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large, multi-level groups of consumers and middlemen will be implicated and in which the problems of proving pass-on may be insurmountable. There will, however, be others in which ultimate consumers will be the most seriously injured parties, will have suffered appreciable damages and will be well prepared to meet their burden of proof. An initial standing threshold would permit such plaintiffs to press their claims, without burdening the courts with frivolous or unnecessarily complex suits. When the standing requirement would not bar a class of plaintiffs so large as to be unmanageable, a court could refuse to certify the suit as a class action. These procedural bars, though perhaps not as simple to implement as the Illinois Brick rule, would permit the courts to promote all the objectives fostered by the treble-damage suit as the circumstances of each case require.

MARTHA JOHNSTON MCDONALD

Civil Rights—Title VII and the Religious Employee: 
Trans World Airlines, Inc. v. Hardison Retrenches on the Reasonable Accommodation Requirement

In 1972, Congress amended the Civil Rights Act of 1964 to include a requirement that an employer “reasonably accommodate” his employees’ religious practices or observances unless doing so would cause an “undue own plant at a loss); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975) (defendant made zipper sliders and sold them to zipper manufacturers who sold to plaintiff); Washington v. General Elec. Co., 246 F. Supp. 960 (W.D. Wash. 1965) (public utility sued defendant for overcharges on 10 generators sold through a contractor).  

85. One such case, Reiter v. Sonotone Corp., 1977-1 Trade Cas. ¶ 61,360 (D. Minn. Mar. 31, 1977), appeal docketed, No. 77-1474 (8th Cir. June 20, 1977), was recently decided in a federal district court. A purchaser of a hearing aid brought a class action suit against the manufacturer for resale price maintenance, alleging that defendants sold hearing aids to select ed retail dealers for approximately $100 and set the price to consumers at about $350. Brief for Appellee at 18. If footnote 16 of Illinois Brick, 97 S. Ct. at 2070 n.16, is interpreted to include control by a supplier, this case should be one of the exceptions to the Illinois Brick rule. See notes 51 & 52 and accompanying text supra. Resale price maintenance, if proved, would surely be recognized as “control” of a retailer by a manufacturer. If the footnote is read to include only “customer” control of a direct purchaser, however, the broad language of the decision might bar the consumer plaintiffs in this case despite their success in establishing their standing in the district court, simply because they are “indirect purchasers.” Because this situation, if plaintiff can prove her allegations of resale price maintenance, does not require the use of pass-on theory, it seems particularly unfair to bar the plaintiff under the Illinois Brick rule, before any proof may be offered.

86. See, e.g., Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (retail consumers of automobiles had standing to sue for alleged overcharges but proposed class of 30 to 40 million car buyers rejected as unmanageable).
hardship" on the conduct of the employer's business. The amendment created continuing confusion about the level to which the employer's accommodation must rise before becoming "unreasonable" and an "undue hardship." The Supreme Court's recent decision in *Trans World Airlines, Inc. v. Hardison* narrowed the definition of "reasonable" accommodation by concluding that an accommodation necessitating the circumvention of seniority provisions of a collective bargaining agreement or requiring that the employer bear more than a de minimis cost in complying with the statute constituted an undue burden. In so holding, the Court followed the 1964 Civil Rights Act requirement of equal treatment of employees and seemingly ignored the congressional mandate in the 1972 amendments to the Act requiring reasonable accommodation of employees' religious beliefs; that is, inequality of treatment of employees on the basis of religion.

Petitioner Trans World Airlines (TWA) hired Larry Hardison, respondent, as a clerk in its Kansas City, Missouri, Stores Department on June 5, 1967. Hardison's position was subject to a collective bargaining agreement with the International Association of Machinists and Aerospace Workers (IAM). In 1968, Hardison became a member of the Worldwide Church of God, a church whose members are required to refrain from work on the Sabbath (sundown on Friday until sundown on Saturday) and on various religious holidays. For some time thereafter, Hardison was able to coordinate his religious practices and his work schedule. In December 1968,

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4. Id. at 2275. The Court pointed out that "[t]he repeated unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities." Id. See note 21 infra for the text of the applicable provisions of the 1964 Civil Rights Act. The 1972 amendment, by contrast, is quite simply a provision for special treatment to some extent. See note 33 and accompanying text infra.
6. The Kansas City TWA base handles maintenance, and its Stores Department operates 24 hours per day, 365 days per year. Whenever an employee is out in this department, a supervisor or an employee from another section must cover the position because service must be maintained. 97 S. Ct. at 2268.
7. The agreement provides that seniority applies in the fulfillment of shift and vacation assignment preferences and in bidding for vacancies, new jobs and transfers. Id. at 2268 n.1.
8. In a memo to a TWA supervisor, the manager of the Stores Department suggested that the steward try to change Hardison's job or days off, that Hardison have his religious holidays off if he agreed to work on more traditional Christian holidays, and that the supervisor should look for another job for Hardison that would not require Sabbath work. Id. at 2268. Hardison found his own solution by switching to the 11 p.m. to 7 a.m. shift, which allowed him to observe the Sabbath.
however, the situation deteriorated when Hardison transferred to a dayshift position in another building that had a separate seniority list. Hardison dropped to second lowest in seniority because of the transfer and was asked to work on Friday evening and Saturday.\textsuperscript{9} Hardison, his supervisor and the union steward met and discussed several potential solutions to the dilemma, but none was instituted.\textsuperscript{10} Finding no solution forthcoming, Hardison simply failed to report for work on three consecutive Saturdays. A discharge hearing was held on March 31, 1969; Hardison was found guilty of insubordination and discharged on April 2, 1969.\textsuperscript{11} After filing an unlawful employment practice charge with the Equal Employment Opportunity Commission and exhausting his administrative remedies, Hardison filed suit against TWA and IAM alleging religious discrimination pursuant to 42 U.S.C. § 2000e-2.\textsuperscript{12}

The district court found that TWA's efforts to resolve Hardison's conflict fulfilled the requirement of reasonable accommodation and that any further effort by TWA would work an undue hardship.\textsuperscript{13} The Eighth Circuit

\textsuperscript{9} This situation arose when the lowest person on the seniority list went on vacation in March 1969. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 36 (8th Cir. 1975).

\textsuperscript{10} The union refused to waive seniority requirements, and Hardison had insufficient seniority to bid for another shift or job. TWA was unwilling to allow Hardison to work a four-day week as shifts were already cut to a minimum on weekends. Hardison's presence was critical because he was the only one available from his shift to perform his function and bringing in a supervisor or another employee from outside would have understaffed some other area. Scheduling someone not assigned to the Saturday shift would have required payment of overtime. 97 S. Ct. at 2268-69.

There was some dispute as to whether someone from another shift was willing to trade shifts. Id. at 2275, 2281-82. A brief filed by IAM notes that even given such a substitute, the union would only allow Hardison to switch if his seniority was sufficient to allow it. Brief for International Association of Machinists and Aerospace Workers at 9. It is unclear whether either TWA or IAM actually checked to see if there was someone with greater seniority than Hardison who wanted the potential substitute's job and would therefore have a preeminent claim to the position.

\textsuperscript{11} 97 S. Ct. at 2267. After Hardison was notified that the hearing had been scheduled, but before it actually occurred, he voluntarily switched to the twilight shift (3:00 p.m. to 11:00 p.m.). IAM was prepared to argue that Hardison should not be discharged as a solution had been found, but when Hardison left work at sundown on Friday, March 28, it became apparent that there was as yet no resolution. Id. See also Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 885 (W.D. Mo. 1974).

\textsuperscript{12} 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975). Hardison based his claim on the requirement that employers 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" found in the EEOC guidelines, 29 C.F.R. § 1605.1(b) (1976), and on the similar language in the 1972 amendments to Title VII, see note 33 and accompanying text infra.

\textsuperscript{13} Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 887 (W.D. Mo. 1974). The district court held specifically that IAM was not required to breach the provisions of its collective bargaining agreement and that TWA was not required to shortchange another area to replace Hardison or pay premium wages to a replacement. Id. at 891. The court also considered challenges to the constitutionality of the reasonable accommodation requirement but found that the provision was not invalid as an unconstitutional establishment of religion. Id. at 887-88.
EMPLOYMENT DISCRIMINATION

reversed with respect to TWA and affirmed with respect to IAM,\(^{14}\) finding that TWA had discarded three reasonable alternative accommodations and had proffered none.\(^ {15}\)

The Supreme Court reversed the Eighth Circuit in part,\(^ {16}\) holding in favor of both TWA and IAM.\(^ {17}\) It found no suggested alternative that would not create an undue burden. The key to the Court's decision was its holding that reasonable accommodation does not include breaching seniority provisions and violating the seniority rights established therein.\(^ {18}\) The Court, however, went on to make it clear that an employer is not required to bear more than a de minimis cost in its efforts to accommodate.\(^ {19}\)

*Hardison* dealt primarily with the 1972 amendments to Title VII of the Civil Rights Act of 1964. These amendments were the product of a congressional response to administrative and judicial interpretations of the 1964 Act's prohibition against religious discrimination.\(^ {20}\) Although the Civil Rights Act of 1964 proscribed employment discrimination based on religion as an unlawful employment practice,\(^ {21}\) it was, in the minds of its proponents, primarily an attack on racial discrimination.\(^ {22}\) Nevertheless, Congress

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14. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 42-43 (8th Cir. 1975). The district court's judgment in favor of IAM was not directly challenged on appeal. Consequently the favorable judgment was affirmed.

15. The alternatives suggested were permitting Hardison to work a four-day week by filling in with a supervisor or another worker, filling Hardison's Sabbath shift with other available personnel within the bounds of the seniority system, or arranging a swap between Hardison and another employee for the entire shift on the Sabbath alone. *Id.* at 41. The court also suggested that if the seniority provision of the collective bargaining agreement were too inflexible to allow such a swap, it would, of itself, constitute an unlawful employment practice. *Id.*

16. 97 S. Ct. at 2270. The reversal was a seven to two decision with Justices Marshall and Brennan dissenting.

17. *Id.*

18. *Id.* at 2275.

19. *Id.* at 2277.

20. See text accompanying notes 27-34 infra.


   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

included religious discrimination as a prohibited practice in the tradition of earlier fair employment practices legislation.\textsuperscript{23}

In order to ensure the implementation of the goals of Title VII, the 1964 Act created the Equal Employment Opportunity Commission.\textsuperscript{24} The EEOC, pursuant to its responsibility of assisting employers in complying with the statute, issued guidelines suggesting that an employer should make reasonable accommodation to employee religious practices unless such measures would result in an undue hardship in the conduct of the employer's business.\textsuperscript{25} Although the guidelines did not provide a definition of "undue hardship," it became clear in EEOC rulings made under the guidelines that only a showing of "compelling circumstances" absolved a non-accommodating employer.\textsuperscript{26}

In requiring "reasonable accommodation" by employers, the EEOC postulated a broader realm of discrimination than that envisioned by Congress in its enactment of the Civil Rights Act.\textsuperscript{27} The EEOC formulation suggested that religious discrimination included not only intentional discrimination or inequality of treatment, but also uniform treatment of employees that had a harsher impact on some because of their religious beliefs, in other words, discrimination by effect.\textsuperscript{28} Thus, according to the EEOC definition, an employer might apply work rules uniformly to all employees and still be guilty of religious discrimination.

\textsuperscript{23} Id. at 600. For examples of earlier fair employment legislation, see id. at 600 n.9.

\textsuperscript{24} 42 U.S.C. § 2000e-4 (1970 & Supp. V 1975). The Commission was, in addition to other responsibilities, to have power "to furnish persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder" and "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public." Id. § 2000e-4(g)(3), (5).


\textsuperscript{26} Edwards & Kaplan, supra note 22, at 627. Undue hardship has been found, for example, when an employee with beliefs requiring that she not work on the Sabbath was hired for harvesting season and, to accommodate her, the employer would have had to train a replacement for one day a week. EEOC Dec. 70-99 (1969), [1973] EEOC Dec. (CCH) 6061, at 4096. See also Note, Religious Discrimination in Employment: The 1972 Amendment—A Perspective, 3 Fordham Urb. L.J. 327, 340 n.81 (1975).

\textsuperscript{27} 97 S. Ct. at 2275; see note 4 supra.

\textsuperscript{28} See Edwards & Kaplan, supra note 22, at 619. Edwards and Kaplan suggest three possible definitions of "religious discrimination" under Title VII: intentional and wilful acts of discrimination; discrimination by effect, that is, an employer rule neutral on its face but not uniform in its impact on employees holding different religious beliefs; and a discrimination by effect standard that provides for exculpation if the employer has made a reasonable effort to accommodate the religious needs of the employee or if an accommodation cannot be made without undue hardship to the employer. Id. The legislative history of Title VII seems to indicate that Congress intended the intentional discrimination formulation in 1964. Id. at 620-22.
Judicial reaction to the guidelines was mixed; several courts chose to ignore them altogether and to require a showing of intentional discrimination. For example, in Reid v. Memphis Publishing Co., the court observed that, although the 1967 guidelines with their "undue hardship" language had already been issued, it would not apply them because they exceeded the congressionally intended scope of Title VII's bar to religious discrimination. Likewise, in Dewey v. Reynolds Metals Co., the court refused to apply the guidelines, speaking even more boldly:

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

In answer to the courts' hostile reception of the EEOC guidelines, Congress amended Title VII in 1972 adding the following definition of "religious discrimination."

30. Id. at 518-20.
32. Id. at 331 n.1.
33. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (currently codified at 42 U.S.C. §2000e(j) (Supp. V 1975)). In introducing the amendment from the floor of the Senate, Senator Randolph expressed his concern about the dwindling membership of certain minority religious sects that had strict tenets regarding observance of the Sabbath. He further suggested that the Civil Rights Act of 1964 had been intended to protect religious conduct as well as belief and is "to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments." 118 Cong. Rec. 705 (1972). With little debate, the provision was passed unanimously on the floor of the Senate. Id. at 730-31. Senator Randolph then ordered printed in the record the decisions in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd per curiam 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) (employer made no effort to accommodate). The assumption has been that Congress acted in response to footnote 1 of Dewey v. Reynolds Metals Co., 429 F.2d at 331 n.1, quoted at text accompanying note 32 supra. See Cooper v. General Dynamics, 533 F.2d 163, 167 (5th Cir. 1976).
34. See note 28 supra.
Again, judicial response to the obligation placed on employers was inconsistent. The variation, however, resulted largely from difficulties in the application of the reasonable accommodation requirement to the unique facts of each case,\(^{35}\) rather than from hesitation to accept the discrimination by effect definition. In response to this confusion among the lower courts the Supreme Court granted certiorari in \textit{Hardison} to delimit the reach of the reasonable accommodation obligation.\(^{36}\) But instead of merely providing guidelines to aid the lower courts in making difficult factual determinations, the Court rejected the discrimination by effect standard so thoroughly that the 1972 amendments were left virtually meaningless.

\(^{35}\) See, e.g., \textit{Reid v. Memphis Publishing Co.}, 521 F.2d 512 (6th Cir. 1975), \textit{cert. denied}, 429 U.S. 964 (1976) (employer not required to accommodate Sabbatarian practices when accommodation would require hiring an additional employee, incurring overtime expenses or violating seniority expectancies of other workers); \textit{Cummins v. Parker Seal Co.}, 516 F.2d 544 (6th Cir. 1975), \textit{aff'd per curiam by an equally divided Court}, 429 U.S. 65 (1976) (complaints of fellow workers of employee not undue hardship). \textit{Compare Draper v. United States Pipe & Foundry Co.}, 527 F.2d 515 (6th Cir. 1975) (offer to transfer employee at a pay reduction is not a reasonable accommodation when substitution could have been arranged), \textit{with Dixon v. Omaha Pub. Power Dist.}, 385 F. Supp. 1382 (D. Neb. 1974) (transfer of employee with pay reduction was a reasonable accommodation when substitution would have necessitated payment of overtime).

\(^{36}\) Indeed, the Court initially considered whether TWA had made reasonable efforts to accommodate. Rather than closely examining the district court determination that any further accommodation would work an undue hardship, 375 F. Supp. at 891, the Court measured the scope of the efforts TWA had made. Thus, the focus shifted from a determination of what \textit{could} have been done to accommodate to what had been done in an unsuccessful effort to do so. Justice Marshall in the dissenting opinion suggested several alternatives that had not been raised earlier. 97 S. Ct. at 2281-82. In essence, \textsection 701(j) of the Equal Employment Opportunity Act of 1972 was reconstructed to require "reasonable efforts at accommodation" rather than reasonable accommodation. In \textit{Draper v. United States Pipe & Foundry Co.}, 527 F.2d 515, 519-20 (6th Cir. 1975), the court looked for other viable alternatives not pursued, even though the employer had made reasonable efforts to accommodate. On the other hand, the Court in \textit{Hardison}, despite the dissent's protest, 97 S. Ct. at 2281-82, accepted the district court’s finding that TWA had done all that it could do to accommodate Hardison’s religious beliefs without either incurring substantial costs or violating the seniority rights of other employees. \textit{Id.} at 2276 n.14.

As an adjunct of its "reasonable efforts" requirement, the Court noted the existence of a seniority system as a significant accommodation to employee religious needs. \textit{Id.} at 2264. The relationship of the seniority system to the accommodation obligation is discussed at text accompanying notes 37-52 \textit{infra}. It is significant to note that although seniority systems have been protected as bona fide under \textsection 703(h) of the Civil Rights Act of 1964 even though discriminatory in impact, \textit{see note 44 infra}, they had \textit{not}, prior to the \textit{Hardison} decision, been viewed as a specific accommodation of employee religious practices under the terms of the 1972 amendment. The Court's observation on this point raises the question whether an employer's acquiescence to a seniority provision in a collective bargaining agreement automatically fulfills its duty of reasonable accommodation. In his dissenting opinion, Justice Marshall rightly noted that "[t]he accommodation issue by definition arises only when a neutral rule of general applicability \textit{[e.g., routine application of a seniority provision} conflicts with the religious practices of a particular employee]." 97 S. Ct. at 2278. It is unlikely that an employer may offer the mere existence of a seniority system against a charge of unlawful religious discrimination, despite the Court's broad language, without some additional showing of an effort to accommodate.
The Court's consideration of the relationship between Hardison's collective bargaining agreement seniority provision and the reasonable accommodation requirement of section 701(j) juxtaposed differing definitions of discrimination. The legislative history of the Civil Rights Act indicated that Congress viewed discrimination as intentional inequality of treatment. Additionally, in section 703(h) of the Civil Rights Act Congress gave express protection to the bona fide application of a seniority system absent discriminatory intent in the application. However, section 701(j), enacted in the 1972 amendments, required reasonable accommodation of employee religious beliefs, thereby extending the definition of religious "discrimination" to include the discrimination by effect situation. Arguably, the 1964 Act and section 703(h) did not control such a situation because they were

38. See note 44 infra.
39. See text accompanying notes 33 & 34 supra. A key problem in recognizing the discrimination by effect standard in the religious discrimination area is the danger that the accommodation remedy oversteps the bounds of the establishment clause. Legislation concerning religion must avoid excessive entanglements between government and religion, have a secular legislative purpose, and have a principal or primary effect that neither advances nor inhibits religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The arguments for and against the survival of § 701(j) under these tests are set forth in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd per curiam by an equally divided Court, 429 U.S. 65 (1976). The majority in Cummins, upholding the statute, found a secular purpose in strengthening Title VII's prohibition of religious discrimination and in ensuring that employees are not punished for following the dictates of conscience. Id. at 552. It found the requisite neutral effect in that the Act primarily ensures job security for people whose religious requirements conflict with uniform work rules and does not treat one religion differently from another. Id. at 552-53.

The dissent in Cummins suggested that the Act, by protecting only certain religious views conflicting with job requirements, confounds the secular purpose of Title VII standing alone. Id. at 556 (Celebrezze, J., dissenting). Additionally, the dissent suggested that, by discriminating between the religious and the non-religious and between religious employees whose beliefs do and do not conflict with work rules, the Act fails the neutral effect test. Id. at 558.

Finally, supporters have noted that the government's only involvement is in determining whether there has been reasonable accommodation or undue hardship. Id. at 533-54. Critics suggest that such a determination requires inquiry into the sincerity of employees' religious beliefs. Id. at 559. See generally Comment, Religious Discrimination in Employment: Striking the Delicate Balance, 80 DICK. L. REV. 717 (1976).

The Supreme Court has granted exemption from restrictive laws that interfere with the free exercise of religion. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398, 409 (1963). Its position has been that "'[n]eutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemption from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." Gillette v. United States, 401 U.S. 437, 454 (1971) (citation omitted).

Justice Marshall, dissenting in Hardison, noted "[i]f the State does not establish religion over non-religion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer." 97 S. Ct. at 2280. When the State grants an exemption to one of its laws that interferes with the free exercise of religion, it is countering its invasion of a protected right rather than establishing religion. But when the State requires an exemption or gives favored treatment based on religion when it has not interfered with the free exercise of religion, the balance between the free exercise and establishment clauses has been upset. A citizen has no choice as to whether he will experience the impact of a
directed at intentional racial discrimination. Consequently, it was unclear whether section 703(h) protected seniority rights after section 701(j)’s expanded definition of discrimination.

Authority existed for both the intentional inequality of treatment and the discrimination by effect approaches. The EEOC had adopted the discrimination by effect approach and was exacting in its requirements of employers with respect to collective bargaining agreements, holding that the agreement must be capable of modification if necessary to effect reasonable accommodation. Several courts had determined that if the employer had any leeway to assign shifts, he must accommodate religious needs, seniority practices notwithstanding. The court of appeals decision in Hardison seems to have been the high water mark in the trend questioning the inviolability of seniority provisions in religious discrimination cases, observing that “‘[i]t would seem that a collective bargaining agreement, the seniority provisions of which preclude any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.’”

On the other hand, the language of section 703(h) requires intentional discrimination in the application of a seniority system for a violation of the Act. This requirement seems conclusively to protect the routine application of a seniority system regardless of its effect. In view of the explicit law. By contrast, an employee voluntarily chooses his employer, at least theoretically, and therefore voluntarily assumes the constraints of the employer’s work rules.


40. Edwards & Kaplan, supra note 22, at 600 n.10.

41. [I]f a collective bargaining agreement is so inflexible as to have the effect of requiring a party to the agreement to discriminate against an individual because of his religion and if the inflexibility of the agreement is not justified by substantial business considerations, then Title VII requires that the agreement be modified so as to eliminate its discriminatory effect.


43. 527 F.2d at 41. This observation would seem to be in direct contradiction to § 703(h), as the Supreme Court decision noted. 97 S. Ct. at 2275.

44. Critics of the Civil Rights Act expressed concern that passage of that Act would interfere with already established seniority rights of workers in previously segregated work
intentional discrimination limitation in section 703(h), the Court in Hardison correctly upheld the inviolability of seniority rights in a confrontation with the accommodation obligation. Congress protected seniority rights even in the face of its deep concern for the intentional racial discrimination at which the Civil Rights Act was primarily directed. This same protection undoubtedly would have stood with respect to religious discrimination, a peripheral concern, if section 703(h) had been considered contemporaneously with the expanded discrimination definition of 701(j).

The Court did not, however, rely exclusively on the explicit language of section 703(h) requiring intent to discriminate in upholding TWA’s seniority system. It based its decision as well on the broad language of Title VII emphasizing the elimination of discrimination in employment. Although “discrimination” as used in the Civil Rights Act is susceptible of several interpretations, the Court suggested that the only proper definition

areas. Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promoting, 82 HARV. L. REV. 1598, 1608-09 (1969). In response, two interpretive memoranda were included in the Congressional Record asserting that already established seniority rights would not be affected. The memoranda were prepared by Senators Clark and Case, 110 CONG. REC. 7212 (1964), and the Justice Department, id. at 7207; see Franks v. Bowman Transp. Co., 424 U.S. 747, 759-60 nn.15 & 16 (1976). Subsequently, a substitute bill was offered by Senators Mansfield and Dirksen containing the provision that was later adopted. See id. at 759-61.

The Civil Rights Act of 1964, Title VII, § 703(h), 42 U.S.C § 2000e-2(h) (1970) provides:

Notwithstanding any other provision of this title, 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 . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

It has generally been accepted that § 703(h) is an accurate representation of the Clark-Case memorandum’s conclusion that Title VII will not affect vested seniority rights absent discriminatory intent. But see Cooper & Sobol, supra at 1607. The Supreme Court has, since the passage of § 703(h), held that the routine application of a bona fide seniority system is not an unlawful employment practice, even when it locks in the effects of past intentional discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Again, this provision is directed primarily at the racial discrimination area. It has virtually no application to the religious discrimination situations because religious “discrimination” in employment is seldom the result of an intent to discriminate, but rather the product of the clash between an employer’s uniform work rules and an employee’s religious practices, resulting in a discriminatory impact.

The remedy suggested in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), is not available for victims of religious discrimination. In Franks, an award of retroactive seniority was allowed to victims of post-Act or pre-Act racial discrimination, bringing them up to the level of seniority they would have achieved absent intentionally discriminatory practices. Id. at 770. In effect, this remedy constitutes a retroactive award of equal treatment. In the case of religious discrimination, where there has been no past intentional discrimination but present discrimination by effect, an infringement of others’ seniority rights could be, in essence, an award of unearned superseniority to the accommodated employee.

45. See notes 21 & 22 and accompanying text supra.
46. 97 S. Ct. at 2277.
47. See note 28 supra.
under the Act is inequality of treatment. In so doing, the Court ignored the anomaly that while the 1964 Act mandates equality of treatment in employment, by the Court's interpretation, section 701(j) specifically calls for special treatment based on religious preferences. The Court did not address this conflict; instead it read section 701(j) as applying only when it would result in no inequality of treatment of employees. This approach suggests that the uniform application of any work rule is an acceptable employment practice as long as it is not applied with an intent to discriminate, regardless of its impact on employees with strongly held religious beliefs.

There is little room for remediating the discrimination by effect situation under this reading of the statute. Such a situation arises when a work rule of

48. The Court observed that the thrust of the statute is that "similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." 97 S. Ct. at 2270 (emphasis added). Furthermore, according to the Court, the Act proscribes discrimination when it is directed against majorities as well as minorities. Id.

It is arguable that Griggs v. Duke Power Co., 401 U.S. 424 (1971), conflicts with such an interpretation. Griggs involved the institution of requirements of a high school diploma or the passing of an intelligence test as a condition of employment. The Court held that if an employment practice that operates to exclude Blacks cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. Id. at 436. It may be, however, that Griggs is distinguishable from the religious discrimination situation in that the adoption of such employment prerequisites as diplomas and intelligence tests perpetuate the effects of past intentional racial discrimination. In addition, if the requirements are not reasonably related to job performance, discriminatory intent may be inferred. See Edwards & Kaplan, supra note 22, at 623-24. Thus, Griggs may be applicable only to situations involving some history of intentional discrimination.

49. As Justice Marshall's dissent notes, 97 S. Ct. at 2279, the majority's approach is precisely that taken in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided Court, 402 U.S. 689 (1971). The court in Dewey stated, "To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement . . . and lead to grievances and additional arbitration." Id. at 330 (emphasis added).

The result in Dewey was specifically criticized during the introduction of the 1972 amendments, and the text of the case was included in the Congressional Record. 118 CONg. REc. 705-06 (1972); see note 33 supra. The Court's similar rationale in Hardison, 97 S. Ct. at 2275, unabashedly contraverts the congressional intent in passing the 1972 amendment.

Additionally, the Court's use of the term "discrimination" against majority employees in accommodating the religious employee even when the majority employees' contractual rights are not abridged, id. at 2277, raises the specter of grievances filed by disgruntled employees whenever an effort is made to accommodate the religious employee. Certainly the existence of § 701(j) should exempt an employer from any such danger unless another employee's contractual rights are in fact abridged or his employment situation is in fact worsened as a result of the accommodation.

50. Justice Marshall strongly disagreed with this interpretation in his dissent. He suggested that the kind of exemption that has traditionally been granted to those with strongly held religious beliefs when governmental obligations conflict with these beliefs should be allowed in the employment situation. 97 S. Ct. at 2280. Indeed, this seemed to be the legislative intent underlying the enactment of § 701(j). See note 33 supra.
general applicability has a harsher impact on an employee with strongly held religious beliefs. Congress mandated in section 701(j) that an effort be made to adjust employment conditions for the religious employee to equalize the impact of such work rules. Nevertheless, the Court concluded that it is unacceptable for an employee to be treated differently on the basis of his religion. The result is that the "undue burden" test is satisfied by a demonstration that accommodation would result in unequal treatment of employees on the basis of their religion.

The logical extension of such a theory is that any accommodation exclusively for religious beliefs necessitates unequal treatment and constitutes an "undue burden." The Court, however, avoided this extreme, never stating that no accommodation is required. In concession to the existence of section 701(j), the Court seems to visualize a realm of accommodation that is acceptable, indeed required, although technically constituting unequal treatment on the basis of religion. This unequal treatment does not rise to the level of "undue hardship." For example, the Court seemed to view favorably the efforts that TWA had made to accommodate Hardison. These included meeting with Hardison to discuss possible solutions, accommodating Hardison's religious holiday observance (in return for his working Christian holidays) and authorizing the union steward to search for someone to swap shifts, a normal procedure. No real costs were incurred, Hardison received no greater employment advantages than other employees in having his holidays off because he had to work others, and seeking a swap was a normal union procedure. Consequently, the threshold at which unequal treatment constitutes an undue burden was not crossed.

Furthermore, the Court implied that incurring de minimis costs on the basis of religion did not cross the inequality of treatment threshold. Although no definition of "de minimis" was tendered, the rejection of two accommodative measures that the court of appeals had found reasonable somewhat delineated the Court's conception of "de minimis." These

51. See text accompanying notes 33 & 34 supra.
52. 97 S. Ct. at 2277.
53. Id. at 2273 (quoting 375 F. Supp. at 890-91).
54. Id. at 2277.
55. In concluding that the potential cost of accommodating Hardison would be greater than de minimis, the Court suggested that TWA might have many employees whose religious practices prohibit them from working on Sunday. Id. at 2277 n.15. This suggestion seems of little substance as there is nothing in the record indicating such numbers. Clearly TWA would have had the burden of producing those statistics had they existed. The opinion, however, implicitly suggests that if it could be shown that the aggrieved employee was a unique case, perhaps the cost of replacing him or of paying overtime wages might not be greater than de minimis. Id. The employer's size may be a consideration in making such a determination. Nonetheless, this concession must be read in light of the Court's equality of treatment ap-
alternatives were that Hardison work a four-day week with the uncovered shift being manned by a supervisor or worker from another department already on duty or that a replacement be found through the enticement of overtime wages. Either of these alternatives could have been implemented without violating the seniority system. Nevertheless, the Court found that incurring these costs of lost efficiency in other departments and payment of a substitute's overtime wages reached a level of inequality of treatment that is unreasonable and an undue burden.

In sum, the analysis seems to be that an employer must make an effort to accommodate, but the manner in which it may do so is severely limited. It may be required to incur de minimis costs. It should allow voluntary swaps between employees. It is, however, not required to violate any uniform work rule so that the religious employee receives greater aggregate benefits than the other employees on the basis of his religion. The Court evidently did not consider the time and administrative costs of planning the accommodation as crossing the inequality of treatment threshold in view of its favorable assessment of TWA's efforts.

After Hardison, several questions remain to confront employers concerning their obligations under section 701(j). Although the Court delineated what is not required, it failed to clarify what an employer is still obligated to do to comply with the statute. It is clear that an employer cannot refuse to make any effort on the employee's behalf. Any negotiated accommodation that results in no greater employment benefits in the aggregate for the religious employee should be allowed. For example, Hardison was allowed to have his religious holidays off in return for working on Christian holidays. This accommodation resulted in no burden to the employer or the other employees that would violate the inequality of treatment restriction even though it theoretically gave Hardison special treatment on the basis of his religion. In addition, the employer may be required to incur some minimal costs, but they should not rise to the level of financing an additional day off for an employee on the basis of his religion. In sum, an employer can be required to shoulder only minimal burdens in an effort to accommodate.

56. Id. at 2273.
57. Id. at 2277.
59. 97 S. Ct. at 2277.
A second question remains concerning the extent to which the Hardison decision applies to unions as distinguished from employers. Even though IAM technically was a prevailing party in the court of appeals, the Court granted its petition for certiorari because the lower court decision had assumed that IAM should be required to waive the collective bargaining agreement to accommodate Hardison. The Court did not, however, explicitly discuss the union’s duties, stating merely that “since we reverse the judgment against TWA, we do not pursue the union’s status in the Court.”

This language suggests that the case’s holding is as applicable to unions as to employers. It would seem then that unions are relieved from (or burdened with) the accommodation duty to the same extent as employers.

Third, the Court premised its protection of vested seniority rights in the face of the accommodation requirement on two grounds: that section 703(h) expressly requires intentional discrimination to render the application of a seniority system an unfair employment practice and that accommodation would require inequality of treatment of employees. As a result, it is unclear whether this protection is extended to other terms of collective bargaining agreements absent the specific statutory language of section 703(h) that is directed only to seniority provisions. As the Court employed its equality of treatment approach in considering other alternative accommodations not regulated by an agreement, the indication is that any term included in a collective bargaining agreement is protected from the reasonable accommodation requirement so long as inequality of treatment would result from the accommodation.

Hardison leaves impotent the congressional mandate in section 701(j) that an employer reasonably accommodate employee religious practices. The amendment’s significance, apart from the 1964 Act’s general prohibition of discrimination, was the recognition of the discrimination by effect situation when a uniform work rule has a greater impact on employees with certain strongly held religious beliefs. The Court, ignoring this evident variation in the definition of discrimination, returned without extensive

60. Id. at 2270 n.5.
61. Id.
62. This conclusion is further bolstered by the fact that other provisions of Title VII have been held to apply to unions. Hardison v. Trans World Airlines, Inc., 527 F.2d at 42.
63. See text accompanying notes 46-48 supra.
64. An example of such a provision is the agency shop clause, found in many collective bargaining agreements, requiring each employee to contribute to the union. These provisions have been held to conflict with strictly held religious views barring support of labor unions. See, e.g., Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).
65. See note 28 and accompanying text supra.
comment to the pre-1972 amendments stance of the Civil Rights Act requiring equality of treatment. Thus, an employer no longer has to make a showing of *undue* hardship; it need only show that accommodation will require greater than *de minimis* costs or ‘‘unequal’’ treatment of employees. In so circumscribing the requirement, the Court nearly proclaims the amendment a nullity.

ELIZABETH L. MOORE

Commercial Law—Anticipatory Repudiation: A New Measure of Buyers’ Damages Under the Uniform Commercial Code

Measuring an aggrieved buyer’s damages when a seller wrongfully repudiates a contract before performance is due has long been considered a troubling and complex task. The complexity concerns, first, the time from which damages should be measured if the buyer chooses not to purchase substitute goods (cover) and, second, the application of the Uniform Commercial Code’s concept of cover in determining this time. Section 2-713 of the Code, which sets forth the buyer’s damages for non-delivery, states that damages should be measured by calculating the difference between contract price and market price at the time the buyer ‘‘learned of the breach.’’ Section 2-610, however, indicates that if a seller repudiates before performance is due, an aggrieved buyer may await performance for a ‘‘commercially reasonable time’’ before taking any action. Damages can be calculated

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2. U.C.C. § 2-712 provides:

   ‘‘Cover’’; Buyer’s Procurement of Substitute Goods
   (1) After a breach within the preceding section the buyer may ‘‘cover’’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
   (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller’s breach.
   (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.
3. U.C.C. § 2-713 provides in pertinent part:

   (1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller’s breach.
4. U.C.C. § 2-610 provides in pertinent part: ‘‘When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may (a) for a commercially reasonable time await performance by the repudiating party . . . .’’