Religious Accommodations and The Forgotten Secular Employees: Undue Hardship Under Title VII of the Civil Rights Act

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Introduction

The special status of religion in the United States has long been emphasized in statutory schemes that protect the rights of employees.[1] Most forms of employment discrimination cannot be legally justified.[2] But when religious beliefs conflict with the requirements of a job, employers can refuse a religious accommodation when it would cause an "undue hardship on the conduct of [an] employer's business."[3] In its 2022–2023 session, the Supreme Court considered the meaning and role of undue hardship for the first time since 1977 in *Groff v. DeJoy*.[4] Previously, in *Trans World Airlines v. Hardison*, the Court determined that an employer need not provide an employee with a religious accommodation if the employer must "bear more than a *de minimis* cost."[5] After *Hardison*, courts could not agree on the meaning of undue hardship and what constitutes a de minimis cost.[6] *Groff*, decided by the Supreme Court in June 2023, clarified an undue hardship to be "substantial increased costs," which requires more than a showing of *de minimis*.[7] However, it remains unclear what burden this may have on secular coworkers.[8]

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[1] 42 U.S.C. § 2000e(j); Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII?*, 78 FORDHAM L. REV. 1331, 1339 (2009) ("Title VII's prohibition on religious discrimination incorporates protection for both the status of being a member of a particular religion and the conduct of observing a particular religion, requiring employers to pay special attention to the religious needs of their employees. In contrast, protection from discrimination based on birthright—such as gender, national origin, or race, only considers the status of being in a particular group and requires employers to treat such status as irrelevant in employment decisions and treatment.").
[2] 42 U.S.C. § 2000e–2(a). *But see* 42 U.S.C. § 12111(1) (The provision of the Americans with Disabilities Act allowing employers to claim an undue hardship in refusing to provide a reasonable accommodation for an employee with a disability).
[3] 42 U.S.C. § 2000e(j)–2(a).
[4] Amy Howe, *Court Schedules Final Two Argument Sessions of the 2022-23 Term*, SCOTUSBLOG (Jan. 31, 2023), https://www.scotusblog.com/2023/01/court-schedules-final-two-argument-sessions-of-2022-23-term/.
[5] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
[6] *See generally* Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60 (1986); Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004); Crider v. Univ. of Tenn., 492 Fed. App'x. 609 (6th Cir. 2012); Groff v. DeJoy, 35 F.4th 162 (3d Cir. 2022); U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 12: RELIGIOUS DISCRIMINATION 66 (2021).
[7] Groff v. DeJoy, 66 U.S. 447, 470 (2023).
[8] *Id.*

This article analyzes the origins of the undue hardship standard within Title VII, *Hardison*, and Equal Employment Opportunity Commission Guidelines. It then reviews the *Hardison* standard and how it has been interpreted in cases where employers have claimed an undue hardship. Finally, this article examines how the recent Supreme Court decision, *Groff v. DeJoy*, may impact employers and workers.[9] *Groff* has terminated the *Hardison* standard and created a new undue hardship standard, which will have major impacts on employers and their employees, both religious and secular.

Background

Title VII

Congress first codified protections against employment discrimination in 1964 through Title VII of the Civil Rights Act (Title VII).[10] The relevant section reads: "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, *religion*, sex, or national origin. . . ."[11] Initially, religious status was simply listed as a protected class, treated similarly to race, color, sex, and national origin.[12] Religion is unique, though, in that an employee's religious practice may interfere with an employer's business and other employees' work.[13] Title VII's original language failed to provide any guidance on what employers legally can do when one's religious practice conflicts with their employment requirements.[14] In 1972, Congress amended Title VII to include § 2000e(j), which addresses

[9] *Id.*
[10] 42 U.S.C. § 2000e–2(a)(1); Debbie Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 118 (2015).
[11] 42 U.S.C. § 2000e–2(a)(1) (emphasis added).
[12] *Id;* Kaminer, *supra* note 10, at 117.
[13] Kaminer, *supra* note 10, at 121–22.
[14] *Id.* at 117–22.

religious accommodations, stating that "an employer may demonstrate that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without *undue hardship on the conduct of the employer's business.*"[15] The undue hardship standard gives employers the power to refuse an accommodation that would burden them, without facing culpability for discrimination.[16] In applying the standard, employers and reviewing courts should closely analyze the accommodation request to determine whether or not it constitutes an undue hardship.[17] If it does, the employer can legally interfere with the employee's religious practice.[18] It was not until five years after Congress amended Title VII that the Supreme Court defined undue hardship and provided guidance about it to employers.[19]

The *Hardison* Standard

Trans World Airlines v. Hardison, in 1977, was the first major Supreme Court case to articulate a standard for determining how and when an employer can properly assert an undue hardship to reject a religious accommodation request.[20] In *Hardison*, the employee's religion forbid him from working during the Sabbath, from Friday evening to Saturday evening.[21] Hardison's employer initially accommodated him by arranging shift swaps with other employees; however, the other employees later became unwilling to constantly rearrange their schedules.[22] Hardison's scheduling accommodation also directly conflicted with his employer's collective bargaining agreement, which instated a seniority system for shift changes.[23] When

[15] Kade Allred, *Giving Hardison the Hook: Restoring Title VII's Undue Hardship Standard,* 36 BYU J. PUB. L. 263, 269–70 (2022); 42 U.S.C. § 2000e(j) (emphasis added).
[16] Kaminer, *supra* note 10, at 120–22.
[17] *Id.*
[18] *See id.*
[19] 42 U.S.C. S 2000e(j); Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).
[20] Kaminer, *supra* note 10, at 120–22.
[21] *Hardison,* 432 U.S. at 67.
[22] *Id.* at 67–68.
[23] *Id.*

Hardison's employer eventually refused to change his schedule, he did not appear to work on Saturdays and was discharged for insubordination.[24]

Upon its review, the Supreme Court examined the extent than an employer must accommodate a religious employee before it claims undue hardship.[25] Ultimately, it found that a religious accommodation that requires an employer "to bear more than a *de minimis* cost," such as Hardison's schedule change for Saturdays, constitutes an undue hardship.[26] The Court agreed with the employer, finding that the preexisting collective bargaining agreement with a seniority system superseded religious accommodations.[27] The Court reasoned that Title VII exists to prevent all types of employment discrimination, and would not allow religious accommodations that "require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[28] Until the recent *Groff* decision, this "*de minimis* cost" standard was the presiding law, albeit some on the court disagreed right at *Hardison's* issuance.[29]

EEOC Guidelines

The Equal Employment Opportunity Commission (EEOC) began promulgating regulations and guidance about the undue hardship standard soon after the *Hardison* decision to clarify what constitutes more than a "de minimis cost" in the workplace.[30] The EEOC defines a religious accommodation as "an adjustment to the work environment that will allow the

[24] *Id.* at 68–69.
[25] *Id.* at 73–74.
[26] *Id.* at 84.
[27] *Id.* at 81–82.
[28] *Id,* at 85.
[29] In a scathing dissent, Justice Marshall interpreted the *Hardison* decision to allow an employer to refuse to "grant even the most minor special privilege to religious observers to enable them to follow their faith" and that it would result in a "cruel choice" between faith and employment. Marshall also viewed this new standard to be discriminatory to employees with minority religions, whom employers may not know about their practice to allow for an accommodation. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).
[30] Kaminer, *supra* note 10, at 122–23. The EEOC has original jurisdiction of Title VII discrimination claims. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 12: RELIGIOUS DISCRIMINATION (2021). Merriam-Webster dictionary defines "de minimis" as "lacking significance or importance" or "so minor as to merit disregard." *De Minimis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/de%20minimis (last visited Mar. 15, 2024).

employee to comply with his or her religious beliefs."[31] Unreasonable accommodations need not be granted.[32] An employer can comply with Title VII by offering an accommodation that is different than the one requested, so long as it actually eliminates the conflict between work and religion.[33]

The EEOC has recommended a few relevant factors for courts to use when determining undue hardship, such as "the type of workplace, nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need this particular accommodation."[34] Undue hardship focuses on the overall burden on an employer's business, not just the monetary costs.[35] Courts have found undue hardship in cases when an employee's proposed religious accommodation would reduce efficiency in the workplace, infringe on the rights or benefits of other employees, or force coworkers to carry the religious employee's share of dangerous work.[36] The EEOC and the courts often review how secular coworkers may be impacted when determining an undue hardship, although there is no consistent standard for how to incorporate coworker burden into this analysis. Employee needs aside from direct harm and productivity, such as their own time off and benefits, should be considered when determining if an undue hardship exists. If the EEOC were to specifically include burden on coworkers as a relevant factor of undue hardship, employers could prioritize the hardship an accommodation would incur on a crucial part of their business: their employees. Instead, employers are left to their own devices to determine how important the needs of other employees are when granting a religious accommodation.

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[31] U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 12: RELIGIOUS DISCRIMINATION 56–57 (2021).
[32] *See id.* at 54 (describing the types of accommodations that may be granted).
[33] Valerie Weiss, *Unwrapping Religious Accommodation Claims: The Impact on the American Workplace After EEOC v. Abercrombie*, 46 SETON HALL L. REV. 1113, 1126 (2016).
[34] U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 12: RELIGIOUS DISCRIMINATION 66 (2021).
[35] *Id.*
[36] *Id.*

Application of the Undue Hardship Standard

Courts have struggled with how to ameliorate the conflict between religious employees and their employers. The most common religious accommodation disputes involve scheduling challenges and employee appearance.[37]

Scheduling Conflicts

Employment schedules can conflict with an employee's religious practice. These issues typically arise when an employee requests time off for a religious observance or a weekly Sabbath.[38] These cases may collide with collective bargaining agreements, which courts tend to prioritize over religious accommodations, again signaling an interest in protecting the rights of secular coworkers.[39]

The Supreme Court reviewed a religious accommodation request that conflicted with a time-off policy in *Ansonia Board of Education v. Philbrook* in 1986, in which a schoolteacher's religion required him to not participate in secular work on religious holidays.[40] The school allowed Philbrook to take unpaid days off or pay for a substitute teacher to accommodate his religious obligations. Nevertheless, Philbrook refused the accommodation because it did not provide him with paid leave.[41]

The Court held that the undue hardship standard applies only if the employer is unwilling to provide any accommodation, and Title VII does not require an employer to adopt the exact

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[37] U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 12: RELIGIOUS DISCRIMINATION 63 (2021). Due to the coronavirus pandemic, employee religious objections to vaccine mandates have also come to the forefront of this debate but will not be analyzed in this article. *See* Mary-Lauren Miller, *Inoculating Title VII: The "Undue Hardship" Standard and Employer-Mandated Vaccination Policies*, 89 FORDHAM L. REV. 2305 (2021); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. FORUM 1106 (2022). To review how courts have begun to resolve this issue, *see* Leigh v. Artis-Naples Inc. No. 2:22-cv-606, 2022 WL 18027780 (M.D. Fla. 2022).
[38] U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 12: RELIGIOUS DISCRIMINATION 63 (2021).
[39] *Id.* at 68.
[40] Ansonia Board of Education v. Philbrook, 479 U.S. 60, 63 (1986).
[41] *Id.* at 65.

religious accommodation that the employee requested.[42] The employer need not show that all possible accommodations constitute an undue hardship to prevail; it need only show that the employee's chosen accommodation poses an undue hardship.[43] *Ansonia* prioritized the rights of employers, and emphasized the importance of secular employees, by finding that Title VII does "not impose a duty on the employer to accommodate at all costs," and thus has liberty to deny accommodations that overburden other coworkers and prioritize religious employees.[44]

More recently, in 2012, the Sixth Circuit analyzed how a religious accommodation for a schedule change can negatively impact coworkers in in *Crider v. University of Tennessee, Knoxville*.[45] Crider's job required her to work on some weekends, but her religion prevented her from working during the Sabbath.[46] Crider was ultimately discharged after her coworkers refused to constantly work weekends to accommodate her religion.[47] When Crider alleged discrimination, her employer countered that the constant schedule changes created an undue hardship on the conduct of their business.[48]

The Court stated undue hardship is "something greater than hardship, and an employer does not sustain [its] burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive [to] the operating routine."[49] Applying *Hardison*, the Court determined that "it is the effect such dissatisfaction [of secular coworkers] has on the employer's ability to operate its business that may alleviate the duty to accommodate;" thus, the undue hardship analysis also considered the burden on Crider's coworkers.[50] Religious

[42] *Id.* at 68–69.
[43] *Id.*
[44] *Id.* at 70.
[45] Crider v. Univ. of Tenn., 492 Fed. App'x. 609 (6th Cir. 2012).
[46] *Id.* at 610.
[47] *Id.* at 611.
[48] *Id.*
[49] *Id.* at 613.
[50] *Id.* at 614 (emphasis omitted).

accommodation requests for schedule changes are commonly found to be an undue burden throughout various circuits, while the impact of employee appearance is more difficult to quantify.[51]

Employee Appearance

Employers often have dress codes and appearance policies for their employees. At times, these appearance policies can conflict with an employee's sincere religious expression. Unlike other religious accommodations, however, a religious employee's appearance has no bearing on the work of their secular coworkers.

An employee challenged Costco's no facial jewelry policy in *Cloutier v. Costco Wholesale Corporation*, as it directly conflicted with her religious expression as a member of the Church of Body Modification (CBM).[52] When Costco enforced its dress code against Cloutier, she refused any accommodation to cover or remove her jewelry, because it would violate her faith, and alleged Title VII discrimination.[53]

The First Circuit concluded "that Costco had a legitimate interest in presenting a workforce" with a professional appearance, which can justify an employer's refusal to exempt an employee from a neutral appearance policy.[54] The court found that the only accommodation Cloutier sought, a complete exception to the dress code, would have "imposed more than a de minimis burden" on her employer.[55] *Cloutier* implied that a religious employee's appearance

[51] Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations that Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII?*, 78 FORDHAM L. REV. 1331, 1353–59 (2009).
[52] Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 128 (1st Cir. 2004). Members of CBM express their religion through various facial piercings, cuts, and jewelry. *Id.* at 129.
[53] *Id.* at 129–30.
[54] *Id.* at 135 (internal quotation omitted).
[55] *Id.* at 138 (emphasis omitted).

alone, which does not burden secular coworkers, can result in an undue hardship and refusal to accommodate.

A decade after *Cloutier*, the debate between employer appearance policies and employee religious expression reached the Supreme Court in *EEOC v. Abercrombie & Fitch Stores*.[56] Samantha Elauf, a practicing Muslim who wore a headscarf, applied for a job at Abercrombie.[57] Elauf was not hired for the position after a manager determined her headscarf would violate Abercrombie's dress code, despite her being otherwise qualified for the position.[58] She alleged that she was denied employment due to wearing a headscarf for religious reasons.[59]

While Elauf never requested an accommodation, the Court found that she was denied employment due to Abercrombie's assumption that she would need one.[60] The *Abercrombie* decision emphasized that Title VII "does not demand mere neutrality with religious practices."[61] *Abercrombie* was crucial to establishing that employers have an affirmative duty to accommodate an employee's religious expression in the workplace, even if it may conflict with their dress code.[62]

When applied to women simply wishing to wear their headscarves at work, the Court's desire in *Abercrombie* to be more than neutral in granting religious accommodations is not concerning. However, this language could also be used to treat religious employees preferentially when compared to their secular coworkers, as employers are now legally obligated to treat them

[56] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015). *Abercrombie* is a landmark decision in terms of the notice requirement for requesting a reasonable religious accommodation, but also discusses undue hardship. *Id.*
[57] *Id.* at 770.
[58] *Id.*
[59] *Id.* at 771.
[60] *Id.* at 774.
[61] *Id.* at 775.
[62] Amina Musa, *'A Motivating Factor'—The Impact of* EEOC v. Abercrombie & Fitch Stores, Inc. *on Title VII Religious Discrimination Claims*, 61 ST. LOUIS UNIV. L.J. 143, 143 (2016).

with more than "mere neutrality."[63] The holding in *Abercrombie* should have been narrowed to only protect accommodations that will not impact others, like what Elauf was seeking. Instead, religious employees can use *Abercrombie* as a shield to obtain more leeway in their accommodations, regardless of the harm to secular coworkers.

Overall, courts have implemented *Hardison* in many ways, often finding an undue burden and ruling for the employer. Many critique *Hardison,* arguing that it favors employers and suppresses an employee's free exercise of religion.[64] In light of this criticism, the Supreme Court recently decided to overhaul this standard in *Groff v. Dejoy,* and its impacts have yet to unfold.[65]

The New Undue Hardship Standard: *Groff v. Dejoy*

The Case

Gerald Groff, a devout Christian who observes a Sunday Sabbath, worked for the United States Postal Service (USPS) in a rural office with few employees.[66] When USPS implemented a Sunday delivery schedule, Groff alerted management that he would be unable to work on Sundays, citing his religious practices.[67] He was unable to work on several Sundays and could not find coverage, and therefore faced discipline from USPS.[68] Groff then resigned for lack of an "accommodating employment atmosphere" and alleged Title VII religious discrimination, to

[63] *Id.* at 154.
[64] *See generally* Brief Amici Curiae of Former EEOC General Counsel and Title VII Religious Accommodation Expert in Support of Petitioner at 1, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief of the Muslim Public Affairs Council as Amicus Curiae Supporting Petitioner at 2, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief Amici Curiae of the National Jewish Commission on Law and Public Affairs et al. in Support of Petitioner at 3, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).
[65] Dionysia Johnson-Massie et al, *Nearly 50 Years Later, the Supreme Court "Clarifies" the Undue Hardship Standard in Religious Accommodation Claims*, LITTLER (June 30, 2023), https://www.littler.com/publication-press/publication/nearly-50-years-later-supreme-court-clarifies-undue-hardship-standard.
[66] Groff v. DeJoy, 35 F.4th 162, 164 (3d Cir. 2022).
[67] *Id.* at 166.
[68] *Id*.

which his employer countered that the permanent schedule change would be an undue hardship.[69]

On appeal, the Third Circuit struggled to determine what exactly constitutes a reasonable accommodation.[70] While the Supreme Court has mandated that a reasonable accommodation must eliminate the conflict between faith and employment, other Circuit Courts have found that "requiring a total elimination of the conflict ignores Title VII's inclusion of the word 'reasonably' as a modifier to the word 'accommodate'" and could be overly burdensome to the employer.[71] The court defined reasonable accommodation as something that "requires the employer to offer an adjustment that allows the employee to fulfill the religious tenet but requires nothing more from the employer."[72] Finding USPS was unable to offer a reasonable accommodation to Groff, the Third Circuit found Groff's proposed accommodation of never working on Sundays was in fact an undue hardship.[73] The court argued the accommodation imposed "more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."[74]

Judge Hardiman, in his dissent, argued that the Supreme Court has never "held that impact on coworkers alone – without showing business harm – establishes undue hardship."[75] Because the language of Title VII states an employer must show "undue hardship on the conduct of the employer's business," the standard should consider how the business itself will be impacted, not just how Groff's coworkers will be impacted.[76] Judge Hardiman's dissent

[69] *Id*. at 167.
[70] *Id*. at 169.
[71] *Id.* at 171.
[72] *Id.* at 172.
[73] *Id.* at 175.
[74] *Id*.
[75] *Id*. at 176.
[76] *Id*. at 176–77.

emphasizes that the Court must address the role of secular coworkers in the undue burden analysis, or else adjudicators will continue to argue it can be ignored. The lack of existing law about how to incorporate potential harm on coworkers into granting a religious accommodation can lead employers to ignore the needs of other employees to prevent litigation by a religious employee. Thus, the Supreme Court granted certiorari of *Groff* to reconsider if *Hardison* should be replaced more stringent standard and to what extent an employer can demonstrate undue hardship by showing impact on coworkers.[77]

Arguments for Changing the *Hardison* Standard

The *Groff* litigation gained traction among religious groups due to its potential to increase protections for religious employees.[78] From the Muslim Public Affairs Counsel to Christian Legal Society, a plethora of religious organizations filed amicus briefs in favor of Groff and overturning *Hardison*.[79] Employee rights organizations also filed amicus briefs, generally agreeing that the Hardison standard should be changed, with increased focus on secular coworkers' role in the analysis.[80]

Groff, as well as many of the amicus briefs, argued that the standard to prove undue hardship must be stronger than *Hardison*, and compared it to how undue hardship is interpreted under other employment statutes.[81] Other statutes with employment protections—specifically the

[77] *See* Amy Howe, *Court Grants Review in New Batch of Cases, Including Dispute on Religious Rights of Employees,* SCOTUSBLOG (Jan. 13, 2023), https://www.scotusblog.com/2023/01/court-grants-review-in-new-batch-of-cases-including-dispute-on-religious-rights-of-employees/.
[78] *See* Brief of the Muslim Public Affairs Council as Amicus Curiae Supporting Petitioner, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief Amici Curiae of Christian Legal Society et al. in Support of Petitioner, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174). *See also* Brief for the American Hindu Coalition as Amicus Curiae Supporting Petitioner, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).
[79] *Id.*
[80] *See* Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae Supporting Respondent, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief of the National Employment Lawyers Association and the National Institute for Workers' Rights as Amici Curiae in Support of Neither Party, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).
[81] Brief for Petitioner at 4, 15, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174). *See also* Brief of the Muslim Public Affairs Council as Amicus Curiae in Support of Petitioner at 2, 9, Groff v. DeJoy, 600 U.S. 447 (2023) (No.

Americans with Disabilities Act (ADA) and the Uniformed Service Employment and Reemployment Rights Act (USERRA)—define undue hardship as "significant difficulty or expense."[82]

For example, the ADA specifically defines an undue hardship as "an action requiring significant difficulty or expense" in light of certain enumerated factors such as the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities.[83] The "significant difficulty" standard is much harder for an employer to prove than merely a "de minimis cost."[84] By matching the undue hardship standard with the ADA, there would be a significantly higher burden for employers to accommodate their religious employees.[85]

However, disabled employees may seek different forms of accommodations than religious employees.[86] Disability accommodations allow employees to "perform the essential functions of a task" and therefore do their job properly without exacerbating an existing impairment, while religious accommodations are for the religious exercise of individual employees and are therefore treated differently by the courts.[87] The stakes are higher for an accommodation that prevents harm to an employee than an accommodation that merely impacts

22-174); Brief Amicus Curiae of Christian Legal Society et. al. as Amici Curiae in Support of Petitioner at 4–5, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).

[82] Brief for Petitioner at 20–22, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174). *See* 42 U.S.C. § 12111(10)(A); 38 U.S.C. § 4303(16).

[83] 42 U.S.C. § 12111(10).

[84] *See* Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 124–25 (2019); *compare* Kaminer, *supra* note 10, at 122, 137 (differentiating undue hardship analysis for disability and religious accommodations).

[85] Porter*, supra* note 84, at 144–45.

[86] *See* Stephen Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence,* 37 WAKE FOREST L. REV. 439, 444–45 (2002).

[87] US Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002) (analyzing undue hardship under the ADA); *compare* Ansonia Board of Education v. Philbrook*,* 469 U.S. 60, 63 (analyzing undue hardship for religious accommodations).

an employee's religious practice.[88] Religious and disability accommodations may have the same impact and burden on coworkers, perhaps by requiring a schedule change, either for praying or taking medication. Albeit these similar impacts on coworkers, "[i]n enacting the ADA, Congress explicitly rejected § 701(j)'s de minimis standard" by explicitly identifying a different standard, and thus changing *Hardison* to "significant difficulty or expense" would likely go against the intent of Congress.[89] Perhaps because of these different purposes and statutory language, courts have willingly expressed concern about the burden a disability accommodation will have on coworkers, even though it is not explicitly mentioned in the statute.[90]

Many also argued that the special status of religion in the United States, through the Most Favored Nation Theory, demands more protection to religious employees than what exists.[91] The Most Favored Nation Theory posits that religion must be prioritized over any other protected class and, absent special circumstances, religious accommodations must be granted.[92] Since 2021, the Supreme Court has released multiple decisions prioritizing the Free Exercise Clause and granting religious exemptions and accommodations.[93] Thus, with this ongoing "religious favoritism" of those seeking religious accommodations and protections, it would follow that it should be difficult for employers to refuse an accommodation.[94] With this perspective, *Hardison* is inconsistent with the Court's contemporary and ongoing jurisprudence

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[88] *See* Porter, *supra* note 84, at 137; Befort, *supra* note 86, at 446–47.
[89] Kaminer, *supra* note 10, at 114–15. (emphasis omitted).
[90] *See* Scott C. Thompson, *Open for Business: The ADA Beyond an Employer's Front Door*, 18 TEX. WESLEYAN L. REV. 383, 398–399; Porter, *supra* note 84, at 165.
[91] *See* Brief for Petitioner at 23, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE LJ.F. 1106, 1113 (2022).
[92] "[W]hen the government retains any discretion to grant exemptions from a general rule, it must exempt religious objectors unless it can meet constitutional law's most demanding test: strict scrutiny." Rothschild, *supra* note 91, at 1106 (emphasis omitted).
[93] Luray Buckner, *How Favored, Exactly? An Analysis of the Most Favored Nation Theory of Religious Exemptions from* Calvary Chapel *to* Tandon, 97 NOTRE DAME L. REV. 1643, 1643 (2022).
[94] Bradley Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, 47 HUM. RTS. 29, 29 (2022).

in support of the Most Favored Nation Theory. However, in terms of employment accommodations, it would be harmful for the Court to blanketly approve of accommodations for religious employees, without consideration of how their other coworkers could be impacted.

Understanding the Supreme Court Decision

Justice Alito's unanimous opinion failed to resolve Groff's particular dispute with USPS or offer lower courts guidance on how to assess burdens to secular coworkers.[95] *Groff* also did not explicitly overrule *Hardison*, but instead reinterpreted the case.[96] Groff had the potential to completely change how religious employees and their secular coworkers are treated in the workplace, but the changes are too insignificant to have an impact on religious accommodation litigation and employers' analyses of how to protect all their employees.

Justice Alito spends much of the opinion analyzing *Hardison* and the history of Title VII, with little guidance on the new standard for religious accommodations in the workplace.[97] He explained that *Hardison* itself was not wrongly decided, but was incorrectly interpreted to champion the "de minimis cost" standard.[98] Finding the term "substantial" to have been used multiple times in *Hardison*, the Court clarified a new standard: "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[99] Justice Alito emphasized that because Title VII includes the words "undue" before hardship, the statute favors the granting of religious accommodation

[95] Ian Millhiser, *The Other Big Decision Handed Down by the Supreme Court Today, Explained*, VOX (June 29, 2023), https://www.vox.com/scotus/2023/6/29/23778728/supreme-court-samuel-alito-groff-dejoy-religion-accomodations-workplace; Andrew Strom, *In Groff v. DeJoy, the Supreme Court Left a Key Question Unanswered*, ONLABOR (July 18, 2023), https://onlabor.org/in-groff-v-dejoy-the-supreme-court-left-a-key-question-unanswered/.
[96] Strom, *supra* note 95.
[97] Groff v. DeJoy, 600 U.S. 447, 457–65 (2023).
[98] *Id*. at 468.
[99] *Id*. at 470.

requests.[100] Thus, employers must show more than a "de minimis" cost to demonstrate why an accommodation should not be granted.[101]

Surprisingly, the Court did not adopt the "significant difficulty" standard used in the ADA.[102] Like the de minimis standard, this new "substantial increased costs" standard is a case-specific analysis.[103] "[C]ourts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."[104] While a case-specific analysis may yield best results for specific employees, and allow for religious accommodations in situations where they are needed, it also prevents the courts from knowing what factors to prioritize. Instead, the Court could have created specific factors to review, such as burden on coworkers and impact on members of the public. The Court intends for this new standard to not substantially alter the religious accommodation analysis.[105] It was surprising that, after many concerns from religious groups and employee advocacy organizations, the Court said so little about how to resolve conflicts between religion and work, when those conflicts continue to be a concern in the workplace.

Burden and Harm on Secular Employees

In *Groff*, Justice Sotomayor briefly mentioned in her concurrence that considering the hardship of other employees is a part of the conduct of an employer's business.[106] Overall, the Court said little about how to incorporate the burden on secular coworkers in this new standard,

[100] *Id.* at 469.
[101] *Id*. at 468.
[102] *Id*. at 471.
[103] Groff v. DeJoy, 600 U.S. 447, 471 (2023).
[104] *Id*. at 470 (internal quotations omitted).
[105] "We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today." *Id.* at 471.
[106] *Id.* at 475–76, (Sotomayor, J., concurring).

only focusing on how other coworkers' animosity toward a certain religion cannot factor into proving an undue hardship.[107] Moving forward, it is crucial that the Court acknowledge Title VII's protections for all employees, not just religious ones.

Many religious accommodations have no impact on secular workers, such as appearance accommodations in *Cloutier* and *Abercrombie*. For example, the plaintiff in *Abercrombie*'s request to wear a headscarf has no cognizable effect on secular coworkers.[108] However, schedule change accommodations like in *Hardison* and *Crider* often force secular employees to take up the work of a religious employee who cannot work on specific days, leaving them with an unequal share of the work.[109]

The Court has acknowledged the role of third-party harm, which could include harm on secular coworkers, with religious accommodation requests in other contexts. *Cutter v. Wilkinson* established that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[110] This case also found that religious accommodations should not "override other significant interests."[111] Within employment, these other significant interests could be the impact on secular coworkers, collective bargaining rights, and other statutory protections for workers. Insulating secular coworkers from burdens resulting from an employee's religious accommodation can provide a balance between statutory accommodation requirements and the Establishment Clause.[112]

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[107] *Id*. at 472.
[108] EEOC. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 770 (2015).
[109] *See* Kaminer, s*upra* note 10, at 132–33 (discussing unequal distribution of work resulting from religious accommodations).
[110] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (discussing religious accommodations under the Religious Land Use and Institutionalized Persons Act (RLUIPA)).
[111] *Id.* at 722.
[112] Brief of the National Employment Lawyers Ass'n et. al in Support of Neither Party, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174), at 5.

Religious accommodation requests can create a conflict between the rights of religious employees and the duties of secular employees. Burdens on coworkers logically should be included in an undue hardship analysis because disparate impact on secular employees, or employees that practice a religion other than the one being accommodated, can hinder the conduct of the employer's business.[113] Acknowledging when a religious accommodation goes too far and places a major burden on secular coworkers, while allowing it when the impact on others is minimal, is a way to provide all workers with equal treatment.

Moving Forward

Many scholars of law and religion believe *Groff* will cause a flurry of lawsuits that would not have been considered under *Hardison*.[114] It is rather concerning that the Court did not address the impact a religious accommodation will have on secular coworkers. Recently, religious employees filed lawsuits seeking religious accommodations to allow them to treat members of the LGBTQ+ community differently, as well as not get vaccinated, with an understanding that *Groff* could now result in a more favorable decision for their accommodations.[115] Law professors James Nelson, Micah Schwartzman, and Elizabeth Sepper worry that this new standard overlooks "the burdens on faceless co-workers and managers—and their families—who will bear the brunt of these accommodations, suffering imposition of

[113] Groff v. DeJoy, 600 U.S. 447, 475 (2023) (Sotomayor, J., concurring); Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII?*, 78 FORDHAM L. REV. 1331, 1375–76 (2009).
[114] James Nelson, Micah Schwartzman & Elizabeth Sepper, *The Supreme Court Just Dealt a Major Blow to Corporate Mandates*, SLATE (June 30, 2023), https://slate.com/news-and-politics/2023/06/supreme-court-war-woke-businesses-alito.html; Millhiser, *supra* note 95.
[115] Nelson et. al., *supra* note 114. *See also* Nonnie Shivers & Zachary Zagger, *Seventh Circuit Revives Teacher's Religious Discrimination Case of Transgender Students' Names and Pronouns*, JD SUPRA (Aug. 11, 2023), https://www.jdsupra.com/legalnews/seventh-circuit-revives-teacher-s-3257636/; Riddhi Setty, *High Court Religious Bias Decision Paves Way for EEOC Vax Suits*, BLOOMBERG LAW (Sept. 26, 2023), https://news.bloomberglaw.com/daily-labor-report/high-court-religious-bias-decision-paves-way-for-eeoc-vax-suits.

religion, sexist behavior, and preventable illnesses."[116] By emphasizing the needs of religious employees without providing protections for impacted secular coworkers, the Court again appears to prioritize religion and advocate for Most Favored Nation Theory.[117] The *Groff* opinion's only reference to impact on coworkers was about if any coworker carried a religious animus, but did not mention burdens on their schedule, pay, or responsibilities.[118] This decision was also unclear on how union rights and contracts can interfere with a religious accommodation, paving the way for the court to prioritize an employee's religion over other employees' collective bargaining rights.[119] While *Groff's* new substantial increased costs test may not significantly alter religious accommodation requests, the Supreme Court's refusal to acknowledge the rights of other coworkers—such as to maintain their schedules, be free from harassment, and be productive at work—could compel lower courts to "favor the religious and moral views of some employers and employees over others."[120]

Conclusion

Groff has replaced the "de minimis cost" standard of *Hardison* with a "substantial increased costs" standard. While this standard did not go as far to equate Title VII religious accommodations to disability accommodations, it illustrates the Court's ongoing prioritization of religion, this time by emphasizing the needs of religious employees over secular ones. An undue hardship standard that acknowledges the role of third-party harm of secular coworkers in seeking religious accommodations is necessary. While we must treat those practicing and expressing religion with respect and dignity at work, that should not justify greatly prioritizing religious

[116] Nelson et al., *supra* note 114.
[117] *Id.*; Kaminer, *supra* note 10; Porter, *supra* note 84.
[118] Abigail A. Graber, Cong. Rsch. Serv., LSB10999, *GROFF V. DEJOY*: SUPREME COURT CLARIFIES EMPLOYMENT PROTECTIONS FOR RELIGIOUS WORKERS 3 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10999.
[119] Strom, *supra* note 95.
[120] Nelson et al., *supra* note 114.

workers over secular workers when issuing accommodations. This balance is especially crucial as courts begin to face a wave of coronavirus vaccination mandate exemptions from religious workers, coupled by the disputes of secular employees who fear their health and safety when working with unvaccinated religious employees. As expected, the *Groff* decision continues to forget secular coworkers, paving the way for religious employees to be favored over other employees.