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AFTER THE FALL: THE EMPLOYER'S DUTY TO
ACCOMMODATE EMPLOYEE RELIGIOUS PRACTICES
UNDER TITLE VII AFTER *ANSONIA BOARD OF
EDUCATION V. PHILBROOK*[†]

*Peter Zablotsky**

I. INTRODUCTION

In an attempt to eliminate discriminatory employment practices in the United States, Congress enacted Title VII of the Civil Rights Act of 1964 a little more than two decades ago.¹ As part of the congressional effort to eliminate employment discrimination,² section 703(a)(1) of Title VII made it an unlawful employment practice for employers to discriminate against current or prospective employees because of their religion.³

Although Congress had declared religious discrimination in em-

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1. 42 U.S.C. §§ 2000e—2000e-17 (1982).

2. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 9 (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2401 ("The purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."); 110 CONG. REC. 13,079-80 (1964) ("[N]o American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity . . .") (Statement of Sen. Clark); *Trans World Airlines v. Hardison*, 432 U.S. 63, 71 (1977) ("The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex or national origin."); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

3. 42 U.S.C. § 2000e-2(a)(1) (1982). In relevant part, the section provides that:

(a) It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The prohibitions of Title VII also apply to labor organizations. Section 703(c), 42 U.S.C. § 2000e-2(c) (1982), states:

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

ployment unlawful, it neglected to address the scope of the duty imposed by section 703(a)(1), or to indicate if an employer had an affirmative duty to accommodate employee religious practices. The Equal Employment Opportunity Commission (EEOC) and the federal courts quickly came forward to interpret the section and address these issues.

The EEOC interpreted the section as imposing an affirmative duty on employers. In 1966, the agency issued a guideline stating that, under the Act, employers had an obligation to accommodate the religious needs of their employees when accommodation could be achieved without serious inconvenience to the conduct of their business.⁴ In 1967, the EEOC amended its guideline so as to require employers to accommodate the religious needs of their employees when accommodation could be achieved without working an undue hardship on their business.⁵ By contrast, some courts did not interpret section 703(a)(1) as imposing an affirmative duty on employers. Rather, these courts held that the section required only that an em-

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- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
 - (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Generally, the duty of labor organizations under Title VII is beyond the scope of this Article. Some aspects of the duty of a labor organization not to discriminate based on religion, however, are discussed in Parts III and IV. *See infra* notes 42-49 & 109 and accompanying text. For a more complete discussion, see Comment, *Religious Accommodation Versus Union Security: A Tale of Two Statutes*, 9 N. KY. L. REV. 331 (1982).

4. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(a)(2) (1967). The guidelines stated in part:

The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

Id. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 72 (1977); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1090-91 (6th Cir. 1987) (Krupansky, J., dissenting), *cert. denied*, 108 S. Ct. 1293 (1988).

5. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(b) (1968). The guideline stated in part:

The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

Id. See *Hardison*, 432 U.S. at 72; *Pyro Mining*, 827 F.2d at 1091 (Krupansky, J., dissenting).

ployer avoid employment practices that were discriminatory in purpose.⁶

In 1972, Congress purported to resolve this conflict by amending section 701 of Title VII in accordance with the 1967 guideline of the EEOC.⁷ The language of the amendment, which became section 701(j), stated: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."⁸ In effect, the definition of religious discrimination as contained in the amendment made it an unlawful employment practice under section 703(a)(1) of Title VII for an employer not to reasonably accommodate, in the absence of undue hardship to the employer's business, the religious practices of his employees.⁹

6. See, e.g., *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331 (6th Cir. 1970) ("This section of [Title VII] requires a finding that the employer has intentionally engaged in an unlawful employment practice before the court may award relief."), *aff'd by an equally divided Court*, 402 U.S. 689 (1971); *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 341 (D. Ore. 1969).

7. Equal Employment Opportunity Act of 1972, § 2, 42 U.S.C. § 2000e(j) (1982). See 118 CONG. REC. 705-06 (1972) (remarks of Sen. Randolph); *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 (1977); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988).

8. 42 U.S.C. § 2000e(j) (1982).

9. *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). A statute requiring accommodation of employee religious practices raises constitutional questions based upon the establishment clause. U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion . . ."). See *Hardison*, 432 U.S. at 90-91 (Marshall, J. dissenting); accord Eades, *Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion*, 5 U. DAYTON L. REV. 59 (1980); Note, *Anderson v. General Dynamics Convair Aerospace Division: First Amendment Establishment Clause Challenge to Title VII's Mandated Accommodation of Religion*, 76 NW. U.L. REV. 487 (1981); Note, *Constitutionality of an Employer's Duty to Accommodate Religious Beliefs and Practices*, 56 CHI.-[] KENT L. REV. 635 (1980); Note, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution*, 9 LOYOLA U. CHI. L.J. 413 (1978); Note, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 HASTINGS CONST. L.Q. 901 (1977); Comment, *The Reasonable Accommodation Rule Mandates Unconstitutional Preferences for Religious Workers in Title VII Actions*, 30 VAND. L. REV. 1059 (1977).

A number of circuit and district courts have performed a constitutional analysis when applying § 701(j). See, e.g., *International Ass'n of Machinists & Aerospace Workers v. Boeing Co.*, 833 F.2d 165, 168-69 (9th Cir. 1987) (The court applied the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to § 701(j) and concluded that it did not run afoul of the establishment clause because the section was enacted to promote the legitimate secular purpose of prohibiting discrimination in the workplace, its primary effect was neutral, and it did not result in excessive government entanglement in religion.), *cert. denied*, 108 S. Ct. 1488 (1988); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir.) (The court applied the test articulated in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and concluded that § 701(j) did not run afoul of

Although enacted to clarify the nature of the employer's duty under Title VII, the amendment did not provide guidance with respect to three significant issues: 1) the definition and scope of reasonable accommodation;¹⁰ 2) the definition and scope of undue

the establishment clause because the section reflected the clearly secular purpose of prohibiting discrimination in employment, had a primary effect that neither inhibited nor advanced religion, and did not excessively entangle the government with religion. The court also applied the test articulated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), to § 701(j), and again upheld it, concluding that the section reflected government neutrality in the face of religious differences, and did not result in government sponsorship of or financial support for a particular religious group.), *cert. denied sub nom. United Steelworkers of Am. v. Tooley*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 453-55 (7th Cir.) (upheld constitutionality of § 701(j)), *cert. denied*, 454 U.S. 1046 (1981); *Anderson v. General Dynamics*, 489 F. Supp. 782, 784-91 (S.D. Cal. 1980) (held § 701(j) unconstitutional), *rev'd*, 648 F.2d 1247 (9th Cir. 1981); *Burns v. Southern Pac. Transp. Co.*, 20 Empl. Prac. Dec. (CCH) ¶ 30,184 (D. Ariz. 1979) (upheld constitutionality of section 701(j)); *Yott v. North Am. Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977) (held § 701(j) unconstitutional), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *see also Thornton v. Caldor*, 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) (Connecticut statute prohibiting employer from requiring employee to work on his Sabbath violates establishment clause, but the statute is distinguishable from the Title VII duty to accommodate). However, majority opinions in both *Hardison* and *Ansonia* did not directly address the constitutionality of Section 701(j). *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 80 (1986); *Hardison*, 432 U.S. 63.

Establishment clause considerations have, however, clearly defined the parameters of the duty to accommodate employee religious practices. Specifically, regarding the threshold question of what constitutes a religious belief, courts generally limit their inquiry to whether an employee is sincere in his religious beliefs, and do not attempt to evaluate the nature of the belief. *See, e.g., Ansonia*, 479 U.S. 80; *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519 (4th Cir. 1987), *rev'd*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988); *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988). And, regarding the ultimate question of what is required of an employer who must accommodate, the courts have held that, pursuant to the establishment clause, neither employers nor fellow employees can be required by § 701(j) to incur substantial costs to accommodate a religious employee. *See, e.g., Hardison*, 432 U.S. at 84-85.

The constitutional issue concerning costs is whether a law requiring employees to incur costs in accommodating employees would run afoul of the establishment clause. The majority opinion in *Hardison* suggested that such a requirement would be unconstitutional, stating: "While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs." *Hardison*, 432 U.S. at 85-86. The dissent in *Hardison* acknowledged only that "important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer." *Id.* at 90 (Marshall, J. dissenting). Yet the dissent felt that the purpose and primary effect of the religious accommodation requirement was secular, i.e., to secure equal economic opportunity for members of minority religions. The dissent concluded that the fact that the law sometimes required special treatment of members of a particular religious group did not constitute the "sponsorship, financial support, and active involvement of the sovereign in religious activity," which the establishment clause prohibits. *Id.* at 90 n.4 (Marshall, J. dissenting) (quoting *Walz v. Tax Comm'n*, 397 U.S. 667, 668 (1970)).

10. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977); *see also Comment, The*

hardship;¹¹ and 3) the relationship between reasonable accommodation and undue hardship.

Recent court decisions, culminating with the 1986 Supreme Court decision in *Ansonia Board of Education v. Philbrook*,¹² have proffered answers to each of these questions. This Article proposes that the answers proffered generally limit the employer's duty to accommodate employee religious practices. The Article concludes, however, that despite these limits accommodation has not been restricted in at least one significant situation.

Specifically, regarding reasonable accommodation, *Ansonia* followed an approach that potentially creates a per se rule of reasonableness when the accommodation is based on provisions of a collective bargaining agreement.¹³ In addition, dicta in *Ansonia* suggests that compensation is not a component of protected employment status, with the potential result that an employer would have no duty to accommodate an employee's religious practices if the employee is not facing loss of employment.¹⁴

Regarding undue hardship, the Court in *Ansonia* suggested that the analysis used to evaluate cost alternatives could be applied to no-cost alternatives, with the potential result that undue hardship could be found regardless of whether the proposed accommodation imposes any costs, directly or indirectly, on the employer.¹⁵

Finally, regarding the relationship between reasonable accommodation and undue hardship, *Ansonia* followed an approach that makes reasonable accommodation separate and controlling, with the result that an employer's duty to accommodate is satisfied as soon as he proposes a reasonable method of accommodation; the employer need not show that any methods of accommodation suggested by the employee impose undue hardship.¹⁶

While the *Ansonia* Court's approach to these three issues theoretically limits an employer's duty to accommodate employee religious practices in some situations, this Article concludes that, on balance, these limits do not affect the duty to accommodate in the situation in

Supreme Court Narrows an Employer's Duty to Accommodate An Employee's Religious Practices Under Title VII, 53 BROOKLYN L. REV. 245, 246 (1987).

11. See Comment, *supra* note 10, at 246.

12. 479 U.S. 60 (1986).

13. See *infra* notes 26-61 and accompanying text.

14. See *infra* notes 62-88 and accompanying text.

15. See *infra* notes 89-120 and accompanying text.

16. See *infra* notes 121-207 and accompanying text.

which an employee who faces a choice between his job and his religion can be accommodated at no cost to the employer.¹⁷

The Article begins by placing the problem in context, with a discussion of the facts of the seminal Supreme Court cases of *Hardison v. Trans World Airlines*¹⁸ and *Ansonia Board of Education v. Philbrook*.¹⁹ Next, the Article analyzes the statutory and case law defining the concepts of reasonable accommodation and undue hardship. Then, the Article analyzes the statutory and case law defining the relationship between the two concepts. Within each of these sections, the Article examines the impact of *Ansonia* on the analytical framework courts have used to evaluate the duty to accommodate. Lastly, the Article analyzes post-*Ansonia* case law in an effort to assess the cumulative impact of the recent developments in the judicial effort to resolve the three issues left open by the 1972 amendment.

II. THE PROBLEM IN CONTEXT: *HARDISON* AND *ANSONIA*

The Supreme Court cases of *Hardison* and *Ansonia* illustrate typical situations in which the problem of accommodation arises. *Hardison* represents the problem where a seniority provision of a collective bargaining agreement is controlling and accommodation can be achieved only at a cost to the employer. *Ansonia* represents a situation where compensation, but not termination of employment, is at issue.

Hardison was an airline stores clerk employed by TWA. Under the collective bargaining agreement between the airline and the union that represented the clerks, shifts were assigned by seniority. After working at TWA for a year, Hardison became a Sabbath observer. At that time he was working at a job location where he had sufficient seniority to bid for shifts which did not conflict with his observance of the Sabbath. He then transferred to a job location where he did not have sufficient seniority. Subsequently, he was asked to work on Saturday when a fellow employee went on vacation. Hardison explained that his religious beliefs prevented him from working on Saturday, and proposed several alternatives. The proposals included: arranging a shift exchange between Hardison and another employee; arranging for a supervisor to replace Hardison; assigning Hardison to a four day work week; and paying another employee a premium wage to replace

17. See *infra* notes 208-31 and accompanying text.

18. 432 U.S. 63 (1977).

19. 479 U.S. 60 (1986).

Hardison. The last proposal would have cost TWA one hundred and fifty dollars over a three month period, at which time Hardison could have transferred back to his original work location. Hardison proposed that he reimburse TWA the one hundred and fifty dollars. TWA rejected all of Hardison's proposals and, when he did not report for work on his Sabbath, discharged him.²⁰ In upholding the discharge, the Supreme Court held that the seniority provision in the collective bargaining agreement already represented a significant accommodation of employee religious practices. The Court also held that an employer was not required to incur more than a *de minimis* cost when seeking to accommodate an employee.²¹

20. *Hardison*, 432 U.S. at 66-70.

21. *Id.* at 77-85. Since its publication, *Hardison* has purportedly been applied in virtually every significant case dealing with reasonable accommodation. *See, e.g., Ansonia*, 479 U.S. 60 (Court applied *Hardison* in religious discrimination case involving holy day observance); *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519, 523 (4th Cir. 1987) (Sabbath observer), *rev'd*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (Sabbath observer), *cert. denied*, 108 S. Ct. 1283 (1988); *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573-74 (11th Cir. 1986) (Sabbath observer); *Baz v. Walters*, 782 F.2d 701, 706-07 (7th Cir. 1986) (termination of a Veterans Administration chaplain for proselytizing among psychiatric patients); *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (refusal by an employee to process draft registration forms because this conflicted with his religious beliefs); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984) (holy day observer); *Fike v. United Methodist Children's Home, Inc.*, 709 F.2d 284, 286 (4th Cir. 1983) (employee claimed his discharge was due to the fact that he was a Methodist layman rather than a Methodist minister); *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37-38 (6th Cir. 1982) (union security clause); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 144-47 (5th Cir. 1982) (holy day observer); *Edwards v. School Bd.*, 658 F.2d 951, 954 (4th Cir. 1981) (holy day observer); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451-55 (7th Cir.) (union security clause), *cert. denied*, 454 U.S. 1046 (1981); *Howard v. Haverty Furniture Cos.*, 615 F.2d 203, 204-06 (5th Cir. 1980) (termination of employee for leaving work to officiate at a funeral without employer's permission); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 908-09 (9th Cir. 1979) (union security clause), *cert. denied*, 445 U.S. 928 (1980); *Brown v. General Motors Corp.*, 601 F.2d 956, 958-62 (8th Cir. 1979) (Sabbath observer); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405-07 (9th Cir. 1978) (union security clause), *cert. denied*, 439 U.S. 1072 (1979); *Anderson v. General Dynamics*, 589 F.2d 397, 400-01 (9th Cir. 1978) (union security clause), *cert. denied*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 903 (7th Cir. 1978) (termination of an employee because Saturday Bible class activities conflicted with work schedule); *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72, 74 (4th Cir. 1977) (Sabbath observer), *overruled*, *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116, 119 n.3 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977) (Sabbath observer), *cert. denied*, 434 U.S. 1039 (1978); *United States v. City of Albuquerque*, 545 F.2d 110, 115 (10th Cir. 1976) (Sabbath observer), *cert. denied*, 433 U.S. 909 (1977); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) (employee's objection to religious exercise during mandatory employee meetings); *Getz v. Pennsylvania*, 644 F. Supp. 28 (E.D. Pa.) (holy day observer), *aff'd*, 802 F.2d 72 (3d Cir. 1986); *Bennett v. Monon Trailer Corp.*, 631 F. Supp. 724 (N.D. Ind. 1985) (Sabbath observer), *aff'd*, 789 F.2d 919 (1988); *Williams v. Owens-Corning Fiberglas, Inc.*, 40 Empl. Prac. Dec. (CCH) ¶ 36,176 (D. Kan. 1986) (employee's need for Sundays off in order to perform ministerial duties); *Dickson v. International Longshoremen*

Ansonia, the second case, involved a teacher, Philbrook, who sought paid leave from the school board in order to observe his religious holidays. The leave policy of the Ansonia School District was the product of a collective bargaining agreement. The agreement provided that a teacher could take three days paid leave per year for the observance of religious holidays, and three days paid leave to attend to legitimate and necessary personal business, excluding, *inter alia*, observance of religious holidays. In 1985, Philbrook needed more than three days to observe his religious holidays. Because Philbrook was experiencing financial difficulties, he proposed that he be allowed to use one of his personal days for religious purposes, or be allowed to pay for the cost of a substitute in exchange for not being docked in salary. The school district refused to adopt either of Philbrook's proposals, and told him that if he wanted to observe more than three religious holidays per year, he would have to take unpaid leave.²² In upholding the position of the school board, the Court held that the duty to accommodate did not require an employer to act contrary to a leave provision contained in a collective bargaining agreement. The Court also stated that compensation was not a component of employee status requiring preservation pursuant to the duty to accommodate.²³

These two cases are the foundation of the solutions to the

& Warehousemen's Union Local 40, 39 Empl. Prac. Dec. (CCH) ¶ 35,852 (D. Or. 1985) (Sabbath observer); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78, 79 (M.D. Ga. 1985) (Sabbath observer), *aff'd without op.*, 792 F.2d 1125 (11th Cir. 1986); *Krushinski v. Roadway Express, Inc.*, 626 F. Supp. 472, 473-74 (M.D. Pa. 1985) (Sabbath observer); *Gibson v. Missouri Pac. R.R.*, 620 F. Supp. 85 (E.D. Ark. 1985) (Sabbath observer), *dismissed*, 788 F.2d 1171 (8th Cir. 1988); *Protos v. Volkswagon of Am. Inc.*, 615 F. Supp. 1513 (W.D. Pa. 1985) (Sabbath observer), *aff'd in part, vacated in part*, 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1988); *EEOC v. Caribe Hilton Int'l*, 597 F. Supp. 1007, 1011-13 (D.P.R. 1984) (Sabbath observer); *Wesling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982) (denial of employee's request to leave work early in order to assist with a church play); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1186, 1188-90 (M.D. Ala. 1982) (Sabbath observer); *EEOC v. Sambo's, Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981) (refusal by employer to hire a member of the Sikh religion because of his failure to meet facial hair standards); *Niederhuber v. Camden County Vocational & Technical School Dist. Bd. of Educ.*, 495 F. Supp. 273, 279 (D.N.J. 1980) (Sabbath observer), *aff'd*, 671 F.2d 496 (3d Cir. 1981); *EEOC v. Picoma Indus.*, 495 F. Supp. 1, 2 (S.D. Ohio 1978) (Sabbath observer); *Willey v. Maben Mfg., Inc.*, 479 F. Supp. 634, 637 (N.D. Miss. 1979) (holy day observer); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1181 (D.D.C. 1979) (employee's request for an injunction against the I.R.S. to restrain from classifying abortion clinics as tax exempt); *Wren v. T.I.M.E.-D.C., Inc.*, 453 F. Supp. 582, 584 (E.D. Mo. 1978) (Sabbath observer), *aff'd*, 595 F.2d 441 (8th Cir. 1979); *Blakely v. Chrysler Corp.*, 407 F. Supp. 1227, 1230-31 (E.D. Mo. 1975) (Sabbath observer); *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382, 1387 (D. Neb. 1974) (Sabbath observer).

22. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 64 (1986).

23. *Id.* at 68-71.

problems left unresolved by the amendment to Title VII; each of the three unanswered questions is potentially resolved by the specific holdings articulated, and analytical approaches followed, by the Court in these two cases. This Article will now look at each of the three issues separately, and then turn to a post-*Ansonia* analysis of accommodation cases.

III. REASONABLE ACCOMMODATION

The first issue left unresolved by the 1972 amendment, and subsequently raised in the accommodation cases, is the definition of reasonable accommodation as that term is used in section 701(j) and relates to section 703(a)(1) of Title VII. Although the definition of reasonable accommodation is significant because, to a large extent, the term defines the scope of the employer's duty,²⁴ the amendment makes clear only that an employer has an affirmative obligation to act.²⁵ The amendment offers no guidance regarding the extent of the effort required, i.e., guidance with respect to what effort is a reasonable effort. There are two possible approaches to defining the term more specifically—one that focuses on the relevant provision of the applicable collective bargaining agreement, and one that focuses on the resolution of the religious conflict presented and the preservation of the status of the employee involved.

A. *Reasonable Accommodation and Collective Bargaining—The Balancing Approach*

When a requirement of an employee's religion conflicts with a neutral employment policy contained in a collective bargaining agreement,²⁶ the presence of a collective bargaining agreement raises the

24. *Id.* at 69 ("By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end.")

25. See 42 U.S.C. § 2000e(j) (1982); *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 n.9 (1977) (language of § 701(j) reflects the interest of Congress to require the employer to make some effort to accommodate the religious practices of an employee).

26. See, e.g., *Ansonia*, 479 U.S. 60; *Hardison*, 432 U.S. 63; *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772 (9th Cir. 1986); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022 (5th Cir. 1984); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984); *Edwards v. School Bd.*, 658 F.2d 951 (4th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072

question of whether the statutory duty to accommodate takes precedence over the terms of the agreement.²⁷ The reasonableness of the employer's conduct in this situation is determined by balancing national labor policy as embodied in the National Labor Relations Act²⁸ and the Railway Labor Act²⁹ against antidiscrimination in employment policy as embodied in Title VII.³⁰

(1979); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1976); *EEOC v. Davey Tree Surgery Co.*, 43 Fair Empl. Prac. Cas. (BNA) 1177 (N.D. Ca. 1987); *Williams v. Owens-Corning Fiberglas, Inc.*, 40 Empl. Prac. Dec. (CCH) ¶ 36,176 (D. Kan. 1986); *Getz v. Pennsylvania*, 644 F. Supp. 28 (E.D. Pa.), *aff'd*, 802 F.2d 72 (3d Cir. 1986); *Bennett v. Monon Trailer Corp.*, 631 F. Supp. 724 (N.D. Ind. 1985), *aff'd*, 789 F.2d 919 (1988); *Benefied v. Food Giant, Inc.*, 630 F. Supp. 78 (M.D. Ga. 1985), *aff'd*, 792 F.2d 1125 (11th Cir. 1988); *Gold v. City of Chicago*, 43 Fair Empl. Prac. Cas. (BNA) 917 (N.D. Ill. 1986); *Krushinski v. Roadway Express, Inc.*, 626 F. Supp. 472 (M.D. Pa. 1985); *Dickson v. International Longshoremen & Warehousemen's Union Local 40*, 39 Empl. Prac. Dec. (CCH) ¶ 35,852 (D. Or. 1985); *Gibson v. Missouri Pac. R.R.*, 620 F. Supp. 85 (E.D. Ark. 1985), *dismissed without op.*, 786 F.2d 1171 (8th Cir. 1986); *Protos v. Volkswagon of Am., Inc.*, 615 F. Supp. 1513 (W.D. Pa. 1985), *aff'd in part, vacated in part*, 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1988); *McDonald v. McDonnell Douglas Corp.*, 36 Empl. Prac. Dec. (CCH) ¶ 35,192 (N.D. Okla. 1984); *EEOC v. Caribe Hilton Int'l*, 597 F. Supp. 1007 (D.P.R. 1984); *Rising v. Roadway Express Inc.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,117 (D. Mass. 1981); *Niederhuber v. Camden County Vocational & Technical School Dist. Bd. of Ed.*, 495 F. Supp. 273 (D.N.J. 1980), *aff'd*, 871 F.2d 498 (3d Cir. 1981); *EEOC v. Picoma*, 495 F. Supp. 1 (S.D. Ohio 1978); *Kendall v. United Airlines*, 494 F. Supp. 1380 (N.D. Ill. 1980); *Wren v. T.I.M.E.-D.C., Inc.*, 453 F. Supp. 582 (E.D. Mo. 1978), *aff'd*, 595 F.2d 441 (8th Cir. 1979); *Blakley v. Chrysler Corp.*, 407 F. Supp. 1227 (E.D. Mo. 1975); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974); *Reid v. Memphis Publishing Co.*, 369 F. Supp. 684 (D.C. Tenn. 1973), *aff'd*, 521 F.2d 512 (8th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976).

27. See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63, 80 (1977).

28. 29 U.S.C. §§ 151-69 (1982) [hereinafter NLRA].

29. 45 U.S.C. §§ 151-88 (1982) [hereinafter RLA].

30. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (reconciling NLRA with Title VII); *Hardison*, 432 U.S. at 80-83 (reconciling "national labor policy" with Title VII); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1027 (5th Cir. 1984) ("[W]e do not construe section 701(j) to require an employer to bypass duly elected bargaining representatives to negotiate directly with individual employees. Such a construction would run counter to basic principles of national labor policy as expressed with specific regard to the railway industry in the Railway Labor Act."); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984) (reconciling NLRA with Title VII); *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982) (reconciling NLRA with Title VII); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir.) (reconciling NLRA with Title VII), *cert. denied*, 454 U.S. 1046 (1981); *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978) (reconciling NLRA with Title VII), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979); *Kendall v. United Airlines*, 494 F. Supp. 1380 (N.D. Ill. 1980) (reconciling RLA with Title VII); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), where the Court was called upon to reconcile the dictates of the NLRA with those of Title VII. *Franks* held that retroactive seniority could be awarded to victims of past discrimination in order to make the victims whole. The Court stated that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public

The balancing process used to determine the reasonableness of the employer's efforts to accommodate when collective bargaining agreements are involved requires consideration of three factors: 1) the significance of the contractual provision at issue to the collective bargaining process; 2) the effect of religious accommodation of one employee on the contractual rights of other employees; and 3) the special treatment, if any, afforded the contractual provision under Title VII.³¹ If the application of these three factors indicates that national labor policy concerns are paramount in a given situation, the employer's conduct is declared reasonable if he simply adheres to the neutral policy contained in the collective bargaining agreement. On the other hand, if, on balance, antidiscrimination policy is considered to be more critical, the employer may be required to propose a method of accommodation which is contrary to the terms of the agreement before his conduct is deemed reasonable.³²

1. *The Development of the Balancing Approach*

The most significant case analyzing the relationship between religious accommodation and collective bargaining agreements is *Hardison*. With respect to this relationship, *Hardison* held that the employer's Title VII duty to accommodate the religious needs of his employees did not take precedence over the terms of a seniority system contained in a provision of a valid collective bargaining agreement. The Court concluded that an employer is not required by Title VII to create an exception to its seniority system in order to meet the religious needs of an employee.³³ In support of its conclusion, the

policy interest." *Id.* at 778; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (reconciling NLRA with Title VII).

31. *Hardison*, 432 U.S. at 80-84.

32. See *infra* notes 42-49 and accompanying text.

33. *Hardison*, 432 U.S. at 80-84. When first published, *Hardison* aroused considerable controversy. See, e.g., Frantz, *Religious Discrimination in Employment: An Examination of the Employer's Duty to Accommodate*, 39 DET. C.L. REV. 205 (1979); Livingood, *The Status of Religious Accommodation After the Hardison Case*, 29 LAB. L.J. 226 (1978); Retter, *The Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees*, 11 COLUM. HUM. RTS. L. REV. 63 (1980); Wolkinson, *Title VII and the Religious Employee: The Neglected Duty of Accommodation*, 30 ARB. J. 89 (1975); Note, *Religious Accommodation in Employment—the Eleventh Commandment?*—*Trans World Airlines v. Hardison*, 32 ARK. L. REV. 588 (1978); Note, *Title 7—Religious Discrimination—Employer's Duty to "Reasonably Accommodate" Employees' Religious Practices*, 9 CREIGHTON L. REV. 795 (1976); Note, *Title VII and the Religious Employee: Trans World Airlines, Inc. v. Hardison Retrenches on the Reasonable Accommodation Requirement*, 14 N.C.L. REV. 356 (1978); Note, *Religious Discrimination and Title VII's Reasonable Accommodation Rule: Trans World Airlines, Inc. v. Hardison*, 39 OHIO ST. L.J. 639 (1978); Note, *Accommodation*

Court articulated and applied the three factors mentioned above. First, the Court noted that seniority provisions were generally included in collective bargaining agreements. Then, the Court reasoned that if seniority systems gave way to the Title VII duty to accommodate, employees who did not observe a particular religious practice would be deprived of their contractually guaranteed seniority rights. Finally, the Court noted the special treatment afforded seniority systems under Title VII.³⁴

The Court's conclusion, based upon the application of the three factors to the situation before it, would appear to be beyond dispute.³⁵ Seniority provisions³⁶ are generally considered central to the process

of an Employee's Religious Practices: Trans World Airlines, Inc. v. Hardison, 15 URB. L. ANN. 311 (1978); Note, *Trans World Airlines, Inc. v. Hardison: A Limitation on the Employer's Duty to Accommodate the Religious Practices of his Employees*, 1977 UTAH L. REV. 835; Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOKLYN L. REV. 598 (1978); Comment, *Religious Discrimination in Employment: Striking the Delicate Balance*, 80 DICK. L. REV. 717 (1976); Comment, *Title VII and the Sabbath Observer*, 5 HOFSTRA L. REV. 911 (1977); Comment, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution?*, 9 LOYOLA U. CHI. L.J. 413 (1978); Comment, *Extent of Accommodation to Employees' Religious Practices under Title VII: Developments Since Trans World Airlines, Inc. v. Hardison*, 31 MERCER L. REV. 595 (1980); Recent Developments, *Civil Rights—Title VII and the Duty to Accommodate Religious Practices: Toward a Stricter Standard?*, 45 FORDHAM L. REV. 967 (1977).

Despite the controversy, *Hardison* has been universally applied in accommodation cases. See *supra* note 21.

34. *Hardison*, 432 U.S. at 79-82.

35. Subsequent cases dealing with seniority agreements which have applied *Hardison* include: *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022 (5th Cir. 1984) (employer who assigned shifts on the basis of seniority provision in collective bargaining agreement need not contravene the system to accommodate Seventh Day Adventist who did not have enough seniority to bid on shifts that allowed him to accommodate his Sabbath); *Kendall v. United Airlines*, 494 F. Supp. 1380, 1391 (N.D. Ill. 1980) (employer who assigned shifts on the basis of seniority provisions in collective bargaining agreement need not contravene or in any way modify the system to accommodate Sabbath observer who did not have enough seniority to bid on shifts that accommodated his Sabbath); *Wren v. T.I.M.E.-D.C., Inc.*, 453 F. Supp. 582, 584 (E.D. Mo. 1978) (employer who assigned routes, which in turn determined weekly shifts and hours, on the basis of seniority provision in collective bargaining agreement need not go outside of system to accommodate member of Worldwide Church of God who, with one exception, had insufficient seniority to bid on shift that accommodated his Sabbath), *aff'd*, 595 F.2d 441 (8th Cir. 1979).

36. The agreement stated, in part:

The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

. . . .

Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department

Trans World Airlines v. Hardison, 432 U.S. 63, 67 n.1 (1977).

of collective bargaining, and thus qualify as significant contractual provisions.³⁷ *Hardison* itself illustrates that significant aspects of the employment situation are often based upon such provisions.³⁸ In addition, if the employer circumvented the seniority system by relieving one employee of work on his Sabbath and ordering a senior employee to replace him, the senior employee would clearly have been denied his shift preference and deprived of his contractual rights.³⁹ Finally, section 703(h) of Title VII creates an exemption for discrimination resulting from the operation of seniority by providing that, absent discriminatory intent, "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system."⁴⁰ Even the dissent in *Hardison*,

37. *Id.* at 79 ("Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts."). For cases involving seniority agreements, see, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1976); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022 (5th Cir. 1984); *Kendall v. United Airlines*, 494 F. Supp. 1380 (N.D. Ill. 1980); *Wren v. T.I.M.E.-D.C., Inc.*, 453 F. Supp. 582 (E.D. Mo. 1978), *aff'd*, 595 F.2d 441 (8th Cir. 1979).

38. *Hardison*, 432 U.S. at 80-81. The Court explained that whenever there were not enough employees who chose to work a particular shift, some employees were assigned to that shift even if it was not their first choice. *Id.* This often occurred with respect to Saturday work because even though TWA had cut back its Saturday work force to a skeleton crew, not enough employees chose Saturday work to staff certain departments. In these circumstances, the collective bargaining agreement between TWA and IAM gave first preference to employees who had worked in a particular department the longest.

The Court concluded that it was essential to TWA's business that Saturday and Sunday work be required from at least a few employees even though most employees wanted those days off, and that "allocating the burdens of weekend work was a matter for collective bargaining." *Id.* at 80.

39. *Id.* at 80-81. The Court explained that if TWA, despite the seniority system, had relieved *Hardison* of Saturday work and ordered a senior employee to replace *Hardison*, the senior employee would have been denied the shift preference so that *Hardison* could be given his. The Court concluded that this would amount to a denial of contractual rights for the senior employee at least in part because the senior employee did not observe the Saturday Sabbath. *Id.*

40. 42 U.S.C. § 2000e-2(h) (1982). See *Hardison*, 432 U.S. at 82 (Based on the language of § 703(h), "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 352 (1977) ("[T]he unmistakable purpose of Section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."); see also *United Airlines v. Evans*, 431 U.S. 553 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 ("[Section 703(h)] is a definitional provision; as with the other provisions of Section 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not."). Regarding the seniority provision in *Hardison*, the Court concluded that there was no suggestion of discriminatory intent in the case. The Court based its conclusion on the fact that the intent of the seniority system was not to discriminate against religion, or create a situation in which freedom to exercise religion was consistently limited for any particular group. The Court concluded that it was coincidental that, in *Hardison's* case, the seniority system made it impossible for him to exercise his religion. *Hardison*, 432 U.S. at 82.

though generally critical of the analysis of the majority regarding the employer's duty to accommodate, agreed that the seniority rights of all employees under the collective bargaining agreement should be preserved.⁴¹

2. *Post-Hardison Developments*

Following *Hardison*, courts were faced with the task of determining the effect of Title VII on other types of provisions in collective bargaining agreements. In particular, cases arose that involved union security provisions and leave provisions.

a. *Union Security Provisions*

Several cases arose involving employees who were both Seventh Day Adventists and subject to collective bargaining agreements containing union security provisions.⁴² These cases involved a conflict between national labor policy and antidiscrimination policy because the tenets of the employees' religion prohibited them from joining a union, or paying union dues or a service fee equal to union dues, while the union security provisions required employers, when requested to do so by unions, to discharge employees who refused to join the unions or pay dues.⁴³

41. *Hardison*, 432 U.S. at 91-97 (Marshall, J., dissenting). At least one case, *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185 (M.D. Ala. 1982), applied this approach to a situation which apparently did not involve a collective bargaining agreement. *Murphy* involved an employer-hospital which scheduled its employee-nurses on a neutral, rotating basis, without regard to seniority. *Id.* at 1190. The court, after discussing the effect of accommodation on other employees, held that, pursuant to *Hardison*, an employer seeking to satisfy its Title VII obligation to accommodate the religious practices of its employees is not required to alter such a neutral scheduling system, but must attempt to accommodate the employee within the neutral system. *Id.* at 1189. The court went on to analyze alternatives consistent with the scheduling system, including staff reduction and use of part-time employees. *Id.* at 1190-92.

42. There are several types of union security agreements, including the closed shop and the agency shop. A closed shop provision requires union membership as a condition of continued employment. An agency shop provision does not require union membership as a condition of employment, but does require payment to the union of a sum equal to its current dues. *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 450 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 342 (6th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Cooper v. Gen. Dynamics*, 533 F.2d 163, 165 (5th Cir. 1976).

43. See, e.g., *International Ass'n of Machinists & Aerospace Workers v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1488 (1988); *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979); *Cooper v. General Dynamics*, 533 F.2d 163 (9th Cir. 1976); *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), *cert. denied*, 445 U.S. 928 (1980); *Tooley v. Martin-Marietta*

The first factor to be considered, i.e., the importance of the provision to the collective bargaining process, suggests that union security provisions should be treated like seniority provisions. Union security provisions, like seniority provisions, constitute an important aspect of collective bargaining⁴⁴ and are commonly found in collective bargaining agreements.⁴⁵ The other two factors, however, indicate that security provisions should be treated differently from seniority provisions. While affording one employee special treatment under a seniority system necessarily affects the status and rights of other employees on the seniority list, requiring an employer or union to take steps inconsistent with a union security provision does not adversely affect the contractual rights of other employees.⁴⁶ In addition, Title

Corp., 476 F. Supp. 1027 (D. Or. 1979), *aff'd*, 648 F.2d 1239 (9th Cir.), *cert. denied sub nom.* United Steelworkers of Am. v. Tooley, 454 U.S. 1098 (1981). Generally, in these cases, the employees proposed that their religious beliefs be accommodated by allowing the employees to contribute an amount, equal to union dues, to a charitable organization. When the unions rejected this alternative and demanded that the employers discharge the employees, the employers brought Title VII actions against the unions, the employees, or both.

44. The NLRA explicitly authorizes union security provisions. Section 8(a)(3), 29 U.S.C. § 158(a)(3), states in part: "[N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require membership as a condition of employment." In addition, the relevant legislative history states in part: "It seems to us that these amendments [the proviso portions of § 8(a)(3)] remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promote stability by eliminating 'free riders' the right to continue such arrangements." S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947). *See also* International Ass'n of Machinists v. Street, 367 U.S. 740 (1960). The court in *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398, 400 n.4 (9th Cir. 1974), *cert. denied*, 445 U.S. 928 (1980), in discussing the importance of union security agreements to national labor policy, summarized failed attempts to enact exceptions to the union security provisions of the NLRA as follows:

H.R. 11666, 89th Cong., 1st Sess. (1965) ([attempt to] [e]xempt persons with religious convictions from the union membership requirements of NLRA [was referred to committee only]); S. 3203, 89th Cong., 2d Sess. (1966) ([attempt to] protect persons conscientiously opposed to union membership [was] [d]efeated); S. 3153, 89th Cong., 2d Sess. (1966) ([attempt to make] it unfair labor practice under NLRA to require persons conscientiously opposed to union membership . . . [was] [d]efeated); S. 2108, [attempt] to make it an unfair labor practice for a labor organization to discriminate on account of race, color, religion or national origin [was] [r]eferred to Committee on Labor and Public Welfare [only].

The court concluded that "[i]t is for Congress, which authorized union security clauses, not the judiciary, to carve out exceptions to those clauses." *Id.*

45. *See infra* note 46 and accompanying text.

46. *Accord* *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 38 (6th Cir. 1982). In distinguishing the situation in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), involving seniority provisions, from the one before it involving security provisions, the court stressed the fact that if TWA acted in a way that was inconsistent with the seniority system, other employees would have been adversely affected and TWA would have incurred substantial expenses. The court concluded that, absent these two negative ramifications, the employer before it could not use the union security provision of its

VII does not provide an exemption for unintentional discrimination resulting from enforcement of a union security provision.⁴⁷

In fact, courts resolving religious discrimination cases involving union security provisions have generally held that, in order to satisfy the duty to reasonably accommodate, employers must create exceptions to union security provisions contained in collective bargaining agreements.⁴⁸ The courts have made it clear, however, that an employer is not being per se unreasonable for acting in accordance with a union security provision. Other factors are also relevant, including availability of methods of accommodation, and whether those methods work an undue hardship on the union or employer.⁴⁹

agreement with the union representing its employees to violate Title VII. The court then upheld the finding of the district court that the employer had failed to establish that accommodation would cause undue hardship. *McDaniel*, 696 F.2d at 38. See also *Anderson v. General Dynamics*, 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979).

47. See 42 U.S.C. § 2000e-2(h) (1982); accord *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981):

Title VII does not itself provide an exemption for unintentional discrimination resulting from the enforcement of union security clauses as it does, for example, for unintentional discrimination resulting from the implementation of a bona fide seniority or merit system. Given the absence of such an express exemption and the complete lack of evidence that Congress intended the courts to imply such an exemption from the NLRA, we join with the Fifth, Sixth and Ninth Circuits in holding that the union security provisions of the NLRA "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees."

(citations omitted) (quoting *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978)).

48. See *supra* note 46 and accompanying text. This result has subsequently been codified in § 19 of the NLRA, 29 U.S.C. § 169 (1982).

At least one court has held that Title VII prohibits a closed shop, despite the existence of § 8(a)(3) and § 8(b)(2) of the NLRA, 29 U.S.C. §§ 158(a)(3), (b)(2) (1982), which authorize unions to negotiate and enforce closed shop agreements. See *Tooley v. Martin-Marietta Corp.*, 476 F. Supp. 1027 (D. Or. 1979), *aff'd*, 648 F.2d 1239 (9th Cir.), *cert. denied sub nom. United Steelworkers of America v. Tooley*, 454 U.S. 1098 (1981). The *Tooley* court pointed out that Title VII was enacted after the closed shop provisions of the NLRA, and prohibited religious discrimination even in situations involving otherwise lawful objectives. The court concluded that "the religious accommodation provision of Title VII is an appropriate exception to the NLRA. It accommodates the free exercise of religion without violating the Establishment Clause." 476 F. Supp. at 1029. See Note, *Title VII of the Civil Rights Act Requires Reasonable Accommodation of Employee's Religious Belief by Employer Despite Conflicting Lawful Agency Shop Provision*, 19 B.Y.U. L. REV. 152 (1977); Note, *Accommodating the Anti-Union Religious Employee—a Balanced Approach*, 32 RUTGERS L. REV. 484 (1979); Note, *Accommodation of Refusal to Pay Dues in an Agency Shop Because of Religious Beliefs*, 23 WAYNE L. REV. 1171 (1977).

49. See, e.g., *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37-38 (6th Cir. 1982); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451-53 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Anderson v. General Dynamics*, 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979); *Cooper v. General Dynamics*, 533 F.2d 163, 173 (5th Cir. 1976) (Brown, J., concurring), *cert. denied sub*

b. Leave Provisions

Most recently, courts have been asked to determine the effect of the Title VII duty to accommodate on leave provisions contained in collective bargaining agreements. Generally, the conflict here arises when the tenets of an employee's religion require him to refrain from work on certain holidays, but the governing collective bargaining agreement does not allocate enough leave days for that purpose.⁵⁰

Application of the three factor balancing approach articulated in *Hardison* to the conflict between the duty to accommodate and contractual leave provisions which do not require an employer to adjust his work schedule would once again suggest that, despite the importance of leave provisions to collective bargaining, the conflict should be resolved in favor of Title VII. Like union security provisions, and unlike seniority provisions, adjusting this type of leave provision to accommodate the religious practices of one employee does not affect the contractual rights of any other employees.⁵¹ And, again like

nom. International Ass'n of Machinists and Aerospace Workers v. Hopkins, 433 U.S. 908 (1977). Courts have considered undue hardship when determining a union's duty to accommodate despite the fact that § 701(j) of Title VII, 42 U.S.C. § 2000e(j) (1982), does not qualify the union's duty with the phrase "undue hardship." See *Cooper*, 533 F.2d at 170-71.

50. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (member of Worldwide Church of God required to miss six days of work to observe religious holy days; operative collective bargaining agreement allocated only three days of paid leave for religious observance); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984) (Orthodox Jew required to miss three days of work to observe religious holy days; operative collective bargaining agreement allocated only two days of paid leave for religious observance); *Kendall v. United Airlines*, 494 F. Supp. 1380 (N.D. Ill. 1980) (member of Worldwide Church of God sought leave of absence to accommodate his Sabbath observance; operative collective bargaining agreement provided for leaves of absence, which employer refused to grant).

51. There are several types of leave provisions. Most grant leave based upon various enumerated reasons. For example, the leave policy in *Ansonia* read, in part, as follows:

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness and/or illness in the immediate family (spouse, children, parents, and family members residing in household), which requires the presence of the professional staff member, and within the limits stated below: limit of 2 days per

....

10. Mandated religious observance. 3 days per year—without charge. Those holidays which are required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year.

Philbrook v. Ansonia Board of Educ., 757 F.2d 476, 479 n.2 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986). See also *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984). An employee who takes leave pursuant to this type of provision is replaced by a substitute employee from outside the regular work force. Thus, the contractual rights of the employees in the regular workforce are

union security provisions and unlike seniority provisions, Title VII does not provide an exemption for unintended discrimination resulting from the enforcement of leave provisions.⁵²

Initially, a number of courts held that the mere presence of a leave provision in a collective bargaining agreement did not relieve the employer of the duty to seek an accommodation between the employee's work and religious requirements.⁵³ More recently, however, the Tenth Circuit in *Pinsker v. Joint District No. 28J*⁵⁴ held that an employer who adheres to the terms of a typical leave provision in a collective bargaining agreement has complied with Title VII, even if the leave provision is inadequate to accommodate the employee's needs. The court so held even though the leave policy in question did not require an adjustment of other employees' work schedules. Specifically, *Pinsker* involved a school teacher who was required to take unpaid leave to observe his religious holidays. In rejecting the teacher's claim of failure to accommodate, the court stated that, "[b]ecause [employees] are likely to have not only different religions but also different degrees of devotion to their religions, [an employer] cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly."⁵⁵

The approach articulated in *Pinsker* was apparently followed by the Supreme Court in *Ansonia*. Like *Pinsker*, *Ansonia* involved a school teacher who was required to take unpaid leave to observe his religious holidays, and a collectively bargained leave policy that did not resolve the employee's conflict between his religion and job responsibilities.⁵⁶ In remanding for a determination of whether the employer's leave policy was reasonable, the Court stated: "We think that [the employer's] policy in this case, requiring [the employee] to take unpaid leave for holiday observance that exceeded the amount allowed by the collective bargaining agreement, would generally be a reasonable one."⁵⁷

unaffected. See, e.g., *Ansonia*, 757 F.2d at 486-87. This discussion is concerned with these types of leave provisions only. Other types of leave provisions are based on seniority. These types of leave provisions should be analyzed in the same way as scheduling systems based on seniority. See *supra* notes 35-41 and accompanying text.

52. See 42 U.S.C. § 2000e-2(h) (1982).

53. See, e.g., *Kendall v. United Air Lines*, 494 F. Supp. 1380, 1391 (N.D. Ill. 1980); see also *Ansonia*, 757 F.2d 476.

54. 735 F.2d 388 (10th Cir. 1984).

55. *Id.* at 391.

56. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

57. *Id.* at 70.

3. *The Impact of Ansonia and Pinsker on the Balancing Approach*

Some aspects of *Ansonia* and *Pinsker* appear to restrict the utility of the balancing approach. By allowing neutral provisions in a collective bargaining agreement to satisfy the employer's duty to accommodate, *Ansonia* and *Pinsker* seem to create a non-statutory exemption to Title VII for unintentional discrimination resulting from enforcement of provisions contained in collective bargaining contracts, even when the provisions do not affect the rights of other employees. When coupled with the statement in *Ansonia* that once an employment policy in a collective bargaining agreement is determined to be reasonable the inquiry regarding the employer's duty to accommodate is satisfied,⁵⁸ *Ansonia* further restricts the utility of the balancing approach by making the conduct of an employer who is party to a collective bargaining agreement containing a relevant provision reasonable per se with respect to compliance with Title VII.⁵⁹

58. *Id.* at 68-69. After reasonably accommodating the employee's religious needs, "[t]he employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Id.*

59. *Id.*; see also *Pinsker*, 735 F.2d at 391. At one point, the Court in *Hardison* articulated language consistent with the per se approach. In discussing the seniority provision in the collective bargaining agreement, the Court stated:

We shall say more about the seniority system, but at this juncture it appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. As will become apparent, the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off.

Trans World Airlines v. Hardison, 432 U.S. 63, 78 (1977). In the very next sentence, however, the Court began examining steps taken by the employer to accommodate its employees, stating: "Additionally, recognizing that weekend work schedules are the least popular, the company made further accommodation by reducing its work force to a bare minimum on those days." *Id.* The Court subsequently analyzed other methods of accommodation. *Id.* at 84-85.

The court in *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986), refused to find that the presence of a leave provision in a contract in and of itself constituted a reasonable accommodation. In so holding, the court did consider both the importance of leave provisions to the collective bargaining process, and the effect of accommodating the observing employee on the non-observing employees. Regarding the former, the court stated that "[e]mployers and unions must be free to outline specific types of paid leaves in a contract without the threat of being charged with religious discrimination," and that employers and unions were free "to agree to take the personal business leave provisions out of the contract all together." *Id.* at 485-86. Regarding the latter, the court stated that the employee's proposal that he be allowed to take personal business leave for religious observance did not amount to a request for preferential treatment, because the employee was asking the school board and the union to change its leave policy as applied to all employees covered by the contract. Similarly, the court felt that the proposal did not amount to a request for a privilege based upon religious beliefs. Rather, the court stated, "Appellant has asked to be treated differently; he has not asked for privileged treatment." *Id.* at 487. The court felt

Ultimately, however, *Ansonia* and *Pinsker* argue for the continued validity of the balancing approach. Both cases involved collective bargaining agreements with provisions specifically designed to accommodate employee religious practices in the manner requested by the complaining employee, i.e., provisions which allocated paid days off for observance of religious holidays.⁶⁰ By holding that the provisions satisfied the employer's duty to accommodate, *Ansonia* and *Pinsker* simply found that leave provisions which provide paid days off for religious observance effectively balance the concerns of Title VII and national labor policy, even if the provisions did not provide sufficient time off to meet the specific needs of the plaintiff employee. The latter interpretation would seem to be the appropriate interpretation of *Ansonia* and *Pinsker*; it continues to allow the policies of both Title VII and federal labor law to be factored into the accommodation analysis, and comports with the approach articulated in *Hardison*.⁶¹

B. *The Resolution and Preservation Approach*

The second approach to defining reasonable accommodation is based upon the premise that employers are required to accommodate the religious practices of their employees in a manner which reasonably preserves employment status.⁶² This approach focuses on the specific nature of the religious and employment requirements at issue, and can be used whether or not a collective bargaining agreement is involved.⁶³ Under this approach, when an employee's religious practices conflict with his employment requirements, the employer has an affirmative duty to propose a method of accommodation.⁶⁴ The pro-

that privileged treatment was not involved because, in exchange for receiving the additional paid days off, the employee was willing to make up the time or pay for a substitute. The court concluded that interpreting *Hardison* as precluding the accommodations proposed by the employee would "preclude all forms of accommodation and defeat the very purpose behind Section 2000e(j)." *Id.*

60. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984).

61. See *supra* notes 24-32 and accompanying text. *Hardison* was cited as authority in both *Ansonia* and *Pinsker*.

62. See, e.g., *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986).

63. See, e.g., *Ansonia*, 479 U.S. 60; *American Postal Workers*, 781 F.2d 772.

64. *American Postal Workers*, 781 F.2d at 775. See *Anderson v. General Dynamics*, 589 F.2d 397, 401 (9th Cir. 1978) ("[T]he burden was upon the [employer], not [the employee] to undertake initial steps toward accommodation."), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) ("[T]he burden was on the Company and the Union to prove that they made good faith efforts to accommodate [the employee's] religious

posed method is analyzed to determine if it eliminates the employee's religious conflict. If the proposed accommodation successfully eliminates the employee's religious conflict, the method is then evaluated to determine if it does so without affecting the employment status of the employee. An accommodation that eliminates the employee's religious conflict without affecting his employment status is deemed reasonable.⁶⁵ The determination of reasonableness is made on a case by case basis.⁶⁶

While the basic premise underlying this resolution and preservation approach is well settled, the scope of the term "employment status" is not. Broadly defined, the term includes employment opportunities, and compensation, terms, conditions, and privileges of employment.⁶⁷ Narrowly defined, the term is limited to employment opportunities, and excludes compensation as an element.⁶⁸ The term employment status is not specifically defined in section 701(j). Nevertheless, the concept of employment status is central to the application

beliefs"); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 341-42 (6th Cir. 1978); *see also* *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 n.9 (1977); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (nothing in the statute supports the position that suggesting methods of accommodation is part of the employee's burden of proof).

65. *See, e.g., American Postal Workers*, 781 F.2d 772. The case involved postal clerks who, out of religious conviction, refused to process draft registration forms. When the employees were transferred to other jobs within the postal service, they brought suit, alleging religious discrimination. In holding that the transfers must be analyzed to determine their effect on employee status before the transfers could be deemed to constitute a reasonable accommodation, the court defined status as the "compensation, terms, conditions, and privileges of employment." *Id.* at 776. In so holding, the court relied on language in the National Labor Relations Act and the EEOC guidelines discussed earlier. *Id.* *See also* *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) ("The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work."), *rev'd*, 479 U.S. 60 (1986); *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988).

66. *See, e.g., Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988); *American Postal Workers*, 781 F.2d 772; *Anderson v. General Dynamics*, 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 902-03 (7th Cir. 1978); *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 489 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976).

67. *See, e.g., American Postal Workers*, 781 F.2d at 776.

68. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70-71 (1986); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 391 (10th Cir. 1984). *Pinsker* involved a school teacher who was an Orthodox Jew. The teacher was subject to a collective bargaining agreement in effect between the employer school board and the union representing the employee teacher. The contract allocated a specific number of paid days off for religious observance and a specific number for personal leave, and specifically stated that personal leave days could not be used for religious observance. A conflict arose because the tenets of Pinsker's religion forbade him from working on holy days, but the collective bargaining agreement to which he was subject did not allocate sufficient paid time off for the pur-

of the resolution and preservation approach; the breadth of the definition of employment status can have a substantial effect on the reasonable accommodation analysis, particularly in cases involving employees who seek to have their observance of the Sabbath or particular holidays accommodated.⁶⁹

1. *The Appropriate Interpretation of the Term Employment Status*

There is some evidence in the legislative history of the amendment to section 701 of Title VII that supports a narrow construction of employment status. Much of the discussion in the legislative record reflects the concern of Senator Randolph, the sponsor of the 1972 amendment, that employees not lose their jobs because their religious beliefs prevent them from working on Sunday or from sundown Friday to sundown Saturday.⁷⁰ Despite the possible inference that Con-

pose. Pinsker proposed that he be allowed to use personal leave days for religious observance, and the school board rejected his proposal. *Id.* at 389-90.

In upholding the board's position, the *Pinsker* court stated "Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, a school district cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly." *Id.* at 391. Because the Board's policy did not force Pinsker to choose between his job and his religion, the court held that this was reasonable accommodation of Pinsker's religious practices, even though he was required to take unpaid leave. *Id.* See also *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985) (court presumed that a policy providing unpaid leave for religious observance was "reasonable"), *rev'd*, 479 U.S. 60 (1986).

69. The effect is two-fold. Obviously, if offering a policy of unpaid leave is deemed to satisfy an employer's statutory duty to accommodate, an employee who observes a holiday normally falling on a work day loses compensation. However, holding that lost compensation does not affect employment status and completely resolves the conflict between religious practice and employment requirements denies the employee the benefit of having his proposed methods of accommodation considered and analyzed for undue hardship. See, e.g., *Ansonia*, 479 U.S. at 74 (Marshall, J., dissenting):

In this case, contrary to the Court's conclusion, [479 U.S.] at 70-71, the school board's accommodation of Philbrook's religious needs by merely allowing unpaid leave does not eliminate the conflict. Rather, the offer forces Philbrook to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay. It is precisely this loss of compensation that entitles Philbrook to further accommodation, if reasonably possible without undue hardship to the school board's educational program. It may be that unpaid leave will generally amount to a reasonable accommodation, but this does not mean that unpaid leave will always be the reasonable accommodation which best resolves the conflict between the needs of the employer and employee. In my view, then, an offer of unpaid leave does not end the inquiry: If an employee, in turn, offers another reasonable proposal that results in a more effective resolution without causing undue hardship, the employer should be required to implement it. The relationship between reasonable accommodation and undue hardship is discussed in Part V, *infra*.

70. 118 CONG. REC. 705-06 (1972) (statement of Sen. Randolph). There has been some debate over the utility of using the legislative history of § 701(j) in determining the extent of the obligation

gress intended to protect only employees threatened with loss of their

to accommodate. The entire history contains only the transcript of a brief floor debate in the Senate, which is comprised almost entirely of statements by Senator Jennings Randolph—a sponsor and the chief proponent of the 1972 amendment to § 701(j)—and reprints of the cases of *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), and *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

The statements of Senator Randolph centered around the situations of Sabbath observers, which he defined as those observing “the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, ‘From eve unto eve shall you celebrate your Sabbath.’” 118 CONG. REC. 705 (1972) (quoting the Bible). The Senator expressed concern over what he believed to be a partial refusal by employers to hire or retain employees who were Sabbath observers. He also stated that he believed the courts had failed to resolve the issue, and had on occasion determined that freedom from religious discrimination was nebulous. He concluded that he was offering the amendment “to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.” *Id.* at 705-06.

The *Dewey* case involved an employee who refused to work on Sunday because of his religious beliefs. Pursuant to the terms of a collective bargaining agreement, the employee was nonetheless occasionally scheduled for overtime work on Sunday. The relevant provisions of the collective bargaining agreement: 1) stated that all employees were obligated to perform straight time and overtime work provided by the employer; 2) provided for division of overtime among all employees as equally as possible, with mandatory overtime being assigned in the inverse order of seniority; and 3) allowed any employee assigned overtime to arrange for another employee to replace him. The employee was assigned overtime five times in a seven month period, and arranged for a replacement each time. Subsequently the employee was assigned to work on three Sundays and refused to work or find a replacement, believing it was against his beliefs to work on Sunday or induce others to do so. After his third failure to report for work or find a replacement, the employee was discharged. *Dewey*, 429 F.2d at 328-29. The court held that the neutral provision in the collective bargaining contract satisfied the employer's duty to accommodate, and upheld the discharge. *Id.* at 330.

Similarly, *Riley* involved an employee who, because of his religious beliefs, refused to work from sundown on Friday to sundown on Saturday of each week. The problem arose when the employee, who was a mechanical foreman, was transferred to a shift which required that he work from 3:30 p.m. to 12 a.m. five days a week, including Friday. The transfer of the employee was made pursuant to a company policy which shifted foremen every 90 days, and was further necessitated by the vacation season. Despite the transfer, the employee refused to work after sundown on Friday, and was terminated for his refusal. 330 F. Supp. at 584-85. The court held that the employer did not discriminate against the employee based upon his religious beliefs. The court reasoned that the employee's transfer was made pursuant to neutral work rules and came in the normal conduct of the business of the employer. *Id.* at 591.

Some judges have found the legislative history very helpful in defining the scope of the employers duty to accommodate. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 88-90 (Marshall, J., dissenting) (“[T]he Court seems almost oblivious of the legislative history of the 1972 amendments of Title VII. . . . That history is far more instructive than the court allows.”). Other judges feel that the history is of little or no use. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (“The legislative history of § 701(j) . . . is of little help in defining the employer's accommodation obligation.”); *Hardison*, 432 U.S. at 74 n.9 (The Court summarized the contents of the legislative record of § 701(j), and characterized it as “unclear” and “opaque.” Regarding *Riley*, the Court concluded that “[i]t is clear from the language of § 701(j) that Congress intended to change this result by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation.” Regarding *Dewey*, the Court concluded that “[c]learly, any suggestion in *Dewey* that an employer may not be required to make *reasonable* accommodation for the religious needs of its employees was disapproved by § 701(j); but Congress did not indicate that

jobs, however, the appropriate scope of employment status, and hence the appropriate application of a theory focusing on eliminating religious conflict while preserving employment status, appears to be more encompassing. This conclusion is based upon the language of section 703(a)(1) of Title VII, the language of the relevant guidelines promulgated by the EEOC, and the approach taken in other relevant federal labor legislation, i.e., the National Labor Relations Act and the Railway Labor Act.

Section 703(a)(1) prohibits religious discrimination with respect to "compensation, terms, conditions, or privileges of employment."⁷¹ The language of section 703(a)(1) clearly indicates the adoption of a broad view of employment status. Since section 701(j) defines religion for the purpose of determining if discrimination exists under section 703(a)(1),⁷² a consistent reading of sections 701 and 703 mandates the adoption of a broad view of employment status for purposes of an analysis of reasonable accommodation. On the other hand, adopting a narrow reading of employment status for the purpose of section 701(j) would lead to an anomalous result: conduct that would otherwise be unlawful discrimination under section 703(a)(1), e.g., discrimination with respect to compensation, would arguably be excused because the same conduct would not be an element of religion or reasonable accommodation under section 701(j). Such a reading of the amendment would actually afford employees less protection from religious discrimination than the pre-amendment

'reasonable accommodation' requires an employer to do more than was done in *Dewey*.'") (emphasis in original); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 n.6 (2d Cir. 1985) ("The legislative history provides little assistance in interpreting § 2000e(j)."), *rev'd*, 479 U.S. 60 (1986). Yet even those judges which claim that the value of legislative history is limited have proceeded to use it to support their conclusions. See *Ansonia*, 479 U.S. at 68-69.

71. 42 U.S.C. § 2000e-2(a)(1) (1982). See also 42 U.S.C. § 2000e-2(a)(2) (1982), which states:

It shall be an unlawful employment practice for an employer . . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

72. 42 U.S.C. §§ 2000e(j) (1982). See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977) ("The intent and effect of [§ 703(j)] was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."); *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 ("The Supreme Court has held that the intent and effect of this [§ 703(j)] definition of 'religion' is to make it a violation of [§ 703(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of employees and prospective employees.").

version of Title VII.⁷³

Secondly, the language of the EEOC guidelines suggests that a broad definition of employment status is more appropriate for use in an analysis of reasonable accommodation. EEOC guideline 1605.2(c)(2)(ii) states that, in determining whether an offer of accommodation is reasonable, the Commission will examine the degree to which the accommodation disadvantages the employee "with respect to his or her employment opportunities,"⁷⁴ and goes on to specify certain opportunities, to wit, "compensation, terms, conditions or privileges of employment."⁷⁵

Finally, the National Labor Relations Act has adopted a broad view of employment status with respect to its most significant policy—promoting collective bargaining.⁷⁶ Section 8(d) of the National Labor Relations Act defines collective bargaining, in part, as "the per-

73. Although not requiring reasonable accommodation until the enactment of the 1972 amendment, Title VII has barred religious discrimination in employment with respect to "compensation, terms, conditions, or privileges of employment" since its enactment. See 42 U.S.C. § 2000e-2(a)(1) (1982); *Trans World Airlines v. Hardison*, 432 U.S. 63, 72-77 (1977).

74. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605(2)(c)(2)(ii) (1987) (This subsection is reproduced in note 169, *infra*).

75. *Id.*

76. The text of the NLRA, § 1, 29 U.S.C. § 151 (1982), entitled "Findings and Declaration of Policy," directly and clearly articulates the significance of collective bargaining to American national labor policy. The section concludes as follows:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id. See also *Hardison*, 432 U.S. at 79 ("Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . ."); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964):

The [NLRA] . . . is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective.

Id. at 271 (quoting *International Harvester Co.*, 138 N.L.R.B. 923, 925-26 (1962)).

Other sections of the NLRA underscore the importance of collective bargaining. For example, § 7, 29 U.S.C. § 157 (1982), gives employees the right "to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1982) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. Finally, § 8(b)(3), 29 U.S.C. § 158(b)(3) (1982) makes it an unfair labor practice for a duly authorized labor organization to refuse to bargain collectively with an employer.

formance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other conditions of employment."⁷⁷ In addition, in further clarifying the duty of collective bargaining, the Supreme Court has declared the subjects of wages, hours, and other terms and conditions of employment to be mandatory subjects of bargaining.⁷⁸ Similarly, the Railway Labor Act has adopted a broad view of employment status with respect to two of its most significant policies—promoting industrial peace and encouraging collective bargaining.⁷⁹

77. 29 U.S.C. § 158(d) (1982). The complete definition, excluding provisos, is as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id.

78. *See, e.g., NLRB v. Wooster*, 356 U.S. 342, 349 (1958) ("Read together, these provisions [§ 8(a)(5) and § 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment.'"); *NLRB v. American Ins. Co.*, 343 U.S. 395 (1952).

The principles of national labor policy are not simply useful by analogy when dealing with issues raised by Title VII. Rather, the courts have specifically instructed that, particularly when a collective bargaining agreement is involved, national labor policy must be factored into an analysis of reasonable accommodation of religious practice. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977). One seminal case in this area is *Hardison*, which, after a discussing of the relevancy and impact of national labor policy, held that the statutory obligation to accommodate religious needs does not take precedence over the terms of a seniority provision in a collective bargaining contract. *Id.* at 79-81.

Other courts have pointed out that certain remedial provisions of Title VII were modeled after remedial provisions of the National Labor Relations Act. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) (Congress modeled back pay provision of Title VII after an antecedent provision of NLRA); *Edwards v. School Bd.*, 658 F.2d 951, 954 (4th Cir. 1981); *Wangness v. Watertown School Dist.*, 541 F. Supp. 332, 340 (D.S.D. 1982).

79. Regarding industrial peace, § 2 of the RLA states in part:

The purposes of the [RLA] are:

....

(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a(4)-(5) (1982). Regarding collective bargaining, the RLA states:

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the opera-

Based upon one or more of these considerations, most courts employing the resolution and preservation approach to define reasonable accommodation have broadly construed the term employment status.⁸⁰ This has resulted in the generally accepted view that, in order to satisfy the duty to reasonably accommodate, an employer has an affirmative obligation to propose a method of accommodation which both resolves the employee's conflict and does not affect his employment opportunities, compensation, or terms, conditions, or privileges of employment.⁸¹

2. *Employment Status as Interpreted by Ansonia*

Despite the language of section 703(a)(1), the EEOC guidelines, the language and policy of the National Labor Relations Act, and the analysis of *Hardison* and other prior case law, the Supreme Court in *Ansonia* adopted a narrow construction of the term employment status in applying the resolution and preservation approach to determine an employer's duty to reasonably accommodate.⁸² The Court rejected the employee's claim that the compensation he lost when he was forced to take unpaid leave to observe his religious holidays affected his employment status, reasoning that "[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status."⁸³ The Court in *Ansonia* cited the EEOC

tion of any carrier growing out of any dispute between the carrier and the employees thereof.

Id. § 152 (first). The remainder of § 152 outlines procedures for facilitating collective bargaining and dispute resolution.

Courts analyzing religious accommodation in employment situations subject to the RLA have made it clear that the policies of the RLA must be considered in the accommodation process. *See, e.g.,* Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022 (5th Cir. 1984); Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

80. *See, e.g.,* American Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 776-77 (9th Cir. 1986) (court relied upon NLRA and EEOC guidelines as support for broadly defining employment status).

81. *Id.*

82. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70-71 (1986).

83. *Id.* (quoting *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977)). *Satty* was an action for sex discrimination in employment brought by a female employee against an employer who followed a policy of: 1) denying accumulated seniority to female employees returning from pregnancy leave; and 2) not awarding sick leave pay to pregnant employees. Regarding sick leave, the *Satty* Court held that excluding pregnancy from a disability insurance plan or a sick-leave compensation program did not deprive the employee of employment opportunities or otherwise adversely affect employment status in violation of § 703(a)(2). 434 U.S. at 145. The Court did not cite any authority for its conclusion.

definition of employment opportunity as support for narrowly defining employment status. In holding that an employer's accommodation could be reasonable even though it did not minimize the amount of compensation lost by the employee, the Court stated that the EEOC guidelines only required an employer to minimize the disadvantage to the employee's economic opportunity.⁸⁴ The Court seemingly ignored the fact that the first component of the EEOC's definition of employment opportunity is compensation.⁸⁵

84. *Ansonia*, 479 U.S. at 69 n.6. The Court focused on the EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(c)(ii) (1987), which provide that, in situations involving more than one reasonable method of accommodation, "the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." *Id.* The Court concluded that this guideline justified limiting the term employment status to loss of job, stating that, "this guideline, by requiring the employer to choose the option that least disadvantages an individual's *employment opportunities*, contains a significant limitation." *Ansonia*, 479 U.S. at 69 n.6 (emphasis in original).

85. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(c)(2)(ii) (1987); *Ansonia*, 479 U.S. at 74 (Marshall, J., dissenting):

Title VII prohibits discrimination not only with respect to *employment opportunities*, but also with respect to "*compensation*, terms, conditions, or privileges of employment. The EEOC guidelines consider compensation encompassed within the concept of "employment opportunities." A forced reduction in compensation based on an employee's religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion.
(emphasis in original).

There has been some discussion regarding the weight to be accorded EEOC guidelines generally, and their value in interpreting Title VII specifically. On occasion, the Court has stated that EEOC guidelines are accorded less weight than administrative regulations elevated to the force of law by Congress and little weight if they vary from prior EEOC policy without legislative support. *See, e.g., Ansonia*, 479 U.S. at 69 n.6; *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519 (4th Cir., 1987), *rev'd*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988). On other occasions, the Court has used EEOC guidelines as support for expanding the scope of Title VII. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment charges are sufficient to support a claim under Title VII). Justice Marshall has described this inconsistent use of EEOC guidelines as "nothing more than a selective reading of the express provisions of Title VII and the guidelines." *Ansonia*, 479 U.S. at 74 (Marshall, J., dissenting).

Perhaps one of the few definitive statements that can be made about the guidelines is that when Congress has ratified an administrative construction with positive legislation, the guideline is entitled to deference. *Hardison*, 432 U.S. at 76 n.11; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969). This argues for a broad interpretation of employment status as it relates to reasonable accommodation because prior to the 1972 amendment to § 701, which legislated the concept of reasonable hardship into Title VII, the EEOC had been interpreting Title VII as requiring an employer to reasonably accommodate an employee's religious practices with respect to the compensation, terms, conditions, and privileges pertaining to the employee's job. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2 (1987); *Hardison*, 432 U.S. at 76 n.11.

3. *The Ramifications of Ansonia*

The limiting effect of the Court's adoption of the narrow construction of the term employment status is potentially significant. When carried to its logical conclusion, it imposes on employers the affirmative duty to accommodate the religious practices of their employees only if the employees must choose between practicing their religions or keeping their jobs. In no other situation would accommodation be required, even if an employee suffered significant reduction in compensation or prestige because he chose to practice his religion. The employer's obligation has not been defined so minimally since the enactment of the 1972 amendment. In addition, by legitimizing employer conduct pursuant to section 701(j) that, absent the section, would otherwise be a violation of section 703(a)(1), the *Ansonia* Court's interpretation of the term employment status for the purpose of section 701(j) would actually reduce protection from employment discrimination below the level afforded by the pre-1972 amendment version of Title VII.⁸⁶

It is not clear, however, that the Court intended to effectuate such a significant narrowing on either the duties imposed by Title VII generally or those imposed by sections 703(a)(1) and 701(j) specifically. The *Ansonia* Court also focused on the fact that the employer's duty was satisfied because the employee had had his religious practices accommodated, without loss of compensation, three times in that year alone.⁸⁷ Viewed in this light, the Court's dictum regarding employment status limits, but does not eliminate, the employer's duty to accommodate when compensation is involved. This view more closely comports with the plethora of significant precedent which defines employment status broadly.⁸⁸

IV. UNDUE HARDSHIP

The second issue left unresolved by the 1972 amendment is the definition of undue hardship as that term is used in section 701(j) and relates to section 703(a)(1) of Title VII. While the amendment requires employers to reasonably accommodate the religious practices of their employees if they can do so without "undue hardship on the conduct of [their] business," it offers little guidance as to the precise

86. See *supra* note 73 and accompanying text.

87. *Ansonia*, 479 U.S. at 64-65.

88. See *supra* notes 70-81 and accompanying text.

definition of the term.⁸⁹

A consensus has nevertheless emerged on three basic points regarding the phrase. First, the undue hardship language of section 701(j) qualifies the reasonable accommodation language of the same section.⁹⁰ Thus, the duty of employers to accommodate the religious practices of their employees is by no means absolute. Rather, it is limited to those alternatives which do not work an undue hardship on their business.⁹¹ The Court, on a case by case basis, determines whether an alternative works a hardship on an employer by examining the possible alternatives for accommodating an employee's religious practices and assessing the hardship involved with each.⁹² Interpreting undue hardship as qualifying reasonable accommodation is not only required by the language of section 701(j), but is generally considered to be consistent with, and perhaps mandated by, the principles embodied in the establishment clause of the United States Constitution.⁹³

Second, the undue hardship language of the amendment and the principles embodied in the establishment clause are also generally held to require that an employer subject to section 701(j) need not bear more than a de minimis cost when accommodating an employee.⁹⁴ This de minimis rule was first articulated in *Hardison*,

89. 42 U.S.C. § 2000e(j) (1982).

90. See *id.*; *Trans World Airlines v. Hardison*, 432 U.S. 63, 75 (1977); *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986); accord Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirements Since Trans World Airlines, Inc. v. Hardison*, 53 *FORDHAM L. REV.* 839, 841 (1985).

91. See Note, *supra* note 90, at 841; see also *Ansonia*, 479 U.S. at 68.

92. See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63, 77-85 (1977); *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) ("the circumstances under which a particular accommodation may cause 'undue hardship,' must be made in the particular factual context of each case"); *Anderson v. General Dynamics*, 589 F.2d 397, 400 (9th Cir.), *cert. denied sub nom. International Ass'n of Machinists and Aerospace Workers v. Anderson*, 442 U.S. 921 (1979).

93. See *supra* note 9.

94. *Ansonia*, 479 U.S. 60; *Trans World Airlines v. Hardison*, 432 U.S. 63, 85 (1977); *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573 (11th Cir. 1986); *Baz v. Walters*, 782 F.2d 701, 706, 707 (7th Cir. 1986); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451 (7th Cir.), *cert. denied*, 454 U.S. 1048 (1981); *Howard v. Haverty Furniture Cos.*, 615 F.2d 203, 206 (5th Cir. 1980); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 908-09 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Brown v. General Motors Corp.*, 601 F.2d 956, 958-60 (8th Cir. 1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72, 77-78 (4th Cir. 1977), *overruled*, *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 n.3 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78, 79 (M.D. Ga. 1985), *aff'd without op.*, 792 F.2d 1125 (11th Cir. 1986); *Krushinski v. Roadway Express, Inc.*, 626 F. Supp. 472, 473 (M.D. Pa. 1985); *EEOC v. Caribe*

which stated that "to require [the employer] to bear more than a de minimis cost in order to [accommodate the employee] is an undue hardship."⁹⁵ Since its articulation in 1976, the phrase *de minimis* cost has become virtually synonymous with the term undue hardship.⁹⁶

Finally, despite the many interests of employees and unions involved in an accommodation analysis, the undue hardship language of section 701(j) is applied only to the interests of employers. The statute does not require that hardships suffered by unions or employers as a result of the accommodation process be factored into the analysis.⁹⁷

Hilton Int'l, 597 F. Supp. 1007, 1011-12 (D.P.R. 1984); *Wesling v. Kroger*, 554 F. Supp. 548, 552 (E.D. Mich. 1982); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1188-90, 1192 (M.D. Ala. 1982); *EEOC v. Sambo's, Inc.*, 530 F. Supp. 86, 91, 93 (N.D. Ga. 1981); *Wiley v. Maben Mfg. Inc.*, 479 F. Supp. 634, 637 (N.D. Miss. 1979).

95. *Trans World Airlines v. Hardison*, 432 U.S. 63, 83 (1977). In establishing the *de minimis* limit for costs employers are required to incur pursuant to § 701(j), the Court reasoned that to require an employer to bear additional cost to accommodate one employee while no such costs are incurred with respect to his other employees would involve unequal treatment of employees based on religion, and amount to employer financing of employee religious practices. *Id.* See also *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986) (*Hardison* was concerned with "a form of reverse discrimination").

96. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) ("An accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost.'") (quoting in part *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977)); *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573 (7th Cir. 1986); *Baz v. Walters*, 782 F.2d 701, 706, 707 (7th Cir. 1986); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1981); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451 (7th Cir.), *cert. denied*, 454 U.S. 1048 (1981); *Howard v. Haverly Furniture Cos.*, 615 F.2d 203, 206 (5th Cir. 1980); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 908-09 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Brown v. General Motors Corp.*, 601 F.2d 956, 958-60 (8th Cir. 1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (1978), *cert. denied*, 439 U.S. 1072 (1979); *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72, 77-78 (4th Cir. 1977), *overruled*, *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 n.3 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988); *Williams v. Owens-Corning Fiberglas, Inc.*, 40 Empl. Prac. Dec. (CCH) ¶ 36,176 (D. Kan. 1986); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78 (M.D. Ga. 1985), *aff'd without op.*, 792 F.2d 1125 (11th Cir. 1986); *Bennet v. Monon Trailer*, 42 Empl. Prac. Dec. (CCH) ¶ 36,733 (N.D. Ind. 1985); *Krushinsk v. Roadway Express, Inc.*, 626 F. Supp. 472, 473 (M.D. Pa. 1985); *EEOC v. Caribe Hilton Int'l*, 597 F. Supp. 1007, 1011-12 (D.P.R. 1984); *Wesling v. Kroger*, 554 F. Supp. 548, 552 (E.D. Mich. 1982); *EEOC v. Sambo's, Inc.*, 530 F. Supp. 86, 91, 93 (N.D. Ga. 1981); *Rising v. Roadway Express, Inc.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,116 (D. Mass. 1981); *Wiley v. Maben Mfg., Inc.*, 479 F. Supp. 634, 637 (N.D. Miss. 1979).

97. As was the case with reasonable accommodation, the undue hardship proviso of § 701(j) has also been held to apply to unions. See *Cooper v. General Dynamics*, 533 F.2d 163, 173 (5th Cir. 1976) (Brown, J., concurring) (Based on the goal of industrial peace that underlies all federal employment relationship legislation, the difficulty in achieving that goal, and the recognition that the self-interest of the parties involved cannot be ignored in the employment situation, "[t]he Union should therefore have the right—equally with the employer—to demonstrate if it can that the practice condemned cannot be avoided without undue hardship to its legislatively ordained role."), *cert. denied sub nom. International Ass'n of Machinists and Aerospace Workers v. Hopkins*, 433 U.S. 908 (1977); *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398, 404-05 (9th Cir. 1974), *cert. denied*, 445 U.S. 928 (1980). For a complete discussion of these cases, see Comment, *supra* note 3, at 346-51.

Beyond these three general points, however, neither Title VII nor the Constitution offer guidance as to the appropriate scope of undue hardship. Here again, the task of defining undue hardship (and *de minimis* cost), and hence determining to what extent the employer's duty to reasonably accommodate is qualified by the concept of undue hardship, has been left to the courts. In assessing the hardship imposed by various methods of accommodation, courts have generally distinguished between cost and no-cost alternatives.

A. *Cost Alternatives*

A cost alternative is a method of accommodation which requires an employer to spend or lose money in order to accommodate the religious practices of an employee.⁹⁸ Courts evaluating cost alternatives have generally focused only on whether a financial loss must be suffered or an expenditure incurred to achieve accommodation.⁹⁹ A method of accommodation is declared unduly harsh if it requires an employer to bear any additional cost whatsoever.¹⁰⁰ Undue hardship is found regardless of the type of cost involved, be it a direct financial

However, the concept of undue hardship has been held to be inapplicable to employees. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 66 (1986). Thus, an employer is not required to adopt the method of accommodation that works the least amount of hardship on the employee. *Id.*; *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984).

98. For example, in *Hardison*, the Supreme Court noted that the Eighth Circuit Court of Appeals suggested that Hardison be permitted to work a four day week in order to avoid working on his Sabbath, or be replaced by other employees who would be paid premium wages. The appeals court had further suggested that in the event TWA was left shorthanded by its effort to accommodate Hardison, TWA could replace Hardison with supervisory personnel or with qualified personnel from other departments. In disagreeing with the court of appeals and finding that the court's suggestions would work an undue hardship on the employer, the Court concluded, "Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages." *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). See *infra* notes 101-02; see also Note, *supra* note 90, at 857-61.

99. See *infra* notes 101-02, 108 (1977), and accompanying text.

100. See, e.g., *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022 (5th Cir. 1984). Turpen involved a railroad employee who did not have sufficient seniority to secure a shift assignment that would have freed him from working on his Sabbath. When the employee failed to report to work on his Sabbath, he was discharged. The employee brought a religious discrimination action, claiming that he had proposed several reasonable methods of accommodation. These alternatives included having the company pay another employee overtime to replace him and reimbursing the company for the cost of the overtime. *Id.* at 1024-27. In holding that the employee's suggestion would work an undue hardship on the employer despite the employee's offer to pay the overtime differential, the court stated that "substantial costs would be involved to keep track of and bill plaintiff for different employees every week working part of his shift." *Id.* at 1028 n.6. See also *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986) (Court refused to consider employee's suggestion that he reimburse his employer for costs incurred in securing a substitute).

cost, such as costs incurred in securing a temporary replacement for an employee or costs involved in paying premium wages,¹⁰¹ or an indirect cost, such as costs resulting from lost efficiency or costs resulting from increased administrative workload.¹⁰²

101. *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573 (11th Cir. 1986) (inequitable commissions resulting when employee removed from Saturday rotation held to constitute undue hardship because additional monetary expenditure was required); *id.* (inequitable commissions resulting when salary paid employee replaced with hourly paid employee held to constitute undue hardship because additional monetary expenditure was required); *id.* (replacing salaried employee with hourly paid employee held to constitute undue hardship because additional monetary expenditure was required); *id.* (juggling work schedules held to constitute undue hardship because additional monetary expenditure was required); *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986) (administrative costs involved in transferring religious employee to another facility held to constitute undue hardship because additional monetary expenditure was required); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984) (paying for three days of religious leave held to constitute undue hardship because additional monetary expenditure was required); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 145 (5th Cir. 1982) (hiring a substitute pharmacist held to constitute undue hardship because additional monetary expenditure was required); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 907 (9th Cir. 1979) (employee's refusal to pay union dues constituted undue hardship because it could lead to further organizational activities thus imposing additional cost on employer), *cert. denied*, 445 U.S. 928 (1980); *id.* (allowing employee to switch to a job outside the bargaining unit constituted undue hardship because employer would incur additional expenses in training another employee); *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976) (treating fireman's Sabbath as a night off held to constitute undue hardship because additional monetary expenditure was required), *cert. denied*, 433 U.S. 909 (1977); *id.* (cost to accommodate vacancies paid for by public funds held to constitute undue hardship because additional monetary expenditure was required); *id.* (rescheduling employee to work overtime held to constitute undue hardship because additional monetary expenditure was required); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78, 82 (M.D. Ga. 1985) (paying employee for work not needed held to constitute undue hardship because additional monetary expenditure was required), *aff'd without op.*, 792 F.2d 1125 (11th Cir. 1986); *Gibson v. Missouri Pac. R.R.*, 620 F. Supp. 85 (E.D. Ark. 1985) (employee's refusal to work on Saturdays constituted undue hardship because it would require employer to incur additional cost of \$240 for overtime), *dismissed without op.*, 788 F.2d 1171 (8th Cir. 1988); *id.* (allowing employee to switch shifts with another worker constituted undue hardship because it required employer to pay overtime); *id.* (employee's refusal to work on Saturdays constituted undue hardship because it required employer to cancel an assignment, resulting in lost revenue); *Dickson v. International Longshoremen & Warehousemen's Union Local 40*, 39 Empl. Prac. Dec. (CCH) ¶ 35,852 (D. Or. 1985) (giving employee a full week's wage with Friday off was undue hardship because it violated the collective bargaining agreement); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1192 (M.D. Ala. 1982) (overtime pay or higher wages for licensed practical nurse held to constitute undue hardship because additional monetary expenditure was required); *Cross v. Bailar*, 477 F. Supp. 748, 751 (D. Or. 1979) (allowing employee Saturdays off constituted undue hardship because employer would either have to train other employees or pay over time); *id.* (allowing employee to work Saturday night into Sunday morning constituted undue hardship because employer was required to pay 25% additional wages to employee); *Wren v. T.I.M.E.-D.C., Inc.*, 453 F. Supp. 582, 584 (E.D. Mo. 1978) (possible failure in finding replacement driver for religious employee held to constitute undue hardship because additional monetary expenditure was required), *aff'd*, 595 F.2d 441 (8th Cir. 1979); *id.* (paying extra contributions to pension and insurance funds held to constitute undue hardship because additional monetary expenditure was required).

102. *Getz v. Pennsylvania*, 802 F.2d 72 (3d Cir. 1986) (allowing employee to work extra over-

The approach focusing only on whether cost is involved first

time in order to accumulate vacation days to make up for paid religious holidays taken held to constitute undue hardship); *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573 (11th Cir. 1986) (removal of employee from Saturday rotation held to constitute undue hardship because loss of efficiency would result); *id.* (replacing salaried employee with hourly paid employee on Saturdays held to constitute undue hardship because loss of efficiency would result); *id.* (juggling work schedules held to constitute undue hardship because loss of efficiency would result); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (transferring employee to another facility held to constitute undue hardship because loss of efficiency would result); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 338 (10th Cir. 1984) (allowing teachers to make up religious leave by performing extra-curricular activities held to constitute undue hardship because loss of efficiency would result); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 907 (8th Cir. 1979) (providing employee with a job outside collective bargaining unit held to constitute undue hardship because it would result in preferential treatment), *cert. denied*, 445 U.S. 928 (1980); *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976) (compelling other employees to accept less favorable working conditions held to constitute undue hardship because loss of efficiency would result); *cert. denied*, 433 U.S. 909 (1977); *id.* (reduction in ability to fight fires held to constitute undue hardship because loss of efficiency would result); *id.* (imposition of complex scheduling held to constitute undue hardship because loss of efficiency would result); *id.* (undermanned shift requiring firemen from another station to cover affected shift held to constitute undue hardship because loss of efficiency would result); *id.* (risk to citizens and fire fighters because department is below manning requirements held to constitute undue hardship because loss of efficiency would result); *id.* (rescheduling employee to work overtime held to constitute undue hardship because loss of efficiency would result); *Williams v. Owens-Corning Fiberglas*, 40 Empl. Prac. Dec. (CCH) ¶ 36,176 (D. Kan. 1986) (allowing employee to take a leave of absence every Sunday constituted undue hardship because it violated collective bargaining agreement); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78, 82 (M.D. Ga. 1985) (allowing employee to remain in present position when unavailable on Sabbath held to constitute undue hardship because loss of efficiency would result), *aff'd without op.*, 792 F.2d 1125 (11th Cir. 1986); *Dickson v. International Longshoremen & Warehousemen's Union Local 40*, 39 Empl. Prac. Dec. (CCH) ¶ 35,852 (D. Or. 1985) (allowing employee to keep position on availability list when absent from work was undue hardship because under collective bargaining agreement, the employee was required to be placed at the bottom of the list); *Gibson v. Missouri Pac. R.R.*, 620 F. Supp. 85 (E.D. Ark. 1985) (requiring employer to rearrange schedule was undue hardship because it resulted in violation of collective bargaining agreement), *dismissed without op.*, 786 F.2d 1171 (8th Cir. 1986); *EEOC v. Caribe Hilton Int'l*, 597 F. Supp. 1007, 1011 (D.P.R. 1984) (interruption of other employees rest days held to constitute undue hardship because loss of efficiency would result), *aff'd*, 821 F.2d 74 (1st Cir. 1987); *id.* (relocation of employees held to constitute undue hardship because loss of efficiency would result); *id.* (supervisors covering for absent employee held to constitute undue hardship because loss of efficiency would result); *Wesling v. Kroger*, 554 F. Supp. 548 (E.D. Mich. 1982) (allowing employee day off held to constitute undue hardship because morale of other employees affected); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1192 (M.D. Ala. 1982) (substituting employees held to constitute undue hardship because loss of efficiency would result); *EEOC v. Sambo's, Inc.*, 530 F. Supp. 86, 90 (N.D. Ga. 1981) (risk of noncompliance with sanitation regulations held to constitute undue hardship because loss of efficiency would result); *id.* (difficulty in enforcing grooming standards for other employees if relaxed for one held to constitute undue hardship because loss of efficiency would result); *Rising v. Roadway Express, Inc.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,117 (D. Mass. 1981) (requiring employer to reconstruct work week held to be undue hardship); *EEOC v. Picoma Indus.*, 495 F. Supp. 1, 3 (S.D. Ohio 1978) (granting exception to rule designed to discourage absenteeism held to constitute undue hardship because loss of efficiency would result), *aff'd*, 627 F.2d 1090 (6th Cir. 1980); *Kendall v. United Airlines*, 494 F. Supp. 1380, 1388 (N.D. Ill. 1980) (allowing employee to shift work days falling on the Sabbath to other non-conflicting days held to constitute undue hard-

emerged in *Hardison*. In concluding that alternatives for accommodation suggested by the employee were unduly harsh, the *Hardison* Court stated that to require an employer to incur financial costs when accommodating an employee would, in effect, require the employer to finance the means for the employee to practice his religion and constitute unequal treatment of employees based upon religion.¹⁰³ The Court so held despite the fact that the employee in the case had offered to reimburse the employer for costs incurred,¹⁰⁴ which the dissent calculated to be one hundred and fifty dollars.¹⁰⁵ The Court did not explain how the reimbursement alternative would burden the employer.

Although subject to much debate when it first appeared,¹⁰⁶ the approach of *Hardison* has been followed in almost all cases involving alternatives of accommodation that work to the financial detriment of the employer.¹⁰⁷ Indeed, it has evolved into a per se approach; virtually all cost alternatives have been declared unduly harsh simply because a loss is involved.¹⁰⁸ Because of the per se nature of this approach, cost alternatives are generally no longer available to employees seeking accommodation under Title VII.¹⁰⁹

ship because it violated collective bargaining agreement); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979) (accommodation of religious employee resulting in dissatisfaction of other employees held to constitute undue hardship because loss of efficiency would result); *Wren v. T.I.M.E.-D.C., Inc.*, 453 F. Supp. 582, 584 (E.D. Mo. 1978) (complex procedure to locate replacement held to constitute undue hardship because loss of efficiency would result); *aff'd*, 595 F.2d 441 (8th Cir. 1979).

103. *Trans World Airlines v. Hardison*, 432 U.S. 63, 85 (1977).

104. *Id.* at 95 (Marshall, J., dissenting).

105. *Id.* at 92 n.6 (Marshall, J., dissenting).

106. See *supra* note 33; see also Note, *supra* note 90, at 849-56.

107. See *supra* notes 101-02.

108. *Id.*

109. The one significant exception to what has evolved into a per se hardship rule regarding direct or indirect financial costs is an impact approach that has been used in cases involving employees who have religious objections to paying union dues. See *International Ass'n of Machinists & Aerospace Workers v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1488 (1988); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 452 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Brown v. General Motors Corp.*, 601 F.2d 956, 958 (8th Cir. 1979); *Anderson v. General Dynamics*, 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979). For a discussion of the conflict between union security provisions and Title VII, see *supra* notes 42-49 and accompanying text. Unlike the per se approach, financial expenditure is not the operative fact under the impact approach. Rather, the amount of financial expenditure is specifically calculated and evaluated in light of the impact it has on the union involved. See, e.g., *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978) (loss of union dues of \$228.00 per year resulting from Seventh Day Adventist's

B. *No-Cost Alternatives*

Perhaps because of the results reached in cases involving methods of accommodation requiring financial expenditure, cases have also arisen involving methods of accommodation that do not require financial expenditure, either directly or indirectly, on the part of an em-

refusal to pay dues did not work an undue hardship on a union representing a workforce of three hundred, of which only three were Seventh Day Adventists), *cert. denied*, 439 U.S. 1072 (1979); *Tooley v. Martin-Marietta Corp.*, 476 F. Supp. 1027 (D. Or. 1978), *aff'd*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). *Tooley* also involved a union who claimed the loss of dues from three Seventh Day Adventists and three other employees who might also refuse to pay constituted undue hardship. The district court first noted that 540 employees were represented by the union, and calculated the dues of each employee to be less than \$600.00 per year. Then, the court noted that the 1978 income of the union was \$46,000.00, which represented a budget surplus of \$4,300.00. Next, the court noted that the union had had a budget surplus for several years. 476 F. Supp. at 1030. The court concluded that "[t]he likelihood that the union will ever be burdened by the few members who refuse to pay union dues because of religious beliefs is remote," and rejected the union's argument as "frivolous." *Id.* at 1030-31. The court also rejected as frivolous the arguments of the union that supervising payments to charity would cause administrative inconvenience amounting to undue hardship, and that loss of dues would weaken support needed for litigation. *Id.* at 1031. Factors considered in determining impact include the size of the union, the overall operating costs of the union, and the number of individuals who require accommodation. Pursuant to this approach, if the effect of the financial expenditure required for accommodation does not significantly affect the union the hardship is not deemed undue, despite the fact that a financial expenditure is involved. *See id.* at 1030-31; *see also Boeing*, 833 F.2d at 171 ("[I]f there was a widespread refusal to pay union dues, [the employee's] charitable contribution would be disallowed. She would be required to pay the union.").

Courts applying the impact approach have noted its several advantages over the per se approach. First, the impact approach is more consistent with the requirement of the amendment that employers must act affirmatively to accommodate employees. It does not allow an employer who proposes no methods of accommodation whatsoever to justify his inaction simply by claiming that all possible alternatives involve cost. *Tooley*, 476 F. Supp. at 1030-31. *See also* *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 38 (6th Cir. 1982) (where union makes no attempt to accommodate plaintiff who refuses to pay dues for religious reasons, the demand for her discharge by the union and subsequent discharge by employer were unlawful). Second, the impact approach measures actual hardship. Thus, the right to be accommodated is not defeated by assumed or hypothetical hardship. *Compare Hardison*, 432 U.S. at 84 n.15 ("The dissent . . . fails to take account of the likelihood that a company . . . may have many employees whose religious observances . . . prohibit them from working on Saturdays or Sundays.") with *Anderson*, 589 F.2d at 402 ("Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978) (the court, citing *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1976), expressed "skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice"); *McDaniel*, 696 F.2d at 38 n.2 (court considered actual number of employees involved in accommodation process); *Tooley*, 476 F. Supp. at 1030-31 (court considered actual number of employees involved in accommodation process). Despite these advantages, the impact approach has been applied only in cases involving employees whose religious practices prohibit them from paying union dues. The impact approach was not affected by *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). *See Boeing*, 833 F.2d 165.

ployer.¹¹⁰ Examples of such no-cost alternatives include flexible scheduling arrangements for employees, and voluntary substitution of an employee who faces no conflict between job and religion for one who does.¹¹¹ Often, the burden of effectuating no-cost alternatives falls primarily on the employee, with the employer having only the secondary duty of facilitating their implementation.¹¹² Before the Supreme Court's decision in *Ansonia*, courts had generally held that no-cost alternatives did not work an undue hardship on the employer. These courts reasoned that if an alternative did not exact an actual cost in money or efficiency from an employer, the cost involved in effectuating the accommodation did not rise to the level of undue hardship.¹¹³

110. See, e.g., *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772 (9th Cir. 1986) (employees sought exemption from a work related regulation); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985) (employee offered to pay cost of substitute; employee wanted to use day of personal leave provided for by contract), *rev'd*, 479 U.S. 60 (1986); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984) (employee wanted to use day of personal leave provided for by contract); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141 (5th Cir. 1982) (employee sought to swap shifts with another employee); *Wangness v. Watertown School District*, 541 F. Supp. 332, 334 (D.S.D. 1982) (employee requested leave of absence without pay to attend religious festival); *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605 (1986).

111. See *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.2 (1986).

112. See, e.g., *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141 (5th Cir. 1982) (employee was required to arrange for a substitute to insure that he would have holy days off); *Wangness v. Watertown School Dist.*, 541 F. Supp. 332 (D.S.D. 1982) (employee prepared class and briefed substitute prior to taking one week leave).

113. See, e.g., *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986); *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982) (allowing employee to pay equivalent amount of union dues to charity did not constitute undue hardship because company would not have to incur additional expenditures and there was no evidence other employee's would be adversely affected); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (director substituting for pharmacist held to not constitute undue hardship because no loss of efficiency would result); *id.* (operation without pharmacist held to not constitute undue hardship because no loss of efficiency would result); *id.* (employer directing employees to switch shifts held to not constitute undue hardship because no loss of efficiency would result); *Brown v. General Motors*, 601 F.2d 956, 960 (8th Cir. 1979) (possibility that another full-time employee may have to be hired in the future held to not constitute undue hardship because additional monetary expenditure was not required); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (keeping track of employee's charitable contributions held to not constitute undue hardship because no loss of efficiency would result), *cert. denied*, 439 U.S. 1072 (1979); *id.* (employees paying equal amount of union dues to charity held to not constitute undue hardship because no loss of efficiency would result); *Anderson v. General Dynamics*, 589 F.2d 397, 402 (9th Cir. 1978) (complaints of other employees when equal amount of union dues is paid to charity held to not constitute undue hardship because no loss of efficiency would result), *cert. denied sub nom. International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 904 (7th Cir. 1978) (granting employee day off did not constitute undue hardship because no loss of efficiency would result); *id.* (replacing employee with temporary help was held to not constitute undue hardship because no additional expenditure required); *id.* (replacing unskilled laborer with

This was precisely the Second Circuit's reasoning in *Ansonia*, in which the employee, seeking time off from work to observe a religious holiday, proposed two no-cost methods of accommodation—the use of personal leave time and the reimbursement to his employer of the cost of a substitute.¹¹⁴ In remanding for a determination regarding undue hardship, the Second Circuit held that “on the record before us it appears that neither of the accommodations would lead to greater than de minimus cost.”¹¹⁵

The Second Circuit's approach to no-cost alternatives accommodates the employee without requiring the employer to bear additional expense or tolerate inefficiency. It comports with the mandate of sec-

another unskilled laborer did not constitute undue hardship because no loss of efficiency would result); *id.* (replacing employee paid at premium wage with another employee paid at premium wage held not to constitute undue hardship because no additional expenditure required); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 522 (6th Cir. 1976) (requiring employer to adjust shifts was not an undue hardship because no additional expenditure was required); *id.* (requiring employer to excuse employee for a portion of his shift did not constitute undue hardship because no loss of efficiency would result); *EEOC v. Davey Tree Surgery*, 43 Fair Empl. Prac. Cas. (BNA) 1177, 1179 (N.D. Cal. 1987) (allowing employee to donate equivalent amount of union dues to charity did not constitute undue hardship); *Protos v. Volkswagon of Am., Inc.*, 615 F. Supp. 1513 (W.D. Pa. 1985) (allowing employee to forgo mandatory overtime did not work undue hardship on employer's absentee relief program because employer could train other employees at no additional cost), *aff'd in part, vacated in part*, 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1988); *Wangsness v. Watertown School Dist.*, 541 F. Supp. 332, 337 (D.S.D. 1982) (requiring school to use a substitute teacher did not result in undue hardship because no affect on school's efficiency resulted); *Niederhuber v. Camden County Vocational & Technical School Dist. Bd. of Educ.*, 495 F. Supp. 273, 280 (D.N.J. 1980) (giving teacher 5-10 days off per year without pay held to not constitute undue hardship because students were not negatively affected), *aff'd*, 671 F.2d 496 (3d Cir. 1981); *id.* (giving teacher 5-10 days off per year without pay held to not constitute undue hardship because seniority agreement was not violated); *id.* (giving teacher 5-10 days off per year without pay held to not constitute undue hardship because there was no shortage of qualified teachers); *id.* (teacher's days off held not to constitute undue hardship because additional monetary expenditure was not required); *Tooley v. Martin-Marietta Corp.*, 476 F. Supp. 1027, 1031 (D. Or. 1979) (allowing employee to pay equivalent amount of union dues to charity did not constitute undue hardship because no additional administrative expenditure required as union also contributed to charity), *aff'd*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1180 (S.D.N.Y. 1979) (employee's refusal to handle tax exemption forms for certain organizations held to not constitute undue hardship because no loss of efficiency would result), *cert. denied*, 452 U.S. 939 (1981); *id.* (additional monetary expenditure was not required); *Blakely v. Chrysler Corp.*, 407 F. Supp. 1227, 1230 (E.D. Mo. 1975) (requiring employer to utilize extra personnel to replace employee did not constitute undue hardship), *rev'd sub nom. Chrysler Corp. v. Mann*, 561 F.2d 1282 (1977), *cert. denied*, 434 U.S. 1039 (1978); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1286 (D. Vt. 1974) (unskilled employees supplying own replacement held to not constitute undue hardship because additional monetary expenditure was not required); *id.* (no loss of efficiency would result).

114. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986).

115. *Id.* at 485.

tion 701(j) by requiring accommodation in a situation that does not work an undue hardship on an employer. Indeed, this entire mode of analysis seems to be a simple corollary to the direct or indirect financial cost per se analysis, i.e., methods of accommodation that require employers or unions to bear additional costs are unduly harsh, and methods which require no additional expenditure are not. It is, essentially, the approach taken by the EEOC.¹¹⁶

After hearing the case on appeal from the Second Circuit, the Supreme Court found for the employer in *Ansonia*, noting at one point that the employer has no duty "to accommodate at all costs."¹¹⁷ The Court so noted even though the case involved the no-cost alternatives of use of personal leave time and reimbursement to the employer for the cost of a substitute.¹¹⁸

C. *The Ramifications of Ansonia*

The effect of the Court's statement that an employer has no duty "to accommodate at all costs" is unclear. Arguably, the statement was intended as conclusory regarding the hardship involved with the two no-cost alternatives at issue in *Ansonia*. If so, the statement substantially changes the analysis of undue hardship by applying, for the first time, the analytical framework used to assess cost alternatives to no-cost alternatives. In effect, the per se approach would be extended to no-cost alternatives, and thereby label all possible alternatives, regardless of the cost involved, unduly harsh per se. Such an interpretation of undue hardship would completely eliminate the employer's reasonable duty to accommodate under section 701(j).

On the other hand, the focus of the Court's analysis was on reasonable accommodation and the relationship between the concepts of reasonable accommodation and undue hardship. The specific issue of what constitutes undue hardship was not discussed, and there is no specific language in the opinion suggesting that the Court was seeking to modify the analytical framework for no-cost alternatives.¹¹⁹ In fact, at least one post-*Ansonia* decision, that of the Sixth Circuit in *Smith v. Pyro Mining Co.*,¹²⁰ has used the pre-*Ansonia* framework to

116. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (1986).

117. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

118. *Id.* Prior to *Ansonia*, the Tenth Circuit Court of Appeals reached the same result in a case involving similar alternatives. See *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984).

119. See *infra* notes 171-207 and accompanying text.

120. 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988).

analyze a situation involving a no-cost alternative. Thus, the effect of *Ansonia* on the undue hardship analysis does not appear to be significant.

V. THE RELATIONSHIP BETWEEN REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

The final question left unresolved by the 1972 amendment is the relationship between the concepts of reasonable accommodation and undue hardship.¹²¹ There are three ways to define this relationship: 1) consider the concepts as contributing equally to the analysis; 2) consider undue hardship as an inseparable and controlling concept in the analysis; and 3) consider reasonable accommodation as a separate and controlling concept. The nature of the relationship is significant because it determines the extent to which the concept of undue hardship is factored into the overall accommodation analysis, which in turn determines the relevancy of methods of accommodation suggested by employees.

A. *The Equal Contribution Approach*

The first approach treats the concepts of reasonable accommodation and undue hardship as equally important to the analysis of the overall duty to accommodate. Pursuant to this approach, every alternative for accommodating an employee's religious practices, whether suggested by the employer or employee, is evaluated with respect to both reasonableness and hardship.¹²² If more than one alternative is found to be satisfactory in a given situation, i.e., both reasonable and not unduly harsh, the alternative selected is the one which least disadvantages the employee.¹²³

Although the 1972 amendment does not expressly define the relationship between reasonable accommodation and undue hard-

121. See *Ansonia*, 479 U.S. 60; *id.* at 72 (Marshall, J., dissenting); *Trans World Airlines v. Hardison*, 432 U.S. 63, 73-76 (1977); *id.* at 91 (Marshall, J., dissenting); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986).

122. See, e.g., *Hardison*, 432 U.S. at 77-86. Although this Article speaks in terms of methods of accommodation suggested by employers and employees, the analytical framework under discussion is equally applicable to methods of accommodation suggested by a court or the EEOC. Compare *id.* at 80-82 (employee's suggestion analyzed); *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519, 521 (4th Cir. 1987) (employee suggestion analyzed), *rev'd*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988) with *Hardison*, 432 U.S. at 84-85 (Eighth Circuit Court of Appeals suggestion analyzed); *Ithaca Indus.*, 829 F.2d at 522 (EEOC suggestion analyzed).

123. See, e.g., Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2 (1986).

ship,¹²⁴ support for the equal contribution approach is found in both the language of the amendment and the legislative record of its enactment. Regarding the statutory language, the use of the term reasonable in section 701(j) seems to require flexibility and cooperation in the accommodation process. The Fifth Circuit has stated that "the use of the term 'reasonable' suggests [that] bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."¹²⁵ Several courts have reasoned that, based upon the "reasonable accommodation" language, the employer has the affirmative duty to attempt to accommodate the religious practices of the employee, and the employee has the correlative duty to make a good faith effort to resolve the conflict between his religion and his employment through the means offered by the employer.¹²⁶ This reasoning fosters flexibility in the accommodation process by at once requiring the employer to proffer an alternative which resolves the employee's conflict, and denying the employee unfettered discretion to reject a method of accommodation.

Regarding the legislative history of section 701(j), as the Court in *Ansonia* points out, there is a call for "flexibility" in the remarks of Senator Randolph.¹²⁷ The specific context of these remarks suggests that the senator was concerned with providing the EEOC with flexibility and discretion when evaluating claims of religious discrimina-

124. See 42 U.S.C. § 2000e(j) (1982).

125. *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982). In reaching this conclusion, the Brener court relied upon *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979) (accommodation held to be impossible where employee refused to either pay union dues or contribute an equivalent sum to his church or a charity of his choice), *cert. denied*, 445 U.S. 928 (1980); *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977) (employee who refused to satisfy his religious needs by availing himself of employer's leave procedures or using paid earned absences, but instead simply failed to report for work when scheduled, was responsible for failure of accommodation), *cert. denied*, 434 U.S. 1039 (1978); *United States v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976) (employee who made no effort to avail himself of employee's scheduling system permitting trading of shifts by employees, but instead simply did not report for work as scheduled, was responsible for failure to accommodate).

126. *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) ("Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer."); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978) ("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.").

127. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (citing 118 CONG. REC. 706 (1972) (statement of Sen. Randolph)); *id.* at 73 (Marshall J., dissenting).

tion and determining satisfaction by employers of the duty to accommodate.¹²⁸ Of greater significance regarding the legislative history, however, is the dissatisfaction expressed in the legislative record with the results reached in the cases of *Dewey v. Reynolds Metals Co.*¹²⁹ and *Riley v. Bendex Corp.*¹³⁰ The courts in both of these cases had held that an employer satisfies his duty to accommodate simply by applying a neutral work rule, thus following an approach which discourages flexibility by giving the employer complete authority to choose the method of accommodation.¹³¹ Congressional dissatisfaction with these cases is apparent by several points made in the legislative record. In one passage, Senator Randolph stated that "freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some ways."¹³² Later in the record, the senator stated that "[t]his amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts have apparently not resolved. I think it is needed . . . because court decisions have clouded the matter with some uncertainty"¹³³

Although *Hardison* did not specifically discuss the relationship between reasonable accommodation and undue hardship, or comment on the duty to consider alternatives proposed by the employee, the Supreme Court in fact applied the equal contribution approach in the case. As stated previously, *Hardison* held that assigning work shifts pursuant to a seniority system contained in a collective bargaining agreement was a reasonable accommodation of employee religious practices.¹³⁴ Yet after making this determination, the Court analyzed various alternative methods of accommodation proposed by the em-

128. 118 CONG. REC. 706 (1972) (statement of Sen. Randolph). The statements were made in the context of increasing the flexibility of the EEOC to determine whether Sabbath observers were having their observance interfered with. See *supra* note 70 and accompanying text; *Trans World Airlines v. Hardison*, 432 U.S. 63, 88-89 (1977) (Marshall, J., dissenting).

129. 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971).

130. 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

131. See *supra* note 70 and accompanying text; *Trans World Airlines v. Hardison*, 432 U.S. 63, 89-90 (1977) (Marshall, J., dissenting).

132. 118 CONG. REC. 705 (1972) (statement of Sen. Randolph).

133. *Id.* at 705-06. See *Hardison*, 432 U.S. at 89-90 (Marshall, J., dissenting).

134. *Hardison*, 432 U.S. at 81.

ployee,¹³⁵ including permitting the employee to work a four day week and replacing the employee either with supervisory personnel or qualified personnel from other departments, and replacing the employee with other available employees through the payment of premium wages.¹³⁶

The equal contribution approach followed by *Hardison* was essentially the approach the EEOC had followed. In its guidelines promulgated pursuant to section 701(j), the EEOC articulates means of accommodation that will not work undue hardship on employers or labor unions, "which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge."¹³⁷ The means articulated by the EEOC include voluntary substitutes and swaps,¹³⁸ flexible scheduling arrangements,¹³⁹ lateral transfer and change in job assignments,¹⁴⁰ and donation of a sum equivalent in union dues to charitable organizations.¹⁴¹ The Commission elaborates with respect to some of these alternatives. It states that employers and labor unions should consider facilitating voluntary substitutes and swaps by publicizing policies regarding accommodation, promoting an atmosphere favorable to shift substitution, and providing a means for arranging substitutes.¹⁴² It also states that parties should consider facilitating flexible scheduling arrangements by introducing flexible arrival and departure times, work breaks,

135. *Id.* at 77-85.

136. *Id.*

137. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(d) (1987). The subsection states:

(d) *Alternatives for accommodating religious practices.* (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. . . . The principles expressed in these Guidelines apply as well to such requests for accommodation.

138. *Id.* § 1605.2(d)(1)(i).

139. *Id.* § 1605.2(d)(1)(ii).

140. *Id.* § 1605.2(d)(1)(iii).

141. *Id.* § 1605.2(d)(2).

142. *Id.* § 1605.2(d)(1)(i).

lunch hours, work hours, choice of holidays, and procedures to make up lost hours.¹⁴³ This type of specific, objective guidance has created a workable framework within which the scope of the employer's duty to accommodate, as defined with reference to the concept of undue hardship,¹⁴⁴ can be determined.

The EEOC has also constructed a framework for evaluating the reasonableness of employer or labor organization conduct in situations where there exists a choice among alternatives. The guidelines provide that, when there exists more than one available method of accommodation that will not cause undue hardship, the EEOC will evaluate the alternatives for accommodation considered by the employer, and the method of accommodation actually offered to the employee.¹⁴⁵ The guidelines go on to state that in situations where the various methods of accommodation have a disparate impact on the employee, the employer "must offer the alternative which least disadvantages the individual with respect to his or her employment oppor-

143. *Id.* § 1605.2(d)(1)(ii).

144. The EEOC has similarly promulgated objective factors to consider with respect to undue hardship. *Id.* § 1605.2(e). This section states in part:

(e) *Undue hardship.* (1) *Cost.* An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost." [quoting *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977)] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) *Seniority Rights.* Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra*, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

145. *Id.* § 1605.2(c)(2). See *infra* note 169.

tunities.”¹⁴⁶ Although at first blush this approach appears to cede control of the accommodation process to employees, this is not the case. The EEOC approach does not discourage flexibility by granting employees unfettered discretion to choose a method of accommodation. Rather, the approach seeks to determine which approach least disadvantages the employee without working an undue hardship on the employer.¹⁴⁷

As *Hardison* and the EEOC guidelines suggest, the equal contribution approach applies the concepts of reasonable accommodation and undue hardship to the analysis of the duty to accommodate in a way that accomplishes several important objectives articulated in the language of the amendment and the legislative record of its enactment. Specifically, the approach encourages flexibility by providing the opportunity for full consideration of all reasonable methods of accommodation. It also encourages cooperation among the participants in the accommodation process by not leaving the decision regarding the choice of methods for accommodation solely in the hands of one party.¹⁴⁸

B. Undue Hardship as Inseparable and Controlling

The second approach to defining the relationship between reasonable accommodation and undue hardship treats undue hardship as the controlling concept in the analysis of the employer's duty to accommodate. This approach is premised on the theory that the concepts of reasonable accommodation and undue hardship are interlocking, and that accommodation cannot be defined without reference to undue hardship.¹⁴⁹ Given this interrelationship, the employer's duty to accommodate is not satisfied, even after he proposes a reasonable accommodation, if the employee proposes an accommodation that is also reasonable. Rather, the employer must accept the employee's proposal unless it would cause an undue hardship to the

146. 29 C.F.R. § 1605.2(c)(2)(ii) (1987). *See infra* note 169.

147. *Compare* *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986); Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(c) (1987).

148. Linking the concepts of undue hardship and reasonable accommodation would require a corresponding limiting of the application of the *per se* reasonable accommodation rule. *See supra* Part III. Title VII, however, accords special treatment only to seniority systems. 42 U.S.C. § 2000e-2(h) (1982). Thus, while Title VII arguably mandates application of the *per se* rule in situations involving seniority systems, its application is not mandated in any other circumstances. *See supra* notes 42-53 and accompanying text.

149. *See, e.g., Ansonia*, 757 F.2d at 484 (“The duty to accommodate, however, cannot be defined without reference to undue hardship.”).

employer's business.¹⁵⁰ Within the limits of undue hardship, this approach allows the employee's suggestions to dictate the terms of his accommodation.¹⁵¹

The Second Circuit in *Ansonia* applied this approach and held that an employer was required to accept the method of accommodation preferred by the employee unless the method would cause the employer undue hardship. The Second Circuit recognized that the employer's duty to accommodate had never been articulated in a manner which required the employer to accept the alternative preferred by the employee, but argued that its approach was nonetheless consistent with prior case law and then current EEOC guidelines.¹⁵²

With respect to the case law, the court specifically relied upon *Hardison*,¹⁵³ *Turpen v. Missouri-Kansas-Texas Railroad Co.*,¹⁵⁴ and *Brener v. Diagnostic Hospital Center*.¹⁵⁵ None of these cases, however, supports the approach articulated by the Second Circuit.

First, the Second Circuit stated that the approach taken in *Hardison* was not inconsistent with its approach in *Ansonia*, and claimed that the Court in *Hardison* assessed only the employee's proposals, and was not called upon to "assess the propriety of the employer's offering one accommodation but rejecting the employee's proposed accommodation."¹⁵⁶ *Hardison*, however, did in fact involve an employer who offered his accommodation based upon provisions in the collective bargaining agreement, and rejected accommodations, offered by the employee, which involved four day work weeks and imposed shift exchanges. Indeed, the *Hardison* Court evaluated in detail all of the alternative methods of accommodation proposed by both parties.¹⁵⁷

150. *Id.*; see also *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986).

151. This approach has been specifically rejected by several courts. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986); *American Postal Workers*, 781 F.2d at 775.

152. *Ansonia*, 757 F.2d 476.

153. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

154. 736 F.2d 1022 (10th Cir. 1984).

155. 671 F.2d 141 (5th Cir. 1982).

156. *Ansonia*, 757 F.2d at 484.

157. *Hardison*, 432 U.S. at 77-85. Specifically, the Court found that TWA made the following efforts to accommodate Hardison: held several meetings with Hardison; accommodated Hardison's observance of religious holidays; authorized the union steward to seek a shift swap between Hardison and another employee; attempted to find Hardison another job; reduced its weekend work force; scheduled its work shifts pursuant to the seniority system contained in the collective bargaining agreement. *Id.* In addition, the Court found that the following methods of accommodation suggested by the employee worked an undue hardship on the employer: circumventing the seniority

Second, the Second Circuit in *Ansonia* looked to the *Brener* decision, and noted that the *Brener* court examined the proposed accommodations of both the employer and the employee. The *Ansonia* court reasoned that “[t]he implication is that, even if the employer proposes a reasonable accommodation it has not satisfied its duty to accommodate unless the employee’s suggested accommodations would lead to greater than de minimis cost.”¹⁵⁸ In *Brener*, the court upheld the discharge of an employee who refused to report to work on his Sabbath or avail himself of procedures for securing a substitute.¹⁵⁹ The problem with the use made of *Brener* by the Second Circuit is that, again, the approach of the court in *Brener* does not support, by implication or otherwise, the notion that an employer must accept, absent undue hardship, an alternative proposed by an employee. Rather, the *Brener* decision urged flexibility in the accommodation process, and chastised an employee who did not attempt to resolve his conflict within the terms proposed by the employer; in direct contravention of the approach advocated by the Second Circuit, *Brener* concluded that “[a] reasonable accommodation need not be on the employee’s terms only.”¹⁶⁰

Third, the Second Circuit stated that the *Turpen* court was also not called upon to assess a situation in which an employer offered one accommodation while rejecting another offered by an employee. The Second Circuit claimed that its approach was supported by the *Turpen* court’s statement that “the reasonableness and undue hardship questions ‘were interlocking.’”¹⁶¹ *Turpen* involved a Sabbath observer who requested that his religious beliefs be accommodated in

system when scheduling employee shifts; permitting Hardison to work a four day week; replacing Hardison with supervisory personnel; replacing Hardison with personnel from another department; and paying premium wages to another employee to replace Hardison. *Id.*

158. *Ansonia*, 757 F.2d at 485.

159. *Brener*, 671 F.2d at 145-46.

160. *Id.* at 146. Specifically, the court stated that the statute’s use of the term “reasonable” required bilateral cooperation among the parties in the attempt to reconcile the needs of the employee’s religion and the employer’s business. The court recognized that the Title VII burden to accommodate rested with the employer, but nonetheless held that the employee had a correlative duty to make a good faith effort to resolve his conflict by using the method of accommodation offered by the employer. The court concluded that “[a] reasonable accommodation need not be on the employee’s terms only.” *Id.* at 145. Because the plaintiff in *Brener* did not make a good faith effort to resolve his conflict within a flexible scheduling system offered by the employer as a means of accommodation, the court held that the plaintiff could not reject the hospital’s efforts as inadequate. *Id.* at 145-46.

161. *Ansonia*, 757 F.2d at 484 (quoting *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)).

shift scheduling. The scheduling was done pursuant to a seniority system embodied in a collective bargaining agreement. The request was refused. Turpen then proposed several methods of accommodation, which were rejected.¹⁶² In its analysis, the *Turpen* court focused primarily on the alternatives suggested by the employee, and determined that all of these alternatives would work an undue hardship on the employer.¹⁶³

On the one hand, the approach taken by the *Turpen* court is consistent with that of the Second Circuit in *Ansonia*. Like the Second Circuit and unlike *Hardison*, the employer in *Turpen* did not offer to accommodate the employee, but simply rejected the employee's proposals.¹⁶⁴ Also, by deeming reasonable accommodation and undue hardship interlocking, and then proceeding to evaluate methods of accommodation suggested by the employee,¹⁶⁵ the *Turpen* court, like the Second Circuit, implies that the suggestions made by the employee were relevant. On the other hand, because the court assessed the employee's suggestions only after the employer claimed no accommodation was possible, the *Turpen* decision supports an approach that separates reasonable accommodation and undue hardship¹⁶⁶ at least as much as it supports the approach of the Second Circuit. In addition, one of the alternatives discussed by the Second Circuit in *Ansonia*, i.e., an offer by the employee to pay the costs incurred by the employer in replacing the employee on various days, was specifically found by the court in *Turpen* to work an undue hardship on the employer.¹⁶⁷

Finally, the Second Circuit relied on section 1605.2(c)(2) of the EEOC guidelines.¹⁶⁸ The section states, in part, that "[w]hen there is more than one method of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment

162. *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1024-26 (5th Cir. 1984).

163. *Id.* at 1026-28.

164. *Compare id.* at 1025 with *Trans World v. Airlines v. Hardison*, 432 U.S. 63, 77-85 (1977).

165. *Turpen*, 736 F.2d at 1025-26. Specifically, the court analyzed the following methods of accommodation suggested by the employee, and concluded that they worked an undue hardship on the employer: having the employee work another shift; having the employee work a swing shift; having the employee pay a replacement the difference between straight time and overtime. *Id.*

166. *Id.*

167. *See id.*

168. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 485 (2d Cir. 1985) ("The EEOC's recent guidelines on religious discrimination—while not dispositive of the interpretation of Title VII—also support the approach we above suggest.") (citations omitted), *rev'd*, 479 U.S. 60 (1986).

opportunities.”¹⁶⁹ On the surface, the approach suggested by the EEOC may often be consistent with that taken by the Second Circuit. If the employee suggests a method of accommodation that is reasonable, does not create undue hardship, and least disadvantages the employee, the method must be accepted. Read in a larger context, however, the approaches do not appear to be consistent; the EEOC guidelines do not mandate that the employees’ suggestions generally be controlling. Rather, as discussed previously, the guidelines as a whole are concerned with flexibility, cooperation, and minimizing the disadvantage to all parties involved.¹⁷⁰

As the case law and EEOC guidelines suggest, section 701(j) does not support an approach which makes undue hardship, and therefore employee suggestions, the controlling component of an accommodation analysis. Such an approach reduces the flexibility in the analysis, and thereby runs counter to the purpose of the section.

C. Reasonable Accommodation as Separate and Controlling

The third approach to defining the relationship between reasonable accommodation and undue hardship treats reasonable accommodation as the controlling concept in the analysis of the duty to accommodate. Under this approach, the concepts of reasonable accommodation and undue hardship are separated, and the employer’s duty under Title VII is defined as requiring reasonable accommodation *or* a showing that reasonable accommodation would be an undue hardship.¹⁷¹ If an employer’s suggested method of accommodation is deemed reasonable, employee suggestions of alternative methods of

169. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(c)(2) (1987). The subsection provides:

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

Id.

170. See *supra* notes 137-48 and accompanying text.

171. *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir.

accommodation are deemed irrelevant and not considered.¹⁷²

The Supreme Court in *Ansonia* directly addressed the relationship between reasonable accommodation and undue hardship, and adopted this last approach, i.e., the approach which makes reasonable accommodation controlling. The Court first held that "the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."¹⁷³ The Court then specifically rejected the view that reasonable accommodation and undue hardship were interrelated and deserving of equal treatment when evaluating the duty to accommodate.¹⁷⁴ The Court instead held that once an employer has offered to the employee a reasonable alternative, the employer is not required to demonstrate the hardship of the employee's alternatives.¹⁷⁵

The Court relied upon several sources to support its view that reasonable accommodation was a separate and controlling component of the accommodation analysis, and in so doing articulated most of the arguments advanced by proponents of this approach. First, the Court relied upon what it viewed as the plain meaning of section 701(j), stating that, by its very terms, the amendment provides that an employer meets his statutory obligation as soon as he offers any reasonable accommodation.¹⁷⁶ But, as Justice Marshall pointed out in his dissent, the language of the amendment simply places an affirmative duty on the employer to accommodate his employee's religious practices, and nowhere specifies who must respond to whom.¹⁷⁷ Nor does the amendment define reasonable accommodation, undue hardship, or otherwise offer guidance regarding the relationship between the two concepts.¹⁷⁸ Indeed, as the Court recognizes elsewhere in its

1986); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 341 (6th Cir. 1978).

172. *American Postal Workers*, 781 F.2d at 776-77 (if, on remand, defendant's transfer policy was found to preserve employee status, employee's proposed alternatives need not be accepted); *Pinsker*, 735 F.2d at 391 (defendant employer which followed a policy of requiring teachers to take unpaid leave for religious observance need not consider alternative policy less burdensome to employees).

173. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

174. *Id.*

175. *Id.*

176. *Id.*; see also *Pinsker*, 735 F.2d at 390 ("Simply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer.").

177. *Ansonia*, 479 U.S. at 72-73 (Marshall, J., dissenting).

178. See 42 U.S.C. § 2000e(j) (1982).

opinion, "the reasonable accommodation duty was incorporated into the statute . . . somewhat awkwardly."¹⁷⁹ The enduring nature of the dispute surrounding the relationship between reasonable accommodation and undue hardship seems to belie the notion that the words of the amendment provide a clear basis for its interpretation.¹⁸⁰

Second, the Court stressed that the need for flexibility in the accommodation process mandated that any reasonable accommodation offered by the employer satisfied his obligation to accommodate.¹⁸¹ To support this conclusion the Court relied on the legislative history of section 701(j),¹⁸² and the Fifth Circuit case of *Brener v. Diagnostic Center Hospital*.¹⁸³

Regarding the legislative history, the Court stated that Senator Randolph "expressed his hope that accommodation would be made with 'flexibility' and 'a desire to achieve an adjustment.'"¹⁸⁴ Here again, as Justice Marshall points out in his dissent, these statements lend at least as much support to the view that the concepts of reasonable accommodation should not be separated, or that the concept of undue hardship should control the analysis, as they do to the Court's view that the concepts should be separated and reasonable accommodation should control.¹⁸⁵ Beyond this, the portion of the legislative record quoted by the Court dealing with flexibility was concerned with increasing the EEOC's ability to determine whether a group of religious adherents was having its practices interfered with, not with limiting an employee's ability to suggest alternative methods of accommodation.¹⁸⁶ Furthermore, it seems anomalous for the Court,

179. *Ansonia*, 479 U.S. at 63 n.1.

180. See generally Part V of this Article.

181. *Ansonia*, 479 U.S. at 69.

182. *Id.*

183. *Id.* (citing *Brener v. Diagnostic Hosp. Center*, 671 F.2d 141 (5th Cir. 1982)). *Brener* involved a hospital pharmacist, an Orthodox Jew, who was discharged for failing to report to work for his regularly scheduled shift. The employee claimed that his failure was due to his observance of religious holidays, and that the employer failed to take reasonable steps to accommodate his need for observance. At the time of the discharge, the employer had in place a scheduling system pursuant to which the employees met to arrange their own work schedules, and could trade shifts to satisfy personal scheduling preferences. Rather than work within this system, the employee simply did not show up for work and did not attempt to arrange an exchange of shift with another employee. *Brener*, 671 F.2d at 143-44.

184. *Ansonia*, 479 U.S. at 69 (quoting Sen. Randolph, 118 CONG. REC. 706 (1972)).

185. *Id.* at 73 (Marshall, J., dissenting).

186. The relevant portion of the legislative record is as follows:

MR. DOMINICK. I thank the Senator. I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our

first, to use the legislature's desire for flexibility as a basis for denying the employee the right to select from among various available reasonable methods of accommodation, and to then use the desire for flexibility as a basis for permitting the employer to satisfy his duty to accommodate without even factoring reasonable employee suggestions into an accommodation analysis.

Regarding *Brener*, the Court in *Ansonia* drew support for its conclusion by pointing out that that Fifth Circuit case urged flexibility and cooperation on employers and employees seeking to resolve conflicts between religious practices and employment requirements.¹⁸⁷ The *Brener* court's focus on flexibility and cooperation is undeniable.¹⁸⁸ However, both the facts and analytical approach of the *Brener* case would appear to severely limit its value as support for the proposition that such cooperation forecloses an evaluation of employee suggestions in the context of an accommodation analysis. Unlike *Ansonia*, or for that matter *Hardison*, the *Brener* case involved an employer who offered his employee several methods of accommodation.¹⁸⁹ These alternatives included: adopting a rotating shift scheduling system that was more flexible than a seniority-based system; allowing the employees to arrange the shift schedule themselves; discounting tenure of service as a factor when scheduling; approving routinely the trading of scheduling; and reducing the work shift

business in this country. It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In other words, flexibility is provided so that someone could make a discretionary judgment on it?

MR. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree.

I agree with the Senator's feeling and I am sure that this is what is meant and would flow from the adoption of the practice under the amendment.

118 CONG. REC. 706 (1972).

187. *Ansonia*, 479 U.S. at 69.

188. See *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 144-45 (5th Cir. 1982); see also *supra* notes 159-61 and accompanying text.

189. Compare *Ansonia*, 479 U.S. at 70 (employer offered to accommodate employee only pursuant to its general policy of offering unpaid leave) with *Trans World Airlines v. Hardison*, 432 U.S. 63, 77-78 (1977) (in an effort to accommodate the religious practices of its employees, the employer met with the employee; accommodated the observance of employee's religious holidays; attempted to arrange shift swaps; attempted to find the employee another job); *Brener*, 671 F.2d at 144-45.

whenever possible.¹⁹⁰ In addition, unlike *Ansonia*, *Brener* involved an employee who did not reasonably attempt to avail himself of the methods offered by the employer—methods which might have resolved his conflict between his religious practices and job requirements.¹⁹¹ Most significantly, despite the fact that reasonable methods of accommodation were offered by the employer and refused by the employee, the *Brener* court nonetheless went on to evaluate for undue hardship several methods of accommodation suggested by the employee.¹⁹² Thus, the approach of the court in *Brener* is identical to the approach of the Court in *Hardison*, and inconsistent with the approach taken in *Ansonia*.¹⁹³

Third, the Court in *Ansonia* justified its view that reasonable accommodation was a separate and controlling component of the accommodation analysis by stating that an employer need not accept any particular employee-proposed alternative. In support of this proposition, the Court cited *American Postal Workers Union v. Postmaster General*.¹⁹⁴ In one sense the Court's analysis in *Ansonia* and the Ninth Circuit's analysis in *American Postal Workers* are consistent. The court in *American Postal Workers*, which involved post office employees whose religious tenets forbade them from processing draft registration forms, specifically rejected an approach ceding com-

190. *Brener*, 671 F.2d at 144-45.

191. In *Brener*, the employee refused to take advantage of the employer's flexible shift scheduling policy—a policy which permitted employees to arrange the scheduling and would have accommodated the employee had he availed himself of it. Specifically, the employee did not try to contact employees who were not scheduled to work on the days the employee wanted off, or otherwise attempt to arrange accommodation. *Id.* at 144. Only then did the court chastise the employee for being uncooperative, and pen the language quoted in *Ansonia*. *Id.* at 145-46, cited in *Ansonia*, 479 U.S. at 69. By contrast, in *Ansonia*, in an effort to work within the employer's scheduling system, the employee took unpaid leave, and worked on several holidays. *Ansonia*, 479 U.S. at 64-65.

192. *Brener*, 671 F.2d at 146-47. The employee proposed three alternatives: 1) that a substitute employee be hired; 2) that a supervisor substitute for the employee; 3) that the employer operate without the employee. The court rejected the first employee proposal because it entailed more than a de minimis cost; the second because it resulted in inefficiency, economic loss, and increased risk to patients; and the third because it had a detrimental impact on the employer's business. *Id.*

193. The approach followed in *Hardison* and *Brener* is similarly inconsistent with the approach followed in *Pinsker*. Specifically, *Pinsker* involved an employee teacher who sought to observe his religious holidays. The employer school district only offered to accommodate the employee pursuant to the terms of the collective bargaining agreement, which required employees wishing to observe religious holidays to take unpaid leave. The court held that the employer acted reasonably, and refused to consider employee suggestions regarding alternative methods of accommodation. Despite the clear differences between the two cases, the *Pinsker* court cited *Brener* as support for its decision. *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984).

194. *Ansonia*, 479 U.S. at 68 (citing *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772 (9th Cir. 1986)).

plete control of the analysis to the employee. The court held that Title VII did not compel an employer to accept any accommodation, short of undue hardship, proposed by an employee.¹⁹⁵ Ultimately, however, the approaches of these cases are not consistent. The court in *American Postal Workers* did not deem employee suggestions irrelevant. Rather, it followed an approach which requires that methods of accommodation proposed by the employee be implemented, absent undue hardship, whenever the method proposed by the employer does not resolve the conflict between the employee's religious beliefs and job requirements.¹⁹⁶ Thus, if the facts of *Ansonia* were analyzed under the *American Postal Workers* approach *in toto*, the court would be required to consider employee suggestions because the method proposed by the Ansonia Board of Education did not resolve Philbrook's conflict.¹⁹⁷

Fourth, the Court in *Ansonia* felt that if the concepts of reasonable accommodation and undue hardship were linked, the employee would be "given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict."¹⁹⁸ The Court referred to section 701(j) and concluded that the amendment did not require the employer to "accommodate at all costs."¹⁹⁹

Any concern on the part of the *Ansonia* Court regarding employee abuse in selecting from among alternative methods of accommodation would seem easily answered by the concept of undue hardship; by its terms the amendment limits any employee choice to

195. *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986). In *American Postal Workers*, the employee argued that § 701(j) required an employer to accept any accommodation, which did not cause any "undue hardship," proposed by an employee, even in situations in which an employee rejected an accommodation offered by the employer solely on secular grounds. The court rejected the argument, holding that such an interpretation of § 701(j) "would have the effect of shifting the entire responsibility for accommodation to the employer, by granting an employee the unequivocal right to have every alternative assessed under the 'undue hardship' standard. Such a result runs contrary to the basic premise of Section 701(j), i.e., mutual cooperation." *Id.* at 777.

196. *Id.*; see *supra* notes 62-66 and accompanying text.

197. In *Ansonia*, the alternative proposed by the employer required the employee to take unpaid leave in order to observe his religious holidays, thus affecting the employee's compensation. *Ansonia*, 479 U.S. at 70-71. *American Postal Workers* defined employment status as including compensation. *American Postal Workers*, 781 F.2d at 776. Thus, the alternative proposed by the employer in *Ansonia* would affect status as that term is defined in *American Postal Workers*, and would trigger an undue hardship analysis of alternatives proposed by the employee.

198. *Ansonia*, 479 U.S. at 69.

199. *Id.* at 70-71.

one which does not work an undue hardship on the employer, not to one which is most beneficial to the employee.²⁰⁰ In addition, as was the case with legislative intent, it seems anomalous for the Court to separate the concepts of reasonable accommodation and undue hardship for the purpose of denying an employee the opportunity to accept the accommodation most beneficial to him, when the very separation gives the employer unfettered discretion to select the accommodation most beneficial to it.

Finally, the Court concluded that its separation approach was consistent with the approach taken in *Hardison*. The Court stated that *Hardison* dealt with undue hardship as a separate issue only after determining that no reasonable accommodation was possible.²⁰¹ This rationale inexplicably overlooks the fact that in *Hardison* the Court performed an undue hardship analysis on alternatives suggested by the employee and the lower court *after* holding that the accommodation offered by the employer was reasonable. Indeed, the *Hardison* Court devoted substantial discussion to both aspects of the case.²⁰² Regarding reasonable accommodation, it extolled the virtues of collective bargaining and stressed the need to balance the policies of Title VII with national labor policy. The Court developed a rule of per se reasonableness regarding general accommodation of employee religious and secular needs contained in collective bargaining agreements.²⁰³ Then, after finding in no uncertain terms that the method of accommodation offered by the employer was reasonable, the *Hardison* Court went on to perform an undue hardship analysis on two other methods of accommodation suggested by the employee.²⁰⁴ Thus, the approach in *Hardison* seems patently inconsistent with an approach that separates undue hardship and reasonable accommoda-

200. 42 U.S.C. § 2000e(j) (1982).

201. *Ansonia*, 479 U.S. at 68-69 ("As *Hardison* illustrates, the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.").

202. See *supra* notes 134-36 and accompanying text.

203. *Trans World Airlines v. Hardison*, 432 U.S. 63, 78-85 (1977).

204. *Id.*; see *Ansonia*, 479 U.S. at 75 (Marshall, J., dissenting). Justice Marshall stated that:

The Court's analysis in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), is difficult to reconcile with its holding today. In *Hardison*, the Court held that the employer's chosen work schedule was a reasonable accommodation but nonetheless went on to consider and reject each of the alternate suggested accommodations. The course followed in *Hardison* should have been adopted here as well.

Id.

tion, and invokes undue hardship only if no reasonable accommodation is offered.

D. The Effect of Ansonia on the Relationship Between Reasonable Accommodation and Undue Hardship

By adopting an approach that treats reasonable accommodation as the separate and controlling element in the analysis of the duty to accommodate, the *Ansonia* Court once again answered a question left open by the 1972 amendment in a way that theoretically limits protection of employees from religious discrimination. The decision also calls into question the validity of the EEOC procedures dealing with choices among reasonable methods of accommodation, procedures that were developed pursuant to *Hardison*.²⁰⁵ In its treatment of reasonable accommodation as the controlling element in the relationship between reasonable accommodation and undue hardship, the holding of *Ansonia* directly conflicts with the analysis of *Hardison*. Whereas *Hardison* maintained the relevancy of, and even encouraged, employee suggestions even after employers had offered reasonable methods of accommodation, *Ansonia* renders employee suggestions irrelevant.

In practical terms, however, this aspect of the *Ansonia* analysis does not appear to have wrought a significant change on the duty to accommodate. Pursuant to *Ansonia*, an employer is still required to reasonably accommodate an employee's religious practices, just as an employer was required to do pursuant to *Hardison* and prior to *Ansonia*.²⁰⁶ And, despite the fact that the *Hardison* Court deemed employee suggestions relevant, the employer in *Hardison* was still allowed to satisfy his duty to accommodate by implementing a reasonable method of his own choosing, as was also the case with the employer in *Ansonia*.²⁰⁷

VI. CONFLICTS AND RESULTS UNDER POST-ANSONIA ANALYSIS

While imposing some theoretical limits on employers' duty to accommodate, *Ansonia* does not appear to have affected an employer's duty to accommodate an employee who faces a choice between his job

205. See, e.g., *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519, 522 (4th Cir. 1987), *rev'd*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988). The court, citing *Ansonia*, refused to interpret the phrase "reasonable accommodation" in accordance with EEOC guidelines.

206. Compare *Hardison*, 432 U.S. 63 with *Ansonia*, 479 U.S. 60.

207. *Ansonia*, 479 U.S. 60; *Hardison*, 432 U.S. 63.

and his religion so long as the employee can be accommodated by a no-cost alternative.²⁰⁸ Beyond this, the post-*Ansonia* cases seem to be defining the duty less restrictively than *Ansonia*, and more in keeping with *Hardison*.

Accordingly, one significant post-*Ansonia* decision is *Smith v. Pyro Mining Co.*²⁰⁹ *Pyro Mining* involved an employee, Smith, who was a member and officer of a local Baptist church. Church doctrine prohibited all officers from working on Sunday, and Smith believed it was a sin to either work on Sunday or personally solicit someone else to work in his place.²¹⁰ Subsequent to hiring Smith, the employer, Pyro Mining, implemented a neutral work scheduling system which required each employee to work twenty six Sundays per year.²¹¹ Prior to implementing this system, Pyro Mining announced that employees who objected to working on Sundays could avoid the shift by arranging swaps with other employees. Because of Smith's religious beliefs, however, he refused to either work on Sunday or solicit a replacement, and was consequently fired.²¹²

The Sixth Circuit began its analysis by employing the conflict and status approach to determine if the method of accommodation proposed by the employer, i.e., a policy allowing employees to arrange for shift swaps, was reasonable. Because the method did not resolve the employee's conflict, the court concluded that it was unreasonable.²¹³ After determining that the employee had not offered a reasonable method of accommodation, the court went on to evaluate other available methods for undue hardship. The court determined that one available method of accommodation—Pyro's solicitation of a replacement for Smith—would likely have resolved Smith's conflict without working an undue hardship on Pyro.²¹⁴ Because the employer failed to offer a reasonable method of accommodation, and because an alter-

208. *Ansonia*, 479 U.S. at 70-71.

209. 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988).

210. *Id.* at 1083.

211. *Id.* The system was based on an eight day work week. Pursuant to the system, employees worked four consecutive ten hour days, and then had four consecutive days off. *Id.*

212. *Id.* at 1083-84.

213. *Id.* at 1088 ("[W]here an employee sincerely believes that working on Sunday is morally wrong and that it is a sin to try to induce another to work in his stead, then an employer's attempt of accommodation that requires the employee to seek his own replacement is not reasonable.").

214. *Id.* at 1089. The court concluded that soliciting a replacement for Smith would not work an undue hardship on Pyro Mining because: the company had previously taken an active role in arranging shift trades among employees; the company had previously followed a policy of advertising an employee's need to arrange a shift exchange; the company already had the means, i.e., bulletin boards and a monthly newspaper, in place for advertising an employee's need to secure a shift ex-

native method of accommodation that would not work an undue hardship on the employer was available, the court concluded that Smith's firing was the result of religious based discrimination.²¹⁵

By and large, the analysis of the Sixth Circuit in *Pyro Mining* is in keeping with the dictates of *Ansonia*. As mandated by *Ansonia*, the *Pyro Mining* court required accommodation of an employee who was forced to choose between his job and his religion²¹⁶ and was capable of being accommodated by a no-cost method of accommodation.²¹⁷ And, the *Pyro Mining* court did not consider it appropriate to analyze alternative methods of accommodation for undue hardship until it determined that the alternative proposed by the employer was not reasonable.²¹⁸

In a limited way the Sixth Circuit's analysis may be broader than the Court's analysis in *Ansonia*. Rather than allowing the employer to satisfy his duty to accommodate simply by following a neutral employment policy, as was the case with the neutral policy regulating leave in *Ansonia*, the *Pyro Mining* court required the employer to take steps beyond the neutral rule when doing so would not constitute an undue hardship.²¹⁹ When so viewed, the *Pyro Mining* approach is similar to the balancing approach followed in *Hardison* and other cases.²²⁰

Another significant post-*Ansonia* case is *EEOC v. Ithaca Industries, Inc.*²²¹ *Ithaca Industries* involved an employee, Dean, who refused, for religious reasons, to work on Sunday. Dean worked for a company, Ithaca Industries, which allocated Sunday work according to a neutral scheduling system. Pursuant to the scheduling system, the Sunday shift was staffed first with volunteers. The remaining slots were filled with workers chosen by shift supervisors.²²² In due course, Dean was assigned to work several Sunday shifts. When he refused,

change; the company could have accommodated Smith by placing a notice in its newspaper or on one of its bulletin boards. *Id.*

215. *Id.* at 1088-89.

216. Compare *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 64-65 (1986) with *Pyro Mining*, 827 F.2d 1081.

217. Compare *Ansonia*, 479 U.S. at 64-65 with *Pyro Mining*, 827 F.2d at 1089.

218. Compare *Ansonia*, 479 U.S. at 70-71 with *Pyro Mining*, 827 F.2d at 1085.

219. Compare *Ansonia*, 479 U.S. at 64-65 with *Pyro Mining*, 827 F.2d at 1089.

220. Compare *Trans World Airlines v. Hardison*, 432 U.S. 63, 79, 84-89 (1977) with *Pyro Mining*, 827 F.2d at 1089.

221. 829 F.2d 519 (4th Cir. 1987), *rev'd*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988).

222. *Id.* at 521.

he was fired.²²³

Initially, the Fourth Circuit held that Ithaca Industries, in following its neutral scheduling system, had fulfilled its duty to reasonably accommodate Dean. The court specifically refused to consider any other methods of accommodation.²²⁴

As with *Pyro Mining*, *Ithaca Industries* involved the type of situation in which *Ansonia* still requires accommodation absent undue hardship, i.e., an employee forced to choose between his job and his religion.²²⁵ Thus, as Ithaca Industries did not offer Dean a method of accommodation that resolved his conflict, it should have been required, pursuant to *Ansonia*, to prove that other no-cost alternatives would have created an undue hardship.²²⁶ Instead, by refusing to evaluate no-cost methods of accommodation even after the employer did not offer to accommodate the employee, the Fourth Circuit panel, in effect, required neither reasonable accommodation *nor* a showing of undue hardship.²²⁷ This approach not only further restricts the protection from religious discrimination remaining after *Ansonia*, but is

223. *Id.* In assigning workers to Sunday shifts, the shift supervisors considered: whether an employee had worked on previous Sundays; the number of hours an employee had worked during the week; the job qualifications of the employee. *Id.*

224. *Id.* at 522.

225. *Compare* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 64-65 (1986) with *Ithaca Indus.*, 829 F.2d at 522.

226. *See supra* notes 171-75 and accompanying text.

227. The court supported its decision by relying on several facts that are not appropriately considered in an analysis of reasonable accommodation. First, the court seemed to criticize Dean for adhering to his religious belief. Specifically, the court stated:

Throughout his testimony, Dean refused to compromise in any way on the Sunday work issue. He never offered to work on Sunday even if he would be allowed to attend church services. The district court judge found that "he just would not work on Sunday, period." By his own absolutist position, Dean precluded Ithaca from making a reasonable accommodation for his religious practices.

Ithaca Indus., 829 F.2d at 521-522 (citation omitted).

This reasoning completely ignores the fact that § 701(j) and § 703(a)(1) of Title VII require employers to make some effort to accommodate Sabbath observers. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 73-76 (1977); *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185 (M.D. Ala. 1982); 118 CONG. REC. 705-06 (1972) (statement of Sen. Randolph). *But see* *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977), *overruled*, *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 n.3 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988), and that § 701(j) was enacted, in part, in response to court decisions which held that employers had no burden to attempt to accommodate Sabbath Observers. *See Pyro Mining*, 827 F.2d at 1087-88, 1088 n.6 (citing *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom.* *International Ass'n of Machinists & Aerospace Workers v. Hopkins*, 433 U.S. 908 (1977); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972)). *But see Pyro Mining*, 827 F.2d at 1089-90 (Krupansky, J., dissenting) which, despite the amendment of Title VII by § 701(j), stated that *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th

directly contrary to the definition of the employer's duty to accommodate contained in section 703(a)(1) and applied in *Hardison*, *Ansonia*, and virtually every other relevant authority.²²⁸

A majority of the Fourth Circuit recognized these problems, and the case was subsequently reversed by the court sitting en banc.²²⁹ The en banc court held that Ithaca Industries had violated section 703(a)(1) by the company's "absolute lack of effort at accommodation."²³⁰

Like *Pyro Mining* and *Ansonia*, the en banc decision in *Ithaca Industries* clearly requires accommodation of an employee who is forced to choose between his job and his religion when accommodation can be achieved without undue hardship. Beyond this, *Ithaca Industries*, like *Pyro Mining* and *Hardison*, goes beyond *Ansonia* in clearly refusing to allow employers to satisfy their duty to accommodate simply by adhering to a neutral work rule.²³¹

Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), was still viable precedent in the Sixth Circuit.

Second, the court in *Ithaca Industries* seemed to suggest that Dean did not deserve accommodation because "his employment career was somewhat less than impressive." *Ithaca Indus.*, 829 F.2d at 521. While the reason for an employee being discharged is relevant when determining if a *prima facie* case of religious discrimination exists, it is irrelevant to an accommodation analysis. *See, e.g.*, *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (to establish a *prima facie* case of religious discrimination, an employee must show that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with conflicting employment requirement'") (quoting *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)), *rev'd*, 479 U.S. 60 (1986); *Pyro Mining*, 827 F.2d at 1085; *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. General Motors Corp.*, 601 F.2d 347, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.* 574 F.2d 897, 901 (7th Cir. 1978), *cert. denied sub. nom.*, *Haring v. Regan*, 452 U.S. 939 (1981).

Finally, the court seemed to feel that the employee before it was not sincere in his religious belief, and therefore not deserving of accommodation. *Ithaca Indus.*, 829 F.2d at 520. While sincerity of belief certainly has a place in an analysis of religious discrimination, it is appropriately considered when determining if an employee has established a *prima facie* case under § 703(a)(1), *see, e.g.*, *Ansonia*, 107 S. Ct. at 370, not in an analysis of accommodation under § 701(j).

228. The employer's duty under § 701(j) and § 703(a)(1) is universally interpreted as the duty to reasonably accommodate the employee's religious practices or show that accommodation would work an undue hardship on his (the employer's) business. *See, e.g.*, *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986); *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 (1977); *Smith v. Pyro Mining Co.*, 827 F.2d 1081-85 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984); *Anderson v. General Dynamics*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied sub nom.* *International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979).

229. *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116 (4th Cir.) (en banc), *cert. denied*, 109 S. Ct. 306 (1988).

230. *Id.* at 118.

231. *Id.* at 119. Specifically, the en banc court stated:

VII. CONCLUSION

The 1972 amendment of section 701 of Title VII left open questions as to the definitions of both reasonable accommodation and undue hardship, and the relationship between the two concepts. Recent court decisions, culminating with *Ansonia*, have proposed answers to each of these questions that theoretically or potentially limit the employer's duty to accommodate employee religious practices. On balance, however, these limits do not appear to affect the majority of accommodation cases.

Specifically, regarding reasonable accommodation, *Ansonia* and *Pinsker* have followed a balancing approach which potentially creates a rule of per se accommodation concerning provisions contained in collective bargaining agreements. However, these decisions ultimately seem more concerned with sustaining provisions which, in general, balance the policies of Title VII and federal labor law.²³² On a related point, dictum in *Ansonia* suggests that, for the purposes of a conflict and status approach, the term "employment status" should be read to exclude compensation as a component. When viewed in light of the facts of *Ansonia* and the substance of prior case law, however, the dictum seems better interpreted as a limit on the degree of accommodation required in cases involving compensation.²³³

Regarding undue hardship, the Court in *Ansonia* penned language suggesting that the analysis used to evaluate cost alternatives could be applied to no-cost alternatives. However, at least one post-*Ansonia* court did not interpret *Ansonia* in this manner and continued to apply a pre-*Ansonia* framework when analyzing no-cost alternatives.²³⁴

Finally, regarding the relationship between reasonable accommodation and undue hardship, *Ansonia* followed an approach which made the concept of reasonable accommodation separate and controlling, and held that the employer's duty to accommodate was satisfied as soon as he proposed a reasonable method of accommodation. This

It is true that in this case Ithaca did demonstrate an effort to accommodate *all* their employees when Sunday work was assigned. These accommodations, however, were clearly not for reasons of religion, nor were they specifically aimed at addressing Dean's beliefs. In addition, Ithaca made no effort to accommodate Dean by any of the methods suggested by the guidelines in the regulations.

Id. (footnote omitted) (emphasis in original).

232. See *supra* notes 26-61 and accompanying text.

233. See *supra* notes 62-88 and accompanying text.

234. See *supra* notes 89-120 and accompanying text.

approach, however, would seem to have little practical effect on the duty to accommodate.²³⁵

Regardless of the application of these potential limits, it is clear that they do not affect the duty of an employer to accommodate an employee who faces a choice between his job and his religion and can be accommodated by a no-cost alternative.²³⁶

235. *See supra* notes 121-207 and accompanying text.

236. *See supra* notes 208-31 and accompanying text.