University of Baltimore Law Review

Volume 49 | Issue 2 Article 4

2020

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MANGERS AND TURBANS: NONVERBAL RELIGIOUS EXPRESSION IN A DIVERSE WORKPLACE

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I. INTRODUCTION

With the current emphasis on workplace diversity, researchers have noted an increase in religious expression on the job and, consequently, in religious friction.[1] Most of the literature focuses on speech, but other forms of expression, such as religious posters, symbols, and music, can cause dissension as well.[2] Under Title VII of the Civil Rights Act of 1964, employers are required to accommodate the religious practices of employees in the workplace, unless doing so will cause undue hardship.[3] Protected activity includes religious expression when employees sincerely believe their

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1. Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 704–05 (2015); Sonia Ghumman et al., *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. & PSYCHOL. 439, 448–49 (2013).

> In addition to an increase of religious expression in the workplace, there has also been an increase in religious diversity in the American workforce. This led one commentator to predict a few years ago that "[g]iven our increasingly pluralistic and diverse population, it is likely that religious conflict in the workplace may increase, unfortunate as this might be. It is especially true as religions whose practices do not follow more familiar patterns are more widely represented in our work force."

Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81, 83 (2000) (alteration in original). "In some instances, . . . debates among employees have become adversarial and tendentious." Michael Wolf, *Religious Conflict in the Workplace: The Problem of the Proselytizing Employee*, *in* ARBITRATION 2009 DUE PROCESS IN THE WORKPLACE 129, 129 (Paul D. Staudohar ed., 2010).

2. *See* DOUGLAS A. HICKS, RELIGION AND THE WORKPLACE: PLURALISM, SPIRITUALITY, LEADERSHIP 74–75 (2003).
3. Ghumman et al., *supra* note 1, at 444.

religion requires it.[4] This Article explores the accommodation of religious expression other than speech,[5] when it may impose hardship,[6] and how such hardship can be avoided.[7]

Religious displays are most commonly associated with four kinds of hardship to employers: customer alienation,[8] coworker distraction,[9] religious harassment of coworkers,[10] and mistaken attribution to employers or coworkers.[11] Title VII law requires the employer and the religious employee to try to reach a compromise.[12] Each form of hardship needs a different approach.[13]

II. DIVERSITY AND CONFLICT

American companies have sought diversity among their employees since the 1980s.[14] This has resulted in religiously diverse workplaces.[15] Management experts agree that there are a number of benefits to workplace diversity,[16] but it has also led to increased religious conflict at work.[17]

A. More Religious Diversity

Until the late 1980s, attention to minority employees was limited to complying with anti-discrimination laws and helping underrepresented groups assimilate.[18] A 1987 research report, entitled *Workforce 2000 Work and Workers for the 21st Century*, led to a change in the diversity field.[19] *Workforce 2000* shifted the

4. *Id.* at 444, 448.
5. *See infra* Section III.B.
6. *See infra* Part IV.
7. *See infra* Section V.D.
8. *See infra* Section IV.A.
9. *See infra* Section IV.B.
10. *See infra* Section IV.C.
11. *See infra* Section IV.D.
12. *See infra* Part V.
13. *See infra* Part V.
14. Rohini Anand & Mary-Frances Winters, *A Retrospective View of Corporate Diversity Training from 1964 to the Present*, 7 ACAD. MGMT. LEARNING & EDUC. 356, 358–59 (2008).
15. Ghumman et al., *supra* note 1, at 448–49.
16. *See* Thomas Barta et al., *Is There a Payoff from Top-Team Diversity?*, MCKINSEY & CO. (Apr. 2012), https://www.mckinsey.com/business-functions/organization/our-insights/is-there-a-payoff-from-top-team-diversity [https://perma.cc/47FQ-44SP].
17. *See* Ghumman et al., *supra* note 1, at 448–49.
18. Anand & Winters, *supra* note 14, at 357–59.
19. *Id.* at 358; *see also* WILLIAM B. JOHNSTON & ARNOLD E. PACKER, WORKFORCE 2000 WORK AND WORKERS FOR THE 21ST CENTURY xiii–xxvii (1987).

corporate focus to retention of diverse workers;[20] because the United States was demographically changing,[21] a successful business needed to learn how to retain a diverse workforce.[22] Roosevelt Thomas, known as the "Father of Diversity," wrote that recruitment was not the major problem, but fostering a workforce "where we is everyone" was critical to business survival.[23]

Today, the increasingly diverse demography of the United States coupled with business globalization has led companies to place a higher value on inclusive and diversity-conscious leaders.[24] Understanding diversity has become a necessary business skill, like problem solving or punctuality.[25] "[T]he 21st century variety of diversity training is focused on building skills and competencies that enable learners not only to value differences but also to be able to utilize them in making better business decisions."[26] Modern managers no longer assume that only certain groups need diversity training.[27] Training for all employees has become necessary, as "employees need to be more cross-culturally competent in an increasingly global world."[28]

The American workplace is more religiously diverse than ever.[29] This increase in religious diversity at work can be attributed to a demographic shift in the United States population in general.[30] As of 2016, just 43% of Americans identified as both white and Christian, down from 81% in 1976.[31] During the same period, and particularly since the 1990s, the religiously unaffiliated have "roughly tripled" to

20. *See* Anand & Winters, *supra* note 14, at 358.
21. *See id.*
22. *Id.* at 361–62.
23. *Id.* at 359; Phaedra Brotherton*, R. Roosevelt Thomas, Jr.*, ASS'N FOR TALENT DEV. (May 2011), https://www.td.org/magazines/td-magazine/r-roosevelt-thomas-jr [https://perma.cc/3ZY5-6U62].
24. *See* Anand & Winters, *supra* note 14, at 362, 365–66.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *See* Kaminer, *supra* note 1, at 83.
30. *See* Daniel Cox & Robert P. Jones, *America's Changing Religious Identity*, PUB. RELIGION RES. INST. (Sept. 6, 2017), https://www.prri.org/research/american-religious-landscape-christian-religiously-unaffiliated/ [https://perma.cc/5BER-BMEV].
31. *Id.*

24%.[32] The number of Buddhist, Hindu, and Muslim congregations in the United States has tripled since the 1970s.[33]

Management experts say the trend in diversity has come with many benefits for organizations.[34] According to one expert, "If you have more diversity and a pluralistic workforce, you have more opportunities to experience and learn different things. . . . As a result, the new experience process can have conflict, but you also get innovation and customer insight. If you can work through it, you get a net benefit."[35] Another touted benefit of workplace diversity is better company performance.[36] In addition, increased diversity may make a company more attractive to potential employees.[37]

B. Religious Conflict in the Workplace

Along with benefits, religious diversity in the workplace can lead to conflict.[38] Religious discrimination complaints have increased.[39] Moreover, American workers say they observe more religious

32. *Id.*
33. Christopher P. Scheitle & Elaine Howard Ecklund, *Examining the Effects of Exposure to Religion in the Workplace on Perceptions of Religious Discrimination*, 59 REV. RELIGIOUS RES. 1, 2 (2017).
34. Matthew Brown, *Religious Discrimination in the Workplace Increases with Diversity*, DESERET NEWS (Sept. 2, 2013, 7:00 AM), https://www.deseretnews.com/article/865585613/Religious-discrimination-in-the-workplace-increases-with-diversity.html [https://perma.cc/H6UF-VLR6].
35. *Id.* A 2013 Deloitte study found that when employees think their organization is committed to and supportive of diversity, and they feel included, their ability to innovate increases by 83%. DELOITTE & VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMM'N, WAITER, IS THAT INCLUSION IN MY SOUP? A NEW RECIPE TO IMPROVE BUSINESS PERFORMANCE 4 (2013), https://www2.deloitte.com/content/dam/Deloitte/au/Documents/human-capital/deloitte-au-hc-diversity-inclusion-soup-0513.pdf [https://perma.cc/YPH2-EK2G].
36. A McKinsey & Company study found that companies with a diverse executive board saw a 95% higher return on equity than those with less diverse executive boards. Barta et al., *supra* note 16.
37. In a study by PricewaterhouseCoopers, 45% of males and 54% of females researched diversity and inclusion policies of a company before accepting a job offer, and 48% of males and 61% of females looked at the diversity of the leadership team. *Magnet for Talent: Managing Diversity as a Reputational Risk and Business Opportunity*, PWC 8 (2017), https://www.pwc.co.uk/human-resource-services/assets/documents/diversity-and-inclusion-reputation-2017.pdf [https://perma.cc/3WF5-CCRK].
38. Brown, *supra* note 34.
39. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *EEOC Charge Statistics*], https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/3CZJ-DZKV] (last visited Dec. 18, 2019).

conflict in diverse workplaces, and many now feel uncomfortable with religious expression at work.[40]

According to the U.S. Equal Employment Opportunity Commission (EEOC), religious employment discrimination claims are on the rise.[41] The EEOC charge statistics show that religious discrimination claims have doubled in the last twenty years and represent an increasing percentage of discrimination claims overall.[42] Since 2001, more than 20% of the complaints the EEOC investigates annually involve bias against Muslims, a group that makes up less than 2% of the population.[43] According to one survey, 54% of all workers believe that Muslims face a lot of discrimination in the workplace, and 55% of atheists say they face a lot of discrimination in the workplace.[44]

The rise in discrimination claims corresponds with anecdotal reports by American workers: with religious diversity comes more religious conflict.[45] Approximately one in five workers reports religious conflict in highly diverse or moderately diverse workplaces.[46] Additionally, 23% of all workers in highly diverse environments report witnessing or experiencing conflict between religious and LGBT co-workers, compared to just 7% of workers in minimally diverse environments.[47]

With this potential for conflict, many people are becoming less comfortable about religious expression in the workplace.[48] Although nearly 9-in-10 white evangelical employees are "somewhat or very comfortable" when the issue of religion comes up at work, 43% of nonbelievers are "somewhat or very uncomfortable."[49] Yet, a work

40. Brown, *supra* note 34.
41. *EEOC Charge Statistics*, *supra* note 39.
42. *Id.*
43. Brown, *supra* note 34.
44. TANENBAUM CTR. FOR INTERRELIGIOUS UNDERSTANDING, WHAT AMERICAN WORKERS REALLY THINK ABOUT RELIGION: TANENBAUM'S 2013 SURVEY OF AMERICAN WORKERS AND RELIGION 8 (2013) [hereinafter TANENBAUM], https://tanenbaum.org/wp-content/uploads/2014/02/Tanenbaums-2013-Survey-of-American-Workers-and-Religion.pdf [https://perma.cc/77NF-K3ZS].
45. *Religion in Workplace Increasingly Diverse: Comes with Potential Pitfalls*, HUFFINGTON POST (Sept. 1, 2013) [hereinafter HUFFINGTON POST], https://www.huffingtonpost.com/2013/09/01/diversity-religion-workplace-increasing_n_3846021.html [https://perma.cc/927R-QA2K].
46. TANENBAUM, *supra* note 44, at 19.
47. *Id.*
48. *See id.* at 16–17.
49. *See* HUFFINGTON POST, *supra* note 45.

environment that suppresses religious expression can spell trouble for the employer.[50]

III. TITLE VII

Title VII requires businesses to make reasonable accommodations for their employees' religious practices unless undue hardship will result.[51] Religious expression is considered a religious practice when an employee sincerely believes his or her religion requires it.[52] Generally, accommodating the need for religious expression means allowing it.[53]

A. Protection for Religious Practices

When Congress enacted the Civil Rights Act of 1964, Title VII treated religion the same as the other protected categories of race, color, sex, and national origin.[54] Discrimination based on religious beliefs or status was prohibited, but the law was silent about accommodating religious practices.[55] Beginning in 1967, EEOC Guidelines required accommodation of a religious practice unless it would result in "undue hardship" to the employer, but courts refused to follow these guidelines.[56]

After several federal courts held that employers who refused to accommodate religious practices were not discriminating on the basis of religion,[57] Congress, led by Senator Jennings Randolph of West Virginia, overwhelmingly approved an amendment to Title VII in

50. *See* James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 531–32 (2004).
51. *Id.* at 532.
52. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).
53. *See* Thomas D. Brierton, *"Reasonable Accommodation" Under Title VII: Is It Reasonable to the Religious Employee?*, 42 CATH. LAW. 165, 168–69 (2002).
54. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)–(e), 78 Stat. 241, 255–56 (1964) (current version at 42 U.S.C. § 2000(e) (2012)).
55. *See id.* § 201, 78 Stat. at 243.
56. *See* 29 C.F.R. § 1605.1 (1968); *see, e.g.*, Dewey v. Reynolds Metal Co., 429 F.2d 324, 330 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971); *see, e.g.*, Riley v. Bendix Corp., 330 F. Supp. 583, 590–91 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972). See Kaminer, *supra* note 1, at 459; Brierton, *supra* note 53, at 167–68; and Oleske, *supra* note 50, at 532, for a discussion of numerous courts refusing to follow the EEOC's guidelines.
57. Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 474 (2006).

1972.[58] To "save employees the pain of having to choose between their religions and their jobs,"[59] the statutory definition of religion was broadened to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[60] Observant employees with religious needs throughout the day were to be welcomed into the secular working world.[61]

Title VII, as amended, is not aimed at neutrality toward religion.[62] Accommodation requires special treatment; an employer cannot avoid its obligations by treating everyone equally.[63] Title VII elevates the religious needs of employees, even if coworkers may

58. *See Riley*, 464 F.2d at 1116–17; *see generally* 118 CONG. REC. 705–06 (1972) (statement of Sen. Randolph) (stating that freedom of religion is a fundamental right in America, and freedom includes being able to fully observe one's religion).

59. Prenkert & Magid, *supra* note 57, at 475–76.

60. 42 U.S.C. § 2000e(j) (2006); *see also* Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1029–30 (8th Cir. 2008); *see also* Bush v. Regis Corp., 257 Fed. App'x. 219, 221 (11th Cir. 2007).

61. Symposium, *Religion in the Workplace: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion*, 4 EMPL. RTS. & EMPLOY. POL'Y J. 87, 98 (2000).

> Title VII helps to prevent religious workers from being forced to divide lives into rigidly separate identities—one private and religious, the other public and secular—as if religion were something that only goes on certain days of the week, certain times of the day, only in the privacy of your home or in places like churches and synagogues. Title VII reflects a vision of religious life in which a Jew is able to be a Jew seven days a week, in which Christians can be Christians throughout their day, and Muslims observe their faith at work as well as at home. Believers of all stripes can let the Lord be Lord of their entire lives and not just Lord of their private lives.

Id.

62. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015).

> Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not to "fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice.". . . Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

Id.

63. *See* Oleske, *supra* note 50, at 534–35, 554.

feel slighted.[64] "[C]ourts have largely rejected defenses that are based on 'hypothetical morale problems' or 'proof that employees would grumble.' . . . Title VII . . . requires employers to provide religion with 'preferential treatment' in 'some circumstances.'"[65]

Absent undue hardship, failing to reasonably accommodate the religious observances or practices of an employee is considered discrimination on the basis of religion and subjects an employer to Title VII liability.[66] The 1972 amendment, however, did not define "reasonable accommodation" or "undue hardship."[67] Legislative efforts to codify federal accommodation law have largely failed,[68] but EEOC guidelines issued in 1980 remain in effect today.[69] The burden of undue hardship is measured using considerations like: the size of the employer, the number of employees requiring accommodation, and the operating costs of the employer.[70] Employers cannot claim undue hardship by simply assuming that too many coworkers will want the same accommodation.[71] On the other hand, cases make clear that "[c]onsidering an accommodation's impact on both the employer and coworkers . . . is appropriate when determining its reasonableness."[72]

The extent of the obligation to accommodate religion has engendered much disagreement since the 1972 amendment and the 1980 EEOC Guidelines.[73] Terms such as undue hardship and reasonably accommodate are intentionally imprecise to take into

64. *Id.* at 534–35.

65. *Id.*

66. Davis v. Fort Bend County, 765 F.3d 480, 485 (5th Cir. 2014) (citing 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2012)). In *Davis*, the court stated that to establish a prima facie case, the plaintiff must "present evidence that (1) she held a bona fide religious belief, (2) her belief conflicted with a requirement of her employment, (3) her employer was informed of her belief, and (4) she suffered an adverse employment action for failing to comply with the conflicting employment requirement." *Id.* at 485 (quoting Tagore v. United States, 735 F.3d 324, 329 (5th Cir. 2013)); *see also* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 168 (2d Cir. 2001) (explaining that an employee must request the accommodation because employers are not expected to know the religious practices of every employee).

67. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73–75 (1977).

68. Flake, *supra* note 1, at 709–10.

69. *Id.* at 715–16.

70. *Id.* at 715; *see also* 29 C.F.R. § 1605.2(e)(1) (2017).

71. Flake, *supra* note 1, at 715; *see also* 29 C.F.R. § 1605.2(c)(1).

72. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 314 (4th Cir. 2008); *see also* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 168 (2d Cir. 2001) (holding that the accommodation sought by the employees was not reasonable due to the burden it would place on the employer).

73. Flake, *supra* note 1, at 719.

account the secular pressures on businesses; questions are fact-intensive and depend on individual circumstances.[74]

B. Religious Expression Is Protected Activity

For many, the term "religious observances or practices" calls to mind behaviors such as attending organized services, resting on the Sabbath, adhering to dietary restrictions, and praying.[75] Expression, however, can be a form of religious observance or practice.[76] The law recognizes that some religious adherents are obliged to proselytize.[77] Other forms of expression like posters, buttons, figurines, and artwork may be required as well.[78] It makes no difference that a particular type of religious expression is not ordinarily associated with the organized version of the employee's religion.[79] The employee's religious need to express, even if shared by no one else in the world, is entitled to protection if it is sincere.[80]

Title VII has been invoked to protect a religious need for expressive displays.[81] *Wilson v. United States West Communications* involved a worker who took a religious vow to wear a large button with a photograph of an aborted fetus except when she was sleeping or showering.[82] She was told not to come to work with the button on, sent home when she reported to work wearing it, and then fired for her unexcused absence.[83] In the ensuing action, the court recognized that this expressive activity was a religious practice entitled to some form of accommodation under Title VII absent undue hardship.[84]

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74. *Firestone Fibers & Textiles Co.*, 515 F.3d at 313.
75. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL NO. 915.003, at 9 (2008) [hereinafter EEOC COMPLIANCE MANUAL].
76. *Id.*
77. *See, e.g.*, *Knight*, 275 F.3d at 167–68 (explaining that evangelizing may be a requirement under some religions).
78. *See infra* notes 81–93 and accompanying text.
79. Walter Olson, *A Hijab and a Hunch: Abercrombie and the Limits of Religious Accommodation*, 2014–2015 CATO SUP. CT. REV. 139, 144.
80. *Id.* at 150 ("As the EEOC's compliance manual noted, Title VII protects a religious belief or practice that may happen to arise 'in the person's own scheme of things' and 'even if few—or no—other people adhere to it.'").
81. *See Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/policy/docs/qanda_religion.html [https://perma.cc/U28R-JWYJ] (last modified Jan. 31, 2011).
82. Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995).
83. *Id.* at 1339–40.
84. *Id.* at 1340–42 (ruling that Wilson's religious expression clearly required accommodation, but the type of accommodations offered by her employer were sufficient); *see also* Rivera v. Choice Courier Sys., Inc., No. 01 Civ. 2096 (CBM),

A need to display inspirational artwork is also a religious practice covered by Title VII.[85] In *Dixon v. Hallmark Cos*., the plaintiffs "presented evidence that they [were] sincere, committed Christians who oppose[d] efforts to remove God from public places."[86] The couple was fired from an apartment complex management office for refusing to remove a twenty-six-inch by fifty-inch poster with the words, "Remember the Lilies… Matthew 6:28."[87] The Eleventh Circuit reversed a summary judgment against the couple, holding they had established a prima facie case of discrimination, and the employer had failed to present any evidence of accommodation or undue hardship.[88]

In a similar case, *Brown v. Polk County*, a county worker was told he had to remove three prayer plaques from his office ("God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference"; "God be in my life and in my commitment"; and the Lord's Prayer) because they might be considered "offensive to employees."[89] Upon termination for refusing to remove the plaques, the employee sued the county, alleging religious discrimination.[90] Because the county made no effort to accommodate the employee's religious needs, the Eighth Circuit held that the county could only prevail if it proved that an accommodation would be unduly burdensome.[91]

Courts agree that buttons, posters, and other non-speech forms of religious expression are the types of religious observances and practices covered by Title VII.[92] When a sincere religious belief requires the expression, Title VII is implicated, and the employer must accommodate the expression absent undue hardship.[93]

C. How Much Accommodation?

The more difficult question is how much an employer must do to accommodate religion.[94] Not very much, courts have often held;

2004 WL 1444852, at *2–3,*5 (S.D.N.Y. June 25, 2004) (noting that plaintiff, a courier, was fired for refusing to remove a "Jesus is Lord" badge).

85. *See Questions and Answers: Religious Discrimination in the Workplace*, *supra* note 81.
86. Dixon v. Hallmark Cos., 627 F.3d 849, 855 (11th Cir. 2010).
87. *Id.* at 853.
88. *Id.* at 856.
89. Brown v. Polk County, 61 F.3d 650, 659 (8th Cir. 1995).
90. *Id.* at 653.
91. *Id.* at 654.
92. *See supra* notes 76–91 and accompanying text.
93. *See supra* notes 76–91 and accompanying text.
94. *See* Brierton, *supra* note 53, at 165.

businesses are not required to expend more than a *de minimis* amount to accommodate religious practices.[95] Since accommodating employee expression generally does not involve any expense at all,[96] however, religious expression usually must be permitted unless it causes undue hardship in a nonmonetary way.[97]

The Title VII requirement to accommodate the religious practices of an employee is far from absolute.[98] "Congress recognized that because of business necessity and the legitimate rights of other employees, it could 'not impose a duty on the employer to accommodate at all costs;'"[99] thus, an exception was written into the statute for "undue hardship" to the employer.[100] In interpreting the "undue hardship" language, courts have been sympathetic to employers in the religious accommodation context.[101] A hardship is considered "undue" if it requires the expenditure of more than a *de minimis* amount.[102]

The *de minimis* standard was introduced in 1977 in *Trans World Airlines, Inc. v. Hardison*, a Sabbath work shift case.[103] A junior worker required accommodation to observe the Sabbath, but the Supreme Court was concerned with extra overtime expense to the

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95. *Id.* at 191.

96. *See* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J. L. & PUB. POL'Y 959, 1007 (1999) (discussing examples, such as work bulletin boards or expressions written on pay checks, where accommodation imposes minimal to no cost for the employer).

97. *See infra* Part IV.

98. *See infra* notes 99–106 and accompanying text.

99. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313 (4th Cir. 2008) (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).

100. 42 U.S.C. § 2000e(j) (2012).

101. *See* Brierton, *supra* note 53, at 191–92.

102. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977).

> If most human resources managers experience disability accommodation as far more of a headache than religious accommodation, one reason lies in the way courts have interpreted the two statutes in starkly different fashions. One key term that appears in both areas of law—"undue hardship" to an employer—gets defined in almost comically opposite ways. In disability accommodation, courts routinely refuse to find undue hardship even when employers have been battered by the cost, disruption, and inconvenience of trying to accommodate a worker. In religious accommodation, by contrast, they follow a *de minimis* standard; even a little bit of employer cost, disruption, or inconvenience is undue.

Olson, *supra* note 79, at 157.

103. *Trans World Airlines, Inc*., 432 U.S. at 84–85.

employer and the effects on coworkers under a collective bargaining agreement and seniority system.[104] Subsequent cases echoed these concerns about coworkers in addressing what was deemed *de minimis* and, thus, reasonable.[105] As one court said, "Considering an accommodation's impact, on both the employer and coworkers . . . is appropriate when determining its reasonableness."[106]

Most cases on the effects of religious accommodation on coworkers, like *Trans World Airlines*, focus on employees who refuse shifts on the Sabbath,[107] but religious expression cases are distinguishable from them.[108] Allowing expression implies no out-of-pocket cost to the employer, and coworkers are not required to step in and cover.[109] If an employer has a no-poster rule, how much could it cost to waive the prohibition to accommodate an employee with a religious need for an inspirational poster?[110] Undue hardship, however, need not be financial; there are other forms of hardship.[111] The rule would have to be to allow the religious expression unless something about it results in one of these nonmonetary forms of undue hardship.[112]

IV. TYPES OF HARDSHIP

Allowing employers an opening to prove undue hardship distinguishes religious practice accommodation from other prohibitions against employment discrimination.[113] In this section,

104. *Id.*
105. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 314 (4th Cir. 2008).
106. *Id.*
107. Kaminer, *supra* note 1, at 87; *Trans World Airlines, Inc*., 432 U.S. at 84–85; Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1027 (8th Cir. 2008); Tepper v. Potter, 505 F.3d 508, 511 (6th Cir. 2007); Smith v. Pyro Mining Co., 827 F.2d 1081, 1083–84 (6th Cir. 1987); Brown v. Gen. Motors Corp., 601 F.2d 956, 957–59 (8th Cir. 1979); Minkus v. Metro. Sanitary Dist. of Greater Chi., 600 F.2d 80, 80–81 (7th Cir. 1979).
108. *See* Berg, *supra* note 96, at 977.
109. *See id.*
110. *See id.*
111. Farah v. A-1 Careers, No. 12-2692-SAC, 2013 WL 6095118, at *8 (D. Kan. Nov. 20, 2013) (quoting Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir. 1995), *cert. denied*, 515 U.S. 1152 (1995)); EEOC COMPLIANCE MANUAL, *supra* note 75, at 46.
112. *See supra* notes 94–111 and accompanying text.
113. Employers cannot claim it would be a hardship to hire African-Americans, Jews, Mexican-Americans, or women, for example, because customers would likely take offense. Mayale-Eke v. Merrill Lynch, 754 F. Supp. 2d 372, 381 (D.R.I. 2010); *cf.* King v. Kirkland's Stores Inc., No. 2:04-CV-1055-MEF, 2006 WL 2239208, at *7–8, *14 (M.D. Ala. Aug. 4, 2006) (assuming, *sub silentio*, that firing on the basis of race

the article explores the types of hardship employers can suffer if they are required to accommodate religious expression.[114] Religious displays can cause hardship to employers in at least four ways.[115] First, they can offend customers.[116] Second, they can be so distracting that they affect productivity.[117] Third, religious expression can infringe on the rights of other employees to be free from religious harassment.[118] And fourth, there is a danger that religious displays will be misattributed to employers or to coworkers sharing space.[119]

A. Customer Reaction

Religious expression and displays can lead to customer complaints.[120] Courts have sided with employers when employees attempt to spread their religion to customers,[121] particularly when the customers object.[122] Similarly, courts have been concerned with the

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because a customer complained that too many African-Americans were working at a store would violate Title VII).

114. *See infra* Sections IV.A–D.
115. *See infra* Sections IV.A–D.
116. *See infra* Section IV.A.
117. *See infra* Section IV.B.
118. *See infra* Section IV.C.
119. *See infra* Section IV.D.
120. *See infra* notes 121–24 and accompanying text.
121. *See* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 164–65 (2d Cir. 2001). Public employers are in a particularly precarious position. *See* Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1208 (9th Cir. 1996). They run afoul of the First Amendment when they prohibit speech, but they risk violating the Establishment Clause when the speech involves religion. *Id.* The courts are not particularly sympathetic. *Id.* When supervisors at the California Department of Education issued orders prohibiting "employees in [a religious plaintiff's] division from engaging in any oral or written religious advocacy in the workplace and displaying any religious artifacts, tracts or materials outside their offices or cubicles," the rules were held to be overbroad and summary judgment was granted to the employee. *Id.*
122. In *Knight*, a state employer of sign language interpreters was not required to permit the interpreters to evangelize to clients as an accommodation. *Knight*, 275 F.3d at 164–65.

> Here the state showed permitting religious speech when working with clients was and would continue to be disruptive, and that disruption outweighed appellants' free speech interests. Because appellants' jobs both require a great deal of public contact, the state has a significant interest in regulating speech related to that contact. Knight's clients were so upset by her religious speech they brought legal action against the state and Knight personally. Wilson testified Quental's interpreting client was upset and

effect on business when an employee wears religious symbols in a manner considered offensive.[123] For example, a Wal-Mart employee whose "Universal Belief System" compelled him to wear various pieces of religious attire, including a priest's shirt and collar, a beret and a court jester hat, a kaffiyeh (Muslim headdress), a fanny pack with an anarchy symbol, a chain with multiple crosses hanging from it, and a necklace with a crucifix, was the subject of customer and coworker complaints.[124]

B. Employee Distraction

Expressive rituals can also cause undue hardship to an employer because they distract other employees.[125] Since religious practices need not be mandated by any broadly-subscribed, organized religion, Title VII applies to any requirement for expression borne of a sincere religious belief, even if self-styled, self-imposed, and unique to the employee, no matter how unusual.[126] What if an employee has a sincere belief that he must play religious music at earsplitting volume?[127]

Title VII does not contemplate an unlimited right to religious expression.[128] "Although the law is still developing in this area and remains unclear . . . an employer may restrict" religious expression if it "disrupts or is expected to interfere with the operations of other employees . . . ."[129] The EEOC Guidelines permit employers to "consider the potential disruption, if any, that will be posed by permitting [an] expression of religious belief."[130] Past disruption or

> agitated by Quental's religious speech. Prohibiting discrimination against an employee's speech does not require employers to accept speech "that impedes an employee's performance of [her] duties." Thus, the harmful side effects of the use of religious speech with a client "outweigh its benefits to the speaker-employee," so that "the employer is justified in taking adverse action against the employee in order to mitigate the negative effects."

Id. (citations omitted).

123. *See* Lorenz v. Wal-Mart Stores, Inc., No. SA-05-CA-0319 OG (NN), 2006 WL 1562235, at *2–3 (W.D. Tex. May 24, 2006), *aff'd*, 225 F. App'x 302 (5th Cir. 2007).
124. *Id.*
125. *See infra* notes 126–31 and accompanying text.
126. *See* discussion *supra* Section III.B.
127. *See infra* notes 128–31 and accompanying text.
128. EEOC COMPLIANCE MANUAL, *supra* note 75, at 56–58.
129. Ghumman et al., *supra* note 1, at 450.
130. EEOC COMPLIANCE MANUAL, *supra* note 75, at 77; *see* Farah v. A-1 Careers, No. 12-2692-SAC, 2013 WL 6095118, at *8 (D. Kan. Nov. 20, 2013).

reasonably expected disruption to coworkers, customers, or business operations are valid considerations.[131]

C. Protection of Freedom from Religious Harassment

In some cases, coworkers may view religious expression as harassment.[132] Standing squarely against an employee's Title VII right to religious expression is another employee's right, also under Title VII, not to be religiously harassed.[133] "[R]eligious expression (displaying religious pictures, posters, or messages within a workstation) becomes a challenge for many employers because they must balance religious accommodation obligations with disparate treatment and harassment issues."[134] No one has a right under Title VII to harass others;[135] "[a]n employer need not accommodate an employee's religious practice by violating other laws."[136]

Blindly accommodating a religious need to express may leave the employer vulnerable to a religious harassment suit by other employees.[137] The Supreme Court has interpreted Title VII to include a requirement that employers provide a workplace free of harassment based upon a protected category.[138] The employee claiming harassment is required to "show that the harassment was: (1) based on his religion; (2) unwelcome; (3) sufficiently severe or pervasive to alter the conditions of employment by creating an intimidating, hostile, or offensive work environment; and, (4) that there is a basis for employer liability."[139] In a case alleging the harassment came from a coworker, "an employer is liable if it knew

131. EEOC COMPLIANCE MANUAL, *supra* note 75, at 77; *see Farah*, 2013 WL 6095118, at *8.

132. *See infra* notes 133–60 and accompanying text.

133. Laura Fleming, *Christmas Trees and Religious Accommodation*, ORANGE COUNTY L., Dec. 2006, at 10–11 (2006) ("[Using] the workplace as a forum for evangelism exposes the employer to possible suits by other employees for violation of their religious freedom rights or for religious harassment."); Ng v. Jacobs Eng'g Grp., No. B185838, 2006 WL 2942738, at *4 (Cal. Ct. App. Oct. 16 2006) ("Complaints from plaintiff's coworkers regarding her proselytizing activities in the workplace exposed defendant to potential liability for religious harassment claims by the coworkers if plaintiff were allowed to continue her proselytizing.").

134. Ghumman et al., *supra* note 1, at 450.

135. *See* EEOC COMPLIANCE MANUAL, *supra* note 75, at 43.

136. Tagore v. United States, 735 F.3d 324, 329 (5th Cir. 2013).

137. *See* EEOC COMPLIANCE MANUAL, *supra* note 75, at 43–44.

138. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–67 (1986) (stating that a hostile environment created by sexual harassment is actionable).

139. EEOC COMPLIANCE MANUAL, *supra* note 75, at 31.

or should have known about the harassment and failed to take immediate and appropriate corrective action."[140]

When is religious expression harassment?[141] The easy cases are threats to act against an individual because of his religion, continued unwelcome speech after the speaker has been asked to stop, and simple insults or epithets.[142] Harder cases involve supervisor speech, non-hostile proselytizing speech that disturbs, and accumulated religious speech.[143]

Coworkers may allege harassment from religious expression, but courts have given employers inconsistent guidance about what constitutes harassment.[144]

> Some employees wish to – or believe their religion requires them to – express their religious beliefs at work by, for example, posting religious messages in their workspace, using religious language (such as "Praise the Lord") when communicating with others, or attempting to proselytize coworkers . . . . Court decisions are not entirely clear . . . when an employee professing his or her faith crosses the line to become a harasser. Some courts have held that an employer has no duty to accommodate an employee's religious expression when it could constitute harassment against other employees or it contravenes the employer's diversity or nondiscrimination policies. Other courts have found in the religious employee's favor if his or her

140. *Id.* at 39.

141. *See infra* notes 142–60 and accompanying text.

142. Berg, *supra* note 96, at 985–86.

143. *Id.* at 987–88, 991.

144. "The impact that proselytizing has on employee morale and productivity . . . requires a fact-bound analysis. The precedent indicates that the courts are largely sympathetic to employers when they present evidence that proselytizing will endanger productivity or provoke harassment claims from co-workers." Wolf, *supra* note 1, at 132.

> When proselytizing provokes complaints from other employees or from customers, most courts will find that the probability of a loss in productivity, an adverse impact on customer relations, or the filing of a harassment claim will be sufficient to satisfy the employer's burden of proving why an accommodation was not possible. To the extent that employers have failed to meet this burden, it is usually because the proselytizing was nonconfrontational and the employer's evidence was too speculative to prove that proselytizing was likely to result in an actual adverse consequence. A knee-jerk reaction by an employer is the surest way to lose a proselytizing case.

Id. at 133.

> behavior was merely annoying or created discomfort for others. Clearly, the more persistent and intense an employee is about expressing religious views at work, the more likely other workers are to feel harassed.[145]

"Title VII does not require an employer to allow an employee to impose [his or her] religious views on others."[146] Such a requirement "would . . . work[] an undue hardship."[147] A claim of harassment, however, must be reasonable and justified.[148] Employees ultra-

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145. Lisa Guerin, *Workplace Harassment Based on Religion*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/workplace-harassment-based-religion.html [https://perma.cc/7GH4-EYJD] (last visited Dec. 18, 2019). "With respect to employees who wish to proselytize in the workplace, an employer is . . . deemed to suffer an undue hardship whenever an accommodation risks creating a hostile work environment or alienating customers." Wolf, *supra* note 1, at 131; *see* Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012 (4th Cir. 1996); *see* Johnson v. Halls Merch., Inc., No. 87-1042-CV-W-9, 1989 WL 23201, at *2 (W.D. Mo. Jan. 17, 1989).

146. Averett v. Honda of Am. Mfg., Inc., No. 2:07-cv-1167, 2010 WL 522826, at *10 (S.D. Ohio Feb. 9, 2010) (quoting Wilson v. U.S. W. Commc'ns, 58 F.3d 1337,1342 (8th Cir. 1995).

> Complaints from plaintiff's coworkers regarding her proselytizing activities in the workplace exposed defendant to potential liability for religious harassment claims by the coworkers if plaintiff were allowed to continue her proselytizing. The court concluded that . . . defendant was not required to permit an employee to impose her religious views on other employees or to allow its facilities to be used for religious purposes.

Ng v. Jacobs Eng'g Grp., No. B185838, 2006 WL 2942739, at *4 (Cal. Ct. App. Oct. 16, 2006).

147. *Ng*, 2006 WL 2942739, at *8.

148. Kaminer, *supra* note 1, at 111, 120.

> [T]he courts have tended to look at whether the complaints or disruptive behavior in response to the religious speech is reasonable or justified. This in turn is based upon whether the court determines that the religious expression in question is *objectively* harassing, thus following the *Harris* court's determination that "[c]onduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment—an environment that a *reasonable* person would find hostile or abusive—is beyond Title VII's purview."
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> . . . .
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> . . . [C]ourts . . . hold[] that speech which is objectively harassing to a reasonable person does not have to be accommodated under section 701(j). This has led courts to discriminate against unusual or uncommon religious speech. Therefore, the lower courts have

sensitive to any mention of religion cannot be permitted to silence their coworkers.[149]

> In an expansive and healthy workplace, workers are free to express religious views, as they do views on traditional American topics of conversation: politics, sports, and family, to name a few. Religious garb or prayer breaks can be met, not with suspicion of coercion, but with the openness that accompanies culturally acceptable identities, such as being married with children, or an animal lover, or a rabid fan for a particular baseball team. Although a single worker might feel devalued with prominent photographic displays of spouses and children, a mother of six children might feel slighted by a population-control advocate, an animal lover might be horrified by a hunting aficionado, and a Mets fan might dislike the overbearing Yankees fan with excessive team paraphernalia, one set of these workers does not get to control the workplace to prohibit the other's

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> determined that religious employees have the right to greet customers with phrases such as "God bless you" and "Praise the Lord," or on occasion read Biblical passages at meetings, but can be prohibited from prefacing virtually every sentence with the phrase "In the name of Jesus Christ of Nazareth," or continually wearing an uncovered anti-abortion button containing a graphic photograph of an aborted fetus.

Id.

149. *See* Nantiya Ruan, *Accommodating Respectful Religious Expression in the Workplace*, 92 MARQ. L. REV. 1, 29–30 (2008).

> [C]ourts have never recognized an "upset coworker" exception to anti-discrimination laws, even to accommodation mandates. Rejecting religious accommodation because coworkers are upset is no more justified than letting coworker preferences trump requirements of disability accommodations, medical leave, anti-harassment policies, etc. This argument against a "coworker veto" does not diminish the point . . . that religious expression that is aimed at demeaning secularist workers should not be protected or accommodated. . . . [C]ourts will have to balance the rights of religious expression with the rights of other workers to be free from harassment.

Id.

> [T]he negative reactions of other employees per se [cannot] suffice to justify restricting an employee's speech. Such a doctrine does not provide adequate protection under Title VII for religious speech. After all, as other commentators have noted, an employer can in no way justify a refusal to hire blacks or women on the ground that hiring them would disturb other employees.

Berg, *supr*a note 96, at 978–79.

> expression. Likewise, secularist workers should not have the ability to silence religiously observant workers.[150]

Discussing or expressing religion should not be taboo in the workplace, but unwelcome religious criticism directed at individual employees is considered harassment.[151] When an employee distressed her supervisor and a subordinate with letters criticizing their personal lives and telling them to ask God for forgiveness, it was ruled harassment.[152] Similarly, a Walmart employee was harassing others when a co-worker "reported that [plaintiff] was 'screaming over her' that God does not accept gays, they should not 'be on earth,' and they will 'go to hell' because they are not 'right in the head.' Five other employees confirmed that [plaintiff] said that gays are sinners and are going to hell."[153] Frightening coworkers can also be harassment.[154] For example, an employee who scared coworkers with her calculation of the date of the end of the world was considered harassing.[155] Additionally, threatening religious language may be harassment.[156]

Most agree that posting religious sayings in one's own cubicle does not violate Title VII[157] as long as they "do not demean other religious views."[158] Similarly, allowing nonverbal religious expression at the workplace, such as religious jewelry, statues, or symbols, does not create a hostile work environment for coworkers.[159] Permitting

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150. Ruan, *supra* note 149, at 30–31.

> [F]ear alone, even fear of discrimination or other illegal activity, is not enough to justify such a mobilization of governmental force against [a religion-expressing employee]. The fear must be substantial and, above all, objectively reasonable. A phobia of religion, for instance, no matter how real subjectively, will not do. As Justice Brandeis has said, rather starkly, "Men feared witches and burnt women."

Brown v. Polk County, 61 F.3d 650, 659 (8th Cir. 1995) (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

151. *Ng*, 2006 WL 2942739, at *6–7.
152. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1015–16, 1021 (4th Cir. 1996).
153. Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552, 553, 555 (7th Cir. 2011).
154. Mitchell v. Univ. Med. Ctr., Inc., No. 3:07CV-414-H, 2010 WL 3155842, at *2, *7 (W.D. Ky. Aug. 9, 2010).
155. *Id.*
156. Averett v. Honda of Am. Mfg., Inc., No. 2:07-cv-1167, 2010 WL 522826, at *8–9 (S.D. Ohio Feb. 9, 2010).
157. *See* Powell v. Yellow Book USA, Inc., 445 F.3d 1074, 1076–78 (8th Cir. 2006).
158. EEOC COMPLIANCE MANUAL, *supra* note 75, at 39.
159. Kaminer, *supra* note 1, at 140.

religious symbols that are demeaning or frightening, however, can be harassment.[160]

D. Possibility of Misattribution

Cases and literature involving religious displays are scarce.[161] Generally, one worker's religious display would not annoy another in the same way as persistent speech.[162] However, displays are sometimes objectionable on an entirely different ground: the possibility of misattribution.[163] Depending on where they are placed, an employee's religious artwork and articles can be misunderstood to express the views of an employer or coworker.[164] This is the rationale behind many public employer Establishment Clause cases.[165]

1. Misattribution to Employer

Title VII protection for religious expression does not extend so far that an employer must risk appearing to adopt the message on its own behalf.[166] "Regardless of whether the client objects, a religiously oriented expression may be an undue hardship for an employer when the expression could be mistaken as the employer's message."[167] Religious displays present an even greater risk of misattribution than employee speech.[168] The question is whether a reasonable observer would understand the religious message of an employee as emanating from the employer.[169]

160. *See* Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 978 (N.D. Ind. 2000) (discussing burning a cross as a religious symbol); *see* Kaushal v. Hyatt Regency Woodfield, No. 98 C 4834, 1999 WL 436585, at *1 (N.D. Ill. June 22, 1999) (discussing a swastika as a religious symbol).

161. *See, e.g.*, George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 885–86 (1988).

162. *See* Berg, *supra* note 96, at 971.

163. *See* discussion *infra* Sections IV.D.1–2.

164. *See* discussion *infra* Sections IV.D.1–2.

165. *See* discussion *infra* Section IV.D.1

166. *See Religious Accommodation: Do We Have to Allow Employees to Proselytize or Use Religious Expressions/Greetings?*, SOC'Y HUMAN RES. MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/religios-accommodation--do-wehave-to-allow-employees-to-proselytize-or-use-religious-expressions-greetings.aspx [https://perma.cc/R9DN-FAWQ] (last visited Dec. 18, 2019).

167. *Id.*; *see also* EEOC COMPLIANCE MANUAL, *supra* note 75, at 79–80.

168. *See* Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1214 (9th Cir. 1996).

169. *See id.* at 1213.

Compliance with Title VII must not interfere with the right of an employer to control its own message.[170] A company has First Amendment rights, and Title VII cannot be used to prevent it from expressing its own views.[171] An employer is entitled to "decide what viewpoints to espouse in its own speech or speech that might be attributed to it."[172]

For public employers, the Establishment Clause compounds the problem:

> [O]n issues of religion in the workplace, public-sector employers are distinctively whipsawed by multiple sources of liability. On display of religious symbols at a workplace, for example, they may have to contend with possible liability under the First Amendment (if, say, they restrict employees' speech improperly) and the Establishment Clause (if, say, they give the impression of endorsing that same speech).[173]

As difficult as walking this line between the two First Amendment clauses can be, "Title VII liability for not accommodating employees' religious practices—an exposure they share with private employers—then gets layered on top."[174]

2. Misattribution to Coworker

When two coworkers share a cubicle or office, posters or religious symbols placed in that space by one can be viewed as the expression of the other.[175] If Office Mate A hangs a poster on a shared wall that says, "I worship pumpernickel," Office Mate B may not object to the artwork on harassment grounds or be offended by it.[176] The problem is that it will create a false impression that the poster represents the views of both occupants of the office.[177] Office Mate B's name and reputation can be affected by misattribution of religious artwork or

170. *See* Loren F. Selznick, *Walking the Executive Speech Tightrope: From Starbucks to Chick-fil-A*, 65 OKLA. L. REV. 573, 600 (2013).
171. *Id.*; *see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).
172. *See In re* Kendall, 712 F.3d 814, 825 (3d Cir. 2013).
173. Olson, *supra* note 79, at 151.
174. *See id.*
175. *See* Powell v. Yellow Book USA, Inc., 445 F.3d 1074, 1077–78 (8th Cir. 2006); *see* Ruan, *supra* note 149, at 6–7.
176. *See* Ruan, *supra* note 149, at 29–30.
177. *See id.* at 6–7; *see also Powell*, 445 F.3d at 1077–78.

objects he does not believe in.[178] Although the courts have not yet addressed this risk to coworkers sharing office space, they have deemed the risk worthy of concern to employers[179] and have long protected individuals from the consequences of misattribution in a variety of contexts.[180]

V. ACCOMMODATION, HARDSHIP, AND COMPROMISE

Even where there is undue hardship to the employer, the inquiry is not at an end.[181] Courts require an effort at compromise with the religious employee.[182] For a compromise to be legally acceptable, it must satisfy the religious needs of the employee; however, the employer is not required to put up with undue hardship and the employee must show a willingness to bend.[183] The possibility and nature of a compromise accommodation can depend on the type of hardship.[184]

178. *See* King v. Allied Vision, Ltd., 807 F. Supp. 300, 304 (S.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom.* King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992).

179. *See supra* notes 175–78 and accompanying text.

180. "[P]ublicity that unreasonably places [another] in a false light before the public" is considered an actionable invasion of privacy. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652E (West 1977); *see, e.g.*, Krajewski v. Gusoff, 53 A.3d 793, 805–09 (Pa. Super. Ct. 2012). Parade organizers are not required to include everyone because "participation would likely be perceived as having resulted from the . . . customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 575 (1995). The Lanham Act prevents one from passing off a product as originating from someone else (15 U.S.C. § 1125(a)(1)) and addresses the risk that an inferior product may be attributed to the one falsely credited. Richard Feiner & Co. v. Passport Int'l Prods., Inc., No. 97 Civ. 9144(RO), 1998 WL 437157, at *1 (S.D.N.Y. July 31, 1998). Falsely making a document purporting to be the act of another is prosecuted as forgery. *See* ARK. CODE ANN. § 5-37-201(a)(1) (West 2019); *see* DEL. CODE ANN. tit. 11, § 861(a)(2) (West 2019); *see* IOWA CODE ANN. § 715A.2(1)(b) (West 2019); *see* MISS. CODE ANN. § 97-21-35 (West 2019); *see* TENN. CODE ANN. § 39-14-114(b)(1)(A)(i) (West 2019).

181. *See* Flake, *supra* note 1, at 701–02.

182. *See id.* at 717.

183. "A worker's discrimination suit will almost certainly fail if it is shown that he refused to cooperate with his employer in its efforts to find a suitable accommodation of his religious beliefs and practices." RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE: THE LEGAL RIGHTS AND RESPONSIBILITIES OF WORKERS AND EMPLOYERS 204 (2011).

184. *See infra* Sections V.A–D.

A. Accommodating when Customers Are Alienated

Customer response is supposedly factored into the reasonableness equation.[185] Of course, concern about negative customer reaction to the religion of an employee is a forbidden consideration under Title VII,[186] but it is permissible to take customer response into account in assessing the reasonableness of an accommodation of religious practices or expression.[187] That said, employers are entitled to more consistency than the courts have provided on accommodating for religious symbols and expression.[188]

Religious exceptions to dress codes, for example, have been required in some cases and not others.[189] Courts recognize that businesses use dress codes and uniforms to impress customers.[190] The Supreme Court, in *EEOC v. Abercrombie & Fitch Stores, Inc.*,[191] however, held that a dress code with a no headwear policy had to

185. Professor Flake argues for more deference to employers in proving image-based hardships. *See* Flake, *supra* note 1, at 751–52.

> Absent a customer complaint about an employee's religious expression, it is almost impossible for an employer to prove an accommodation damaged its image. Unlike other types of hardship, damage to image is almost always intangible and, consequently, very difficult to measure. It is easy to calculate the impact of paying overtime wages to an employee who works in place of a coworker observing the Sabbath. But proving the adverse consequences of an employee saying "God bless you" to customers is far more difficult. Unless an offended customer actually complains, there is no clear way to measure how an employee's religious expression affects customers' buying intentions, commitment, loyalty, or overall perception of the business. The effect such expression has on how other stakeholders view an organization may be even more difficult to detect, although certainly no less significant.

Id.

186. *See* Mayale-Eke v. Merrill Lynch, 754 F. Supp. 2d 372, 381 (D.R.I. 2010); *cf.* King v. Kirkland's Stores Inc., No. 2:04-cv-1055-MEF, 2006 WL 2239203, at *1, *4 (M.D. Ala. Aug. 4, 2006) (assuming, *sub silentio*, that firing on the basis of race because a customer complained that too many African-Americans were working at a store would violate Title VII).

187. *See* Flake, *supra* note 1, at 751–52.

188. "When courts well-versed in the nuances of Title VII reach conflicting decisions in factually similar cases, it is unrealistic to expect employers to fare any better." *Id.* at 745.

189. *See infra* notes 190–97 and accompanying text.

190. Camara v. Epps Air Serv., Inc., 292 F. Supp. 3d 1314, 1318 (N.D. Ga. 2017).

191. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).

give way for a Muslim applicant's need to wear a headscarf.[192] Yet, in a subsequent case, a federal district court sided with an employer who accommodated employees with religious headwear by finding them positions that did not require uniforms.[193] In the Wal-Mart case with the employee who came to work wearing a combination of religious symbols that offended customers, the store manager attempted an accommodation.[194] The employee was permitted to wear a Muslim headdress alone, but he continued to wear the entire ensemble and, after several disciplinary actions and meetings, the employee was fired.[195] The court found that in order to accommodate the employee, Walmart would have had to create an entirely new position for him away from both customers and coworkers.[196] This was too much hardship.[197]

The precedent on religious greetings could confound an employer trying to comply with Title VII.[198] On the one hand, an accommodation for an office coordinator whose religion compelled her sporadic use of the phrase "Have a Blessed Day" was sufficient when the company only prevented her use of the phrase with customers.[199] On the other hand, greeting food service customers with "God bless you" and "Praise the Lord" was entitled to accommodation as not unduly burdensome to another employer.[200] In a third case, any accommodation for an employee whose religion compelled her to "preface nearly every sentence she spoke with the phrase 'In the name of Jesus Christ of Nazareth'" was held to be too burdensome.[201]

B. Accommodating a Distracting Practice

Title VII does not require an employer to allow a religious employee to distract coworkers by playing liturgical music at an

192. *Id.* at 2034.
193. *Camara*, 292 F. Supp. 3d at 1328.
194. Lorenz v. Wal-Mart Stores, Inc., No. SA-05-CA-0319 OG (NN), 2006 WL 1562235, at *9 (W.D. Tex. May 24, 2006), *aff'd*, 225 F. App'x 302 (5th Cir. 2007).
195. *Id.* at *3.
196. *Id.* at *10.
197. *Id.*
198. *See infra* notes 199–201 and accompanying text.
199. Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 474, 477 (7th Cir. 2001).
200. Banks v. Serv. Am. Corp., 952 F. Supp. 703, 707, 710 (D. Kan. 1996) (reasoning that no money would be lost because there was only a small number of customer complaints).
201. Johnson v. Halls Merch., Inc., No. 87-1042-CV-W-9, 1989 WL 23201, at *2 (W.D. Mo. Jan. 17, 1989).

earsplitting volume.[202] An employer is entitled to insist on an atmosphere of productivity and should be able to impose reasonable time, place, and manner restrictions to prevent coworker distraction, even if they interfere with religious practices.[203] The employer is, however, required to explore possible accommodations that would not impede the work.[204] Would the employee's religious needs be satisfied if the music was confined to headphones?[205] What if the employee offered to pay to soundproof a private office?[206] Could the music playing be limited to certain times of day when other employees were not present?[207] Could the music be played at a lower volume?[208] Could the employee take breaks and listen to the music at full volume in the car?[209] If the employee refuses every attempt at accommodation and insists on a religious practice that decreases productivity, the courts should not find a Title VII violation.[210]

On the other hand, what if a hypersensitive atheistic employee is distracted by any religious expression no matter how unobtrusive?[211] Reasonableness is the rule.[212] Fellow employees are not given unbridled power to stifle the religious expression of their coworkers.[213] "An employer . . . has no legal obligation to suppress any and all religious expression merely because it annoys a single employee."[214] Employers do not have to stop employees from

202. *See infra* notes 203–10 and accompanying text.
203. *See* Allen v. City of Pocahontas, 340 F.3d. 551, 557 (8th Cir. 2003); *see also* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246 (10th Cir. 1999); *see also* Jenkins v. Orkin Exterminating Co., 646 F. Supp. 1274, 1278 (E.D. Tex. 1986).
204. *Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/religion.cfm [https://perma.cc/9NKX-QPAA] (last visited Dec. 18, 2019).
205. *See* Gunning v. Runyon, 3 F. Supp. 2d 1423, 1430 (S.D. Fla. 1998).
206. Determining whether a particular accommodation would cause an undue burden to an employer is a factual analysis and specific to the particular circumstances of the case. *See Questions and Answers: Religious Discrimination in the Workplace*, *supra* note 81 (listing factors which are considered when determining whether an accommodation would pose an undue hardship).
207. *See id.*
208. *See id.*
209. *See id.*
210. *See* EEOC v. Firestone Fibers & Textile Co., 515 F.3d 307, 312–13 (4th Cir. 2008).
211. *See* Powell v. Yellow Book USA, Inc., 445 F.3d 1074, 1078 (8th Cir. 2006).
212. *See id.*; *see also Religious Discrimination*, *supra* note 204.
213. *See* Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) ("[U]ndue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief.").
214. *Powell*, 445 F.3d at 1078.

posting religious messages in their own cubicles, even if a coworker complains that the messages are "inappropriate and distracting."[215]

C. Accommodating a Harassing Practice

What can employers do when an employee harasses fellow employees with religion?[216] Initially, it is important for employers not to assume that an employee's religious expression annoys coworkers.[217] Although employers may view religious expression in the workplace as a potential liability, it is becoming increasingly common.[218] On the theory that it is safer to avoid the whole topic, some employers have tried prohibiting all religious expression, but Title VII does not allow this.[219] Singling out religious speech as taboo while allowing other types of speech is discrimination.[220]

Sometimes courts say religious speech is protected even if it is irritating and unwelcome, as long as it is not demeaning or degrading.[221] Given the protected nature of speech and the required accommodation of religious practices under the law, "the presumption should favor the worker's religious expression *unless* it demeans or devalues another worker's" religion.[222]

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215. *Id.*

216. *See infra* notes 217–43 and accompanying text.

217. *See* EEOC COMPLIANCE MANUAL, *supra* note 75, at 24.

218. *See* Flake, *supra* note 1, at 705–06. Courts sometimes assume otherwise, but commentators recognize that religious conversation with coworkers is not necessarily unwelcome. *See* Debbie N. Kaminer, *Religious Accomodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 143–44 (2015) [hereinafter *Religious Accomodation in the Workplace*]; *see* Ruan, *supra* note 149, at 23–25. Likewise, coworkers may approach religious displays with friendly interest and curiosity. Flake, *supra* note 1, at 706.

219. "Title VII violations may result if an employer tries to avoid potential co-worker objections to employee religious expression by preemptively banning all religious communications in the workplace, since Title VII requires that employees' sincerely held religious practices and beliefs be accommodated as long as no undue hardship is posed." *See* EEOC COMPLIANCE MANUAL, *supra* note 75, at 24.

220. *See* Ruan, *supra* note 149, at 22.

221. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607–08 (9th Cir. 2004).

> A good portion of disturbing or "offensive" religious speech is simply the discussion of religious ideas, the advancing of some ideas, and the criticism of others. Such forms of religious speech, however provocative, differ from racist and sexist speech, which typically involve an attack on the personal characteristics or status of an individual. To attack someone's ideas can madden and disturb that person, but it remains distinct from attacking the person himself.

Berg, *supra* note 96, at 965.

222. Ruan, *supra* note 149, at 32.

In fact, expression about religion is entitled to more protection in the workplace than expression about other subjects.[223] The First Amendment does not protect employees in a private workplace from employer restrictions, but Title VII steps in to protect their religious speech.[224]

> Religious expression warrants protection higher even than other kinds of protected expression. The power of religion derives, in large part, from a sense in the believer that a higher power *requires* certain conduct. Further, there is an eternal consequence attendant to the believer's obedience or disobedience. Praying or proselytizing may not be matters of discretion. Thus, the price of silencing religion seems to be far greater than the price of silencing other kinds of expression. Souls suffer no eternal harm (indeed, they may benefit) where non-religious expression is limited. Other concerns counsel against general censorship, but religion is something different. "I'll pray for you" is qualitatively different from "I don't have time for you—unless you tell me what you're wearing." While it would be perfectly reasonable for employers to foster something close to a zero-tolerance policy regarding sexual expression, it is highly objectionable—both to many employees and to our tradition of religious liberty—to do so with respect to religious expression.[225]

Hostile environment harassment cases are, after all, discrimination cases, and "it cannot be religious discrimination for an employee simply to express her own faith affirmatively."[226] Following "[t]his rule would protect almost all displays of religious clothing, jewelry, and art, as well as probably the largest share of religious statements. It simply is not harassment of others to say something positive about one's own faith."[227] In short, a request to display religious posters,

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223. Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After Ellerth and Faragher*, 42 HOW. L.J. 327, 344 (1999).
224. *See id.* at 328–29.
225. *Id.* at 344.
226. Berg, *supra* note 96, at 989.
227. *Id.* "[A]ffirmative expressions of one's own faith or lack of faith, not targeted at an objecting individual, cannot be harassment. . . . Bible verses on . . . paychecks just cannot be harassment. . . . There is a difference between affirmatively pursuing one's

symbols, or statues should be accommodated, unless they contain something directly negative about others.[228] When "an employee contends that she has a religious need to impose personally and directly on fellow employees," this cannot be accommodated.[229]

When one employee's religious expression protected under Title VII conflicts with another's Title VII right to be free of harassment, which employee wins?[230] "Each of these countervailing rights is a form of religious liberty; each of these countervailing rights is part of the right not to be discriminated against in employment on the basis of religion."[231] The easy answer is the harassed employee wins.[232] The obligation to accommodate religious expression ends where unlawful harassment (or any other violation of law) begins.[233]

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own faith and attacking, denigrating, or interfering with someone else's faith." Symposium, *supra* note 61, at 128 (statement of Professor Douglas Laycock).

228. "Is there any functional difference between posters that denigrate others' religious beliefs and words actually spoken to an individual that do the same thing?" Gilmer & Anderson, *supra* note 223, at 341–42; *see* Fleming, *supra* note 133, at 11.

229. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996).

230. *See* Ruan, *supra* note 149, at 21.

> In accommodating religion in the workplace, courts necessarily face a balancing act. Courts must balance the right of employees to be free to express their religious identities with other employees' right not to work in a hostile environment and employers' interest in maintaining a respectful atmosphere conducive to productivity. When faced with having to balance competing rights and interests, judges are in the inevitable position of line drawing. So how can courts draw lines that foster workplace norms that include tolerating differing forms of religious expression?

Id.

231. *The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 39 (1994) (statement of Professor Douglas Laycock).

232. *See* Kaminer, *supra* note 1, at 86; *See Religious Accomodation in the Workplace*, *supra* note 218, at 143.

233. Kaminer, *supra* note 1, at 97.

> Relying on *Hardison*, lower courts have unanimously agreed that employers are not required to violate valid statutes in accommodating a religious employee since requiring such a violation would constitute more than a *de minimis* cost.
>
> Since Title VII prohibits hostile work environment harassment, section 701(j) does not require an employer to accommodate a religious employee if such an accommodation would result in a hostile work environment. Therefore, Title VII's prohibition of hostile work environment harassment trumps the statute's requirement of accommodation of religious employees, and . . . courts are more concerned with prohibiting

> [A]n employer never has to accommodate expression of a religious belief in the workplace where such an accommodation could potentially constitute harassment of co-workers, because that would pose an undue hardship for the employer. Therefore, while Title VII requires employers to accommodate an employee's sincerely held religious belief in engaging in religious expression (*e.g.*, proselytizing) in the workplace, an employer does not have to allow such expression if it imposes an undue hardship on the operation of the business. For example, it would be an undue hardship for an employer to accommodate proselytizing by an employee if it constituted potentially unlawful religious harassment of a co-worker who found it unwelcome, or if it otherwise interfered with the operation of the business.[234]

Proselytizing to other employees has been met with inconsistent treatment.[235] In one case, the Seventh Circuit held that a company was "not required to accommodate [the employee's] religion by permitting her to distribute pamphlets offensive to other employees."[236] In contrast, the EEOC instructs employers to:

> [T]rain managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (*e.g.*, designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).[237]

> hostile work environment harassment than with accommodating religious employees.

Id.

234. EEOC COMPLIANCE MANUAL, *supra* note 75, at 43–44.

235. *See infra* notes 236–37 and accompanying text.

236. Ervington v. LTD Commodities, L.L.C., 555 F. App'x 615, 618 (7th Cir. 2014).

237. EEOC COMPLIANCE MANUAL, *supra* note 75, at 47.

> According to the EEOC an employer should not try to suppress all religious expression in the workplace. . . . The EEOC cautions employers not to speculate on possible disruptions but to train managers to gauge the actual disruption posed by religious expression in the workplace. . . . Employers should consider incorporating into anti-harassment training for managers and

When religious expression causes hardship, reflexive censorship is not the answer.[238] Courts favor alternative solutions less restrictive of religious speech.[239] The reasonable accommodation requirement calls for the employer to try to find a compromise that allows expression without undue hardship.[240] Accommodations are not considered reasonable unless they resolve the conflict between the employee's religion and the employer's requirements.[241] This is a fact-based inquiry.[242] The employee in *Wilson* whose religion compelled her to wear a large button with a photograph of an aborted fetus was held reasonably accommodated when her employer allowed her to wear the button around the office if it was covered.[243]

D. Accommodating a Display Likely to Be Misattributed

No one should be required to appear, falsely, to support the religious views of an employee or coworker.[244] Therefore, when the worry is misattribution, the compromise must foreclose such confusion.[245]

For employers, placement of the religious message is an important factor.[246] There is no danger of misattribution when employees place personal religious articles in their own offices or cubicles.[247] The EEOC Guidelines provide an example of two employees hanging the same "Jesus Saves" poster: an employer would be required to allow an employee with a private office and little public contact to hang the

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> employees a discussion of religious expression and the need for all employees to be sensitive to the beliefs or nonbeliefs of others.

Accommodating Religion, Belief and Spirituality in the Workplace, SOC'Y HUM. RES. MGMT. 7 (Sept. 10, 2015), https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/accommodating-religion,-belief-and-spirituality-in-the-workplace.aspx [https://perma.cc/9RL5-TSCN].

238. *See* Tucker v. State of Cal. Dep't of Educ., 97 F.3d 1204, 1215 (9th Cir. 1996) (holding that state agency's complete ban on display of religious materials in the office was not reasonable).
239. *See id.* at 1216.
240. *See* 29 C.F.R. § 1605.1(b) (1968).
241. Wilson v. U.S. W. Commc'ns Inc., 860 F. Supp. 665, 672 (D. Neb. 1994) (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986)).
242. *Id.* (quoting Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978)).
243. *Id.* at 675.
244. *See* Warnock v. Archer, 380 F.3d 1076, 1082 (8th Cir. 2004).
245. *See id.* at 1081.
246. *See id.* at 1082.
247. *Id.* (citing Brown v. Polk County, 61 F.3d 650, 658 (8th Cir. 1995)). Nor is misattribution likely when an employee places "unobtrusive displays of religious adherence," such as a cross pendant on his own body. Draper v. Logan Cty. Pub. Library, 403 F. Supp. 2d 608, 621 (W.D. Ky. 2005).

poster; however, an employer would not be forced to allow a security guard to hang the same poster at the front desk because that would pose an undue hardship.[248]

At one end of the scale, then, is the private office or cubicle of the employee, where the most religious expression should be permitted since misattribution is least likely; at the other end of the scale is the front entrance, where requiring accommodation for religious articles is most likely to lead to misattribution.[249] What about all of the geographical territory in between?[250] The test is reasonableness: an employer is permitted "restrictions on speech that an observer could reasonably attribute" to the business.[251] In common areas, such as hallways and lunchrooms, "[r]easonable persons are not likely to consider all of the information posted on bulletin boards or walls . . . to be [employer]-sponsored or endorsed."[252]

Even public employers cannot prohibit religious displays altogether;[253] the public employer must walk the fine line between First Amendment free exercise[254] and Title VII accommodation on the one hand[255] and First Amendment establishment on the other.[256] Government employers cannot single out religious content for prohibition on the ground that it might be misattributed.[257] The

248. EEOC COMPLIANCE MANUAL, *supra* note 75, at 40–41.

249. *See* Tucker v. State of Cal. Dep't of Educ., 97 F.3d 1204, 1216 (9th Cir. 1996).

250. *See id.*

251. *See* B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 308 (3d Cir. 2013); *see also* Morse v. Frederick, 551 U.S. 393, 405 (2007) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

252. *See Tucker*, 97 F.3d at 1215.

253. "The defendants would have us hold that their 'interest' in avoiding a claim against them that they have violated the establishment clause allows them to prohibit religious expression altogether in their workplace[]. Such a position is too extravagant to maintain . . . ." Brown v. Polk County, 61 F.3d 650, 659 (8th Cir. 1995); *see* Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383, 1394 (11th Cir. 1993).

254. *See Brown*, 61 F.3d at 653.

255. *See id.*

256. *See id.* at 659.

257. *See Tucker*, 97 F.3d at 1215.

> [I]t is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials. The challenged ban not only prevents employees from posting non-controversial information that might interest some or all employees—such as bulletins announcing the time and location of church services, invitations to children of employees to join a church youth group, and newspaper clippings praising Billy Graham, Mother Theresa or Cardinal Bernardin—it would also ban religious messages on

question must be: would a reasonable observer perceive the display as the government endorsing religion?[258]

How does an employer accommodate the need for religious expression without imposing the possibility of misattribution on a coworker?[259] Again, placement should dictate the result.[260] "Often courts' decisions hinge on whether the employee expressed his religious beliefs within his own private workspace or in a common area. Courts should be more willing to treat the former as protected speech . . . ."[261] If coworkers shared an office, a common wall in the office would be understood as common to both office occupants, but if each employee had a separate desk, a display on a desk would not be misattributed.[262] For coworkers who occupy the same desk at different times, the religious employee could be required to put the display out of sight when leaving; if a display is removed from view, no one has standing to claim an injury from it.[263]

Why not provide the religious employee with his or her own office?[264] There are numerous Americans with Disabilities Act (ADA) cases indicating that providing an employee with a single

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> controversial subjects such as abortion, abstinence of various types, family values, and the v-chip. Material that addresses controversial topics from a non-religious viewpoint would, however, be permissible, as would signs inviting employees to motorcycle rallies, swap meets, x-rated movies, beer busts, burlesque shows, massage parlors or meetings of the local militia. The prohibition is unreasonable not only because it bans a vast amount of material without legitimate justification but also because its sole target is religious speech.

Id.; *see also* Chandler v. Siegelman, 230 F.3d 1313, 1316 (11th Cir. 2000) ("The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all.").

258. Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 174 (3d Cir. 2002); *see also* Kiesinger v. Mex. Acad. & Cent. Sch., 427 F.Supp. 2d 182, 191 (N.D.N.Y. 2006).

259. *See infra* notes 260–67 and accompanying text.

260. *See* Laura M. Johnson, Note, *Whether to Accommodate Religious Expression that Conflicts with Employer Anti-Discrimination and Diversity Policies Designed to Safeguard Homosexual Rights: A Multi-Factor Approach for the Courts*, 38 CONN. L. REV. 295, 315 (2005).

261. *Id.*; *see* Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 51–52 (2001).

262. *See* Johnson, *supra* note 260, at 315–17.

263. Barber v. Bryant, 860 F.3d 345, 353–54 (5th Cir. 2017), *cert. denied*, 138 S.Ct. 652 (2018); Staley v. Harris County, 485 F.3d 305, 309 (5th Cir. 2007).

264. *See infra* notes 265–67 and accompanying text.

office can be a reasonable accommodation.[265] Title VII, however, expressly prohibits employers from "segregating" religious employees.[266] "Anti-discrimination laws are designed, in part, to increase the employment opportunities of groups that have been segregated in the workplace. The purposes of antidiscrimination laws would not be furthered by allowing continued segregation based on co-worker preference."[267]

VI. CONCLUSION

Title VII requires accommodation of religious practices when it will not cause undue hardship to the employer.[268] Religious expression, including religious display, is protected under Title VII.[269] Although employers are not required to bear more than *de minimis* expense to accommodate employee religious practices,[270] the types of hardship attached to religious expression are generally nonmonetary.[271]

At least four hardships can result from religious displays in the workplace.[272] First, customers may complain or take their business elsewhere.[273] Second, other employees may be distracted by religious expression and suffer a loss of productivity.[274] Third, the religious display of one worker can constitute harassment of a coworker.[275] And fourth, the display may be misattributed to the employer or a coworker.[276]

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265. *See* Grear v. Miller & Newberg, Inc., No. 15-7458-JAR, 2016 WL 4095429, at *9 (D. Kan. Aug. 2, 2016); *see* EEOC v. Newport News Shipbuilding & Drydock Co., 949 F. Supp. 403, 407–08 (E.D. Va. 1996); *see* Pamela S. Karlen & George Rutherglen, *Disabilities, Discrimination and Reasonable Accommodation*, 46 Duke L.J. 1, 36 (1996).
266. 42 U.S.C. § 2000e-2(a) (2012); Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE 103, 105 (2012).
267. Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 605 (1997).
268. Ghumman et al., *supra* note 1, at 444.
269. *See supra* notes 75–93 and accompanying text.
270. *See supra* notes 94–106 and accompanying text.
271. *See supra* Part IV.
272. *See supra* Part IV.
273. *See supra* Section IV.A.
274. *See supra* Section IV.B.
275. *See supra* Section IV.C.
276. *See supra* Section IV.D.

Ultimately, accommodation of religious expression requires compromise between the employer and employee.[277] Both are required to be reasonable.[278] Courts have applied inconsistent approaches to addressing the hardship of customer discomfort; some approve curbing religious expression toward customers, while others require employers to allow it.[279] In addressing the hardship of coworker distraction, employers have been permitted to insist on measures to reduce distracting or disturbing religious communications to coworkers.[280] And, while the Title VII right to engage in religious practices at work should never be construed to require another employee to endure religious harassment, unreasonably sensitive employees may not censor the religious speech of their coworkers.[281] Finally, as both employers and coworkers have a legitimate interest in not having religious displays falsely attributed to them, rules regarding size and placement of those displays should be permissible to accommodate an employee's religious expression, while preserving the legitimate business interests of the employer.[282]

277. *See supra* notes 181–84 and accompanying text.
278. *See supra* Part V.
279. *See supra* Section V.A.
280. *See supra* Section V.B.
281. *See supra* Section V.C.
282. *See supra* Section V.D.