notes 113-14 and accompanying text.
118. See *Kallas,* 560 P.2d at 711.
120. See, e.g., Post, supra note 34, at 182, 193 n.72 (describing the decision as “pioneering” and “seminal”); see also LINDEMANN & GROSSMAN, supra note 55, at 223 n.26 (citing the decision for the proposition that “a supervisor cannot subject subordinates to his preaching”).
123. In one respect this is a common scenario. One pair of commentators has asserted that in “all successful federal religious harassment decisions through 1994 . . . the individuals were harassed because they were Jewish.” Dworkin & Pierce, supra note 103, at 78.
lied upon evidence indicating that the religious material contained in the newsletter caused the plaintiff to question his job security, and led him to conclude that an employee needed to be a Christian in order to advance in the company.

Although one commentator has described Brown Transport as a "frightening" example of a court suppressing protected religious expression in the name of shielding employees from religious harassment, the Seventh Circuit reached a similar result in Venters v. City of Delphi. The plaintiff in Venters claimed to have been subjected to repeated lectures from her supervisor expressing his views of appropriate Christian behavior, to admonitions that she needed to be "saved" in order to avoid damnation, and to inappropriate inquiries into her religious and social life. She ultimately brought a Title VII claim against her employer alleging, among other things, that the supervisor's conduct created

125. See id. at 562. The content of the objectionable articles was not specified in the court's opinion, but a previous commentator stated that "[a]pparently, the message of the articles was a Christian one, not an anti-Jewish one." Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481, 491 n.59 (1991).

126. See Brown Transport, 578 A.2d at 562. The employer's actual refusal to promote the plaintiff because of his religious beliefs clearly would have violated Title VII. See also Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 512-16 (7th Cir. 1996); Thomas v. St. Francis Hosp. & Med. Ctr., 990 F. Supp. 81, 88-89 (D. Conn. 1998).

127. Wayne Lindsey Robbins, Jr., When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims, 47 BAYLOR L. REV. 789, 800 (1995); see also Kaminer, supra note 30, at 134 (noting that the Brown Transport court provided "little explanation for its reasoning").


129. See Venters, 123 F.3d at 970. One pair of commentators has asserted that "[m]ost . . . new [religious] harassment cases involve proselytizing Christians." Dworkin & Pierce, supra note 103, at 78.

130. See Venters, 123 F.3d at 970. See generally Berg, supra note 1, at 987-88 ("[R]eligious statements, especially dogmatic or proselytizing ones, often challenge and disturb listeners. The speaker may well assert that others are misguided on the most important and significant matters in life and therefore are headed for eternal damnation.").

131. See Venters, 123 F.3d at 970.

132. See id. at 961.

133. In addition to the religious harassment claim discussed here, the plaintiff in Venters asserted another Title VII claim alleging that she had been unlawfully discharged on the basis of her religion, and in particular "because she
an intimidating and offensive working environment that altered the conditions of her employment, and thus constituted unlawful religious harassment.\footnote{134}

The trial court granted the employer's motion for summary judgment,\footnote{135} and the plaintiff appealed.\footnote{136} The Seventh Circuit reversed,\footnote{137} holding that the plaintiff had submitted sufficient evidence to permit her religious harassment claim to proceed to trial.\footnote{138} In reaching this conclusion, the court focused on the fact that a supervisor did the proselytizing,\footnote{139} which continued unabated even after the plaintiff made it clear that the supervisor's conduct was unwelcome.\footnote{140}

The court acknowledged the tension between the supervisor's right to express his religious views\footnote{141} and the plaintiff's right "to be left alone to exercise her own thoughts on the subject of religion in private."\footnote{142} However, the court concluded did not measure up to [her supervisor's] religious expectations." \textit{Id.} at 972. The Seventh Circuit held that the plaintiff had presented sufficient evidence in support of this alternative theory of recovery to survive the employer's motion for summary judgment. \textit{See} \textit{Venters}, 123 F.3d at 974, 977. \textit{See generally} LINDEMANN \& GROSSMAN, \textit{supra} note 55, at 753 (observing that "harassment cases often present discharge issues as well").

\footnotetext{134}{\textit{See} \textit{Venters}, 123 F.3d at 972.}
\footnotetext{135}{\textit{See id.} at 961.}
\footnotetext{136}{\textit{See id.} at 962, 971.}
\footnotetext{137}{In addition to the matters discussed in the text, the trial court concluded that the plaintiff could not establish a \textit{prima facie} case of religious discrimination "without informing her employer of her religious needs, and requesting that those needs be accommodated," which she had not done. \textit{Id.} at 971. However, the appellate court disagreed, noting that the case was "not, at bottom, an accommodation case." \textit{Id.} at 971 n.5. \textit{See generally} Beiner \& DiPippa, \textit{supra} note 15, at 583 (observing that "[accommodation claims] are "theoretically different than hostile environment claims").}
\footnotetext{138}{\textit{See} \textit{Venters}, 123 F.3d at 977.}
\footnotetext{139}{\textit{See id.} ("[Plaintiff's] case ... does not rest on allegations of mere discomfort with religious views that we may assume [the supervisor] ... was free to express, but upon allegations that [the supervisor] used his office to impose his religious views on [the plaintiff] as his subordinate.").}
\footnotetext{140}{\textit{See id.} at 976.}
\footnotetext{141}{The court here specifically referred to the supervisor's First Amendment rights. \textit{See id.} at 977. However, he also had a potential statutory right to proselytize, since he believed the Bible compelled him to share his religious views with others, \textit{see id.}, and Title VII requires the employer to accommodate such a belief unless doing so would constitute an undue hardship. \textit{See generally} Kaminer, \textit{supra} note 30, at 141 ("A supervisor's right to religious expression in the workplace is protected by both Title VII and the Constitution.").}
\footnotetext{142}{\textit{Venters}, 123 F.3d at 977. \textit{See generally} Gilmer \& Anderson, \textit{supra} note 23, at 327-28 (discussing the "uniquely significant tension" present in cases where "one employee feels compelled to express her religious convictions in the workplace, and others feel harassed by that very expression").}
that it was unnecessary to resolve the conflict on the facts presented, because any rights the supervisor had did not include the right to make "highly personal remarks about the status of [the plaintiff's] soul when informed that these remarks were unwelcome."

B. The Employer's Potential Liability for Proselytizing by Coworkers

Although the employer's potential liability for religious harassment is greatest when a supervisor is proselytizing, its exposure is unlikely to be limited to that situation. While there is relatively little case law on this issue, the EEOC has held that an employer may also be liable for religious harassment committed by nonsupervisory employees. There is little reason to believe this view would not extend to cases involving unwelcome religious proselytizing.

143. See Venters, 123 F.3d at 977 ("We are not called upon to draw lines at this juncture.").

144. Id.; cf. Berg, supra note 1, at 985 ("[O]nce the recipient says that the speech directed at her individually is unwelcome and asks that it stop, any significant further speech can provide the basis for harassment liability.").

145. See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 639-40 (Iowa 1990) (Harris, J., dissenting in part) ("It is much more difficult [for the employer] to escape [liability] . . . when the discrimination is inflicted, not by just another coworker, but by a supervisor whom the employer placed in charge of the victim of discrimination."); cf. Kaminer, supra note 30, at 135 n.306 ("[T]here is an increased risk of harassment when the religious speaker is a supervisor."); Berg, supra note 1, at 987 ("Speech by a supervisor certainly is more likely to have an effect on an employee's work environment, other things equal, than similar speech by a co-worker.").

146. See Vaughn, 459 N.W.2d at 634 ("An employer cannot stand by and permit an employee to be harassed by his coworkers."); Kaminer, supra note 30, at 86 (observing that "Title VII prohibits hostile work environment harassment, regardless of whether it is created by an employer or other employees").

147. See Beiner & DiPippa, supra note 15, at 615 n.238.

Although there is a good deal of discussion about the employer's potential liability when an employee engages in harassing religious conduct on the job, we have found only one case where liability for a hostile environment was imposed. Employers and courts, however, assume that the employer will be liable in such cases.

Id. (citations omitted).


149. See generally Schopf, supra note 37, at 55 ("If . . . [a] co-worker attempts to impose his religious beliefs on others and does so in a constant and pervasive
Indeed, the applicable law in religious harassment cases has evolved largely through the application of principles developed in sexual harassment cases, where employers clearly can be held liable for the conduct of nonsupervisory employees. The analogy may be particularly appropriate in cases involving religious proselytizing because, unlike the use of epithets and other, more typical forms of religious harassment, proselytizing is conceptually more similar to sex-

manner sufficient to create hostility, those targeted should not be forced to endure the imposition without being able to take legal measures to end such activity.

150. The EEOC has specifically indicated that the principles applicable in sexual harassment cases also apply in cases involving harassment on the basis of “race, color, religion or national origin.” 29 C.F.R. § 1604.11 n.1 (1999); See Gilmer & Anderson, supra note 23, at 334 (observing that “decisions in sexual harassment cases bear serious implications for every other kind of harassment case”); see also Glaser v. Levitt, No. 98 C 210, 1998 U.S. Dist. LEXIS 15343, at **13-14 (N.D. Ill. Sept. 22, 1998) (“Religious harassment claims are measured by the same standards as sexual harassment claims.”); cf: Dworkin & Peirce, supra note 103, at 63 (“Sexual harassment cases in recent years have been primarily responsible for shaping the major developments in harassment law . . . .”)

151. See Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (“It is well established that an employer can be held liable under Title VII for sexual harassment by an employee’s co-workers if the employer had actual or constructive knowledge of the harassment and failed to address the problem adequately.”); Huffman v. City of Prairie Village, 980 F. Supp. 1192, 1202 (D. Kan. 1997) (“An employer may be liable for sexual harassment based upon the conduct of co-workers . . . .”). For prior academic discussions of this issue, see Joseph G. Allegritti, Sexual Harassment of Female Employees by Nonsupervisory Coworkers: A Theory For Liability, 15 CREIGHTON L. REV. 437 (1982), and Christine O. Merriman & Cora G. Yang, Note, Employer Liability for Co-Worker Sexual Harassment Under Title VII, 13 N.Y.U. REV. L. & SOC. CHANGE 83 (1984-85).

152. However, the analogy is not entirely convincing. As one commentator has stated,

acculations of religious harassment often raise distinctive problems. For example, some employees might object to proselytization by co-workers or provocative displays of religious paraphernalia. Although both of these can undoubtedly make workers feel uncomfortable, neither is the precise equivalent of . . . sexist speech designed to drive . . . women from the workplace. The rules that govern these situations must be tailored to take these differences into account.

J.M. Balkin, Free Speech and Hostile Environments, 99 COLUM. L. REV. 2295, 2296 n.3 (1999). See also Schopf, supra note 37, at 58 (“Religious harassment must be defined separately from other forms of harassment.”).

153. See Beiner & DiPippa, supra note 15, at 585 (describing “religious epithets or other harassing behavior . . . specifically directed at the plaintiff because of his or her religion” as “classic types of hostile environment cases”); cf. Cameli v. O’Neal, No. 95 C 1369, 1997 U.S. Dist. LEXIS 9034, at *42 (N.D. Ill. June 20, 1997) (referring to “the typical hostile environment case where the plaintiff has been subjected to vicious racial epithets or physically threatening
ual harassment\textsuperscript{154} than to harassment premised upon race\textsuperscript{155} or other class-based hostility.\textsuperscript{156}

To illustrate, in \textit{Peck v. Sony Music Corp.},\textsuperscript{157} the court held that an employee who had been subjected to unwelcome comments concerning her religious beliefs,\textsuperscript{158} "including statements that [she] was a sinner and would go to hell,"\textsuperscript{159} stated a viable Title VII religious harassment claim.\textsuperscript{160} Relying upon precedent established in the sexual harassment context,\textsuperscript{161} the court reached this conclusion even though it was unclear from the record whether the alleged harasser was the plaintiff's supervisor, or merely a coworker.\textsuperscript{162} The same result seems likely to be reached in other religious proselytizing cases.\textsuperscript{163}

\textsuperscript{154} See \textit{The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcomm. On Courts and Admin. Practice of the Senate Comm. on the Judiciary}, 103d Cong. 41 (1994) (statement of Professor Douglas Laycock, Young Regents Chair in Law, University of Texas Law School) ("The problem of unwelcome proselytizing is in many ways analogous to the problem of unwelcome request for dates."); see also Goldsmith, \textit{supra} note 128, at 1437 ("A demand that an employee alter her religious beliefs is like a demand that an employee submit to sexual advances . . . .").

\textsuperscript{155} But see Beiner & DiPippa, \textit{supra} note 15, at 585 ("Logically, religious harassment appears to be more akin to racial harassment . . . ."); Dworkin & Peirce, \textit{supra} note 103, at 49 ("In the few cases of religious harassment to reach federal courts from 1976 to the 1990s, religious harassment has been treated the same as race and national origin harassment . . . .").

\textsuperscript{156} Compare Dworkin & Peirce, \textit{supra} note 103, at 89 (discussing the "benign motives" involved in religious proselytizing), \textit{with} BARBARA LINDEMANN \& DAVID D. KADUE, \textit{SEXUAL HARASSMENT IN EMPLOYMENT LAW} 178 (1992) (noting that sexual harassment can result from "well-intended romantic overtures").


\textsuperscript{158} See \textit{id.} at 1025-26 (failing to describe the plaintiff's religious beliefs, presumably because her objection to the religious proselytizing to which she was subjected made her own beliefs essentially irrelevant); see also Shapolia \textit{v.} Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir. 1993) ("Title VII has been interpreted to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs.").

\textsuperscript{159} Peck, 68 Fair Empl. Prac. Cas. (BNA) at 1025.

\textsuperscript{160} See \textit{id.} at 1026.

\textsuperscript{161} See, \textit{e.g.}, Karibian \textit{v.} Columbia Univ., 14 F.3d 773, 779-80 (2d Cir. 1994) ("It will certainly be relevant to the analysis . . . that the alleged harasser is the plaintiff's supervisor rather than her co-worker. . . . Yet, even such a distinction will not always be dispositive.") (citations omitted).

\textsuperscript{162} See \textit{Peck}, 68 Fair Empl. Prac. Cas. (BNA) at 1025 n.1.

\textsuperscript{163} See \textit{supra} notes 145-49 and accompanying text. \textit{But see} Compston \textit{v.}
IV. THE APPLICABILITY OF TITLE VII'S REASONABLE ACCOMMODATION OBLIGATION TO WORKPLACE RELIGIOUS PROSLEYTIZING

A. The Categorical Approach: Religious Prosleytizing Cannot Be Accommodated

Despite the expansive definition of religion now contained in Title VII as a result of the 1972 amendment, the Act's reasonable accommodation provision has actually provided surprisingly little protection for religious employees in general, and religious speech in particular. In the present context, for example, the employer's potential liability for religious harassment may obviate its obligation to accommodate workplace religious prosleytizing. Under this view, prosleytizing is the type of "unusual religious speech" that cannot be reasonably accommodated because doing so would cause


164. See Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 168 (5th Cir. 1976) (asserting that the statutory definition "is broad – broader can hardly be imagined"); Borden, 424 F. Supp. at 160 (S.D. Ohio 1976) ("It may be . . . that verbal abuse from fellow employees does not necessarily give rise to a Title VII claim against the employer."); see also Heitzman v. Monmouth County, 728 A.2d 297, 303 (N.J. Super. Ct. App. Div. 1999) (stating that "an employer is not generally liable for harassing conduct by coworkers").

165. See Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 168 (5th Cir. 1976) (asserting that the statutory definition "is broad – broader can hardly be imagined"); Borden, 424 F. Supp. at 160 (S.D. Ohio 1976) ("It may be . . . that verbal abuse from fellow employees does not necessarily give rise to a Title VII claim against the employer."); see also Heitzman v. Monmouth County, 728 A.2d 297, 303 (N.J. Super. Ct. App. Div. 1999) (stating that "an employer is not generally liable for harassing conduct by coworkers").

166. See Berg, supra note 1, at 977 ("In fact, the accommodation provision has given only limited protection to employee religious speech – just as it has given little protection to non-speech religious conduct by employees.").

167. See Kaminer, supra note 30, at 110 (observing that "Title VII's prohibition of hostile work environment harassment can trump . . . an individual's statutory . . . right to religious expression in the workplace"); cf. Wolf, supra note 23, at 131 ("The employer is not required to face a potential religious harassment lawsuit by . . . employees subjected to [religious] proselytizing.").

168. Kaminer, supra note 30, at 141-42. See generally Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1489 (10th Cir. 1989) ("It is certainly conceivable that particular jobs may be completely incompatible with particular religious practices . . . Employers faced with such conflicts should be able to meet their burden by showing that no accommodation is possible.").
the employer undue hardship by exposing it to potential Title VII liability to its other employees.\(^{169}\)

The Fourth Circuit reached this conclusion in *Chalmers v. Tulon Co. of Richmond*.\(^{170}\) In *Chalmers*, a management level employee wrote letters to two coworkers,\(^{171}\) one of whom was her supervisor,\(^{172}\) accusing them of "immorality"\(^{173}\) and "ungodly, shameful conduct."\(^{174}\) When she was discharged for writing the letters, she brought suit alleging that her employer had unlawfully discriminated against her on the basis of her religion in violation of Title VII.\(^{175}\)

The plaintiff contended that, as an evangelical Christian, she had a religious duty to share the gospel,\(^{176}\) and looked for opportunities to do so.\(^{177}\) She maintained that her letter writing was therefore a statutorily protected religious activity,\(^{178}\) and that the employer should have accommodated that activity by imposing a less severe punishment than discharge,\(^{179}\) even if the letters otherwise would have provided a legitimate basis for her termination.\(^{180}\)

The court acknowledged that an employer generally must attempt to accommodate an employee's religious expression, even if the expression would provide a legitimate basis for the employee's termination in the absence of any religious motivation.\(^{181}\) In the face of a vigorous dissent,\(^{182}\) the court never-


\(^{170}\) See generally Henderson v. Stanton, 76 F. Supp. 2d 10, 13-14 (D.D.C. 1999) (discussing the "religious duty" of evangelical Christians to "communicate the gospel by all available means").


\(^{172}\) See *id.* at 1014-18.

\(^{173}\) See *id.* at 1014.

\(^{174}\) See *id.* at 1021.

\(^{175}\) See *id.* at 1020.

\(^{176}\) See *id.* at 1017.

\(^{177}\) See *id.* at 1014. See generally Henderson v. Stanton, 76 F. Supp. 2d 10, 13-14 (D.D.C. 1999) (discussing the "religious duty" of evangelical Christians to "communicate the gospel by all available means").


\(^{179}\) See *Chalmers*, 101 F.3d at 1017. The plaintiff asserted that "her religious beliefs required her to write such letters, i.e., that she was 'led by the Lord' to write them." *Id.* at 1021. The court, in turn, indicated that it did not "in any way question the sincerity of [her] religious beliefs or practices." *Id.*

\(^{180}\) See *id.* at 1017.

\(^{181}\) See *id.*; *cf.* Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1362 (S.D.
theless rejected the plaintiff's argument,\textsuperscript{183} holding that religious proselytizing is not the type of conduct an employer can possibly accommodate.\textsuperscript{184}

The court explained that requiring the accommodation of workplace proselytizing would leave the employer "between a rock and a hard place" by exposing it to potential liability for violating the statutory rights of other employees.\textsuperscript{185} In particular, permitting employees to engage in religious proselytizing might subject the employer to Title VII claims by other employees asserting that the proselytizing constituted unlawful religious harassment.\textsuperscript{186}

This reasoning reflects the analysis in the "leading precedent" addressing an employer's obligation to accommo-
date religious practices, Trans World Airlines, Inc. v. Hardison, upon which the Chalmers court in fact relied. The issue in Hardison was the extent of an employer's duty to accommodate an employee whose religious beliefs prohibited him from working on his Sabbath. In holding that an employer is not required to provide an accommodation that would "require [it] to bear more than a de minimis cost," the Supreme Court interpreted Title VII in the following manner:

The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities... It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the [rights] of some employees... in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.


189. See Chalmers, 101 F.3d at 1018. But see infra notes 273-305 and accompanying text (arguing that Hardison should not be read to support the categorical approach adopted in cases like Chalmers).

190. See Hardison, 432 U.S. at 66. One court described the situation in which "an employee is requesting an adjustment in his work schedule to permit him to observe his sabbath" as the "typical accommodation case." Spratt v. County of Kent, 621 F. Supp. 594, 599 (W.D. Mich. 1985). Indeed, litigants have occasionally argued, albeit unsuccessfully, that the duty to accommodate is limited to this particular religious practice. See, e.g., Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 168-69 & n.10 (5th Cir. 1976), reh'g denied, 537 F.2d 1143 (5th Cir. 1977). For a prior academic discussion of the accommodation requirement's application in this situation, see Clare Zerangue, Comment, Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule, 46 LA. L. REV. 1265 (1986).

191. Hardison, 432 U.S. at 84.

192. Id. at 81; see also Cummins v. Parker Seal Co., 516 F.2d 544, 552 (6th Cir. 1975) ("The reasonable accommodation rule, like Title VII as a whole, was intended to prevent discrimination in employment."). aff'd by an equally divided Court, 429 U.S. 65 (1976), vacated on reh'g, 433 U.S. 903 (1977).
B. The Balancing Approach: Religious Proselytizing Can Be Accommodated In Some Circumstances

As discussed in Section III above, the concern expressed in Chalmers v. Tulon Co. of Richmond with an employer’s potential liability for workplace religious proselytizing is not merely speculative. Nevertheless, relatively few courts have embraced the Fourth Circuit’s seemingly categorical view that workplace proselytizing cannot possibly be accommodated. Most courts instead have concluded that an employer addressing such conduct must attempt to balance the proselytizing employee’s right to engage in a protected religious practice with the right of other employees to work in an environment free from religious harassment.

1. Brown v. Polk County

The Eighth Circuit’s decision in Brown v. Polk County is a prominent example of a court employing this balancing approach. The plaintiff in Brown was a born-again Christian whose religious beliefs played “a central part in his

193. See supra notes 97-163 and accompanying text.
195. See WOLF, supra note 23, at 61 (observing that “proselytizing activities... may give rise to harassment claims by employees who object to the proselytizing”); Schopf, supra note 37, at 59 (“Proselytization... can rise to the level of harassment...”). But see Avis Rent A Car Sys., Inc. v. Aguilar, 120 S. Ct. 2029, 2031 (2000) (Thomas, J., dissenting from denial of certiorari) (“Attaching liability to the utterance of words in the workplace is likely invalid for the simple reason that this speech is fully protected speech.”).
196. See Chalmers, 101 F.3d at 1021. For a critical assessment of the analysis in Chalmers, see Kaminer, supra note 30, at 112-14.
197. See generally Schopf, supra note 37, at 49 (“[T]he balanced approach... suggests a way to resolve the tension between freedom to observe and freedom from observance, by recognizing the need to protect employees from unwanted religious advances in the workplace, while still allowing for a certain level of healthy religious expression.”).
198. Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995).
199. Because the plaintiff in Brown was a government employee, his religious proselytizing had free speech implications that are beyond the scope of this article. See id. at 654 (“In cases such as this one, where a government employee, we must consider both the first amendment [sic] and Title VII in determining the legitimacy of the [employer’s] action.”). For a prior academic discussion of the constitutional issue, see Brian Richards, Comment, The Boundaries of Religious Speech in the Government Workplace, 1 U. Pa. J. Lab. & Emp. L. 745 (1998).
200. See Brown, 61 F.3d at 652. One court has indicated that it was “not aware of any organized religious group bearing the label ‘born-again Christians,’” but assumed that the term refers to “those Protestants who consider
Although the employer did not dispute the sincerity of those beliefs, it made no effort to accommodate the plaintiff's religious activities. The employer instead instructed him to refrain from using its resources in any way that could be perceived as supporting a particular religious activity or organization, and forced him to remove all religious items from his office, including a Bible he kept in his desk.

The employer also reprimanded the plaintiff for engaging in religious activities, and directed him to "cease any activities that could be considered to be religious proselytizing, witnessing, or counseling." When he was subsequently terminated in part for occasionally allowing prayers in his office, citing Bible passages, and "affirming his Christianity," the plaintiff brought suit alleging that the employer had discriminated against him on the basis of his religion in violation of Title VII.

The employer argued that accommodating the plaintiff's religious activities could have created the perception that it would favor employees who shared his religious beliefs when their conversion to be a spiritual rebirth." Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 510 n.1 (7th Cir. 1996) (citing John 1:12-13, 3:3-6). In any event, lack of membership in a formally organized religion does not prevent an employee from claiming the protection of Title VII, because "a religious belief does not have to be espoused or accepted by any religious group to fall within the definition of 'religion' under Title VII." Van Koten v. Family Health Mgmt., Inc., 955 F. Supp. 898, 902 (N.D. Ill. 1997). But cf. Edwards v. Sch. Bd. of City of Norton, Va., 483 F. Supp. 620, 624 (W.D. Va. 1980) (asserting that, in order to be protected under Title VII, an employee's religious belief "must have an institutional quality about it"), vacated and remanded on other grounds, 658 F.2d 951 (4th Cir. 1981).

201. Brown, 61 F.3d at 658.
202. See id. (noting that the employer offered "no challenge to [the plaintiff's] testimony" concerning his religious beliefs).
203. See id. at 654.
204. See id. at 652-53. This instruction undoubtedly reflects the employer's familiarity with the First Amendment principle that "government should not prefer one religion to another, or religion to irreligion." Bd. of Educ. of Kirya Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).
205. See Brown, 61 F.3d at 653. See generally Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1216 (9th Cir. 1996) (observing that "there is a legitimate state interest in preventing displays of religious objects that might suggest state endorsement of religion").
206. See Brown, 61 F.3d at 654.
207. Id. at 652.
208. Id. at 654, 655.
209. See id. at 653.
making personnel decisions, and thus eventually would have led to "polarization between born-again Christian employees and other employees." However, the court disagreed, noting that there was no evidence that any personnel decisions were actually affected by the plaintiff's religious beliefs, or that any employee concerns with respect to this issue were legitimate or reasonable. Because there had been no actual imposition on other employees or disruption of the employer's workplace, the court held that the employer violated Title VII by failing to accommodate the plaintiff's "occasional spontaneous prayers and isolated references to Christian belief."

In contrast to the analysis in Chalmers v. Tulon Co. of Richmond, the Brown court rejected the contention that an employer's interest in avoiding potential religious harassment claims permits it to categorically prohibit religious expression in the workplace. The court explained:

We may concede for the sake of argument that [an employer] has a legal right to ensure that its workplace is free from religious activity that harasses or intimidates. But any interference with religious activity that the exercise of that right entails must be reasonably related to the exercise of that right and must be narrowly tailored to its achievement.

The court here was specifically discussing the plaintiff's


211. Brown, 61 F.3d at 656.

212. See id. at 657. See generally Opoku-Boateng v. California, 95 F.3d 1461, 1473 (9th Cir. 1996) ("[H]ypothetical morale problems are clearly insufficient to establish undue hardship.").

213. See Brown, 61 F.3d at 657.

214. See id.; cf. Kolodziej v. Smith, 588 N.E.2d 634, 638 (Mass. 1992) (holding that an employer's use of "Scriptural passages as support for the lessons it sought to promote" did not warrant a finding that it had "forced the plaintiff to alter her religious convictions or her profession of belief, or to give the appearance of supporting a particular tenet of religion ").


216. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012 (4th Cir. 1996); see supra notes 170-86 and accompanying text.

217. See Brown, 61 F.3d at 659.

218. Id. at 658.
First Amendment right to engage in religious expression, as opposed to his statutory right to do so.\textsuperscript{219} However, because the EEOC has taken the position that “the protections of the Act against religious discrimination can be no broader or narrower than the protections afforded by the First Amendment,”\textsuperscript{220} the court's reasoning appears equally applicable to the plaintiff's Title VII claim.\textsuperscript{221} Indeed, one commentator discussing the employer's statutory duty to accommodate religious practices\textsuperscript{222} has expressed essentially the same view as the court in \textit{Brown}: “Ensuring that the workplace is free from religious intimidation or harassment is a proper goal, but related efforts need to be narrowly structured to avoid eliminating religion from the workplace entirely.”\textsuperscript{223}

2. \textit{Banks v. Service America Corp.}

The Eighth Circuit is not the only court to conclude that an employer's prohibition of workplace religious proselytizing may be actionable under Title VII.\textsuperscript{224} In \textit{Banks v. Service America Corp.},\textsuperscript{225} the plaintiffs were food service employees who were discharged for greeting their employer's customers with expressions such as “God bless you” and “Praise the

\begin{footnotes}
\textsuperscript{219} See id. at 657-59.
\textsuperscript{222} See \textit{Shopf}, \textit{supra} note 37, at 52 n.93:
Private employers do not have the same First Amendment concerns as their government counterparts. But, beyond the fact that it is good policy not to broadly ban or limit activities, private employers will still encounter possible Title VII problems if, for instance, such bans lead to a failure to reasonably accommodate employees' religious beliefs.
\textsuperscript{223} Id. at 52.
\textsuperscript{224} In addition, one commentator has stated: “[M]uch speech that might be considered religious harassment may itself be an exercise of religious liberty that the employer is obligated to accommodate. Disciplining an employee on the basis of such expression might itself be unlawful religious discrimination under Title VII.” \textit{Estlund}, \textit{supra} note 96, at 747 n.241 (citation omitted).
\end{footnotes}
When the plaintiffs subsequently brought suit under Title VII, the employer argued that it could not reasonably have accommodated this religious practice, and thus had lawfully terminated the plaintiffs' employment when they refused to cease extending religious greetings to its customers.

The court held that the plaintiffs had presented a genuine issue for trial with respect to whether terminating their employment on this basis was unlawful. The court acknowledged that a number of the employer's customers had complained that the plaintiffs' greetings were inappropriate. It nevertheless rejected the employer's argument that the plaintiffs' jobs were thus incompatible with their method of greeting customers, and that permitting the plaintiffs to remain in their positions would have constituted an undue hardship.

In reaching this result, the court noted the absence of any evidence that the employer had actually lost any customers as a result of the plaintiffs' conduct. The court acknowledged that customer discomfort with the plaintiffs' religious

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226. See id. at 705, 707.
227. See id. at 705.
228. See id. at 707-708. See generally LINDEMANN & KADUE, supra note 156, at 402 (observing that "employees must not only refrain from ... harassing their co-workers, but must also refrain from harassing customers, clients, and other nonemployees with whom they deal in their employment").
229. See Banks, 952 F. Supp. at 708.
230. See id. at 711; cf. Thomas v. St. Francis Hosp. & Med. Ctr., 990 F. Supp. 81, 88 (D. Conn. 1998) (holding that whether a hospital had validly disciplined a proselytizing employee "because her religious speech annoyed and disturbed patients" was "[an] issue for a factfinder to decide").
231. See Banks, 952 F. Supp. at 707 & n.2.
232. See id. at 709. The court stated: "[T]he fact that [the employer] received assorted complaints ... does not, standing alone, demonstrate that plaintiffs' jobs were "completely incompatible" with their practice of extending religious greetings to food service customers. Given the volume of customers served (2,000 to 3,000 per day), plaintiffs are entitled to the benefit of the favorable inference that 20 to 25 complaints over a three-month period presented no material problem for [the employer]."
233. Id. at 710.
234. See id. at 710; see generally Paul F. Gerhart, Employee Privacy Rights in the United States, 17 COMP. LAB. L.J. 175, 179-80 (1995) ("[A]n employer must prove that accommodating a religious [practice] would pose undue hardship ... . The maintenance of a company's public image is not a sufficient basis to withstand a claim based on religion.").
greetings ultimately could lead to a loss of business, but nevertheless concluded that any assertion that the plaintiffs’ conduct was likely to have a material impact on the employer’s profitability was “more hypothetical than real.”

In this respect, the court indicated that an employer must present evidence of “tangible present costs” of an accommodation, rather than speculative evidence of its future impact. Because the employer in Banks had presented no such evidence, it failed to establish that permitting the plaintiffs to continue extending the customer greetings would have imposed more than a de minimis burden.

Although the Banks court concluded that the plaintiffs were not necessarily attempting to proselytize or impose their religious beliefs on the employer’s customers, its holding presumably did not depend on this conclusion. Given the

235. See Banks, 952 F. Supp. at 710. It is not entirely clear that a demonstrable loss of business due to customer dissatisfaction would have been sufficient to justify the employer’s actions in any event. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (“[I]t would be totally anomalous . . . to allow the preferences and prejudices of the [employer’s] customers to determine whether . . . discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”).

236. Banks, 952 F. Supp. at 710. The court stated:

[I]t is not even clear that a boycott by those who objected to plaintiffs’ greetings would have had any material impact on the profitability or operation of [the employer’s] business—either because they were few in number or because (since [the employer] operated various food stations) patrons could choose whether to encounter or to avoid an encounter with plaintiffs.

Id.

237. Id. at 711 (quoting Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992)); cf. Haring v. Blumenthal, 471 F. Supp. 1172, 1182 (D.D.C. 1979) (“[I]t seems to this Court that ‘undue hardship’ must mean present undue hardship, as distinguished from anticipated . . . hardship.”).

238. The court noted that “[t]he burden is on] the employer to show reasonable accommodation, or that reasonable accommodation would be an undue hardship.” Banks, 952 F. Supp. at 708.

239. See id. at 709.

240. Id. at 711; cf: Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 825 n.1 (5th Cir. 1999) (Jolly, J., dissenting) (“[T]he term ‘proselytize’ is . . . a word used—sometimes pejoratively—in lieu of the term ‘persuade.’”); Springfield v. San Diego Unified Port Dist., 950 F. Supp. 1482, 1487 n.7 (S.D. Cal. 1996) (“Recent case law discussing ‘proselytizing’ consistently refers to that term as a form of religious persuasion.”) (emphasis added).

court's finding (which the employer did not dispute)\(^{242}\) that the customer greetings were an expression of the plaintiffs' sincerely held religious beliefs,\(^{243}\) the proper focus was not on the precise nature of the plaintiffs' conduct,\(^{244}\) but on whether that conduct had disrupted the employer's business.\(^{246}\)

Indeed, the employer's statutory duty to accommodate an employee's religious observance or practice\(^{246}\) can arise from any religiously motivated conduct\(^{247}\) or speech\(^{248}\) and the court clearly recognized that the plaintiffs' greetings constituted protected religious speech.\(^{249}\) Because the term "proselytize" ordinarily contemplates some form of "religious advocacy,"\(^{250}\) a

\(^{242}\) The employer "concede[d] that [the] plaintiffs ... established a prima facie case of religious discrimination," which necessarily included a showing that they held "a bona fide religious belief that conflict[ed] with an employment requirement." \textit{Banks}, 952 F. Supp. at 708.

\(^{243}\) See id. at 705.


\(^{245}\) See \textit{Banks}, 952 F. Supp. at 710 (addressing whether the plaintiffs' religious speech had "imposed undue hardship on [the employer's] operations or materially disrupted its work routine").


\(^{247}\) See Cooper v. Gen. Dynamics, Convair Aerospace Div., 533 F.2d 163, 168 (5th Cir. 1976) (noting that "all forms and aspects of religion, however eccentric, are protected"), \textit{reh'g denied}, 537 F.2d 1143 (5th Cir. 1977); Anderson, 84 Fair Empl. Prac. Cas. (BNA) at 1588-89 ("It is of no consequence that the practice is not required by the tenets of [the employee's] religion. It matters only that [the] practice ... was religiously motivated.") (citations omitted).

\(^{248}\) See Berg, \textit{supra} note 1, at 979 ("Speech is certainly a form of religious 'practice or observance,' indeed a particularly common form."); Gilmer & Anderson, \textit{supra} note 23, at 341 ("The line between mere speech and 'observance or practice' is ... too faint and uncertain to support [the] contention that Title VII does not protect religious expression.").

\(^{249}\) The court stated:

Plaintiffs are Christians who feel strongly that because of what God has done for them and the joy He has given them by changing their lives dramatically, they must say things that are positive, uplifting and inspirational to people with whom they speak, and their religious greetings emanate from this belief .... Honoring God through their speech, through such greetings, was a deep seated sincerely held religious belief and plaintiffs could not stop the practice without violating their beliefs.

\textit{Banks}, 952 F. Supp. at 707 (footnote omitted).

\(^{250}\) Springfield v. San Diego Unified Port Dist., 950 F. Supp. 1482, 1487 (S.D. Cal. 1996); see also Goldsmith, \textit{supra} note 128, at 1438 ("The purpose of proselytizing is to induce another person's religious conversion.").
finding that the plaintiffs were proselytizing should not have altered the result in Banks, despite the court’s apparent reluctance to characterize their conduct in that fashion.

3. Wilson v. U.S. West Communications

Courts utilizing the balancing approach have also reached results favoring the employer. In Wilson v. U.S. West Communications, for example, the plaintiff was a Roman Catholic woman who wore a graphic anti-abortion button at work as part of a personal religious vow. The button caused immediate emotional reactions among the plaintiff’s coworkers, some of whom accused the company of harassment for permitting her to wear the button. After the plaintiff refused the employer’s request that she cover the button while at work, her employment was terminated.

251. Proselytization obviously can take various forms, some of which may be rather subtle. See Good News/Good Sports Club v. Sch. Dist. of Ladue, 28 F.3d 1501, 1516 (8th Cir. 1994) (Bright, J., dissenting). But see Chandler v. James, 998 F. Supp. 1255, 1283 (M.D. Ala. 1997) (criticizing the assumption that “all discussion or reference to Jesus . . . [and] any discussion of Mother Theresa . . . would [necessarily] be religious or have the purpose or effect of proselytizing”).

252. See Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir. 1996) (rejecting the contention that “proselytizing religious speech . . . enjoys a lesser degree of . . . protection than does religious speech that is not intended to recruit new believers”).

253. The court instead characterized the plaintiffs’ religious practice as “blessing” the employer’s customers. Banks, 952 F. Supp. at 708, 710.

254. See generally Haring v. Blumenthal, 471 F. Supp. 1172, 1181 (D.D.C. 1979) (observing that “courts have sometimes held for and sometimes against the complaining employee”) (footnotes omitted).


256. See id. at 1338. The button depicted “an eighteen to twenty-week old fetus,” and “contained the phrases ‘Stop Abortion,’ and ‘They’re Forgetting Someone.’” Id. at 1339.

257. See id. at 1339. In particular, the plaintiff vowed to wear the button “at all times, unless she was sleeping or bathing,” until there was “an end to abortion or . . . she could no longer fight the fight.” Id. (bracketing omitted). That opposition to abortion is a tenet of the Catholic faith seems beyond dispute. See, e.g., Fausto v. Diamond, 589 F. Supp. 451, 460-61 (D.R.I. 1984) (“It is undeniably true . . . that the Roman Catholic Church is militant in its opposition to abortion, and that the Church regards the obligation to preserve human life as religiously-based and theologically imposed.”).

258. See Wilson, 58 F.3d at 1338. See generally Nickerson v. G.D. Searle & Co., 900 F.2d 412, 418 (1st Cir. 1990) (referring to “the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner”).

259. See Wilson, 58 F.3d at 1339.

260. The court noted that the employer had actually offered the plaintiff “three options: (1) wear the button only in her work cubicle, leaving the button
The plaintiff brought suit against the employer claiming religious discrimination in violation of Title VII.\textsuperscript{262} The trial court entered judgment in favor of the employer,\textsuperscript{263} and the plaintiff appealed.\textsuperscript{264} The plaintiff argued that the trial court erred in concluding that the employer offered her a reasonable accommodation, and in holding that her own accommodation proposals would have imposed an undue hardship on the employer.\textsuperscript{265}

In concluding that the employer could not have accommodated the plaintiff's religious practice without undue hardship,\textsuperscript{266} the trial court focused on the workplace disruption caused by the anti-abortion button.\textsuperscript{267} However, the plaintiff argued on appeal that the accommodation obligation established by the EEOC guidelines (and now also contained in Title VII itself)\textsuperscript{268} was "paramount to [other employees'] alleged frustrations with the button."\textsuperscript{269} She claimed that the employer simply should have instructed her coworkers to ignore the button and do their jobs.\textsuperscript{270}

in the cubicle when she moved around the office; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph." \textit{Id.}

261. \textit{See id.} at 1338.

262. \textit{See id.}


264. \textit{See Wilson}, 58 F.3d at 1338, 1340.

265. \textit{See id.} at 1338.


267. The court stated:

Wilson's coworkers were disturbed, distressed, and offended by the button which Wilson wore. A labor grievance was filed on account of the button. Wilson's coworkers balked at attending company meetings which involved Wilson's wearing the button and became angry and frustrated by management's inability to resolve the issue. At various times, Wilson's coworkers threatened to walk off their jobs. A company counselor had to confer with Wilson's coworkers concerning the unpleasant work environment attributable to the presence of the button in the workplace. Loss of efficiency and productivity as well as the expenditure of time and energy in attempts to alleviate the acrimonious atmosphere ... presented more than a \textit{de minimis} cost to [the company].

\textit{Id.} at 675.

268. \textit{See supra} notes 64-65, 86-93 and accompanying text.

269. \textit{Wilson}, 58 F.3d at 1340.

270. \textit{See id.} at 1341. \textit{See generally Berg, supra} note 1, at 978 ("To accommo-
However, the Eighth Circuit rejected the plaintiff's argument, noting that the employer had been unable to persuade its other employees to ignore the button. The court stated:

Although [the plaintiff's] religious beliefs did not create scheduling conflicts or violate dress code or safety rules, [her] position would require [the company] to allow [her] to impose her beliefs as she chooses. . . . To simply instruct [her] co-workers that they must accept [her] insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation.

C. Evaluating the Two Approaches

Although the trial court in Wilson purported to be employing a balancing approach, the Eighth Circuit's analysis more closely resembles the categorical approach adopted in Chalmers v. Tulon Co. of Richmond. In particular, both the Eighth Circuit in Wilson and the Fourth Circuit in Chalmers relied on that portion of Trans World Airlines, Inc. v. Hardison in which the Supreme Court indicated that Title VII's reasonable accommodation provision does not require employers to deny the rights of some employees in order to accommodate the religious practices of others.

Other courts have also interpreted Hardison as permitting an employer to avoid Title VII liability for failing to accommodate an employee's religious practice by demonstrating that the accommodation would have compromised the rights...
of other employees. In fact, employers relying on Hardison "have routinely defended refusals to accommodate religious practices by citing the effect that an accommodation might have on other employees, and courts have routinely held that such effects constitute undue hardship for the employer." One such court has suggested that any other interpretation would effectively compel the employer to "discriminate[] against its other employees on the basis of their religious beliefs.

Under this particular reading of Hardison, Title VII does not require an employer to impose upon other employees in order to accommodate the religious needs of any particular employee. Although this view typically arises in cases in which the potential accommodation would impair other employees' contractual seniority rights, it also appears to absolve employers of any obligation to permit an employee to

278. See, e.g., Brown v. Polk County, 832 F. Supp. 1305, 1314 & n.18 (S.D. Iowa 1993) (citing Hardison and stating that "an employer may . . . meet the undue hardship standard by establishing the accommodation would compromise the rights of others"), aff'd in part and rev'd in part, 61 F.3d 650 (8th Cir. 1995); EEOC v. Caribe Hilton Int'l, 597 F. Supp. 1007, 1011 (D.P.R. 1984) (citing Hardison for the proposition that "the duty to accommodate requires that the employer take certain affirmative measures to satisfy the employee's religious practices, but without . . . hindering the rights of other employees").

279. Kalsi v. New York City Transit Auth., 62 F. Supp. 2d 745, 757 (E.D.N.Y. 1998), aff'd, 189 F.3d 461 (2d Cir. 1999); cf. Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984) ("An employer may prove that an [accommodation] would involve undue hardship by showing that . . . its impact on coworkers. . . . would be more than de minimis.").


282. See McIntyre-Handy v. West Telemtkg. Corp., 97 F. Supp. 2d 718, 736 (E.D. Va. 2000) ("Imposing on other employees to create an accommodation is not required by Title VII.").

283. See, e.g., Cook v. Chrysler Corp., 981 F.2d 336, 338 (8th Cir. 1992). In fact, one court has asserted that "where the seniority issue does not arise, the opinion [in Hardison] is of little aid." Drazewski, 651 F. Supp. at 757; see also Brandes, supra note 31, at 620 ("It is difficult, if not impossible, to pull from the [Hardison] opinion law which will serve as precedent in other religious discrimination cases.").
engage in workplace religious proselytizing that other employees would find objectionable.\textsuperscript{284}

However, not only does this reasoning potentially emasculate the employer's affirmative obligation to accommodate religious practices,\textsuperscript{285} but it also actually may result in religious employees being treated less favorably than other protected Title VII classes.\textsuperscript{286} Indeed, to the extent the court in \textit{Wilson v. U.S. West Communications}\textsuperscript{287} held that the objections of an individual's coworkers were sufficient to preclude her from - and ultimately terminate her for - engaging in statutorily protected religious speech,\textsuperscript{288} the court's reasoning is contrary to the result likely to be reached in any other Title VII context.\textsuperscript{289}

The EEOC, for example, generally holds that the "preferences of coworkers" should provide no defense to the contention that an employer has violated Title VII.\textsuperscript{286} Courts have consistently reached the same conclusion.\textsuperscript{291} One set of com-

\textsuperscript{284} See, e.g., Venters v. City of Delphi, 123 F.3d 956, 977 (7th Cir. 1997) (noting that a supervisor may not "impose his religious views on . . . his subordinate"); Wilson v. U.S. W. Communications, 58 F.3d 1337, 1342 (8th Cir. 1995) ("Title VII does not require an employer to allow an employee to impose his religious views on others."); cf. Banks v. Serv. Am. Corp., 952 F. Supp. 703, 710 (D. Kan. 1996) ("Title VII does not necessarily require an employer to allow an employee to impose his religious views on customers.").

\textsuperscript{285} See Brown v. Gen. Motors Corp., 601 F.2d 956, 962 (8th Cir. 1979) ("Carried to its logical conclusion the . . . language [of \textit{Hardison}] would preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)."); cf. Drazewski, 651 F. Supp. at 759 (asserting that a literal reading of \textit{Hardison} "amounts to an emasculation of the statutory duty of accommodation"); Brandes, supra note 31, at 620 (stating that "the reasonable accommodation standard . . . was essentially emasculated by the majority opinion" in \textit{Hardison}).

\textsuperscript{286} See generally Beiner & DiPippa, supra note 15, at 577 (asserting that "religious employees are often treated less favorably than nonreligious employees in the workplace").

\textsuperscript{287} Wilson v. U.S. W. Communications, 58 F.3d 1337 (8th Cir. 1995).

\textsuperscript{288} See Berg, supra note 1, at 979 (indicating that the \textit{Wilson} court effectively held that "the negative reactions of other employees per se suffice to justify restricting an employee's speech").

\textsuperscript{289} See Beiner & DiPippa, supra note 15, at 605 (observing that "the courts do not permit employers to refuse to hire an employee based on sex or race . . . because of customer preference," and that it is "logical" to extend this reasoning to "co-worker preferences"); Berg, supra note 1, at 979 (noting that "an employer can in no way justify a refusal to hire blacks or women on the ground that hiring them would disturb other employees").

\textsuperscript{290} 29 C.F.R. § 1604.2(a)(iii) (1999).

\textsuperscript{291} See, e.g., Cain v. Hyatt, 734 F. Supp. 671, 681 (E.D. Pa. 1990) ("To permit an employer to circumvent the dictates of [an] antidiscrimination statute . . . because the prejudices of its employees commanded it to do so would be
mentators analyzing this principle has observed that "[i]f a woman caused a commotion on the job because she is, for example, the first woman firefighter, the courts certainly would not allow the fire department to justify her termination" on that basis.\(^{292}\)

The analysis ordinarily should be no different where the workplace "commotion" is caused by an employee's statutorily protected religious speech,\(^{293}\) which, in light of the employer's affirmative duty to accommodate religious practices, is arguably entitled to even more protection than an employee's protected gender status.\(^{294}\) As has been noted elsewhere:

The point of antidiscrimination laws is to open up employment opportunities for individuals in spite of differences. Allowing co-workers to stifle the religious beliefs of others (often resulting in the termination or constructive discharge of the religious employee) is antithetical to these principles, and results in a burden being placed on religious employees because of their religion.\(^{295}\)

This reasoning suggests that despite the seemingly contrary language in *Hardison*,\(^{296}\) Title VII may require an employer to accommodate religious proselytizing\(^{297}\) even in cases where the accommodation would be "detrimental to other employees."\(^{298}\) In this respect, proselytizing appears to be no dif-


\(^{293}\) See Miller v. Drennon, 56 Fair Empl. Prac. Cas. (BNA) 274, 281 (D.S.C. 1991) ("If an employee could pick and choose which of his fellow employees he is willing to work with based on those employees' willingness to comply with his notion of moral or [religious] behavior, the workplace would be chaotic.").

\(^{294}\) See Kaminer, *supra* note 30, at 97 (observing that "religious speech is entitled to special protection under ... Title VII"); cf. Beiner & DiPippa, *supra* note 15, at 595 ("Unlike other forms of discrimination protected [sic] under Title VII, religion is accorded additional protection: an employer must reasonably accommodate an employee's religious beliefs.") (footnotes omitted).


\(^{296}\) See supra notes 187-192 and accompanying text.

\(^{297}\) See Berg, *supra* note 1, at 983 ("Had the Eighth Circuit [in *Wilson*] taken the concept of accommodation seriously, it would have required more than a few negative reactions from employees to justify the employer's restriction of [the plaintiff's] speech.").

ferent than many other religious practices an employer may be required to accommodate, even though they "might be perceived as 'disturbing' to others." 299

In short, an employer that categorically prohibits workplace religious proselytizing because other employees may find that conduct objectionable 300 risks a finding that it has violated Title VII. 301 As one court has stated:

The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee . . . such grumbling must yield to the single employee's right to practice his religion . . . . [However, it] is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC . . . has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce chaotic personnel problems. 302

The preceding discussion suggests that an employer must

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299. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1020 (4th Cir. 1996); see Berg, supra note 1, at 996 ("A wide spectrum of viewpoints may offend adherents of particular religions."); see also Charlotte Elizabeth Parsons, Doing Justice and Loving Kindness: A Comment on Hostile Environments and the Religious Employee, 19 U. ARK. LITTLE ROCK L.J. 643, 660 (1997) ("Just about any behavior could be considered religiously offensive to someone.").

300. See Parsons, supra note 299, at 653 ("Other employees may find [religious] activities offensive or bothersome, particularly if they are the target of the conduct as in the case of proselytizing."); see also Stern, supra note 1, at 1365 ("In many cases in our Westernized society, with its strongly held notions of religious privacy . . . attempting to force people into compliance with religious norms is sure to be resented by many . . . .")

301. See Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) ("[U]ndue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief."); see also Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994) ("[S]imply alleging the need to avoid . . . harassment is not enough."); cf. EEOC v. Arlington Transit Mix Inc., 734 F. Supp. 804, 809 (E.D. Mich. 1990) (holding that an employer had not violated Title VII in part because it had permitted an employee who was alleging religious discrimination "to proselytize coworkers on the job"), rev'd on other grounds, 957 F.2d 219 (6th Cir. 1991).

balance a proselytizing employee’s statutory right to an accommodation against its own countervailing right to prevent workplace disruption and maintain production. Indeed, one court has noted that an approach which balances “the religious interest of the employee against the business interest of the employer” is “the only one which conforms to the [statutory] language.”

Although its reading of Hardison is questionable, other aspects of the Eighth Circuit’s opinion in Wilson v. U.S. West Communications reflect the type of balancing suggested by this analysis. The Wilson court clearly recognized that employers have both a statutory obligation to accommodate an employee’s religious views and a countervailing right to prevent workplace disruption. It then effectively held that by offering the plaintiff the option of covering her anti-abortion button while she was working, the employer had properly balanced these competing interests.

In particular, the employer offered the plaintiff an accommodation that would have permitted her to comply with her religious vow to wear the button, while simultaneously respecting her coworkers’ desire not to be exposed to a form of religious expression they found to be “offensive and disturb-

303. See Pagana-Fay v. Wash. Suburban Sanitary Comm’n, 797 F. Supp. 462, 474 (D. Md. 1992) (“The protection afforded by Title VII is not absolute, and . . . otherwise protected conduct may be so disruptive or inappropriate as to fall outside the statute’s protection.”).

304. See Rollins v. Fla. Dep’t of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989) (observing that “the protection afforded by [Title VII] is not absolute,” but must be balanced against “an employer’s legitimate demand[] for . . . a generally productive work environment”).


306. See supra notes 273-305 and accompanying text.


308. See Marianne C. DelPo, Never on Sunday: Workplace Religious Freedom in the New Millennium, 51 ME. L. REV. 341, 349 n.62 (1999) (asserting that Wilson “was decided as much on the reasonableness of the accommodation offered . . . as it was on the unduefulness of the hardship to be created”).

309. See Wilson, 58 F.3d at 1342.

310. See id. at 1341.

311. See id. at 1339-40.

312. See id. at 1340, 1342.

313. See id. at 1342. Another court discussing the Eighth Circuit’s decision in Wilson has explained: “In other words, it was not a requirement of Wilson’s religious vow that she display the button in a place where everyone with whom she came in contact would see it.” Anderson v. U.S.F. Logistics (IMC), Inc., 84 Fair Empl. Prac. Cas. (BNA) 1581, 1591 (S.D. Ind. 2001).
The plaintiff's acceptance of this accommodation thus would have eliminated the "time robbing" problems and other workplace disruption that had been caused by her co-workers' reactions to her means of expressing her religious beliefs.

In most situations, the balancing of interests this approach requires will be highly fact-sensitive. Thus, the extent of an employer's duty to accommodate religious proselytizing will typically need to be resolved on an ad hoc basis, with other Title VII cases likely to be of relatively little assistance. As one federal appellate court, which was quoted

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314. Wilson, 58 F.3d at 1339.
315. Id. In this context, "time robbing" refers to "negative behavior by co-workers which has a disruptive effect on the workplace." Kaminer, supra note 30, at 110 n.161. One pair of commentators has asserted that "the courts are reluctant to give way to the religious employee's practices in the face of resulting time robbing." Beiner & DiPippa, supra note 15, at 601-02.
316. Wilson, 58 F.3d at 1341. Alluding to the plaintiff's refusal to accept the employer's proposed accommodation, the trial court in Wilson noted that "cooperation of both an employee and an employer is needed in finding a 'reasonable accommodation' that reconciles an employee's religious practices or beliefs with the needs of an employer's business." Wilson v. U.S. W. Communications, Inc., 860 F. Supp. 665, 672 (D. Neb. 1994), aff'd, 58 F.3d 1337 (8th Cir. 1995) (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986)). As another court has explained:
A mutuality of obligation inheres in the employer-employee relationship. Title VII does not supplant this mutuality, but, using it as a necessary background, simply adds detail to certain areas of the relationship which are to remain free of discrimination. [The reasonable accommodation provision] thus has little meaning if it is considered only at an abstract level apart from the complementary nature of the duties that employer and employee owe one another, for a successful accommodation will rarely be possible unless employer and employee make mutual efforts.

Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977).
317. See Kalsi v. New York City Transit Auth., 62 F. Supp. 2d 745, 757 (E.D.N.Y. 1998) ("Whether accommodation of an employee's religious practice would cause an employer undue hardship must be determined based on the particular factual context of each case.") (internal quotation marks and citation omitted), aff'd, 189 F.3d 461 (2d Cir. 1999); Beiner & DiPippa, supra note 15, at 607 ("Exactly how far the accommodation requirement should extend is a difficult question that must be addressed in each individual context in which an employee requests [an] accommodation.").
318. See Brown v. Polk County, 61 F.3d 650, 655 (8th Cir. 1995) ("[T]he precise reach of the employer's obligation to [accommodate] its employees . . . must be determined on a case-by-case basis.") (quoting Beadle v. Hillsborough County Sheriff's Dept, 29 F.3d 589, 592 (11th Cir. 1994)).
319. See Padon v. White, 465 F. Supp. 602, 608 (S.D. Tex. 1979) ("Each of the cases in this area of the law must in effect stand on its own feet. No cases will be located which are completely identical to one another on the facts.").
with approval by the trial court in Wilson,\textsuperscript{320} has observed:

The term "reasonable accommodation" is a relative term and cannot be given a hard and fast meaning. Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances of the individual employer-employee relationship.\textsuperscript{321}

However, one court has suggested, in a slightly different context, that employers consider the following factors when engaging in this type of balancing: "Pertinent considerations include whether the [expression] impairs discipline by superiors or harmony by coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."\textsuperscript{322}

In addition, employers addressing workplace religious proselytizing may be able to glean further guidance from the relatively well-developed rules governing their right to regulate union solicitation,\textsuperscript{323} a form of workplace speech protected under another important federal labor statute,\textsuperscript{324} the National

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\textsuperscript{320} See Wilson, 860 F. Supp. at 672.

\textsuperscript{321} Redmond v. GAF Corp., 574 F.2d 897, 902-03 (7th Cir. 1978).

\textsuperscript{322} Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430, 1436 (C.D. Cal. 1994) (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)); cf. Altman v. Minn. Dep't of Corr., 80 Fair Empl. Prac. Cas. (BNA) 1166, 1170-71 (D. Minn. 1999) ("In determining whether an activity negatively affects the effective functioning of the employer's enterprise, consideration is given to whether the religious exercise creates disharmony in the workplace, impedes the employee's ability to perform his duties, or impairs working relationships with other employees.") (internal punctuation and citation omitted).

\textsuperscript{323} This analogy has generally been ignored by the courts and other commentators, even though the "law on no-solicitation rules is of particularly wide practical application to employers." Sandusky Mall Co., 162 L.R.R.M. (BNA) 1191, 1199 (1999) (Hurtgen, dissenting).

\textsuperscript{324} See generally Local No. 1 (ACA), Broadcast Employees of Int'l Bhd. of Teamsters v. Int'l Bhd. of Teamsters, 419 F. Supp. 263, 277 (E.D. Pa. 1976) ("Free speech is clearly fundamental to the national labor policy."); aff'd in part and rev'd in part, 614 F.2d 846 (3d Cir. 1980); Riesbeck Food Mkt., Inc., 315 N.L.R.B. 940, 941 (1994) (noting that "freedom of speech has long been a basic tenet of Federal labor policy") (citing Letter Carriers v. Austin, 418 U.S. 264, 270 (1974)).
V. ANALOGIZING RELIGIOUS PROSELYTIZING AND UNION SOLICITATION

A. The Treatment of Union Solicitation Under the NLRA

Sections 7 and 8(a)(1) of the NLRA make it unlawful for an employer to interfere with or restrain employees in the exercise of their statutory right to organize or "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." These provisions have been interpreted as making employee efforts to solicit union support a category of statutorily protected speech.

However, the statutory right to engage in union solicitation is not absolute, and must be balanced against the employer's right "to limit the use of its premises and to require employees on the payroll to work in return for their wages."
Stated another way, although employees have a "statutory right... to engage in union solicitation at their place of work," they can be prohibited from exercising that right in a manner that disrupts production.\(^3\)\(^3\)\(^3\)\(^3\)

The federal agency charged with responsibility for administering and enforcing the NLRA,\(^3\)\(^3\)\(^3\)\(^5\) the National Labor Relations Board ("NLRB" or the "Board"),\(^3\)\(^3\)\(^3\)\(^6\) has struck this balance in favor of a rule that generally permits employers to prohibit their employees from engaging in statutorily protected speech during "working time."\(^3\)\(^3\)\(^3\)\(^9\) The Board holds that prohibiting union solicitation during working time\(^3\)\(^3\)\(^3\)\(^8\) is permissible because such a prohibition "is presumed to be directed toward, and to have the effect of, preventing interference with production."\(^3\)\(^3\)\(^3\)\(^9\)

On the other hand, employers generally cannot prohibit their employees from engaging in union solicitation during nonworking time,\(^3\)\(^3\)\(^3\)\(^4\) even though some employees may object

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334. See Denver Tent & Awning Co., 47 N.L.R.B. 586, 588 (1943) (Reilly, concurring) (noting that employers can place "reasonable" limitations on workplace union solicitation in order to "avert[] disruption of production").


336. For an academic discussion of the Board's role in enforcing the NLRA, see William P. Murphy, The National Labor Relations Board—An Appraisal, 52 MINN. L. REV. 819 (1968).


338. The Board draws a distinction between "working time" and "working hours." See Robert's Tours & Transp., Inc., 283 N.L.R.B. 13, 14 (1987). A rule prohibiting solicitation during "working hours" is presumptively unlawful, "because that term connotes periods from the beginning to the end of work shifts, periods that include the employees' own time." Our Way, 268 N.L.R.B. at 394-95.

339. Daylin, Inc., Discount Div., 198 N.L.R.B. 281, 281 (1972), enforced, 496 F.2d 484 (6th Cir. 1974); see also Beverly Enters.-Haw., Inc., 326 N.L.R.B. 335, 365 (1998) (Chairman Gould, dissenting) (observing that "rules that may—in certain circumstances—restrict Section 7 activity during working time... serve the fundamental and legitimate business purpose of maintaining production and discipline"); cf. NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 759, 762 (5th Cir. 1960) ("The employer may not muzzle its employees, but it may expect full and undiverted attention to its affairs while the employee is actively at the post of his duties.").

340. See Rest. Corp. of Am. v. NLRB, 827 F.2d 799, 806 (D.C. Cir. 1987); see also St. Agnes Med. Ctr. v. NLRB, 871 F.2d 137, 143 (1989) (observing that "a ban on union solicitation... during free time or in nonworking areas is presumptively invalid").
to being solicited at any time.\textsuperscript{341} This form of workplace speech does not lose its statutory protection "simply because a solicited employee . . . feels 'bothered' or 'harassed' or 'abused' when fellow workers seek to persuade him or her about the benefits of unionization.\textsuperscript{342}

One Board administrative law judge\textsuperscript{343} explained this expansive interpretation of the right to engage in union solicitation\textsuperscript{344} in the following terms:

[T]he right of employees to discuss unionism, pro or con, necessitates that the exercise of those rights not be limited to situations where participants are in agreement. Disagreement is a normal part of discussion. Annoyance to some on some occasions is unavoidable. . . . [T]here inevitably will be some employees personally annoyed by persistent pro or antiunion proselytizing. Those so annoyed have no individual right under the [NLRA] to handcuff the free speech of others with whom they do not agree.\textsuperscript{345}

In summary, union solicitation during nonworking time cannot be prohibited,\textsuperscript{346} even if it occurs on company property,\textsuperscript{347} unless it is disruptive or otherwise interferes with

\textsuperscript{341} See, e.g., Comm. Hosps. of Cent. Cal., Nos. 32-CA-15864 et al., 1998 NLRB LEXIS 710, at *90 (Sept. 18, 1998) (referring to "an employee who objects to union solicitation in the cafeteria"). See generally NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 759, 762 (5th Cir. 1960) ("Solicitation comprehends the approach by one or more advocates for a cause to those who are either uncommitted or even hostile with a view of persuading such persons to a contrary course of action.").


343. Hearings involving alleged violations of an employee's right to solicit union support under section 10 of the NLRA are held before administrative law judges, whose decisions are then subject to Board review. See 29 C.F.R. §§ 102.15-16, 102.34, 102.45(a) & 102.48(b) (1999).

344. See generally Korn, supra note 330, at 375 (referring to the "broad policy governing workplace solicitation by employees") (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)).


production.\textsuperscript{348} As the Board has stated:

[T]ime outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.\textsuperscript{349}

B. Extending the Board’s Treatment of Statutorily Protected Speech to Title VII Cases Involving Religious Proselytizing

The propriety of extending these NLRA principles to Title VII cases is suggested by the fact that the types of speech protected under both statutes trace their origins to the First Amendment.\textsuperscript{350} Thus, permitting employers to prohibit statu-
torily protected speech during working time, but generally not during an employee's own time, may be equally appropriate in Title VII cases involving employee religious proselytizing.

First, employers attempting to address religious proselytizing are no less entitled to maintain production than employers regulating speech protected by the NLRA. In fact, it is clear from the legislative history that Title VII was not intended to "diminish traditional management prerogatives," and maintaining production is such a prerogative. Thus,

351. See, e.g., Beasley v. Health Care Serv. Corp., 940 F.2d 1085, 1087 (7th Cir. 1991) (discussing an employer's rule that "proselytizing on company time was not permitted"); Silo v. CHW Med. Found., 103 Cal. Rptr. 2d 825, 829 (Ct. App. 2001) (referring to a "rule prohibiting religious discussions during work time"); Brown v. Polk County, 832 F. Supp. 1305, 1314 (S.D. Iowa 1993) ("Allowing supervisors and employees to witness and pray on [company] time would work an undue hardship ...."), aff'd in part and rev'd in part, 61 F.3d 650 (8th Cir. 1995).

352. See, e.g., Kelly v. Mun. Court, 852 F. Supp. 724, 731 (S.D. Ind. 1994) (indicating that employees should be "free ... to evangelize while not working"). While acknowledging the inherently "economic" nature of the workplace, one religious scholar has nevertheless asserted that "free periods before, during and after work can be opportunities for appropriate faith sharing." FRANK P. DESIANO, THE EVANGELIZING CATHOLIC 47, 53 (1998).

353. See Estlund, supra note 96, at 738-39 ("[G]iven the employer's recognized power under the NLRA to limit workplace discourse where necessary to maintain production or discipline, it requires no great departure to allow the employer to restrict workplace discourse ... in order to maintain an atmosphere of tolerance and equality.") (internal quotation marks and footnote omitted). See generally Our Way, Inc., 268 N.L.R.B. 394, 394 (1983) ("Working time is for work' is a long-accepted maxim of labor relations.") (quoting Peyton Packing Co., 49 N.L.R.B. at 843).

354. See Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 260 (4th Cir. 1998) ("Title VII was not intended to immunize ... [un]productive behavior at work.") (internal quotation marks and citation omitted); Garrett v. Mobil Oil Corp., 395 F. Supp. 117, 124 (W.D. Mo. 1975) (asserting that the "overriding" policy consideration in Title VII cases is "efficient and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions") (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)), aff'd, 531 F.2d 892 (8th Cir. 1976).


courts in Title VII religious discrimination cases have specifically held that a loss of production imposes "more than a de minimis cost" on the employer,\(^\text{357}\) thus relieving it of any duty to adopt a religious accommodation that would impede production.\(^\text{358}\)

On the other hand, there is no reason to believe that workplace religious proselytizing is inherently more disruptive than union solicitation,\(^\text{359}\) which "[b]y its nature ... may be disruptive to the maintenance and operation of the employer's business and essential internal discipline."\(^\text{360}\) Indeed, while proselytizing that rises to the level of actionable harassment obviously may disrupt the workplace,\(^\text{361}\) less strident forms of proselytizing\(^\text{362}\) are unlikely to have the same impact.\(^\text{363}\)

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\(^\text{357}\) Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994); see also Stevenson v. Southport, Inc., 73 Fair Empl. Prac. Cas. (BNA) 1789, 1792 (E.D. La. 1997) (finding that a "loss of production would require [the employer] to bear more than a de minimis cost").

\(^\text{358}\) See Cooper, 15 F.3d at 1380; cf. Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (noting that "loss of production ... can amount to undue hardship").

\(^\text{359}\) See Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1215 n.8 (9th Cir. 1996) (finding "nothing ... to indicate that religious materials are more likely to disrupt harmony in the workplace than any other materials on potentially controversial topics such as ... labor relations"). Similarly stated:

To the extent it may be argued that union organizational solicitation [is] a matter of controversy among employees and therefore might be expected to be more disruptive than other types of solicitation, I find such activity to be ... akin to [religious] proselytizing which also has the potential to engender passionate feelings among those solicited.

Webco Indus., Inc., 327 N.L.R.B. 172, 186 n.10 (1998), enforced, 217 F.3d 1306 (10th Cir. 2000).

\(^\text{360}\) NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 759, 762 (5th Cir. 1960).

\(^\text{361}\) See Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994) ("Harassment may interfere with discipline by superiors or harmony with coworkers; it may have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary; and it may interfere with the regular operation of the [employer's business]."); see also Estlund, supra note 96, at 711 ("Speech that contributes to a hostile workplace environment ... is usually 'disruptive' of workplace relations ... ").

\(^\text{362}\) See Laycock, supra note 25, at 57 (indicating that proselytizing is only "sometimes offensive"); Schopf, supra note 37, at 58 (noting that "proselytization ... may not be sufficiently pervasive or hostile to rise to the level of harassment").

\(^\text{363}\) See Schopf, supra note 37, at 58 ("Most religious activity in the workplace will not involve harassment and need not be discouraged."); cf. Goldsmith,
In addition, one rationale for permitting restrictions on religious proselytizing,\textsuperscript{364} union solicitation,\textsuperscript{365} and various other forms of statutorily protected workplace speech\textsuperscript{366} is the fact that other employees are likely to be a captive audience\textsuperscript{367} for the individual engaging in the speech.\textsuperscript{368} However, that is not necessarily true where the speech takes place during nonworking time,\textsuperscript{369} because in that situation employees who

\textit{supra} note 128, at 1438 (stating that "demands to change one's religious beliefs might be innocuous or merely annoying when coming from . . . a co-worker").

364. See, e.g., Baz v. Walters, 782 F.2d 701, 709 (7th Cir. 1986) (upholding the discharge of an employee for "proselytizing upon a captive audience"); cf. Church of the Rock v. City of Albuquerque, 84 F.3d 1273, 1280 (10th Cir. 1996) (addressing the contention that "members of a captive audience . . . are vulnerable to religious proselytizing") (internal quotation marks omitted); Campbell v. Cauthron, 623 F.2d 503, 509 (8th Cir. 1980) (concluding that "religious proselytizing" should not be "allowed to take place in such a manner as to make it nearly impossible to 'escape' the preaching").

365. In NLRA cases, the "captive audience" issue typically arises in cases involving "a peculiar sui generis kind of employer 'solicitation.'" Beverly Enterprises-Hawaii, Inc., 326 N.L.R.B. 335 (1998) (Chairman Gould, dissenting) (emphasis added); see also Note, NLRB Regulation of Employer's Pre-Election Captive Audience Speeches, 65 Mich. L. Rev. 1236 (1967) (passim). However, it is not necessarily limited to that situation:

If compulsory convocation of employees for the exposition of antiunion sentiment is unlawful, a similar round-up for pronion purposes would be equally so. If any right is involved it is that of the employees. If . . . that right is transgressed by involuntary subjection to exhortation against unions, it is equally traversed by unwilling congregation for union harangue.


366. See, e.g., Johnson, 865 F. Supp. at 1438 (indicating that "sexually oriented" expression is a "form[] of protected speech" that may be regulated by an employer in the interest of "protecting . . . a captive audience").

367. As the term implies, a "captive" audience is "one which cannot easily avoid exposure to the speech." State v. Kipf, 450 N.W.2d 397, 407 (Neb. 1990). For a general academic discussion of this aspect of free speech doctrine, see G. Michael Taylor, Comment, "I'll Defend to the Death Your Right to Say It . . . But Not to Me" - The Captive Audience Corollary to the First Amendment, 1983 S. Ill. U. L.J. 211.


might be offended by the speech will often (but not always) be "reasonably free to walk away."\textsuperscript{370}

This reasoning suggests that, like the NLRA,\textsuperscript{372} Title VII generally should require employers to accommodate protected speech that occurs during nonworking time.\textsuperscript{373} The mere fact that some employees might be offended by religious proselytizing that takes place even at that time\textsuperscript{374} does not provide a sufficient basis for prohibiting speech that is not necessarily directed at them,\textsuperscript{375} but instead may be addressed to "other, perhaps willing, listeners."\textsuperscript{376} Under this analysis,\textsuperscript{377} prosely-
tizing during nonworking time should be prohibited only if it is addressed to captive and unwilling listeners, or otherwise demonstrably disrupts the workplace.

C. Application of the Distinction Between Working Time and Nonworking Time in Title VII Cases

In *Gillard v. Sears, Roebuck & Co.*, the court distinguished between working time and an employee's own time in analyzing an employer's duty to accommodate a religious practice protected by Title VII. The plaintiff in *Gillard* was discharged for low productivity, due in part to her “reading of the Bible during working hours.” The plaintiff brought suit under Title VII claiming that her termination on this basis constituted unlawful religious discrimination.

The court disagreed. Noting that an employer is not required to accommodate a religious practice that causes undue hardship to the conduct of its business, the court held

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378. Because their listeners would be a captive audience (and their conduct potentially disruptive), even nonworking employees presumably can be prohibited from proselytizing “in an area where [other] employees are working or performing company functions.” NLRB v. Mueller Brass Co., 501 F.2d 680, 685 n.6 (5th Cir. 1974) (NLRA case); cf. Hampton v. Conso Prods., Inc., 808 F. Supp. 1227, 1234 (D.S.C. 1992) (indicating that it is not a violation of Title VII to discipline an employee for conduct that is “disruptive to the production and morale of her co-workers”).

379. See *Richards*, supra note 199, at 758 (“There is little doubt that some employee speech and proselytizing can cause controversy or significantly reduce the efficiency of the workplace.”); cf. *Johnson*, 865 F. Supp. at 1439 (“[S]imply alleging the need to avoid... harassment is not enough... [T]he [employer] must show that the threat of disruption is ‘actual, material and substantial.’”) (quoting *Roth v. Veterans Admin.*, 856 F.2d 1401, 1407 (9th Cir. 1988)).


381. *See id.* at 1276. *See generally Thermidor v. Beth Israel Med. Ctr.*, 683 F. Supp. 403, 412 (S.D.N.Y. 1988) (“It is widely acknowledged that reasons such as low productivity... constitute legitimate nondiscriminatory reasons justifying discharge.”).


383. *See id.* at 1274.

384. *See id.* at 1276.

385. *See id.*

386. *See id.* (citing *Cooper v. Gen. Dynamics*, Convair Aerospace Div., 533 F.2d 163, 170 (5th Cir. 1976), *reh'g denied*, 537 F.2d 1143 (5th Cir. 1977)). There was no contention that the plaintiff's Bible reading was not a "religious practice" within the meaning of Title VII. *See 42 U.S.C. § 2000e(j) (1994); cf.*
that the employer was entitled to prohibit its employee from engaging in religious activity during working time. In reaching this result, the court emphasized that the plaintiff had not been prohibited from reading the Bible during her breaks.

This reasoning has occasionally been extended to religious proselytizing. In Kelly v. Municipal Court, for example, the court indicated that an employer could properly discipline an employee for reading the Bible and “proselytizing his religious beliefs during working hours,” if he “remained free to study the Bible and to evangelize while not working.” As in the analogous NLRA context, the presumption underlying this holding is that religious proselytizing and other statutorily protected forms of expression are unlikely (or at least less likely) to disrupt the workplace if they are permit-

Roberts v. Madigan, 921 F.2d 1047, 1061 (10th Cir. 1990) (Barrett, J., dissenting) (describing an employee’s “desire to read from his Bible” as the “exercise of a religious practice”).

387. See Gillard, 32 Fair Empl. Prac. Cas. (BNA) at 1276; see also Linde  

eman & Grossman, supra note 55, at 245 n.160 (citing Gillard for the proposition that an employer need not accommodate religious activities “during working time”).

388. See Gillard, 32 Fair Empl. Prac. Cas. (BNA) at 1276 n.5. See generally Helland v. S. Bend Cnty. Sch. Corp., 93 F.3d 327, 331 (7th Cir. 1996) (discussing an employee’s “right to carry his Bible to work and to read the Bible in privacy during job breaks”).

389. See Tucker v. Cal. Dep’t of Educ., 97 F.3d 1204, 1211 n.3 (9th Cir. 1996) (suggesting that an employer could lawfully discipline a proselytizing employee whose conduct caused him to spend “more time than other employees in nonwork related conversation,” or otherwise “diverted him from doing his job effectively”); Wolf, supra note 23, at 131 (“[T]he employer can squelch the activity if . . . an employee’s religious proselytizing causes the workplace to be less productive . . . because the employee spends time talking when he or she should have been working . . .”).


391. Id. at 729; cf. Brown v. Polk County, 832 F. Supp. 1305, 1314 (S.D. Iowa 1993) (holding that an employer was not required to accommodate an employee’s “need to pray and quote scripture during working hours”), aff’d in part and rev’d in part, 61 F.3d 650 (8th Cir. 1995).


393. See, e.g., NLRB v. Gale Prods., Div. of Outboard Marine Corp., 337 F.2d 390, 392-93 (7th Cir. 1964) (Kiley, J., dissenting) (finding “no evidence . . . to show that [union] solicitation on nonworking time would disrupt work”).

394. The Board has acknowledged that there are circumstances in which an employer may legitimately conclude that union solicitation by employees even during nonworking time would “disrupt its business.” McDonald’s Corp., 205 N.L.R.B. 404, 408 (1973); see also Walton Mfg. Co., 126 N.L.R.B. 697, 697 (1960) (stating that “rules which prohibit union solicitation . . . on company property by employees during their nonworking time . . . may be validated by evidence
A similar result was reached in *Quental v. Connecticut Commission on the Deaf & Hearing Impaired*. The plaintiff in *Quental* was employed by a state agency that provided interpreting services for deaf and hearing-impaired clients. While working on these assignments, the plaintiff occasionally shared her personal religious beliefs with clients for whom she was interpreting.

When the plaintiff's employer received notice of the first such incident, her supervisor verbally counseled her about her inappropriate conduct, which was contrary to her professional ethical obligation not to "counsel, advise or inject personal opinions" while providing interpreting services. After its receipt of a subsequent complaint concerning similar conduct with another client, the employer issued the plaintiff a formal written reprimand. This reprimand stated that while the plaintiff was "free to hold her religious beliefs and live by her religious convictions, during the time she [was] being paid . . . to provide interpreting services, she should not promote her religious beliefs."

After receiving this reprimand, the plaintiff filed suit under Title VII. Among other things, she claimed that the employer violated the Act by disciplining her for expressing that special circumstances make the rule necessary in order to maintain production or discipline").

395. *See generally* *Quental v. Conn. Comm'n on the Deaf & Hearing Impaired*, 122 F. Supp. 2d 133, 138 (D. Conn. 2000) (indicating that "speech which is proven to be disruptive to the employer or to the workplace is not protected speech").


397. *See id.* at 135-36.

398. *See id.* at 136-37.

399. *See id.*


401. *See Quental*, 122 F. Supp. 2d at 137.

402. *Id.* at 142 (bracketing altered); *cf. Silo v. CHW Med. Found.*, 103 Cal. Rptr. 2d 825, 829 (Ct. App. 2001) (describing an employee who was "warned not to engage in [religious] discussions on company time"). *See generally Pagana-Fay v. Wash. Suburban Sanitary Comm'n*, 797 F. Supp. 462, 474 (D. Md. 1992) ("Although [an employee has] every right to speak out on behalf of her cause and to be [an] activist . . ., she [goes] too far when she permit[s] her beliefs to adversely affect her day-to-day employment activities.").

403. *See Quental*, 122 F. Supp. 2d at 135, 137.
her religious views to clients while on work assignment, because it did not attempt to accommodate her beliefs, and could not establish that doing so would have constituted an undue hardship. The employer in turn argued that it had, in fact, reasonably accommodated the plaintiff's religious practices, and that it could not have accommodated her further without undermining its mission, purpose, and credibility with its clients.

The court agreed with the employer on both points. It held that allowing the plaintiff to continue to promote her religious views to clients would have constituted an undue hardship because it would have permitted her to violate a professional obligation to which both she and the employer were ethically and contractually bound. Without referring to the Board's analogous approach to speech protected under the NLRA, the court further held that the employer had reasonably accommodated the plaintiff's religious practices because it "did not restrict [her] from sharing her religious beliefs or religious tracts with others outside of the context of providing interpreting services to her clients, for example, with her co-workers or non-clients."

D. The "Disparate Treatment" Exception to the Employer's Right to Prohibit Statutorily Protected Speech During Working Time

Under the approach suggested here, employers may prohibit their employees from proselytizing during working time

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404. See id. at 135.
405. See id. at 136, 141-42.
406. See id. at 141. See generally Padon v. White, 465 F. Supp. 602, 607-08 (S.D. Tex. 1979) ("[A]n employer has an affirmative obligation under Title VII to attempt to accommodate his operations to his employee's religious beliefs. An employer may demonstrate that he has complied with his legal obligation by showing any additional accommodation would involve 'undue hardship.'").
407. See Quental, 122 F. Supp. 2d at 136 ("[T]he court concludes that . . . the [employer] reasonably accommodated [the plaintiff's] religious practices, and to the extent that it did not, it could not do so without undue hardship.").
408. See id. at 142.
409. See id. at 136.
410. See generally Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 233 (1st Cir. 1976) ("[T]he competing interests that weigh against granting employees carte blanche protection are the same in the NLRA and Title VII contexts: the employer's right to run his business must be balanced against the rights of the employee . . .").
411. Quental, 122 F. Supp. 2d at 142.
regardless of whether such conduct would rise to the level of religious harassment. However, this is generally true only if the employer also prohibits its employees from engaging in comparable nonreligious "proselytizing" during working time.

Apart from its affirmative statutory duty to accommodate its employees' religious practices, an employer may be liable for restricting workplace religious proselytizing under Title VII's more traditional disparate treatment theory if it does not similarly restrict speech that is not religiously motivated. This theory permits an employee to recover if she can establish that she "is, or was, treated less favorably than others because of her religious beliefs." As one commentator has stated:

If the employer has singled out religious speech for restriction, while permitting other kinds of speech to go unrestricted, then the speaker himself will be able to claim that he has been discriminated against in the terms and conditions of his employment on the basis of his religion. The employee in such a case asserts a simple theory of disparate treatment on the basis of religion.

Once again, this limitation on the employer's right to

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412. See Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430, 1438 (C.D. Cal. 1994) (suggesting that an employer may restrict its employees' nonharassing workplace expression "during hours in which their freedom is already restricted by the necessities of [their] duties").

413. See generally Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 825 n.1 (5th Cir. 1999) (Jolly, J., dissenting) ("Free market enthusiasts and environmentalists can attempt to 'proselytize' as well as Baptists and Mormons."); see also Berg, supra note 1, at 971 (observing that "an employee may bother and annoy other employees about political or social topics").

414. See generally Beiner & DiPippa, supra note 15, at 582 ("[U]nlke other forms of discrimination, an employee can sue her employer for failure to accommodate her religious beliefs.").

415. See Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1017 (4th Cir. 1996) ("Courts have recognized that employees may utilize two theories in asserting religious discrimination claims. These theories are denominated as the 'disparate treatment' and 'failure to accommodate' theories.") (authority omitted).

416. See Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1215 (9th Cir. 1996) (concluding that an employer's prohibition of workplace advocacy is "unreasonable" if "its sole target is religious speech").

417. Mann v. Frank, 7 F.3d 1365, 1370 (8th Cir. 1993). For the author's previous discussion of this employment discrimination theory, see Michael D. Mobberly, Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases, 24 N.M. L. REV. 89 (1994).

418. Berg, supra note 1, at 976.
regulate religious proselytizing is consistent with the treatment of protected speech under the NLRA. The seminal Board decision in this area is Dutch Boy, Inc., which held that an employer violates section 8(a)(1) of the NLRA by discriminatorily applying an otherwise valid rule limiting union solicitation in the workplace. The courts have agreed with the Board's conclusion that rules prohibiting solicitation only during working time are unlawful if they are applied discriminatorily.

VI. CONCLUSION

Striking the proper balance between a religious employee's right to proselytize and the right of other employees to work in an environment free from religious harassment has been described as the "biggest challenge for the next cen-

419. See generally Rest. Corp. of Am. v. NLRB, 827 F.2d 799, 804-05 (D.C. Cir. 1987) ("The law is clear that a valid no-solicitation rule applied in a discriminatory manner or maintained for discriminatory reasons may not be enforced against union solicitation.").


422. See Dutch Boy, 262 N.L.R.B. at 6; see also Predicasts, Inc., 270 N.L.R.B. 1117, 1119 (1984) (citing Dutch Boy for the proposition that an employer's "[p]romulgation of a rule, though otherwise valid on its face, solely to curtail union activity and not for any legitimate business purpose, constitutes an unfair labor practice"). But cf. Sandusky Mall Co., 162 L.R.R.M. (BNA) 1191, 1201 (1999) (Hurtgen, dissenting) (asserting that "the employer may discriminate among different . . . types of conduct when one would alienate customers or otherwise disrupt or retard business and the other would not").


424. See, e.g., Revere Camera Co. v. NLRB, 304 F.2d 162, 165 (7th Cir. 1962) ("[W]here an employer discriminates in the enforcement of a no solicitation rule in favor of anti-union solicitation by employees the employer's act is an unfair labor practice."); NLRB v. Cent. Power & Light Co., 425 F.2d 1318, 1323 (5th Cir. 1970):

A no-solicitation rule that on its face covers work time is presumptively valid, but only in the absence of evidence that it was enacted for a discriminatory purpose. . . . Coverage of non-work time or time when talk cannot interfere with work, and especially non-coverage of other subjects of conversation, may give rise to an inference of anti-union purpose.
tury in this area of employment law." Because the Act itself provides no guidance in determining the scope of an employer's duty to accommodate its employees' religious practices, and the Title VII case law in this area is limited, "the dividing line between permissible and unacceptable proselytizing may be difficult to locate."

This article argues that relatively settled rules developed in cases involving analogous speech protected under the NLRA can provide much-needed guidance in these Title VII cases. These rules would permit an employer to limit or prohibit proselytizing during working time, unless it failed to similarly limit comparable workplace speech that was not religiously motivated. However, employers could regulate religious proselytizing during nonworking time only if that speech was disruptive, or otherwise interfered with production. This approach, which has been implicitly followed in a few Title VII cases, would strike a reasonable balance between the proselytizing employee's statutory right to express his or her religious beliefs, and the right of the employer

425. DelPo, supra note 308, at 357.
428. See Kaminer, supra note 30, at 98 ("[T]here [are] few cases involving the conflict between one employee's right to religious expression and another employee's right to be free from hostile work environment harassment.").
429. WOLF, supra note 23, at 61-62.
430. See supra notes 326-423 and accompanying text. For an insightful argument advocating the accommodation of employee religious practices directly under the NLRA, see Roberto L. Corrada, Religious Accommodation and the National Labor Relations Act, 17 BERKELEY J. EMP. & LAB. L. 185 (1996).
431. See generally Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976) ("Congress certainly did not mean to grant sanctuary to employees to engage in [protected speech] on company time . . .").
432. See supra notes 412-24 and accompanying text.
433. See generally Unt v. Aerospace Corp., 765 F.2d 1440, 1446 (9th Cir. 1985) ("An employee is not protected by Title VII when he . . . disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals.").
434. See supra notes 380-411 and accompanying text.
435. See Brown v. Polk County, 61 F.3d 650, 658 (8th Cir. 1995) (assuming that the employer "has a legal right to ensure that its workplace is free from religious activity that harasses or intimidates"); cf. Silver v. KCA, Inc., 586 F.2d
and other employees to a workplace free of harassment and disruption.\textsuperscript{436}

\textsuperscript{138, 141 (9th Cir. 1978) (discussing \textquotedblleft the employer's interest in maintaining an efficient and harmonious operation").

\textsuperscript{436} See generally Kaminer, supra note 30, at 85 ("Title VII requires an employer to reasonably accommodate an employee's ... need for religious expression in the workplace. However, Title VII also ... prohibits religious expression which is sufficiently harassing.") (footnotes omitted).