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TOWARD AN INTEGRATED DISPARATE TREATMENT AND ACCOMMODATION FRAMEWORK FOR TITLE VII RELIGION CASES

*Roberto L. Corrada**

As enacted in 1964, Title VII prohibited discrimination on the basis of religion, but it soon became obvious that for meaningful protection of religious belief in the American workplace, accommodation of religious practice was necessary as well. The EEOC formulated regulations defining lack of accommodation as a form of religious discrimination, but that view was rejected by the courts. In response, Congress in 1972 amended Title VII to require that even employers without religious bias must reasonably accommodate employee religious practices.

Since 1972, virtually all courts and commentators have treated Title VII religion claims as either disparate treatment or accommodation cases. Seldom do courts or scholars consider the confluence of the two. What happens, though, if an accommodation case is suffused with bias or even hostility to the religious objector? Does the case follow the traditional bias framework or does it follow the accommodation framework or does it follow both? Since most courts place cases into one framework or another, it is hard to know how prevalent mixed bias/accommodation cases are. The erroneous classification of a Title VII religion case can have negative consequences for plaintiffs in

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individual cases and for the general development of Title VII religion case law.

This Article explores the interrelationship between accommodation and discrimination in Title VII religion cases. This Article begins with discussion and analysis of three typical Title VII mixed disparate treatment/ accommodation cases, demonstrating how malleable and ill-defined the lines between Title VII disparate treatment and accommodation cases can be. These cases show that it is likely that a good number of Title VII religion cases straddle the two frameworks, and that some number of those cases that do straddle the line are unnecessarily pigeonholed into one framework or another.

This Article then analyzes the legislative history and the EEOC regulations of the 1964 statute and the 1972 accommodation amendments to glean congressional and administrative guidance that might prove useful in reconciling the two frameworks. That analysis reveals that a critical distinction between the two frameworks is employer neutrality in the workplace as to the religious beliefs of its employees. This finding allows two observations. The first is that employers cannot defend disparate treatment religious discrimination using accommodation framework defenses. The second is that an alternative, more integrated, approach to Title VII religion cases, one requiring courts (judges or juries) always to determine first whether the employer is neutral toward religion in the workplace, allows religious discrimination and accommodation frameworks to be merged in a meaningful way, thereby minimizing the possibility of erroneous framework classification decisions by judges and attorneys. This Article concludes that use of an integrated framework will enhance the uniformity and coherence of Title VII religion case doctrine.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on religion.[1] The law also requires that religious practice must be reasonably accommodated in the workplace.[2] With

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

2. *See id.* Title VII was amended in 1972 to extend the 1964 prohibition of religious discrimination to religious practice. *See* ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS, & ROBERTO L. CORRADA, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (7th ed. 2004).

some slight variation, most judges, lawyers, legal academics, and law students come to understand that most, if not all, religious discrimination claims are divided into either discrimination/bias cases or accommodation cases.[3] To determine the result in any given religious discrimination case, one must simply choose the appropriate case category (discrimination or accommodation) and then follow the required analytical path.[4]

Despite these rigid categorizations, some legitimate questions might be raised about the extent to which the two categories overlap. In a few reported cases, employers have insisted that defenses to reasonable accommodation apply in cases of bias as well.[5] Typically, in these cases, an employer would first argue that it did not discriminate, but then argue that even if it had discriminated, the employer is not ultimately liable because it had offered a reasonable accommodation for the religious practice at issue or that to do so would result in undue hardship.[6] If the two categories are distinct, a defense in one of the categories should have little relevance for the other. For example, someone alleging religious bias based on disparate treatment would not ordinarily have his or her case dismissed merely because the employer could show that it offered a reasonable accommodation or that it failed to offer such an accommodation because to do so would have imposed an undue hardship on the employer.

The standard defense of the present system is that if there is evidence showing, directly or indirectly, that religious bias was a motivating

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3. *See, e.g.*, BARBARA T. LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 360 (4th ed. 2007); STEVEN L. WILLBORN, STEWART J. SCHWAB, & JOHN F. BURTON, EMPLOYMENT LAW: CASES AND MATERIALS 507–08 (4th ed. 2007). However, some treat accommodation as another form of discrimination, but still understand the two to be separate subsets. *See generally* CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, & REBECCA HANNER WHITE, EMPLOYMENT DISCRIMINATION LAW & PRACTICE (3d ed. 2007).

4. Discrimination/bias cases follow frameworks set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), depending on the quality of the evidence presented to the court by the plaintiff. Accommodation cases follow the framework set out in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). After *Hardison*, to allege an accommodation violation, an employee must show (1) that he or she has a bona fide and sincerely held religious belief or practice that conflicts with an employment requirement, (2) that the employee informed the employer of this belief (or that the employer knew about the belief, however discovered), and (3) the employee was disciplined for failing to comply with the requirement. *See id.* After such a prima facie showing, the burden of persuasion shifts to the employer to show that the employer offered a reasonable accommodation for the religious practice. *See id.* If the employer cannot show it offered such an accommodation, its only hope to avoid liability is to show that any reasonable accommodation would have resulted in an undue hardship to the employer. *See id.*

5. *See, e.g.*, Reed v. Mineta (*Reed I*), 93 F. App'x 195 (10th Cir. 2004), *aff'd*, 438 F.3d 1063 (10th Cir. 2006); Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir. 1995); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995).

6. *See, e.g.*, *Reed I*, 93 F. App'x at 199–200.

factor in an employer's decision affecting the terms and conditions of an employee's job then the case is one of discrimination, regardless of whether the dispute between employee and employer involves an accommodation. If the case is one involving merely accommodation—i.e., for no Saturday work because of required Sabbath observance—the only issue is whether the employer offered the employee a "reasonable" accommodation (or, if it did not, whether the reason was undue hardship). So long as the employer offers a reasonable accommodation, it does not matter whether the employer is biased against the employee's religion or not.

But what if the lines between discrimination and accommodation cannot be drawn so neatly in a given case? Some examples might help illustrate the difficulty that line-drawing engenders. The first example is one that reflects what might happen in a given workplace. What if the employer offers a technically reasonable accommodation to an employee, but is in fact biased against the employee's religion and offers less of an accommodation than he might normally be inclined to offer to other employees whose religion he prefers, or to nonreligious workers who have similar accommodation demands. A defender of the present system might have a hard time characterizing this case. Should it be a disparate treatment case or an accommodation case? If Title VII religious claims are divided neatly into two frameworks as suggested (disparate treatment and accommodation) might this case fall between the cracks since it presents as an accommodation case in which a reasonable accommodation has been offered. In other words, if there is no blended category of *disparate accommodation,* might some mixed discrimination/accommodation cases be shunted wrongly into an accommodation framework?

The second example involves the procedural legal side of the same set of facts in example one. Given the facts stated in example one, what if the attorney representing the employee in fact pleads both a disparate treatment and an accommodation claim, but the judge feels that a reasonable accommodation has been offered and the discrimination evidence is weak, clothed as it is in the issue of accommodation. Might the judge possibly dismiss the discrimination claim and tell the parties to proceed as if the case were simply one of accommodation? If so, there is little the plaintiff's attorney can do because there is no place to argue discriminatory bias in the accommodation framework. Worse, what if the judge thinks that the employee will win the accommodation case, and therefore thinks there is no need to worry about discrimination, and to do so in fact would be inefficient? After all, both theories result in similar remedial outcomes. If the judge dismisses the discrimination

claim but allows the accommodation claim to go forward, might the employee be handicapped on appeal, left to argue the accommodation point, a legal one, as opposed to the discrimination point, a factual, and therefore less assailable, one?

Unfortunately, Title VII's legislative history provides little express guidance about how to conceptualize the two frameworks together, and Supreme Court case law has exclusively focused on cases of accommodation in which discriminatory bias does not seem to be present. As a result, the interrelationship between nondiscrimination and accommodation in general, and the role of employer neutrality in particular, has been under-theorized and under-discussed, resulting in the possibility of haphazard application of the law to resolve workplace religious disputes between employers and employees. The primary concern here is with the required characterization of a case as one involving discrimination or one merely of accommodation. It is hard to know, but reasonably suspected, that as a result, some cases are unnecessarily relegated to a particular framework by the judge or by either or both of the parties to the dispute.[7]

This Article makes two central arguments and then proposes and explores a possible solution. First, this Article argues that the accommodation framework for religion cases, which is fairly generous to employers, should be available only to employers who are otherwise neutral toward religion in the workplace. If there is evidence of bias in a religion case, the accommodation framework, this Article argues, becomes largely irrelevant, even if the ultimate reason for employee discipline or termination was a failure to accommodate. In such cases, an inference of failure to accommodate would generally follow a finding of bias.

Second, this Article argues that the two frameworks for religion should be integrated in order to ensure that cases containing elements of both disparate treatment and accommodation, *disparate accommodation*, are not unnecessarily forced into one framework or the other. By requiring judges and even attorneys to make decisions about which framework to choose, the probability of pigeonholing is inevitably increased. The implications of erroneous framework classification decisions are disturbing in that issues of bias involve determinations of

7. While it is possible that similar concerns might be raised under the Americans with Disabilities Act (ADA) because that law likewise prohibits discrimination on the basis of disability and also requires reasonable accommodation of disability, the ADA and those potential cases are beyond the scope of this Article. For a general discussion of the interaction between accommodation and discrimination in the context of disability, see Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

credibility by a jury whose findings are heavily deferred to by judges or appellate courts, while issues of accommodation are potentially more technical, rational, and legal in nature, resulting in more judicial involvement both at the summary judgment and appellate stages. A classification choice of one framework or another therefore can have a significant impact on case outcome, even to the point of relegating strong bias cases to loss under an accommodation framework.

This Article is an attempt to stimulate discussion and thought about the interrelationship between nondiscrimination and accommodation in Title VII religion cases. Part I of this Article relates the circumstances of three cases in which nondiscrimination and accommodation frameworks clashed, and discusses the varying judicial approaches to the clash in each case. The Part ends with an analysis of the framework choices in the three cases, underscoring the difficulties for classification presented by mixed discrimination/accommodation cases. Part II uses Title VII's early development and the legislative history of the 1972 accommodation amendments to uncover a key principle, employer neutrality, which is then used to reconcile nondiscrimination and accommodation frameworks. The principle is then employed to clarify the concept of disparate accommodation and to suggest an integrated framework for Title VII religion cases.

I. DISCRIMINATION AND ACCOMMODATION: THREE CASES IN JUXTAPOSITION

To better understand the problems of mixed discrimination/ accommodation Title VII religion cases, this section examines three typical mixed cases. The discussion and analysis of these cases focuses on the framework classification decisions of the various judges and the attendant outcomes and consequences of those decisions. The three cases, though typical and similar in some ways, were selected along a spectrum of possible mixed cases, meaning each one has different evidentiary strengths and weaknesses for discrimination and accommodation, in order to provide better comparison. The section concludes with an analysis of the three cases, juxtaposed, to highlight the blurring of lines between discrimination and accommodation that occurs in mixed cases.

A. Don Reed and the FAA

Don Reed, an air traffic controller in Pueblo, Colorado, has a strongly held religious belief that Saturday is the Sabbath and that it should be

kept holy by his not performing labor or causing others to labor on that day.[8] Reed's need to observe a Saturday Sabbath was accommodated for several years at the Pueblo Air Traffic Control Facility because his supervisor selected him for the position of Quality Assurance Training Supervisor (QATS).[9] As a QATS, he was not in the regular seniority shift bidding and consequently did not have to work on Friday evening or on Saturday.[10] However, when a new supervisor, Joe Hof, took over the air traffic facility, he began to ask Reed about the extremity of Reed's religious belief with respect to his Sabbath requirement.[11] On several occasions, he asked Reed about the circumstances in which he might possibly work on Saturday.[12] Hof berated Reed for flying back to Pueblo on a Saturday morning (even though it was not actually a violation of Reed's beliefs to travel back home on the Sabbath) and called Reed's religion a "scam."[13] Hof removed Reed from the QATS position, placing him on the regular seniority list.[14]

Though industrious union agents were able to adjust schedules to accommodate Reed, the facility staffing began to diminish through controller transfers, thus jeopardizing these accommodations.[15] When a transfer would have taken the number of controllers below collectively bargained levels, the union only acquiesced when Hof promised that controller leave demands, including Reed's, would certainly be accommodated.[16] But his leave requests were not accommodated, since both Hof and the assistant manager often refused to cover for Reed even though they routinely covered work for others with secular reasons for missing work,[17] a case of disparate accommodation. Reed was laid off when he was unable to cover a Saturday shift for five straight weeks.[18]

Don Reed's case was first reviewed within the administrative adjudicatory structure of the Federal Aviation Administration (FAA). An administrative law judge (ALJ) ruled in Reed's favor, but solely on the issue of accommodation, which was eventually reversed by the Merit Systems Protection Board in Washington, D.C.[19] Despite this loss, Reed,

8. *Reed I*, 93 F. App'x 195.
9. *Id.* at 196.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 198.
14. *Id.*
15. *Id.* at 197.
16. *Id.*
17. *Id.*
18. *Id.* at 198.
19. Reed v. Dep't. of Transp., DE-0752-95-0637-I-1 (Before James Kasic, ALJ) (Mar. 14, 1996),

as a federal employee, was able to file *de novo* in federal district court in Colorado, where he prevailed and was awarded $2.25 million dollars (reduced to approximately $1 million dollars after application of Title VII's statutory caps) after a four-day jury trial.[20] The FAA lost its appeal to the United States Court of Appeals for the Tenth Circuit.[21] The Tenth Circuit proceeded first to determine whether a reasonable jury could find that Hof and the FAA engaged in intentional discrimination against Reed.[22] Without using any particular intent framework, the court found plenty of evidence to support jury findings of hostility toward Reed, indicating that hostility to religion was a motivating factor in the decision to terminate Reed.[23] The FAA argued that it had provided Reed a reasonable accommodation, its complete obligation under federal law regardless of any showing of disparate treatment. The court failed to reach the employer's accommodation defense, finding it "unnecessary" after a finding of intentional discrimination.[24]

B. Isaiah Brown and Polk County

Isaiah Brown, a Black man self-identified as a born-again Christian, has a strongly held religious belief that his witness to God and Jesus Christ cannot be shed prior to entering the workplace, and that possession of a Bible as well as prayer at work is part and parcel of what it means to be a Christian.[25] Brown was the director of an information services (data processing) department in Polk County, Iowa.[26] Brown supervised approximately fifty employees and reported directly to the county administrator.[27] Brown manifested his Christian beliefs openly at the workplace. On one occasion, he had his secretary type Bible study notes.[28] On several other occasions, he held prayers in his office with several employees before work and also during the work day.[29] Once, in a general meeting, he proclaimed that he was a Christian and quoted the

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rev'd, Reed v. Dep't of Transp., MSPB (Before Erdreich, Slavet) (Aug. 18, 1997) (both on file with author).

20. *Reed I*, 93 F. App'x at 198–99.
21. Reed v. Mineta (*Reed II*), 438 F.3d 1063 (10th Cir. 2006), *aff'g Reed I*, 93 F. App'x 195.
22. *Reed I*, 93 F. App'x at 199.
23. *Id.* at 200.
24. *Id.*
25. Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir. 1995).
26. *Id.* at 652.
27. *Id.*
28. *Id.*
29. *Id.*

Bible regarding work ethic and "slothfulness."[30]

As a direct result of these activities, Brown received a reprimand questioning his lack of judgment regarding his participation in activities directly supporting religious activities and requiring him to "'immediately . . . cease any activities that could be considered to be religious proselytizing, witnessing, or counseling and . . . further [to] cease utilizing County resources in any way that can be seen as supporting religious activity . . . .'"[31] Later, the county administrator asked Brown to remove from his office all items with a religious connotation, including a Bible in his desk.[32]

Later that year, Brown was cited for a lack of judgment related to financial constraints in the county's budget.[33] Two weeks later, after an investigation into personal use of the county's computers by employees, the county administrator asked Brown to resign and then fired him when he refused to do so.[34]

Isaiah Brown's case was remanded to the district court by the Eighth Circuit, sitting en banc, when it found that Mr. Brown's case presented evidence sufficient to require the application of a "mixed motive" analysis and a conclusion that Brown would have prevailed.[35] The Eighth Circuit's ruling directly contradicted the federal district court's finding, after a five-day bench trial, that the plaintiff had "offered no direct evidence that he was fired on account of his religious activities."[36] The court found that although requiring a secretary to type Bible study notes was an undue hardship to the employer and that prayers in the office before work are not protected activities, most of Brown's other religious activity was non-coercive and spontaneous.[37]

Moreover, the court found that there was no evidence in the record of adverse workplace impact resulting from the activity, thus negating any claim of undue hardship.[38] The court determined that Brown presented sufficient evidence to require application of a mixed motive analysis,[39]

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30. *Id.*

31. *Id.*

32. *Id.* at 653.

33. *Id.*

34. *Id.*

35. *Id.* at 657.

36. *Id.* at 657. The en banc Eighth Circuit also reversed a panel of the Eighth Circuit that had upheld the district court. *Id.*

37. *Id.* at 654–56.

38. *Id.* at 657.

39. In a mixed motive case, the plaintiff's evidence of discrimination is so strong *ab initio* that the entire burden of persuasion shifts to the employer who can then only escape liability if it shows that it would have taken the same action against the employee regardless of the demonstrated bias. The "mixed motives" framework is codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(1)(B) (2006), and

especially since the county administrator had testified that Brown's first reprimand was a factor in the decision to terminate Brown.[40] The court refused to remand the case for a new trial with a proper mixed motive instruction, however, because the court felt that based on the record evidence it was clear that the county administrator would not have terminated Brown without the first reprimand for religious activity.[41] The court therefore reversed the judgment of the district court and remanded the case for consideration of the appropriate relief for Brown.[42]

C. Christine Wilson and U.S. West Communications

Christine Wilson, a Roman Catholic, so detests abortion that she made a personal religious vow that she would wear an anti-abortion button, even at work.[43] Wilson had been working for twenty years for U.S. West when she was transferred to a new facility.[44] The facility had no dress code,[45] and Wilson vowed to continue wearing her anti-abortion button "'until there was an end to abortion or until [she] could no longer fight the fight.'"[46] The button was two inches in diameter, showed a color photo of an eighteen- to twenty-week unborn fetus, and it had the phrases "Stop Abortion" and "They're Forgetting Someone."[47] Wilson always wore the button, unless she was bathing or sleeping.[48] Her coworkers found the button offensive for individualistically personal reasons, such as infertility problems, miscarriage, and one co-worker had experienced the death of a premature infant.[49] There was a decline in productivity at work due to coworker hostility toward the button.[50] The employer offered Wilson three accommodations: (1) wear the button only in cubicle, (2) cover the button at work, or (3) wear a button with the same message but no photo.[51] Wilson refused the

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discussed extensively in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

40. *Brown*, 61 F.3d at 657.

41. *Id.*

42. *Id.*

43. Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995).

44. *Id.* at 1338.

45. *Id.* at 1339.

46. *Id.* (alteration in original).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* One supervisor testified that coworkers were uncomfortable "and that some were refusing to do their work." *Id.* Another supervisor testified that there was a "40 percent decline in productivity of the information specialists since Wilson began wearing the button." *Id.*

51. *Id.* at 1339.

possible accommodations, maintaining that they all burdened her religious requirement to be a "living witness" against abortion—she was subsequently terminated.[52]

Christine Wilson did not fare quite as well as either Don Reed or Isaiah Brown ultimately did in court, and possibly rightfully so. At summary judgment, the district court found that U.S. West did not violate its duty to accommodate the plaintiff.[53] The court found two of the three accommodations had in fact been unreasonable, but that the option involving covering the button while at work was reasonable.[54] The court found that covering the button did not conflict with Wilson's vow to be a living witness, and that even if it did, U.S. West could not reasonably accommodate that belief without experiencing undue hardship.[55]

On appeal, the United States Court of Appeals for the Eighth Circuit upheld the decision of the district court. The court found that there was mixed evidence regarding whether Wilson's vow encompassed needing to have a photo on her button,[56] and, accordingly, upheld the district court since it is not clearly erroneous to choose one of two permissible views of the evidence.[57] The court then applied the accommodation framework to the case, despite the fact there was evidence of hostility toward Wilson, and some of it possibly because of her religion.[58] The court, however, in the context of an accommodation analysis, surprisingly addressed the issue of bias, concluding that U.S. West was not biased against Wilson's religious beliefs because (1) U.S. West's sole concern was the photo, not the button, and (2) U.S. West did not object to other religious articles Wilson had in her cubicle or to another employee's abortion button.[59] The court upheld the district court and

52. *Id.* at 1339, 1340.

53. *Id.* at 1340.

54. *Id.*

55. *Id.*

56. *Id.* at 1341.

57. *Id.*

58. *Id.* The *Wilson* decision has been roundly questioned by commentators for a variety of different reasons. *See, e.g.*, Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. PUB. POL'Y 959, 978–79 (1999); Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 16–17 (2001); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81, 116 (2000); Michael D. Moberly, *Bad News for Those Proclaiming the Good News?: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1, 42–43 (2001); Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L. J. 467, 498 (2006).

59. *Wilson*, 58 F.3d at 1341. Normally, bias is an issue for the jury in a Title VII pretext case or mixed motive case.

found that covering the button was a reasonable option because it did not violate Wilson's sincerely held beliefs.[60]

The foregoing three cases are fairly typical of Title VII religion cases presenting mixed questions of discrimination and accommodation. Often, it is difficult to see based solely on the published written decision whether a case was a mixed bias/accommodation case, and still even more difficult to determine whether the court (or the attorneys) unnecessarily pigeonholed a case into a single framework.[61]

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60. *Id.*

61. The following are some of the mixed bias/accommodation cases that possibly could have benefited from a more integrated approach. Without more description than provided in the published opinion it is difficult to tell. Although these cases were not necessarily decided wrongly, they were all handled in different ways, at times puzzlingly so.

- *Cases applying only a bias test:* Abdullah v. Phila. Hous. Auth., No. 99-2309, 2000 U.S. Dist. LEXIS 4814 (E.D. Pa. Mar. 28, 2000); Gunning v. Runyon, 3 F. Supp. 2d 1423 (S.D. Fla. 1998).
- *Cases applying only an accommodation test:* Baz v. Walters, 782 F.2d 701 (7th Cir. 1986); Grant v. Fairview Hosp. & Healthcare Serv., No. 02-4232, 2004 U.S. Dist. LEXIS 2653 (D. Minn. Feb. 18, 2004); O'Brien v. City of Springfield, 319 F. Supp. 2d 90 (D. Mass. 2003); Anderson v. U.S.F. Logistics, Inc., No. IP 00-1364-C T/G, 2001 US Dist. LEXIS 2807 (S.D. Ind. Jan. 30, 2001); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359 (S.D. Fla. 1999); EEOC v. Hanson-Loran Co., No. 93-15058, 1994 U.S. App. LEXIS 6853 (9th Cir. Mar. 15, 1994).
- *Cases applying only a mixed motive test:* McIntyre-Handy v. W. Telemarketing Corp., 97 F. Supp. 2d 718 (E.D. Va. 2000).

There were certainly cases that fully discussed both bias and accommodation claims separately, probably because both were pled in the alternative. In those cases, both claims overwhelmingly had the same outcome, regardless of which claim was handled first or was viewed as the primary claim. *See* Richardson v. Dougherty County, Ga., 185 F. App'x 785 (11th Cir. 2006); Berry v. Dep't of Soc. Serv.s, Tehama County, 447 F.3d 642 (9th Cir. 2006); Aron v. Quest Diagnostics Inc., 174 F. App'x 82 (3d Cir. 2006); Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004); Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130 (2d Cir. 2003); Rashad v. Fulton County, Ga., No. 1:05-C1-01658, 2007 U.S. Dist. LEXIS 23369 (N.D. Ga. Mar. 29, 2007); Leifer v. N.Y. State Div. of Parole, No. CV-04-571, 2007 U.S. Dist. LEXIS 5130 (E.D.N.Y. Jan. 23, 2007); Whatley v. S.C. Dep't of Pub. Safety, No. 3:05-0042-JFA-JRM, 2007 U.S. Dist. LEXIS 2391 (D.S.C. Jan. 10, 2007); Johnson v. Wheeling Pittsburgh Steel Corp., No. 5:05CV55, 2006 U.S. Dist. LEXIS 86922 (N.D. W. Va. Nov. 29, 2006); Noesen v. Med. Staffing Network, Inc., No. 06-0-071-S, 2006 U.S. Dist. LEXIS 36918 (W.D. Wis. June 1, 2006); Lister v. Def. Logistics Agency, No. 2:05-CV-495, 2006 U.S. Dist. LEXIS 5007 (S.D. Ohio Jan. 20, 2006); Matos v. PNC Fin. Serv's Group, No. 03-5320, 2005 U.S. Dist LEXIS 24529 (D.N.J. Oct. 17, 2005); Goldschmidt v. N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303 (S.D.N.Y. 2005); Ovchinikov v. Oak Valley Auto Sales & Leasing, Inc., No. CV-05-905-AT, 2004 U.S. Dist. LEXIS 30336 (D. Or. Dec. 13, 2004); Tyson v. Clarian Health Partners, Inc., No. 1:02-CV-1888-DFH-TAB, 2004 U.S. Dist LEXIS 13973 (S.D. Ind. June 17, 2004); Yisrael v. Per Scholas, Inc., 2004 U.S. Dist. LEXIS 5807 (S.D.N.Y. Apr. 2, 2004); Chaplin v. Du Pont Advance Fiber Sys., 293 F. Supp. 2d 622 (E.D. Va. 2003); Stephen v. Maximum Sec. & Investigations, Inc., 2000 U.S. Dist. LEXIS 17335 (S.D.N.Y. Dec. 4, 2000); Kaushal v. Hyatt Regency Woodfield, No. 98-C-4834, 1999 U.S. Dist. LEXIS 9563 (N.D. Ill. June 21, 1999); Kalsi v. N.Y. City Transit Auth., 62 F. Supp. 2d 745 (E.D.N.Y. 1998); Gay v. S.U.N.Y. Health Science Ctr., No. 96-CV-5065, 1998 U.S. Dist. LEXIS 20885 (E.D.N.Y. July 22, 1998).

In three cases, *Ovchinikov, Tyson* and *Johnson*, plaintiffs prevailed on accommodation but not on bias theories, while in one case, *Gay*, plaintiff lost on accommodation but prevailed on bias.

D. Integrating the Evidence: Are These Cases Different or Similar?

All three cases above involved requests for accommodation and also contained varying degrees of evidence suggesting religious bias in the workplace. Certainly the *Reed* case featured palpable and extensive evidence of both supervisory and co-worker hostility toward Reed's religion. In *Brown*, also, there was evidence of co-worker and employee resistance to Brown's religious beliefs as well as evidence of bias toward Brown by his supervisor based on his aberrational treatment of Brown. Unlike *Reed*, however, the *Brown* case contains elements of inappropriate behavior by Brown, including secretarial assignment to type religious notes and prayer meetings. In *Wilson*, the record seems even more mixed with evidence of legitimate employer concern about accommodation, on the one hand, but evidence of coworker and supervisor resentment and possible bias—admittedly more sparse—on the other.

Perhaps surprisingly, all three of the cases resulted in adverse judgments at the initial stages. Two cases, *Reed* and *Brown*, were reversed by higher courts only after erroneous framework classification by the ALJ in the *Reed* case and by the federal district court in the *Brown* case. The *Wilson* case, though resulting in an adverse judgment for plaintiff at every stage, has been criticized sufficiently, such that there is some doubt about it properly being handled as a summary judgment case.[62]

A closer look at the evidence in these cases shows how classification errors were made at the initial stages. Evidence of express bias (direct evidence) in *Reed* sent the case into a disparate treatment/pretext framework, even though the initial hearing conducted by the ALJ was resolved using an accommodation framework.[63] At trial in federal district court, the jury believed Reed and not his supervisor, and the case was won on grounds of bias.[64]

Similarly, Brown's case was tried in the federal district court as an

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62. *See supra* note 61 and accompanying text.

63. 93 F. App'x at 199–200.

64. *Id.* at 198. It is important to note that the administrative law judge (ALJ) for the FAA in the case below made the exact type of constraining framework choice discussed in this Article. The ALJ felt that Reed presented an accommodation case and decided the case on that basis, finding that the lack of accommodation for Reed resulted from a breached promise by Reed's supervisor to cover all leaves when minimum staffing requirements in the collective bargaining agreement were breached. Since the case was decided on accommodation grounds, the ALJ made no finding of bias as it was deemed unnecessary. Unfortunately, the lack of a bias finding made it all too easy for the Merit Systems Protection Board in Washington, D.C., to reverse the case without oral argument. *See Reed v. Dep't of Transportation*, DE-0752-95-0637-I-1 (Before James Kasic, ALJ) (Mar. 14, 1996), *rev'd*, Reed v. Dep't of Transp., MSPB (Before Erdreich, Slavet) (Aug. 18, 1997).

accommodation case. The district court found for the employer based on its finding that any accommodation would have posed an undue hardship.[65] The Eighth Circuit reversed, stating that it believed that there had not been a sufficient showing of undue hardship by the employer.[66] The Eighth Circuit, though, refused to remand the case for further findings because it felt, based on the record, that religion had played a clear role in Brown's termination (the first reprimand directly and expressly related to Brown's religious activity) and that the employer would not have taken the same action regardless of bias.[67] Since religion played an explicit role in the termination, the Eighth Circuit felt the case should be treated as a disparate treatment/mixed motive case, and resolved the question itself.[68]

Christine Wilson's case does not appear on the surface to present a classification error by either the district or the circuit court, both of which found against her on accommodation grounds. The circuit court opinion in her case is, of course, drafted to support the Eighth Circuit's finding that supervisors were neutral toward religious belief and that coworkers were reacting to secular, not religious, concerns. But a close analysis reveals that the court stretches a bit to uphold summary judgment on accommodation grounds, handling a substantial bias question on the side, as it were, using a truncated accommodation framework as opposed to a disparate treatment framework to deal with the issue.[69] By so doing, the judge prevents a case from going to trial in which there is a virtual work stoppage by coworkers in reaction to Wilson's "offensive" conduct and in which her supervisors discredit her religious beliefs as "personal."[70] The Eighth Circuit could have remanded her accommodation case to the district court and directed it to apply the discrimination/bias framework of *McDonnell Douglas Corp. v. Green*,[71] just as easily as it would have Brown's case.

What would the workplace reaction have been if Wilson had no religious beliefs but wore the exact same button, say, to honor the memory of a miscarried child? Based solely on the record, it is not possible to discern whether Wilson's treatment would have been different, but this type of doubt can be resolved in a jury trial under a disparate treatment framework.

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65. 832 F. Supp. at 1314.

66. 61 F.3d at 657.

67. *Id.*

68. *Id.*

69. *See supra* note 55 and surrounding text.

70. *See supra* notes 49–50, 58 and surrounding text.

71. 411 U.S. 792 (1973).

Of course, Title VII does not require religious beliefs to supersede coworker rights in most instances. So, for example, no co-worker should be required to work in order to accommodate another's religious practice. And in many accommodation cases, the religious believer loses because of just such a scenario. But *Wilson* is not one of those cases. Co-workers were possibly made uncomfortable by Wilson's button, but they were not required to change their work schedule or forfeit pay to accommodate Wilson's beliefs. Although there was coworker resistance in the form of decreased productivity, this might have been resolved simply by an employer command that the employees should return to work and ignore Wilson's button or face discipline themselves. The co-workers were essentially accorded a "heckler's veto" by the employer who chose to act against Wilson rather than the "mob."[72] By contrast, in other areas of civil rights under Title VII, courts have been especially careful not to let coworker or customer bias intrude upon an individual's civil rights.[73] In any case, even if the employer claims accommodation costs, a jury should sort out who has the better part of the argument by analyzing either the reasonableness of the accommodations offered or the hardship involved in accommodation.

This Part has underscored the messiness of the existing discrimination and accommodation frameworks in Title VII for mixed discrimination/

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72. In Feiner v. New York, 340 U.S. 315 (1951), Justice Black dissented from a decision upholding the arrest of a controversial speaker who moved a man in the crowd to threaten violence against the speaker. *Id.* at 321. According to Black, there are different ways to preserve public order, "[o]ne of these is to arrest the person who threatens an assault." *Id.* at 327 n.9. *See also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416–17 (1986) (internal citations omitted) ("[T]he 'heckler's veto' . . . doctrine has its roots in Justice Black's dissent in [*Feiner*] but it is now an established part of the [Free Speech] Tradition. It recognizes that when a mob is angered by a speaker and jeopardizes the public order by threatening the speaker, the policeman must act to preserve the opportunity of an individual to speak. The duty of the policeman is to restrain the mob."); Prenkert & Magid, *supra* note 58, at 497–98 (citations omitted) ("The infamous case of *Wilson v. U.S. West Communications* provides an example of the insidious nature of the heckler's veto. . . . If the coworkers were unable to be productive, the employer could have exercised its authority to force them to work or suffer the consequences. It is unclear why the coworkers' offense was due more deference than Wilson's religious expression.").

73. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 299 (N.D. Tex. 1981) (gender discrimination may be allowed only "in those limited instances where satisfying customer preference is 'reasonably necessary to the normal operation of the particular business or enterprise'"); 1 LINDEMANN & GROSSMAN, *supra* note 3, at 422–23. *See also* Moberly, *supra* note 58, at 41–42 (internal citations omitted) ("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. Courts have consistently reached the same conclusion. One set of commentators analyzing this principle has observed that 'if 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. The analysis ordinarily should be no different where the workplace 'commotion' is caused by an employee's statutorily protected religious speech . . . .") (internal citations omitted).

accommodation religion cases. In the three cases above, jurists deciding some stage of each case differed from each other in classifying the cases into Title VII evidentiary frameworks. The cases highlighted are typical of mixed cases, and therefore it is safe to assume that classification errors, or at least complications, frequently arise in Title VII religion mixed discrimination/accommodation cases. The next Part explores whether there is a better approach to these cases that can help to distinguish the frameworks, and also to eliminate the potential for classification errors.

II. EMPLOYER NEUTRALITY AS A KEYSTONE FOR DEVELOPING AN INTEGRATED FRAMEWORK FOR TITLE VII RELIGION CASES

Mixed discrimination and accommodation Title VII religion cases, as discussed above, pose a variety of challenges for courts and attorneys dealing with them. The primary challenge may well be how to classify a case into one framework or another that does justice to the mixed evidence in the case that pertains more to the framework not chosen. For example, the *Wilson* court was left without a solid foundation for dealing with potential bias once it had decided the case was mostly an accommodation case, and proceeded according to the rigidities of the well-defined accommodation framework. Another substantial issue involves what might be termed "framework-borrowing." In the *Reed* case, for example, after a jury found the FAA liable under both disparate treatment and accommodation frameworks, the government chose to defend the disparate treatment claim by arguing that it had provided a reasonable accommodation—borrowing the defense from one framework to use in another.[74] The Tenth Circuit rejected the FAA's defense, upholding the discrimination finding by the jury, and at least implying that the two frameworks should be kept separate from each other.[75] However, if there is no solid philosophical line to be drawn between the two frameworks in mixed cases, the Tenth Circuit's view might be questioned.[76]

Surprisingly, there is a dearth of literature suggesting that an accommodation defense *cannot* be used in a disparate treatment case. Moreover, there is virtually nothing written about the confluence of the

74. *See* Appellant's Reply Brief (3d Brief on Cross Appeal) (June 26, 2003) at 2–5, 21–41 (on file with author).

75. 93 F. App'x at 199–200.

76. Judge David Ebel, at the beginning of the oral argument before the Tenth Circuit in *Reed I*, asked about whether accommodation could be asserted as a defense in a disparate treatment case. Oral argument, *Reed I*, 93 F. App'x 95 (attended by author).

two frameworks. Maybe the reason for this is obvious—that the frameworks are distinct and never bleed into one another. Such is apparently not the case, however, as evidenced by the government's accommodation defense in *Reed*'s disparate treatment case, or as evidenced by the district court's handling of bias in the *Wilson* case. Commentators have suggested that properly labeling cases as either disparate treatment or accommodation cases has been problematic, citing to *Brown* and *Wilson* as examples.[77]

The following section examines the legislative history of the religious accommodation amendment to Title VII to determine if it sheds any light on the relationship between the disparate treatment and accommodation framework that might be used to answer questions about framework borrowing and framework classification. This section then proposes and explores an integrated framework for Title VII religion cases.

A. The Role of Employer Neutrality in Religious Accommodation Cases

1. Legislative History of the Religious Accommodation Amendment to Title VII

Congress amended Title VII's definition of "religion" in 1972 to require employer reasonable accommodation of religious practice.[78] The amendment was required after it became obvious that Title VII's 1964 definition included relief only for cases of religious bias or discrimination by employers. The case of *Dewey v. Reynolds Metals Co.*[79] brought the issue to a head and served as an impetus for the 1972

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77. About the *Wilson* case, Professors Michael Zimmer, Charles Sullivan, and Rebecca Hanner White ask in their casebook, "Why is *Wilson* an accommodation case? Would plaintiff have been better off eschewing any accommodation claim, and, instead, arguing that she was simply discharged because of her religion[, i.e., the path followed in *Reed*]?" Michael J. Zimmer, Charles A. Sullivan & Rebecca Hanner White, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 598 (6th ed. 2003). The professors then, citing to *Brown*, ask whether the employer is entitled to raise the "accommodation issue—that it could not reasonably accommodate plaintiff's beliefs without undue hardship—as a defense to an individual disparate treatment case?" *Id.*

78. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2006); *see also* STAFF OF S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (H.R. 1746, P.L. 92-261) 711–78 (Comm. Print 1972) [hereinafter LEGISLATIVE HISTORY]. § 701(j) (2000e(j)) provides:

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

42 U.S.C. § 2000e(j).

79. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971). *See*

amendment. The amendment was proposed by Senator Randolph, a member of the Seventh Day Baptists whose Saturday Sabbath often conflicted with work requirements.[80] Senator Randolph's testimony in 1972 reveals that the amendment is aimed at well-meaning employers who harbor no bias toward any particular employee's religious beliefs:

> I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions. I think they are just building upon conviction, and, hopefully, understanding and a desire to achieve an adjustment . . . .[81]

The *Dewey* case occupies a central place in the legislative history of the 1972 amendments. Additionally, *Dewey* is an important case because it sheds light on the reach of Title VII prior to the 1972 accommodation amendments and also helps us understand the limits in accommodation cases vis-à-vis disparate treatment claims. *Dewey,* a Sixth Circuit case, involved a plaintiff who refused to take overtime on Sundays due to his religious belief that he should not work on the Sabbath.[82] Dewey was a member of the UAW at Reynolds Metals and began his complaint with a grievance submitted to arbitration, which was subsequently denied.[83] Dewey simultaneously filed a state religious bias claim with the Michigan Civil Rights Commission.[84] The Civil Rights Commission stated that "absent [an] intent on the part of [the employer] to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs."[85] The Commission then found no intent to discriminate by the employer and dismissed the claim.[86] Dewey next filed a charge with the EEOC, which determined, in contradiction to the Regional Director's recommendation, that there was "reasonable cause" to believe that Reynolds had engaged in unlawful practices and authorized suit in the federal district court.[87] The federal district court judge ruled in favor of

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also LEGISLATIVE HISTORY, *supra* note 78, at 715–27.

80. *See* LEGISLATIVE HISTORY, *supra* note 78, at 711, 715.

81. *See id.* at 714–15.

82. *Dewey*, 429 F.2d 324; LEGISLATIVE HISTORY, *supra* note 78, at 718.

83. *Dewey*, 429 F.2d at 327.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* Reynolds attempted to get the federal court suit dismissed on the grounds that the arbitrator's award was a final adjudication, but the district judge denied the motion. *Id.* Note the *Dewey* case preceded the U.S. Supreme Court's 1974 decision on this issue in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

Dewey after a bench trial.[88]

The United States Court of Appeals for the Sixth Circuit reversed the district court.[89] The Sixth Circuit began by establishing that "[t]he legislative history of the statute is clear that it was aimed only at discriminating practices."[90] The court found that there was nothing discriminatory in the provisions of the collective bargaining agreement or in the way it was executed, and reversed the district court finding of disparate impact, citing the court's inappropriate reliance on *Sherbert v. Verner*,[91] a case involving state, and not private, action.[92]

The court then took issue with the lower court's retroactive application of an EEOC regulation favoring Dewey that was promulgated after Dewey's discharge from Reynolds.[93] The court found that the earlier 1966 regulation in effect at the time of Dewey's discharge was not favorable to Dewey's claim.[94] The later regulation, promulgated on July 10, 1967 (some ten months after Dewey's discharge in September 1966), contained for the first time an EEOC statement that Title VII's religious discrimination prohibition shall include the failure of an employer to reasonably accommodate the religious needs of employees where accommodations can be made without undue hardship on the conduct of the employer's business.[95] The court then, in dicta, questioned the EEOC's authority to promulgate the 1967 regulation, stating:

> It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e–2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, *absent discrimination*, may well be doubted.[96]

The court reversed the district court's finding of intentional discrimination and also declared that the arbitrator's decision on the

88. *Dewey*, 429 F.2d at 328.

89. *Id.*

90. *Id.* (citing 110 CONG. REC. 13079-80 (June 9, 1964)).

91. 374 U.S. 398 (1963).

92. *Dewey*, 429 F.2d at 329. Presumably, the Sixth Circuit felt that the government could go further in resolving state impositions on religion.

93. *Id.*

94. *Id.* at 330.

95. *Id.* at 333 (Combs, C.J., dissenting) (citing EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (effective July 10, 1967)).

96. *Id.* at 331 (majority opinion) (second emphasis added)

matter should have been final.[97] Dewey petitioned for rehearing en banc, which was denied[98] by an opinion emphasizing that "[t]he requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act."[99] According to the court, "[t]he fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different."[100] The majority, moreover, felt that an accommodation requirement would raise grave constitutional concerns, and that government must stay neutral in religious matters.[101] The United States Supreme Court affirmed the Sixth Circuit per curiam by an equally divided Court (with Justice Harlan sitting out).[102] The *Dewey* case is appended along with another similar case, *Riley v. Bendix Corp.*,[103] to Senator Randolph's testimony in favor of the 1972 amendments.[104]

The history of the 1972 accommodation amendment to Title VII makes plain that the EEOC attempted to extend the definition of discrimination to include a failure by employers to reasonably accommodate religious practice in 1967. That attempt was thwarted by various circuit courts, as revealed in *Dewey* and in *Riley*, which are centrally appended to Senator Randolph's testimony proposing the 1972 amendment. A review of the *Dewey* and *Riley* cases along with the fact that they are appended in full in the legislative history of the 1972 amendments shows that the EEOC could not extend the original 1964 statutory language of Title VII to include accommodation where no finding of discrimination was first established. Thus, the 1972 amendment by Congress was only necessary to place an accommodation requirement on otherwise *neutral* employers.

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97. *Id.* at 331–32. Chief Justice Combs in dissent argued that both the 1966 and 1967 regulations of the EEOC contained accommodation language, that the regulations are reasonable interpretations of the statute to which deference is owed, and that the employer failed to show that requiring the employer to find a replacement for Dewey or that Dewey's failure to work would result in undue hardship to the company. *Id.* at 333 (Combs, C.J., dissenting). The dissent also disagreed that Dewey's decision to proceed to arbitration first should be considered somehow an election of remedies. *Id.* at 334.

98. *Id.* at 337.

99. *Id.* at 334.

100. *Id.* at 335.

101. *Id.* at 334–35. The majority opinion in the rehearing denial also agreed with the panel below on the issue of finality of arbitration, stating, "[i]t is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result." *Id.* at 337. Judge Wade McCree dissented from the denial of rehearing en banc, "for the reasons stated in the dissenting opinion of Judge Combs" below. *Id.* (McCree, J., dissenting).

102. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971).

103. 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972); LEGISLATIVE HISTORY, *supra* note 78, at 727–33.

104. *See* LEGISLATIVE HISTORY, *supra* note 78, at 715–33.

Although the EEOC prevailed on the theory that even neutral employers must accommodate religious belief before the district court judge in *Dewey*, the Sixth Circuit made clear both in the panel decision on appeal and in the majority opinion denying rehearing that, absent a finding of discriminatory intent, no accommodation of religion was required under the existing law of Title VII.[105] The 1972 amendments would not have been necessary except to require accommodation in cases where employers were neutral or "well-meaning" with respect to religion or religious belief.

2. The Role of Employer Neutrality in Accommodation Cases

The 1972 amendments support the idea that employer neutrality is a pre-condition to any Title VII religious accommodation analysis. However, even if the legislative history revealed nothing, a common sense analysis of the disparate treatment framework compared to the accommodation framework would yield the same result.[106] In disparate treatment cases, for example, an inquiry into accommodation is not typically necessary, possibly because accommodation concerns are only a pretext to the discrimination. It should be noted that if a court finds disparate treatment—that an employer was motivated by intentional bias—it has broad discretion to address the violation, and would not be limited in formulating relief, as it is in a mere accommodation case, either to reasonableness of accommodation or to *de minimis* notions of undue hardship.

Furthermore, evidence that bias plays no part in accommodation as a general matter is provided by an analysis of the accommodation provision itself, which has no room in it for handling questions of bias. The only framework questions arising out of the statutory language are whether the accommodation was reasonable and if not whether there was an undue hardship to the employer. Without bias, these questions are more or less mechanical and technical. A court can address these without focusing much on the credibility of the witnesses, and the

105. *See supra* notes 80–94 and accompanying text.

106. As Professor Christine Jolls has argued in the context of disability discrimination and the ADA, if an employer intends to treat people differently based on their disability then the attendant claim is one of disparate treatment. *See* Jolls, *supra* note 7, at 649. If, however, the employer treats disabled people differently because of a work requirement, then the claim is one for accommodation. *Id.* Of course, this would be true for religion as well, but ultimately this sharp distinction is unhelpful where, as in Title VII religion, accommodation grew out of disparate treatment and the claims have at times been seen as overlapping. For religion cases, then, it is important to identify and note the distinction between the two as arising out of the legal history of Title VII religion claims and the legislative history of the 1972 amendments to Title VII recognizing and codifying accommodation claims.

framework is efficient in the sense that it takes this into account. Indeed, if all religious claims were aimed at rooting out bias, then the employer's reason that it could not reasonably accommodate without undue hardship would simply be tested by a pretext analysis.

Another look at the *Wilson* case makes the point clear. There, the court felt the need to address bias but untied to any legal framework or test. Now, certainly, judges are quite capable of evaluating the quality of evidence, but without a structural framework upon which to hang the evidence, that evidence is not properly contextualized in the case. It is therefore hard to determine what the evidence means for the final outcome. Since the *Wilson* court had to deviate from the framework to address the issue of bias, the strong possibility of inconsistent approaches to bias evidence in accommodation contexts is greatly increased, at best, and the possibility of arbitrary decision-making is increased and possibly greatly so, at worst.

At bottom, it seems clear based on the legislative history of the 1972 amendments to Title VII as well as a common sense analysis of the two frameworks, that the accommodation framework should only be used when there is no evidence of antireligious bias or discrimination in a given case. The framework should only be available, as Senator Randolph indicated, to "well-meaning" employers who happen to have work requirements that conflict with religious practice. The distinction is especially important because the accommodation framework has been interpreted in ways that are particularly favorable to employers.[107] For example, an undue hardship, after *TWA v. Hardison*,[108] is defined as anything other than a *de minimis* cost.

B. Proposing an Integrated Framework for All Title VII Religion Cases

As the legislative history of the 1972 Title VII amendments regarding religious claims and the history of litigation leading up to the amendments plainly show, the relatively more pro-employer accommodation framework is only appropriate where there is no evidence whatsoever of religious bias or hostility. It is built on the underlying assumption that the employer would have accommodated the

107. "[In] claims that employers have failed to reasonably accommodate the plaintiffs' religion by refusing to permit them to observe religious holy days or to dress or groom in a particular way... plaintiffs lose most of the time. Indeed, the law seems so settled... that the claims are rarely, if ever, brought any more." Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 321 (1997).

108. 432 U.S. 63 (1977).

employee's religious practice if it had not directly conflicted with an important work requirement or resulted in an undue hardship.

Accordingly, in any Title VII religion case an additional inquiry should be required: whether the employer is "neutral" toward the employee's religious belief or practice in the workplace.[109] The following new, integrated framework fits all religion cases regardless of whether they are disparate treatment or accommodation cases. The framework would be mandated in all Title VII religion cases both to prevent courts from overlooking possible bias by unnecessarily channeling the inquiry and to prevent framework borrowing—if only one framework applies, there should be no temptation to argue another framework or pieces of it. Under the new framework, an employee must establish (1) that he or she has a bona fide sincerely held religious belief or practice that either did or did not conflict with a work requirement, (2) that the employer knew or had reason to know about the religious belief or practice, and (3) that the employee suffered an adverse employment action.[110] At this point, the employee has made out a prima facie case for either type of claim, causing the burden of production to shift to the employer. The next step is the "neutrality prong" of the analysis, but in fact the employer here is only required to put forward some evidence showing a legitimate, nondiscriminatory reason (unrelated to the religious belief or practice) for the adverse action, which the employee is free to attack as pretextual, just as in the *McDonnell Douglas* framework.[111] If the employer survives the challenge here, then the case is either dismissed if no accommodation issue has been raised or proceeds into an accommodation case in which the employer can defend by showing either that it proffered a reasonable

109. For purposes of this Article, neutrality is defined with respect to actions taken in the workplace—meaning that the employer bases workplace actions on the objective merits of a given work situation. Neutrality here by no means suggests that the employer's mind has to be free from bias (although it would be great if that were also true). Private views of bias against an employee's particular religion are of no moment unless manifested in workplace specific actions.

110. These three initial framework requirements have been modified to handle both disparate treatment and accommodation claims. Thus, the causal connection between the adverse action and the conflicting religious requirement found only in the accommodation framework is omitted.

111. The employer must now show it was "neutral" toward religion in the workplace (i.e., no bias against religion). Although this provision at first blush looks like it requires the employer to prove a negative (i.e., I am not biased), it in fact merely uses the Title VII intent frameworks to determine whether an employer's actions are intentionally against religion. The intent frameworks here serve as a filter to prevent biased employers from proceeding on in a case to take advantage of the more pro-employer accommodation framework. Of course, if the employee's evidence of bias, whether direct or circumstantial, is sufficiently probative, the employer's burden might be higher here, as required in a mixed motive framework. In such a case, the employer must carry the complete burden of proof in showing that it would have taken the same adverse action against the employee regardless of anti-religion motivation, as required by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

accommodation or that any such accommodation would have presented an undue hardship. In essence all cases require an analysis of potential discrimination and accommodation components together.

In cases where the employer's articulated legitimate, nondiscriminatory reason for acting *is* the reasonable accommodation offered to the employee, failure to accommodate is automatically proved in the integrated framework if the factfinder believes the offer was merely pretextual. If bias is proved under the neutrality prong, but the articulated legitimate nondiscriminatory reason for the adverse action is independent of the attempted accommodation, the case proceeds to an accommodation analysis but since there is evidence of bias, it proceeds in a modified fashion with a presumption against the employer on the reasonableness of the accommodation and a higher burden of undue hardship not limited by the *de minimis* definition imposed in *TWA v. Hardison*.[112]

The following section analyzes how the framework would operate in the particular kinds of circumstances presented by the *Reed*, *Brown*, and *Wilson* cases.

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112. *Evidence of bias and its impact on undue hardship:* Even upon a determination that there is no "intentional" discrimination, but where there has been credible evidence of bias, an employer should not be allowed to use the *de minimis* burden standard for undue hardship defense. Accommodation in this category of cases must in fact be an undue hardship for the employer to prevail. These become cases that may have been brought even prior to the 1972 amendment to Title VII under the original antidiscrimination language of the original 1964 Act. By way of explanation, the *Dewey* court recognized that accommodation requirements imposed by the government on neutral or unbiased employers "would raise grave constitutional questions . . . ." Dewey v. Reynolds Metals Co., 429 F.2d 324, 334 (6th Cir. 1970). Indeed, the court was prescient because the U.S. Supreme Court struggled with underlying constitutional concerns related to accommodation after the 1972 amendment in *TWA v. Hardison*, 432 U.S. 63 (1977) (involving interpretation of the 1972 amendment to Title VII), and *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (involving a Connecticut state religious accommodation statute, but including a concurrence by Justice O'Connor on the issue of the constitutionality of Title VII's 1972 accommodation amendment). Both *Dewey* and *Hardison* involved applicability of the Title VII accommodation amendment to otherwise neutral or unbiased employers. It was in that context and because of underlying constitutional concerns in those particular kinds of cases that the Supreme Court in *Hardison* defined "undue hardship" in the statute to mean no more than a *de minimis* burden (to go further would trigger Establishment concerns), meaning virtually any cost would be an undue hardship. *Hardison*, 432 U.S. at 84. Those constitutional concerns about imposing religious preference on an otherwise neutral employer evaporate, however, in scenarios where there is evidence of employer bias. In those cases, the government may be more aggressive about ensuring religious liberty and equality. There, the full effect of the words undue hardship should be applied in a way that is more faithful to Congress's intent than the watered down *de minimis* interpretation forged by the *Hardison* Court because of lurking constitutional concerns. Moreover, if there is even some evidence of bias in a given case, an analysis of causal reasoning could be used to argue for the application of a higher standard against an employer as a matter of policy. For support for this proposition, see generally Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006).

1. Pretext Cases in an Integrated Framework

After proof of a prima facie case, the neutrality prong of the integrated framework requires a court to proceed by uncovering the employer's reasons for acting or speaking against the plaintiff and his or her religious motivation. The court would require the employer to at least minimally articulate a legitimate, nondiscriminatory reason for acting. If the employer states a reason, the plaintiff may try to show the reason is pretextual, just as in the *McDonnell Douglas* framework. The evidence here may be oral or written evidence of bias or even evidence of disparate treatment of the plaintiff compared to other employees who do not possess the plaintiff's same set of religious beliefs or practices.[113] If the court or factfinder ultimately believes that the employer was motivated by religious bias and not by the neutral reasons articulated, the employer is liable and no separate accommodation analysis is necessary. If motivation is not proven but there is some evidence of bias in the case, the case proceeds to a modified accommodation analysis, as described above.[114] If there is no evidence of bias, i.e., the employer is found to be neutral, but there is an issue of accommodation, then the framework requires that the current accommodation framework be followed—the accommodation framework that generally favors employers.

Both *Reed* and *Wilson* contained sufficient evidence of potential bias to have required a pretext analysis. In the *Reed* case, specific evidence related to supervisory statements of hostility to religion and disparate treatment of Reed—vis-à-vis accommodating leave—were sufficient to sustain a finding that religion had been a motivating factor in management's failure to accommodate. Reed prevailed on the bias claim, and if Reed had been reinstated, the court may well have required some type of accommodation as part of awarded injunctive relief. Since Reed proved bias, his case would proceed to an accommodation analysis, and since the employer's defense against bias in the neutrality analysis was the various accommodations offered, Reed also would have prevailed automatically on the issue of failure to accommodate.

In *Wilson,* the evidence of bias was a bit more diffuse in that adverse reaction to a button with a picture of a fetus may or may not have been anti-religious. Courts facing situations like Wilson's must proceed cautiously to separate out reactions that are related to religion versus those that are not. The pretext framework was designed to distinguish

113. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973). This evidence could even be statistical.

114. *See supra* note 112 and surrounding text.

these motivations, but it was not given a chance in *Wilson*. There, the court simply characterized the evidence, for summary judgment purposes, as showing no bias, but it seems analysis of pretext was not really forthcoming. What about the treatment of other employees presenting similarly burdensome accommodation requirements? How about the treatment in the workplace generally of employees with strict or even fundamentalistic types of religious beliefs and practices? And for that matter, why not give Wilson herself the chance to prove the sincerity of her belief to a jury? Of course, if Wilson had been able to establish her sincerity and that work concerns were simply a pretext for religious discrimination before a jury, the accommodation analysis would have been pro forma.[115]

2. Mixed Motive Cases in an Integrated Framework

The *Brown* case was decided by the Eighth Circuit as a mixed motive case.[116] Under the new, integrated framework, Brown would establish first that he had a sincerely held religious belief. There was no question about this in the *Brown* case as he was a devout practicing Christian. Next, Brown would establish employer knowledge, which in his case was proven in a variety of ways, but primarily through the employer's own documents of reprimand showing one of the express bases for termination was Brown's religious conduct. Next, Brown would show he was subjected to an adverse employment action. Under the new framework, as mentioned previously, he need not establish any causality. The prima facie case here, as in *McDonnell Douglas*, is only intended to filter out cases that do not meet minimum Title VII requirements. The burden then shifts to the employer either to articulate a legitimate nondiscriminatory reason for acting or, in a mixed motive case, to show that it would have acted in the same way regardless of antireligious motivation. The mixed motive framework would be applied if the employee's evidence, circumstantial or direct, showed that a motivating factor in the employer's adverse action was religious bias regardless of the employer's articulated one. In such a case, the employer would be required to show that it would have made the same decision regardless of bias. If, as in *Brown*, it cannot, then the plaintiff prevails and the case ends.

Even if the employer could show that it would have taken the same action in a mixed motive case, the employer cannot avoid the finding

115. *See id.*

116. *See supra* notes 36–42 and accompanying text.

that it was biased against its employee's religion in the workplace. What should happen to accommodation in such a case? In such a case, the employer should not be able to defend an accommodation challenge because it has been proven biased, not neutral, on the issue of the employee's religion. Under the integrated framework, the employer either automatically is found to have failed to accommodate the employee or the case stops before proceeding to accommodation. It seems, though, that if the employee can show pretext under *McDonnell Douglas* and automatically prevail on the issue of failure to accommodate, the same should certainly be true if the employee's evidence on bias is good enough to warrant a mixed motive instruction.

3. Conversion into Accommodation and Modified Accommodation

If an employer prevails in a *McDonnell Douglas* pretext analysis, but there is some surviving evidence of bias against religion in the workplace (just not enough to prove it was a motivating factor in the employer's action), the inquiry proceeds to a modified accommodation analysis in which the hardship claimed by the employer must be undue (i.e., significant) rather than *de minimis*.[117]

If, however, employer neutrality, after a *McDonnell Douglas* pretext analysis, is established either by lack of evidence of bias proffered by the plaintiff or by the employer prevailing under a disparate treatment analysis, the court would proceed then to apply the remaining part of the integrated framework, which in this case would be the ordinary type of accommodation analysis. If an accommodation were implicated in the case, the employer would have to show that it proffered a reasonable accommodation and if it did not that any accommodation would have imposed an undue hardship on the employer.

The conversion of a general religious discrimination disparate treatment "intent" case into a "non-intent" or neutral case in this way has some precedent in Title VII. The same idea has been supported in the context of mixed disparate treatment/impact cases that may not be fully capable of being examined, and therefore separated, prior to trial, much like mixed Title VII religion cases.[118]

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117. *See supra* note 112 and surrounding text.

118. *See* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); BELTON ET. AL., *supra* note 2, at 202–03; Barbara A. Norris, *Multiple Regression Analysis in Title VII Cases: A Structural Approach to Attacks of "Missing Factors" and "Pre-Act Discrimination,"* LAW & CONTEMP. PROBS., Autumn 1986. at 63 (1984). In *Segar v. Smith*, the D.C. Circuit announced the propriety of such a conversion in cases where distinct frameworks were in fact complementary. The case was an appeal of a district court decision holding that the Drug Enforcement Agency (DEA) had engaged in a pattern or practice of discrimination against its black agents in violation of Title VII. *See Segar*, 738 F.2d at 1258. The court

An employer may well defend a claim of religious bias by stating that it had no bias against religion and that the only reason for the adverse action against the employee was that the employee's religious practice conflicted with an important work requirement. If the employer is believed, but only after a searching inquiry into its motivation, then it makes sense to test the accommodation conflict without the need for questioning intent. The proposed integrated framework would allow the inquiry into religious bias to proceed into an ordinary accommodation analysis if a work requirement becomes the neutral reason for the adverse action by the employer.

III. CONCLUSION

This Article proposes that courts follow a new, integrated disparate treatment and accommodation framework for all Title VII religion claims. The integrated framework requires employees to show: (1) the employee had a sincerely held religious belief or practice that may or may not have conflicted with a work requirement; (2) the employer knew of the employee's belief; and (3) the employee was subjected to an adverse employment action. The burden would then shift to the employer to show (1) the employer was neutral, and not intentionally biased toward employee's religion in the workplace, by articulating its reasons for acting, which can be subjected to a pretext attack by the

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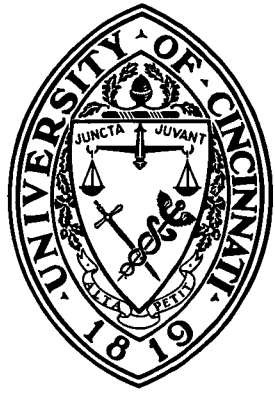
explained that since many of the evidentiary elements are similar between systemic disparate treatment cases and disparate impact cases, it makes sense to extend one into the other. *Id.* at 1265–73. For example, an answer to a claim of systemic disparate treatment might be that the cause of a disparity in agents of color in the workplace is otherwise neutral workplace requirements. If the only claim was disparate treatment, the factfinder would not find intent and the claim would be dropped. A disparate impact claim, however, is not premised on a finding of intent. There, the analysis begins with the identification of neutral employment practices that have a disparate impact and proceeds to determine whether those practices are critical to the workplace. It makes sense then to continue with the second part of the impact framework if neutral practices have been identified by the employer in defense of disparate treatment charges.

As one commentator explains, "[a] promising approach to analyzing class-based Title VII cases involving multiple regression analysis uses disparate treatment and disparate impact *in combination* to address a particular claim of discrimination. . . . [T]he employer may attempt to defend against the inference of discrimination shown by explaining that a specific neutral employment policy caused the differential treatment indicated. At this point, a court will have before it all the elements of a traditional disparate impact claim. Therefore, it is appropriate to require the defendant to prove the business necessity of maintaining the 'neutral' practice with the discriminatory effect." Norris, *supra*, at 77–78; *see also Segar*, 738 F.2d at 1270. The same is true with respect to religious discrimination and accommodation claims. By the time the employer articulates the legitimate, nondiscriminatory reason of a work requirement in answer to a plaintiff's prima facie showing in a pretext framework, a court will have before it all the necessary elements of an (accommodation) claim, making it appropriate to require the employer to show that it made a reasonable accommodation or that it could not without undergoing an undue hardship. *See id.*

employee; and (2) the employer proffered a reasonable accommodation or else established that undue hardship prevented it from doing so.

Integrating Title VII religion case frameworks for disparate treatment and accommodation cases would help to ensure that religion cases are not unnecessarily pigeonholed into one framework, possibly allowing courts or factfinders to overlook evidence of religious bias that may not be apparent under a single framework analysis. The new neutrality prong would force judges and juries to independently, and seriously, analyze the bias evidence in any religion case regardless of whether they truly believed the case to be about accommodation. The framework also would protect against constrained classification judgments by the parties themselves by forcing both plaintiffs and defendants to think seriously about whether bias clouded employer judgments regarding accommodation. Moreover, a single framework would avoid the temptation for judges or attorneys to "borrow" pieces of other existing frameworks for purposes of either defense or analysis. The extra neutrality step in an integrated, single framework for all Title VII religion cases should lead to the greater possibility of justice in mixed accommodation and discrimination cases.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