NYSBA WINTER 2008 | VOL. 33 | NO. 2

L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

Message from the Chair

Alan M. Koral

The Section has had an eventful summer and fall. The fall meeting at the Otesaga in Cooperstown featured an excellent CLE program, a stirring address from Galen Kirkland, the new Commissioner of the Division of Human Rights for the State of New York, and a banquet at which Gene Orza, chief operating officer of the MLB Players Association, shared labor and baseball anecdotes that few have heard before. Our wonderful CLE co-chairs, Stephanie Roebuck and Ron Dunn, are planning a similarly excellent program in New York for the winter meeting in January.

Also in the works are a CLE Program on the Arbitration of Individual Employment Claims, co-sponsored by the State Bar and our ADR Committee (Jon Ben-Asher, Abigail Pessen and Jill Rosenberg), plans for the next fall meeting at the Sagamore, to which we have invited the new Dispute Resolution Section as co-participants, and an International series of presentations co-sponsored with the Cornell ILR School, planned by the indefatigable Janet McEneaney, the chief Editor of this *Newsletter*, as our representative.

The Section is busy with other projects, too. One, to increase our membership, is spearheaded by Ted Rogers, Chair of the Membership Committee, with major contributions by our amazing Chair-Elect, Don Sapir. Their efforts have already resulted in a membership well north of 2,400 attorneys. Another, spearheaded by one of the Section's delegates to the Bar Association's House of Delegates, Evan Spelfogel, with crucial support from our Section's Liaison to the NYSBA, John Gross, is to try to make our advanced L&E CLE programs available to and credit-worthy for newer attorneys. We are seeking support from other Sections for this initiative. Our Section delegates have also taken the lead in the analysis of Bar Association proposals involving mandatory free legal representation for certain people in civil cases.

My pleasure in serving as Section Chair derives in large part from getting to work with so many committed and talented lawyers from all over the state and of all shades of opinion. We have shown for years that attorneys of good will—whether from the management, union or plaintiff side or neutrals, whether on staff in government offices and corporations or in large or small private firms, whether ideologically left-leaning or right-leaning—can come together to think out issues and resolve problems with great benefit to the legal system, to our civil society, to the substantive law of the workplace and, above all, to the public whom we serve. Whether

Inside

NYSBA

it's commenting on new legislation—as our Individual Rights and Responsibilities Committee is doing in conjunction with the Commercial and Federal Litigation Section with respect to clarifying the state's new WARN Act—or exploring sites for future meetings, or looking at diversity strategies to enhance full participation in the Section and the profession, our attorneys work with one another in harmony and cooperation. The results are that Section participation increases the pleasure one takes in being an attorney at the same time it enhances professional skills and the practice of courtesy and civility.

At the winter meeting, for the first time, we are going to seek vendor sponsors for the program. We are hopeful that the sums raised will enable us to lower the cost of participation in future meetings, thereby attracting more public interest lawyers, recent graduates, smaller community attorneys and other Section members for whom the cost of our meetings can be challenging, and also allow us to have a meaningful scholarships program to encourage participation by the truly needy.

Your support of this initiative, which is being spearheaded by Chair-Elect Don Sapir, Secretary-Elect Sharon Stiller, and District Representatives Chair Pete Nelson, will be greatly appreciated. The Section is also considering expanding the sponsorship program to include law firm/lawyer sponsors.

That covers some of the things that have happened and that are in the works. I want to thank all the people I've mentioned, and many, many more, such as our fantastic support person at the NYSBA, Linda Castilla, for making my brief tenure as Chair so enjoyable. The Chair's position takes a very great amount of time, but not for one moment have I regretted the opportunity to work with the warm and wonderful family that is the L&E Section.

Sincerely,
Alan M. Koral

From the Editor

By the time this reaches you, we will have begun a new year and our Section's winter meeting will be just around the corner. I'm looking forward to seeing our members and friends there.

In this issue of the *Newsletter*, we have articles about just cause and "for cause" by Pearl Zuchlewski and Willis Goldsmith. Geoff Mort writes about the Department of Labor's FMLA changes from the employee's perspective. On the international front, Rob Lewis writes about the recent changes in Chinese and Japanese labor laws and Don Dowling contributes another fine column, this one a checklist for seconding expatriate employees. We have an update on PERB cases by Phil Maier and a guide to workplace investigations by Diane Pfadenhauer. Finally, we have a thoughtful article by Bilal Zaheer about the reasonable accommodation of Muslim religious practices in the workplace.

All in all, I believe there's something of interest for everyone in this issue.

Janet McEneaney

Defining "Just Cause" in the Employment Contract Context

By Pearl Zuchlewski

I. Defining Just Cause

A. New York Cases

The New York Court of Appeals "has yet to provide an authoritative definition of just cause."[1] In *Elsemore*, a breach of contract case, the principal issue was whether just cause existed for the termination of the plaintiff's employment. The court cited cases from Delaware and California, as well as the Montana Wrongful Discharge From Employment Act (WDEA), to tentatively define just cause as "looking to whether the employer's decision to terminate was objectively reasonable." It relied extensively on a Vermont case which explained:

> Just cause means some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for his dismissal. . . . The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. We hold that a discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.[2]

The *Elsemore* Court did not find it necessary to fine-tune the definition of just cause because the defendants failed to prove that the plaintiff was ineffective or incapable of performing his duties, displayed poor business judgment or otherwise failed in any way to fulfill his duties under the contract. Consequently, the Court found the defendants liable for breach of the employment contract.

In *Goldberg v. Thelen Reid Brown Raysman & Steiner LLP*, an action to confirm an arbitration award relating to a breach of an employment contract claim, the employer argued that the termination was for good cause, i.e., that Goldberg had not brought enough new business. Goldberg contended that he had no contractual obligation to bill a minimum number of hours.[3] The arbitrator found that Goldberg's contract gave the employer the right to terminate him for good cause, but good cause was not defined in the agreement. The parties did not offer guidance, or precedential interpretations, in support of their arguments, and the contract did not have any measurable performance requirements for generating new business. The arbitrator concluded, "Even though Respondent may have been genuinely and completely disappointed by Claimant's performance, the interpretation and application of the contract cannot be contingent on one party's subjective opinion." The Court confirmed the award.

In *Sudul v. Computer Outsourcing Services, Inc.*,[4] the plaintiff claimed that he was fired without just cause as required by his contract, which provided for "just cause (as determined by [the employer] in good faith)." The employer claimed that Sudul was fired for unsatisfactory performance of his duties. The court held that "it is not necessary to explore the outer reaches of the meaning of 'just cause' in the Agreement because the defendant did not make a good-faith determination that 'just cause' existed to discharge the plaintiff." Furthermore, "although unsatisfactory work performance may have been 'just cause' to discharge Sudul, this reason was clearly a pretext for the real reason Sudul was fired"—to save the company money. Because Sudul was fired in bad faith, the Court held that the firm did not have just cause as the contract required.

In *Soiza v. Unz & Co.*, the plaintiff's contract included a severance provision that would not apply if he resigned or his employment was terminated for cause.[5] There was no definition of cause in the contract. When Unz "characterize[d] its disappointment with de Soiza's 'performance' as 'cause' without some rational, articulated basis for doing so," the court found that this was "simply too shadowy and nebulous an assertion to be given weight."

In *Saperstone v. Airport Group International, Inc.*, the plaintiff sued to recover 12 months of severance pay owed under the terms of the contract after he allegedly was terminated without cause.[6] "Just cause" was not defined in the agreement. The plaintiff argued that just cause did not include unsatisfactory job performance, misconduct or a material failure to abide by personnel policies. The defendant argued that it did and moved for summary judgment. The Court concluded that genuine issues of material fact as to the meaning of termination for just cause precluded summary judgment.

B. Other Jurisdictions

Compare these New York cases with Texas, for instance, where "even an oral or written statement that an employee may be terminated for 'good reason' or 'good cause' without further definition of these terms will not alter the at-will employment relationship."[7] In *Schoch*

v. First Fidelity Bancorporation, the Court explained that, under Pennsylvania law, the term "just cause" is not a "talisman which magically converts the at-will employee into one who can never be discharged without objective cause."[8] When just cause is not defined, the term means that the employer, in its subjective judgment, decides what causes for discharge are just.[9]

"Just cause" has been defined as "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power."[10]In *Baldwin*, the employee manual defined "just cause" as "any gross violation of conduct. . . ."[11]

In Massachusetts, the standard of just cause requires a determination that there existed "(1) a reasonable basis for employer dissatisfaction with a new employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business."[12]

In *Dulude v. Fletcher Allen Health Care, Inc.*, the Vermont Supreme Court defined "just cause" for termination as a "substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for his dismissal."[13] Dulude was a nurse who was fired for allegedly diverting narcotics, falsifying her patient's medical records and failing to meet the standard of practice regarding the administration of medication. She did not have a contract, but claimed that her employer's handbook implied a contract that provided for her discharge only for cause. She did not claim that the employer's reasons for the termination were not its true motivation, but simply that her narcotic administration practices were more appropriate and that, therefore, her employer did not have just cause to dismiss her.

Using "an objective good faith standard," the Court dismissed Dulude's claim. It held that "[t]he ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct."[14] To be upheld, "discharge for just cause must meet two criteria of reasonableness: one, that it is reasonable to discharge the employee because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge."[15]

C. Statutory Definitions

Montana adopted the WDEA in 1987, becoming the first state to pass a statute mandating good cause for employment terminations. Under the WDEA, after any probationary period, an employer may not discharge an employee without good cause.[16] Good cause is defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[17]

A South Dakota statute provides these reasons for employee termination: "habitual neglect of duty, continued incapacity to perform, or any willful breach of duty by the employee in the course of employment."[18]

D. The Model Employment Termination Act

The Model Employment Termination Act (META) prohibits the discharge of covered employees except for "good cause." The drafters of META used "good cause" instead of "just cause," which is commonly found in collective bargaining agreements, to emphasize the discretion allowed management in economic decisions.[19]

META defines "good cause" as:

> (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.[20]

Thus, under META, good cause for termination can be either the employee's improper or inadequate performance (an objective standard), or the changing economic or institutional goals of the employer if the decision is made in good faith (a subjective standard).[21]

Examples of good cause for termination listed in the commentary on META include theft, assault, destruction of property, drug or alcohol use on the job, insubordination, excessive absenteeism and inadequate performance. Off-duty conduct may be grounds for termination if it affects the employee's job performance or the employer's reputation. But a sham layoff, for example, may not be used as a device to dismiss an employee when there is no good cause for a termination.[22]

II. Standard: Who Decides?

An issue when considering just cause is what standard to apply in reviewing whether just cause for termination existed. There are three standards in general use

by state courts.[23] These standards are: (1) the "De Novo" standard, an objective standard, which is most favorable to the employee; (2) the "Good Faith" standard, a subjective standard, which is most favorable to the employer; and (3) a middle ground, combining elements of the first two.[24]

A. The De Novo Standard

Under this standard, the employer is required to prove that the conditions necessitating termination actually existed.[25] The leading case establishing this rule is *Toussaint v. Blue Cross & Blue Shield of Michigan*.[26] The *Toussaint* Court reasoned that a jury must decide whether an employee was discharged for unsatisfactory work because "[a] promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge. There must be some review of the employer's decision if the cause contract is to be distinguished from the satisfaction contract."[27]

Vermont courts have followed *Toussaint* in allowing the jury to decide whether the reason given by the employer was the true reason for discharging the employee.[28] In *Ainsworth,* the plaintiff's contract included a clause providing for termination without cause upon 30 days' written notice. It also provided that "the Employer may terminate his Employment at any time by providing written notice of the reasons therefor to the Employee. In such an event the Employee shall not be entitled to receive the severance allowance referred to in [the termination-without-cause clause]."[29] Ainsworth was fired, allegedly for cause, but he claimed that no cause existed and the employer's reasons were promulgated in order to deprive him of his vested severance allowance.[30]

The Nebraska Supreme Court has held that the issue is for a jury to decide but that "the ultimate burden of proving wrongful termination remains with the employee."[31]

B. The Good Faith Standard

Under this deferential standard, the employer is the sole judge of its own reasonableness. The leading case for this position, *Simpson v. Western Graphics Corp.*,[32] affirmed the lower court's holding that, to constitute just cause, the employer "must make a good faith determination of a sufficient cause for discharge based on facts reasonably believed to be true and not for any arbitrary, capricious, or illegal reason."[33] It is not necessary that the alleged reason for discharge (in this case, threats against a fellow employee) has occurred, "but only that the evidence of threats existed which the employer reasonably believed in good faith after an investigation."[34] As stated by the Simpson Court, "In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter, we shall not infer it."[35]

Simpson also has been followed by courts in Maryland and Utah. In *Towson University v. Conte* the Court held: "We agree with the Oregon Supreme Court that absent some express indication otherwise, an employer does not contract away his core function as ultimate fact-finder with regard to an employer's workplace performance"[36] and in *Uintah Basin*: "[The employer] need only show that [it] acted in good faith by adequately considering the facts it reasonably believed to be true at the time it made the decision."[37]

C. The Middle Ground

Other states have tried to strike a balance between the employer's interest in making employment decisions and the employee's interest in continued employment. Those cases hold that the proper question is—"Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?"[38]

The leading case for the middle ground standard is *Baldwin v. Sisters of Providence in Washington, Inc.*[39] The Court described this standard as balancing "the subjective good faith of the employer with an objective reasonable belief standard."[40] In *Baldwin*, the employer had fired an employee based on allegations of sexual assault. The trial court instructed the jury that "'just cause' means that under the facts and circumstances existing at the time the decision is made, an employer had a good, substantial and legitimate business reason for terminating the employment of a particular employee."[41] The court reversed, holding that "a discharge for 'just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true."[42]

Thus, *Baldwin* obligates employers to act both in subjective good faith and with an objective reasonable belief that good cause for termination existed. *Baldwin* merges the *Simpson* subjective standard of good faith with the objective fact-finder's determination of *Toussaint*.[43]

Although *Baldwin* is more restrictive to the employer than the subjective test of *Simpson,* it still cedes discretion to the employer. The Nevada Court felt that allowing a jury to trump the factual findings of an employer that an employee has engaged in misconduct would be "highly undesirable" because juries are "unattuned to the practical aspects of employee suitability" and "unexposed to the entrepreneurial risks that form a significant basis of every state's economy."[44]

Enough courts have followed *Baldwin* that it may be considered the majority view.[45] The *Baldwin* standard is comparable to the test employed in an influential labor arbitration decision to assess the reasonableness of a just cause termination. In *Enterprise Wire Co.*, the arbitrator

asked seven questions; a "no" answer to any one of the questions would normally mean that just cause did not exist.[46] The seven questions are:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

This test is frequently cited in cases in which the employee's conduct is in dispute.[47]

III. Resignation for Good Reason

At times, employment contracts contain provisions permitting the employees to resign with "good reason" and to obtain any benefits they would have received if they were terminated without cause. The following definition of "Resignation for Good Reason" previously appeared in "Selected Issues in the Negotiation and Drafting of Executive Employment Agreements" presented by Amelia M. Klein and Dennis A. Lalli at the Section's Annual Meeting, February 1, 2008:

> "Good Reason" shall mean termination by the Executive of his employment after written notice to the Company following the occurrence of any of the following events without his written consent:
>
> (i) a reduction in the Executive's then current Base Salary, Target Bonus or his long-term (including equity) opportunities at the Company or a material reduction in welfare benefits and perquisites;
>
> (ii) a material diminution in the Executive's positions, duties or authorities, or interference with Executive's carrying out his duties so that, in the reasonable exercise of the Executive's discretion, he is unable to carry out his duties hereunder as contemplated at the time his employment agreement was entered into;
>
> (iii) the assignment to the Executive of duties which are materially inconsistent with his duties or which materially impair the Executive's ability to function as President and CEO of the Company;
>
> (iv) the failure of the Company to elect or re-elect the Executive to the positions of President and CEO, the removal of the Executive from any such positions, or the failure of the Executive to be elected or re-elected to the Board;
>
> (v) a change in the reporting structure so that the Executive reports to someone other than the Board;
>
> (vi) requiring the Executive to relocate more than 25 miles from New York City;
>
> (vii) a breach by the Company of any material provision of the employment agreement; the failure of the Company to obtain the assumption in writing of its obligation to perform this agreement by any successor to all or substantially all of the assets of the Company within 15 days after a merger, consolidation, sale or similar transaction.

Endnotes

1. *Elsemore v. Lake Placid Group*, LLC, 2007 WL 4324254 at *7 (N.D.N.Y. Dec. 7, 2007).
2. *In re Brook*s, 382 A.2d 204, 207–08 (1977).
3. No. 650164/07, 2007 N.Y. Misc. LEXIS 7358 (Sup. Ct., N.Y. Co., Oct. 10, 2007).
4. 917 F. Supp. 1033 (S.D.N.Y. 1996).
5. No. 107003/98, 1999 WL 688119 (Sup. Ct., N.Y. Co., July 28, 1999).
6. No. 02-CV-6354, 2003 WL 21730710 (W.D.N.Y. June 6, 2003).
7. *Rodriguez v. Escalon*, 90 Fed. Appx. 776, 779 (5th Cir. 2004).
8. 912 F.2d 654 (3d Cir. 1990), at 660 (quoting *Martin v. Capital Cities Media, Inc*., 511 A.2d 830 (Pa. Super. Ct. 1986)).
9. *Schoch*, 912 F.2d at 661.
10. *Baldwin v. Sisters of Providence in Washington, Inc*., 769 P.2d 298, 304 (Wash. 1989); *Pugh v. See's Candies, Inc*., 116 Cal.App.3d 311 (Cal. Ct. App. 1981)

11. *Baldwin*, 769 P.2d at 299.
12. *Joyal v. Hasbro, Inc.*, 380 F.3d 14, 21 (1st Cir. 2004).
13. 807 A.2d 390, 396 (Vt. 2002) (quoting *Brooks*, 382 A.2d at 207).
14. *Id.* (citing *Brooks*).
15. *Id.*
16. Montana Code Ann. § 39-2-904(1)(b).
17. Montana Code Ann. § 39-2-903(5).
18. S.D. Codified Laws Ann. § 60-4-5.
19. Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 Wash. L. Rev. 361, 371, April 1994.
20. META § 1(4).
21. Uniform Law Commissioners, Summary: Model Employment Termination Act, http://www.nccusl.org/nccusl/uniformact-summaries/uniformacts-s-meta.asp.
22. St. Antoine at 371.
23. *Uintah Basin Medical Center v. Hardy*, 110 P.3d 168, 175 (Utah Ct. App. 2005).
24. Delmendo, 66 Wash. L. Rev. at 834-37; *see also* Michael D. Fabiano, *Notes: The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, 44 Hastings L.J. 399, 404-16, January 1993; Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. Cin. L. Rev. 517, 530-36, Winter 2004.
25. *Uintah Basin*, 110 P.3d at 175.
26. 292 N.W.2d 880, 895 (Mich. 1980) ("where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work.").
27. *Id.*
28. *Ainsworth v. Franklin County Cheese Corp.*, 592 A.2d 871 (Vt. 1991); *Raymond v. International Business Machines Corp.*, 954 F.Supp. 744 (D. Vt. 1997); but see *Ross v. International Business Machines Corp.,* No. 2:04-CV-103, No. 2:04-CV-103 at *8 (D. Vt. Jan. 24, 2006) (questioning whether Vermont follows *Toussaint* in light of the "objective good faith" standard in *Dulude*).
29. *Ainsworth*, 592 A.2d at 872.
30. *Id.* at 873.
31. *Schuessler v. Benchmark Marketing and Consulting, Inc.*, 500 N.W.2d 529, 538 (Neb.1993).
32. 643 P.2d 1276 (Or. 1982).
33. *Id.* at 1278.
34. *Id.*
35. *Id.* at 1279.
36. 862 A.2d 941 (Md. 2004).
37. 110 P.3d at 175.
38. *Cotran v. Rollins Hudig Hall Intern., Inc.*, 948 P.2d 412, 422 (Cal.1998).
39. 769 P.2d 298 (Wash. 1989).
40. *Id.* at 304.
41. *Id.* at 300.
42. *Id.* at 304.
43. Bird, 73 U. Cin. L. Rev. at 536.
44. *Southwest Gas*, 901 P.2d at 699. *See also Chrvala v. Borden, Inc.*, 14 F.Supp.2d 1013, 1018 (S.D. Ohio 1998) ("Ohio law recognizes that the relevant inquiry in determining the propriety of a 'just cause' termination is whether the employer engaged in a good faith fact-finding investigation and whether the decision was founded upon substantial evidence.").
45. *Almada v. Allstate Ins. Co., Inc.*, 153 F.Supp.2d 1108, 1114 (D.Ariz. 2000); *Cotran v. Rollins Hudig Hall Intern., Inc.*, 948 P.2d 412, 422 (Cal.1998); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280 (N.M. 1988); *Braun v. Alaska Commercial Fishing and Agriculture Bank*, 816 P.2d 140 (Alaska 1991); *Southwest Gas Corp. v. Vargas*, 901 P.2d 693 (Nev. 1995); *Thompson v. Associated Potato Growers, Inc.*, 610 N.W.2d 53 (N.D. 2000); *Life Care Centers of America, Inc. v. Dexter,* 65 P.3d 385 (Wyo. 2003).
46. 46 Lab. Arb. Dec. (BNA) 359 (Daugherty, 1966).
47. *Fabiano*, 44 Hastings L.J. at 406.

Pearl Zuchlewski is a partner in Kraus & Zuchlewski LLP where she primarily represents individual employees. She is a member of the Executive Committee of the New York State Bar Association Labor and Employment Law Section, Co-Chair of the Section's International Employment Law Committee and former Chair of the Section. In addition, Ms. Zuchlewski is a member of the American Bar Association's Labor and Employment Law Section's Employee Rights and Responsibilities Committee, the National Employment Lawyers Association and the Association of the Bar in the City of New York. As a former member of the Association's Labor and Employment Law Committee, she was a member of the subcommittee which drafted the Model Rules for the Arbitration of Employment Disputes. Pearl thanks Jeremy Freedman for assistance with the preparation of this article. She can be reached at pz@kzlaw.net.

"For Cause" Termination Provisions

By Willis J. Goldsmith

General Considerations

The most significant consideration when drafting a "for-cause" termination provision in an employment agreement is clarity. Vague or ambiguous definitions of cause, or indeed no definition at all, can lead to disputes about whether an employer did in fact have the requisite cause for terminating the employment relationship. This search for clarity needs to be balanced, however, as an overly specific definition of cause could be construed to be so narrow as to exclude certain conduct. Moreover, aside from the more common bases for cause, such as failure to perform or fraud, employers should also account for any job or situation-specific circumstances that may give rise to a reasonable cause for termination, such as a failure to maintain proper licensing. Employers must also consider the consequences of any procedural steps required for a for-cause termination, such as a required notice, an opportunity to cure, or an entitlement to pay or other benefits; failure to comply with these procedures can have adverse consequences for the employer. Finally, employers that include a for-cause termination provision may also consider including a provisions for termination "without cause," limiting the amount of damages to which an employee is entitled by setting forth the pay and other benefits an employee will receive upon termination without cause.

What follows is a discussion of some of the more common elements of a for-cause termination provision, examples of judicial interpretation of such provisions, as well as a series of examples of for-cause provisions, and a brief discussion of without-cause termination provisions.

What Constitutes "Cause"

Cause is often defined in employment agreements to include some or all of the following acts by the employee:

- A failure to perform reasonably assigned duties;
- The commission of a fraud or theft;
- A conviction of a felony or crime involving moral turpitude;
- The disclosure of the Company's confidential information;
- The violation of a restrictive covenant;
- An act of dishonesty, breach of trust, or fiduciary duty actually resulting in, or intended to result in personal gain at the expense of the Company;
- Willful misconduct or gross negligence in the performance of assigned duties or obligations to the Company where such misconduct or negligence is of material and demonstrable injury to the Company;
- The violation of the Company code of conduct, employee rules, the Employee Handbook, Company policy, etc.;
- A material breach of the employment agreement;
- Failure to maintain the necessary license or permit or failure to comply with a law or regulation applicable to the specific business or employment; and/or
- Any other act, omission, or conduct that has or can reasonably be expected to have an adverse effect on the Company.

"Vague or ambiguous definitions of cause, or indeed no definition at all, can lead to disputes about whether an employer did in fact have the requisite cause for terminating the employment relationship."

Although employers may seek to cast a wide net when defining "cause" in a for-cause termination provision in an employment contract, they must take care to avoid defining cause so broadly that the term becomes ambiguous.[1] In *Boyle,* for example, the employment agreement at issue defined cause as "unethical behavior, theft, embezzlement or immoral behavior."[2] The court found the clause to be "somewhat ambiguous."[3] The court could not readily rely upon prior case law. The court explained that "[e]ach case stands on its own facts" because they often involve "different contractual language, different circumstances and different 'for cause' reasons."[4] Thus, the court developed its own view of what "unethical behavior" meant under the agreement, looking to secondary sources and prior case law (not necessarily interpreting employment agreements), and concluded that "unethical" referred to behavior not according to business or professional standards.[5] Though the court ultimately found that the behavior at issue was "unethical" under the agreement (specifically, the plaintiff's decision to embark on a project personally after the Board of Directors was less than enthusiastic about the idea and the plaintiff's unauthorized relocation and collection of relocation expenses), the court could have crafted a different interpretation of "unethical" that would exclude such behavior.[6] In *Coritsidis*, the em-

ployer terminated an employee pursuant to the for-cause provision found in the written employment agreement.[7] The employment agreement defined cause to include instances in which the employee has "acted in a manner contrary to the business practices" of the employer.[8] The court found this definition of cause to be ambiguous because it did "not specify the conduct encompassed by this language," creating an issue of fact, and therefore reversed the Appellate Division's grant of summary judgment in favor of the employee.[9]

Employers should also consider any circumstances specific to the employment that may give rise to a legitimate cause for termination.[10] For example, in *Henein v. Saudi Arabian Parsons Ltd.,* the plaintiff-employee was working in Saudi Arabia pursuant to an employment contract with the defendant-employer.[11] The employment agreement included a for-cause termination provision, and defined cause to include, among other bases, "failure to comply with the local customs or laws of Saudi Arabia. . . ."[12] While in Saudi Arabia, the plaintiff-employee was in an automobile accident and suffered major injuries.[13] During the investigation into the accident, the Saudi Arabian police discovered restricted drugs in the plaintiff-employee's briefcase in his automobile (which the plaintiff claimed to be prescription drugs for which he had a prescription).[14] As a result of this find, the "Saudi officials ordered that [he] be removed from Saudi Arabia, his employment be terminated, his passport turned over to Saudi authorities, and his name be placed on a list of those prohibited from entering Saudi Arabia."[15] The defendant-employer subsequently terminated the plaintiff-employee under the for-cause provision of the employment agreement.[16] The plaintiff-employee filed suit alleging, among other things, breach of contract, specifically the for-cause provision.[17] The court held that the defendant "presented uncontroverted evidence that [the plaintiff] had been banished for violation of the local laws and customs of Saudi Arabia and that he was discharged for this reason. The act of the Saudi government thus constitutes a proper reason for termination under the contract."[18]

Rights Pursuant to For-Cause Termination

Aside from defining "cause" in an employment contract, employers should also consider additional provisions regarding the employee's rights, if any, upon termination for cause, as well as the procedure for implementing a for-cause termination. For example, the employment contract may entitle the employee, upon termination for cause, only to pay and benefits required by law or to six months of base pay, but no bonus. The employment contract may further provide for a notice and cure period pursuant to which the employer must notify the employee x number of days in advance of actual termination, during which time the employee has an opportunity to rectify the situation that gave rise to the cause for termination. Employers should take heed, however, as they may be liable for failure to follow the specified termination procedures.[19]

Examples of For-Cause Provisions

Example 1

Employee Termination for Cause. At the election of the Company, it may immediately upon written notice by the Company to the Employee terminate the Employee for "cause." For the purposes of this paragraph, "cause" for termination shall be deemed to exist upon (i) a good faith finding by the Company of a willful failure or refusal of the Employee to perform assigned duties for the Company of which he has knowledge, or the commission of any other willful or grossly negligent action by Employee with the intent to injure the Company; (ii) any material breach of any material provision of this Agreement by the Employee if the Employee fails to correct such breach (or to take substantial steps to correct such breach) within ten (10) days after receiving written notice thereof; or (iii) the conviction of the Employee of or the entry of a plea of guilty or *nolo contendere* by the Employee to a crime involving an act of fraud or embezzlement against the Company.

Example 2

"Cause" shall mean, prior to any Termination:

(i) the willful and continued failure by the Employee to perform substantially the duties of the Employee's position;

(ii) the willful engaging by the Employee in conduct which is demonstrably injurious to the Company or an affiliate, monetarily or otherwise; or

(iii) conviction of a criminal violation involving fraud, embezzlement or theft in connection with Employee's duties or in the course of Employee's employment with the Company.

Example 3

Cause. Cause means a finding by two-thirds of the members of the Board of Directors then serving, after the Employee has been given the opportunity for a formal hearing, of (A) the Employee's theft or embezzlement, or attempted theft or embezzlement, of money or property of the Company or its Affiliates; the Employee's perpetration or attempted perpetration of fraud, or the Employee's participation in a fraud or attempted fraud, on the Company or an Affiliate, or the Employee's unauthorized appropriation of, or attempt to misappropriate, any tangible or intangible assets or property of the Company or its Affiliates, (B) any act or acts of disloyalty, misconduct

or moral turpitude by the Employee injurious to the interest, property, operations, business or reputation of the Company or its Affiliates or the Employee's conviction of a crime the commission of which results in injury to the Company or its Affiliates or (C) the Employee's repeated refusal or failure (other than by reason of disability) to carry out reasonable instructions by his superiors or the Board of Directors.

Example 4

"Cause" means:

(1) prior to a Change in Control, termination of the Employee's employment with the Company by the Board of Directors because of:

(A) the willful and continued failure by the Employee to perform substantially the duties of the Employee's position, or

(B) the willful engaging by the Employee in conduct which is demonstrably injurious to the Company, monetarily or otherwise;

(2) following a Change in Control, termination of the Employee's employment with the Company by the Board of Directors because of:

(A) any act or omission constituting a material breach by the Employee of any of his significant obligations or agreements under this Agreement or the continued failure or refusal of the Employee to adequately perform the duties reasonably required hereunder which is materially injurious to the financial condition or business reputation of, or is otherwise materially injurious to, the Company or any Affiliate thereof, after notification by the Board of Directors of such breach, failure or refusal and failure of the Employee to correct such breach, failure or refusal within thirty (30) days of such notification (other than by reason of the incapacity of the Employee due to physical or mental illness); or

(B) the commission by and conviction of the Employee of a felony, or the perpetration by and criminal conviction of or civil verdict finding the Employee committed a dishonest act or common law fraud against the Company or any Affiliate thereof (for the avoidance of doubt, conviction and civil verdict, in each case, shall mean when no further appeals may be taken by the Employee from such conviction or civil verdict and such conviction or civil verdict becomes final and binding upon the Employee with no further right of appeal); or

(C) any act or acts of disloyalty, misconduct or moral turpitude by the Employee injurious to the interest, property, operations, business or reputation of the Company or any affiliate thereof.

Example 5

"Cause" shall mean that, prior to any Termination, the Employee shall have committed:

(i) an intentional act of fraud, embezzlement or theft in connection with his duties or in the course of his employment with the Company or any Affiliated Company;

(ii) intentional wrongful damage to property of the Company or any Affiliated Company;

(iii) intentional wrongful disclosure of secret processes or confidential information of the Company or any Affiliated Company; or

(iv) intentional wrongful engagement in any Competitive Activity;

and any such act shall have been materially harmful to the Company. For purposes of this Agreement, no act, or failure to act, on the part of the Employee shall be deemed "intentional" if it was due primarily to an error in judgment or negligence, but shall be deemed "intentional" only if done, or omitted to be done, by the Employee not in good faith and without reasonable belief that his action or omission was in the best interest of the Company. Notwithstanding anything in this Agreement to the contrary, the Employee shall not be deemed to have been terminated for "Cause" hereunder unless and until there shall have been delivered to the Employee a copy of a resolution duly adopted by the affirmative unanimous vote of the Board of Directors of the Acquirer (the "Board") then in office at a meeting of the Board called and held for such purpose (after reasonable notice to the Employee and an opportunity for the Employee, together with his counsel, to be heard before the Board), finding that, in the good- faith opinion of the Board, the Employee had committed any act set forth in subsections (i) through (iv) above, and specifying the particulars thereof in detail. Nothing herein shall limit the right of the Employee or his beneficiaries to contest the validity or propriety of any such determination.

Example 6

"Cause" shall mean:

(i) any act or omission constituting a material and intentional breach by the Employee of any provisions of this Agreement after notice is delivered by the Company that identifies

the manner in which the breach occurred, if within 30 days of such notice, the Employee fails to cure any such failure capable of being cured;

(ii) the willful and continued failure by the Employee to substantially perform his duties hereunder (other than any such failure resulting from the Employee's Disability), after demand for performance is delivered by the Company that identifies the manner in which the Company believes the Employee has not performed his duties, if, within 30 days of such demand, the Employee fails to cure any such failure capable of being cured;

(iii) any intentional misconduct materially injurious to the Company or any Subsidiary, financial or otherwise, or including, but not limited to, misappropriation, fraud, including with respect to the Company's accounting and financial statements, embezzlement or conversion by the Employee of the Company's or any of its Subsidiary's property in connection with the Employee's duties or in the course of the Employee's employment with the Company;

(iv) the conviction (or plea of no contest) of the Employee for any felony or the indictment of any Employee for any felony including, but not limited to, any felony involving fraud, moral turpitude, embezzlement or theft in connection with the Employee's duties or in the course of the Employee's employment with the Company; provided, however, that if such indictment is resolved without resulting in a conviction, the Employee shall be entitled to the benefits under Section X of this Agreement;

(v) the commission of any intentional or knowing violation of any antifraud provision of the federal or state securities laws;

(vi) there is a final, non-appealable order in a proceeding before a court of competent jurisdiction or a final order in an administrative proceeding finding that the Employee committed any willful misconduct or criminal activity (excluding minor traffic violations or other minor offenses) which commission is materially inimical to the interests of the Company or any Subsidiary, whether for his personal benefit or in connection with his duties for the Company or any Subsidiary;

(vii) current alcohol or prescription drug abuse affecting work performance;

(viii) current illegal use of drugs; or

(ix) violation of the Company's Code of Conduct, with written notice of termination by the Company for Cause in each case provided under this Section.

For purposes of this Agreement, no act or failure to act on the part of the Employee shall be deemed "intentional" or "willful" if it was due primarily to an error in judgment or negligence, but shall be deemed "intentional" or "willful" only if done or omitted to be done by the Employee not in good faith and without reasonable belief that the Employee's action or omission was in the best interest of the Company. Failure to meet performance expectations, unless willful, continuing, and substantial, shall not be considered "Cause."

Example 7

Cause. Immediately upon written notice by the Company to the Employee of a termination for Cause. For purposes hereof, "Cause" shall mean:

(i) willful misconduct or gross negligence by the Employee (A) with regard to a material matter that is with regard to the Company or the Employee's duties or (B) that has or is likely to have a material negative impact on the Company, economically, reputationally or otherwise;

(ii) the Employee being convicted of, pleading guilty or *nolo contendere* to or being indicted for (A) any felony (other than a traffic violation) or (B) any crime involving fraud, embezzlement, moral turpitude or theft;

(iii) the Employee's continuing willful failure to attempt in good faith to perform his duties for the Company, as set forth herein, after his receipt of written notice of such failure specifying the details of the basis of the failure, if within 30 days of such demand, the Employee fails to cure any such failure;

(iv) the Employee's willful and intentional material violation of a material written policy of the Company that has or is likely to have a material negative impact on the Company, economically or reputationally;

(v) the Employee's abuse of alcohol or prescription drugs materially affecting work performance or illegal use of drugs; or

(vi) a material breach by the Employee of any material provision of the Agreement, which breach is not (if correctable) corrected by the Employee within thirty (30) days following his receipt of written notice thereof.

Example 8

Termination for Cause. The Company reserves the right to terminate this Employment Agreement at any time for "cause," as defined below, by presenting written charge(s) to the President of the Company, setting for the basis for the action. The Employee shall have the opportunity to respond to any such charges in writing. In that event, upon receipt of the response and upon request by the Employee, the President of the Company will review the response and with the consent of the Board of Directors shall carry out the termination according to the guidelines set forth in the By-Laws.

Cause. Cause is defined under this Agreement as incompetence, insubordination, material violation of the Personnel Policies (as set forth in the Employee Handbook), or for any substantial or material breach or neglect by the Employee of any duty under this Agreement. The results of the Employee's performance evaluations shall also be considered in deciding whether or not cause exists to terminate the employment relationship.[20]

Example 9

Cause is defined as an act of embezzlement, fraud, or dishonesty, or deliberate disregard for the polices or instructions of the Company, or if the Company determines that the Employee has made an unauthorized disclosure of any of the secrets or confidential information of the Company, or induced any customers of the Company to break any contracts with the Company. Cause shall also include the failure to be registered in a state where the Employee does business, failure to disclose any pending regulatory and/or legal problems, and lack of commission production.[21]

Provisions for Termination Without Cause

Employers may consider including a "without cause" termination provision in employment agreements as a complement to a for-cause termination provision. The most obvious benefit of including a without-cause termination provision is the employer's ability to terminate an employee when the definition of cause under the agreement has not been satisfied. If an employment agreement includes only a for-cause termination provision, courts may construe the employment agreement to allow only for-cause termination.[22]

Employers may also consider including as part of the terms of a without-cause termination provision the severance and benefits to which the employee would be entitled upon termination without cause. Such provision can limit the employee's ability to collect damages in the event the employee successfully challenges a for-cause termination.[23] A without-cause termination provision can include the following types of pay and benefits:

- Severance payments (either a lump-sum payment or salary continuation for a specified period);
- Bonus payments (full or partial, based on maximum potential bonus, amount paid in previous year, etc.);
- Continuation of medical benefits (e.g., reimbursement of COBRA premiums by the Employer);
- Job placement or retraining services;
- Relocation assistance;
- Continued perquisites (e.g., housing or car allowance, club memberships, etc.).

Employers who do include such pay and benefits to employees terminated without cause should consider conditioning the receipt of such pay and benefits on the execution of a release of claims in favor of the employer.

Example of a Without-Cause Provision

The Company may terminate the employment without Cause at any time, and for any reason or for no reason at all; provided, however, that the Company shall be obligated to pay the Employee pay and benefits as outlined below in subsections (i) and (ii) as severance, subject to the Employee's execution of a Separation Agreement and Release of all claims related to the Employee's employment or the termination thereof, other than any modifications which may be required to effectuate such release based upon any changes in law or Company practice.

(i) Upon termination without cause, the employee is entitled to receive from the Company severance payments shall be limited to . . .

(ii) Upon termination without cause, the employee is entitled to the following benefits from the Company . . .

Endnotes

1. *See, e.g., Boyle v Cybex Int'l, Inc.*, 942 F. Supp. 115 (E.D.N.Y. 1996); *Coritsidis v. Consumer Home Mortgage, Inc.*, 265 A.D.2d 512, 697 N.Y.S. 2d 126 (2d Dep't 1999).
2. 942 F. Supp. at 124.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 124–25.
7. 697 N.Y.S. 2d 126, 127.
8. *Id.*
9. *Id.*
10. *See, e.g., Prudential-Bach Securities Caporale,* 664 F. Supp. 72 (S.D.N.Y. 1987) (definition of cause in employment agreement

included a failure to be registered in the state in which the employee does business).

11. 818 F. 2d 1508 (9th Cir. 1987).
12. *Id.* at 1510.
13. *Id.*
14. *Id.*
15. *Id.* at 1510–11.
16. *Id.* at 1510.
17. *Id.*
18. *Id.* at 1513 (emphasis added).
19. *See, e.g., Scudder v. Jack Hall Plumbing & Heating, Inc.*, 302 A.D.2d 848, 851, 756 N.Y.S. 2d 330, 332 (3d Dep't 2003) ("Defendants demonstrated failure to follow the process outlined in paragraph nine of the employment contract [regarding termination for cause] not only lends significant credence to plaintiff's characterization of his termination as a fait accompli but, most importantly, renders plaintiff's discharge ineffective."); *see also, e.g., Hanson v. Capital Distr. Sports*, 218 A.D.2d. 909, 912, 630 N.Y.S. 2d 429, 431 (3d Dep't 1995) (where employer failed to comply with the seven-day notice requirement, "the discharge would be ineffective and plaintiff would be entitled to the relief demanded in the complaint").
20. *Scudder v. Jack Hall Plumbing & Heating, Inc.*, 302 A.D.2d 848, 756 N.Y.S. 2d 330 (3d Dep't 2003).
21. *Prudential-Bach Securities v. Caporale*, 664 F.Supp. 72 (S.D.N.Y. 1987).
22. S*ee, e.g., Scudder v. Jack Hall Plumbing & Heating*, 302 A.D. 2d 848, 849, 756 N.Y.S.2d 330, 331 (3d Dep't 2003) (holding that an employment agreement that includes a for-cause termination provision but no provision regarding termination without cause "plainly and unequivocally reflects that [the] employment contract could only be terminated for cause").
23. *See, e.g., Bandelli v. Allstate Ins. Co.*, No. 99 Civ. 9566 (LMM), 1999 WL 722020 (S.D.N.Y. Sept. 16, 1999) (limiting the employee's recovery to "the amount established by the express terms of the Agreements regarding termination without cause").

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The Dirty Dozen: How to Compromise the Effectiveness of a Workplace Investigation

By Diane M. Pfadenhauer

Investigations of workplace misconduct require orderly and methodical practice to ensure that they will pass the scrutiny of lawyers, governmental agencies and other stakeholders if they are challenged. All too often, investigations are handled in a manner that leaves them open to criticism and challenge. Many of these errors committed are predictable, preventable and repeated over and over again.

This article attempts to outline a variety of errors, particularly those most notable, that tend to occur repeatedly in investigations practice. With practical insight, planning, and a commitment to a disciplined process, those who are responsible for workplace investigations of misconduct can promote a realistic outcome to what typically amounts to a stressful and often divisive employee relations situation, thereby avoiding the possibility of the situation spiraling quickly in to a sea of uncertainty. Whatever the result or outcome of the investigation, one that is conducted properly not only becomes legally defensible but is also consistent with notions of fairness and justice required by today's workforce.

"Hindsight, being 20/20, always advises that in the throes of litigation, the organization would have been far better off from both a fee perspective and organizational dynamic perspective calling in the attorneys to assist it in resolving the issue or complaint at the outset."

Number 1—Failure to Call an Attorney When One Is Needed

One would think that the decision to call an attorney to guide an employee-relations issue or a workplace investigation would be made logically and would be dependent upon the seriousness of the issue or complaint. Unfortunately, however, organizations make these decisions based upon a variety of factors unrelated to the seriousness. Much of this failure has a great deal to do with failing to recognize the seriousness of the risk itself and concluding that the organization and its staff are fully capable of handling the matter. All too often the result is the "half-baked" investigation. The organization forges ahead on its own, begins the investigation, and somewhere down the line realizes that the matter is well beyond its capabilities. At this point, counsel is called in who reviews and, at times, modifies the strategy and ongoing investigation. The result is internal turmoil and uncertainty as the investigation must, at times, be begun anew, witnesses are interviewed again and erroneous conclusions undone.

Occasionally, the organization fails to call in the attorney for fear of spending money. Here, the clock-watching bean counters get in the way and hope that the organization can muddle through the firestorm without the attorney's clock running. Organizations that have this concern can do one of two things: replace the bean counters or replace their attorneys. Time and again, this type of thinking is penny wise and pound foolish. Hindsight, being 20/20, always advises that in the throes of litigation, the organization would have been far better off from both a fee perspective and organizational dynamic perspective calling in the attorneys to assist it in resolving the issue or complaint at the outset.

Number 2—Failure to Take the Complaint Seriously

How does the recipient of the complaint know how seriously to consider it? Offhanded comments can amount to putting the employer on notice that something awful is bubbling under the surface. Unfortunately, these comments may be brushed aside by the untrained or unwary—the untrained believing that some sort of formality needs to be put forth by a complainant (i.e., in a formal document) or the unwary being too busy to consider the implications of failing to act.

Not everyone who is the recipient of inartful statements by an employee has the skills to decide whether those statements are ones that amount to a claim of discrimination or harassment and should be taken seriously. Therefore, an effective process must be put into place to ensure that seemingly offhanded comments are directed to the right person to handle. Thus, when the manager in a hallway overhears something, he or she must be trained at a minimum that this might be something that will result in organizational turmoil or liability. The process needs to ensure that someone is available that the supervisor can turn to who is qualified to distill this information and act accordingly. How many times does an employee in litigation allege that he or she reported his or her complaint to management time and time again to no avail? Quite a few. The organization that can effectively and quickly pass this information to an appropriate party each and every time will ultimately be able

to demonstrate a consistent and fair process that nips potential problems in the bud and resolves issues before they explode.

Number 3—Failure to Establish a Protocol to Promote the Maximum Amount of Objectivity

Related to Number 2 above is the premise that once a matter is taken seriously, the organization skimps and cuts corners to expedite the resolution of the issue, or otherwise bury the issue under the rug to avoid embarrassment or protect an important party in the organization. Examples of this are found when witnesses are permitted to control the timing and length of investigatory interviews because of their "busy schedules." At times, individuals controlling the purse strings do not want to call attorneys or retain outside experts to conduct investigations for fear of spending money. Again, the 20/20 rule cited above will likely come back to haunt the organization.

Delegating the task of conducting an investigation to the supervisor in charge of the area, either for expedience or convenience sake, will likely be questioned for its perceived lack of objectivity and on the presumption that the supervisor lacks sufficient training to conduct a workplace investigation. Interference also compromises the investigation when the investigator is not given unfettered access to evidence and witnesses. While these limitations may not be overtly stated, internal investigators often are hindered in their ability to be objective merely as a result of their own reporting relationship. In one example, the human resource manager reported to a senior financial officer. There were glaring missteps and omissions in his initial investigation. When later questioned about them, he indicated that he would never question something that happened in his boss's area of responsibility.

Number 4—Failure to Follow Organizational Policies

One of the most obvious, although seemingly illogical, problems is when an organization fails to follow its own policies. When there is a decentralized process of employee relations, it is not at all uncommon for policies to be administered differently throughout an organization. A way to avoid this is to conduct proper management training and communication to ensure that everyone is on common ground. What are the policies that are relevant to the issue at hand?

When a member of senior management suddenly takes over and wants to do things "his way" because of the presence of an important client, a senior level witness or subject in the investigation, or for purely political reasons, it is entirely possible for policies to be ignored, broken, or simply overlooked. Even without the pressure imposed by senior level employees, all too often there is a policy in place that governs the subject or issue at hand and it is ignored. The first thing to do in the heat of the moment of an investigation is to ascertain what policies apply to the situation—well beyond the EEO/Harassment policy—and be sure to follow them. Often litigation abounds where the organization is alleged "in this instance" to have failed to follow its own policy. The conclusion then drawn is that the organization's motive must have been discriminatory.

Number 5—Failure to Take Appropriate, Consistent, or Adequate Notes

The purpose of notes in an investigation is to summarize what occurred with each of the witnesses and to provide a general overview of how the investigation was conducted. Notes should obviously be orderly, clear, and consistent. The basis of this issue is the concern that the notes may not adequately portray what really happened in the interview. This may occur for a variety of reasons. One of the biggest reasons is that the investigator fails to plan enough time in the investigatory process to review his or her notes after each interview and ensure that they actually reflect the course of the interview. As a result they are taken in a haphazard, rushed manner leaving the opportunity for omissions and inconsistencies. For the investigator's notes to pass muster, they should be able to tell the order of interviews, how much time was spent with each interviewee, where the interview took place, what was addressed in the interview, who was present, and what evidence was shared.

In a deposition years later, the investigator will be asked to explain the notes, as a record of what occurred in the investigation. The reasons for inconsistencies, which could have logically been explained when the interviews took place, are long forgotten and are now subject to question.

Number 6—Failure to Interview All Witnesses

Somewhere along the way, the question will be raised regarding who was interviewed and why. Like a television crime show, questions will surface about mysterious witnesses who were not questioned. Obviously, hindsight helps provide clarity. One of the most important jobs of an investigator, after finding the facts, is to be able to explain why he did what he did at all points in the investigation. In other words, why were certain individuals selected to be interviewed and others were not? The interviewer should always ask each witness if there is anyone else who should be spoken with. Always ask who can corroborate statements that the witness has made. The interviewer should avoid cutting corners because he or she thinks a witness is trustworthy or that another lacks credibility. Seek not only to corroborate but also to disprove statements or claims made. In addition, be sure

to review and understand documentation that can help corroborate statements or claims made. If documentary evidence is technical in nature, the investigator will need to demonstrate that he or she understands it.

Number 7—Failure to Clarify and Confirm

Witnesses always explain issues with descriptive terms. Does the investigator understand the descriptive words used by a witness? Is the investigator's definition of "gross" the same as someone else's? This typically occurs, not surprisingly for example, when there is an accusation that alcohol is involved. Witnesses describe conduct in terms of others being drunk or inebriated. Obviously, the perception of the truth is influenced by the witness's own consumption of alcohol and his or her perspective on what it means to be drunk. In one example, an angry customer complained that staff was routinely imbibing too much alcohol at client functions. She described staff as drunk and disorderly. Relying on statements made by the customer, management sought to immediately discipline the employees accused. Upon further investigation, it was apparent that the angry customer, herself, consumed as much alcohol as the accused employees. By ocusing on the amount consumed by each of them, examining their behavior, and confirming with other witnesses rather than drawing premature conclusions helped the investigator draw the correct conclusions.

Instead of relying on vague descriptors from a witness, the investigator needs to be sure he or she understands what the witness said and what he or she is talking about. He should reconfirm his or her understanding of what was said by the witness without putting words in the witness's mouth. This will help to avoid reaching erroneous conclusions and helps to avoid reaching conclusions too soon in an investigation.

Number 8—Failure to Ask the Hard Questions

Investigations concerning conduct that is graphically sexual in nature or concern, including topics such as child pornography, for instance, often require a strong stomach. They can be awkward, embarrassing, or just plain sickening. An investigator who does not have the stomach to ask direct and, at times, what could be perceived as disgusting and shocking questions, should not conduct the investigation. In addition, witnesses must be presented with the allegations clearly and specifically.

For a variety of nonsensical reasons, some organizations choose to be deliberately vague when confronting a witness. It is not at all uncommon, sadly, for organizations to hear from an employee that she was told inappropriate statements by another employee. Rather than confronting the accused with the specific statements alleged and the identity of the individual who brought the complaint forward, the organization merely calls the accused on the carpet, reports that he or she said something "bad" and admonishes him not to do it again. Any inquiry regarding the details is brushed aside under the guise of confidentiality. Unless there is a fear of retaliation or harm to the complainant (which there should not be with the appropriate policies and systems in place), this type of conduct does nothing to promote an opportunity to resolve workplace issues and provide a learning opportunity for employees to correct their own behavior.

Number 9—Failure to Consider Other Evidence in the Absence of Corroborating Witness Statements

An inexperienced investigator will often conclude that because there are no witnesses to corroborate the allegations, the allegations did not happen. However, the reverse is sometimes the case. Without witnesses, the investigator must consider and rely upon other evidence, often relating to witness credibility, to assess the facts as they are alleged. In addition, the investigator needs to consider the motive behind statements that were made, documentary or other behavioral evidence that is inconsistent with the statements made by witnesses and a whole host of other factors that, in the absence of supporting statements, can indicate that something is awry.

Number 10—Failure to Follow-up with the Claimant and/or Take Adverse Action When Misconduct Is Found

Feedback to the complainant and the accused traditionally marks the close of any investigation. Where no violation of company policy is found, the organization must be sure to balance the need to be responsive to the claimant with the fact that there are no findings against the accused. All too often the claimant is seeking to satisfy a vendetta or is seeking justice of some sort. The key in any communication is to reasonably assure the claimant that the organization took the complaint seriously, investigated properly, and that it remains committed to a workplace free of misconduct. This is particularly important as the organization ultimately wants to resolve the issue in-house rather than creating a sense of doubt on the part of the complainant such that he or she looks outside the organization to resolve the issue. The organization would also be well advised to follow up with the complainant further down the road to ensure he or she has experienced no further problems with the accused, has no further concerns, and does not have a claim of retaliation.

Feedback to the accused, particularly where misconduct is found, must be consistent with the level of violation. All too often, where a violation is found, particularly where the accused is a favored son, the penalty is a mere

slap on the wrist. Where the penalty does not match the severity of the offense, the organization leaves its motives open to question and its commitment to a workplace free of misconduct open to doubt. Even though most organizations attempt to keep the penalty under wraps for the sake of confidentiality, the adverse action must send the appropriate message to the offender and others who may learn of the penalty.

"Approaching any workplace investigation in a methodical and thoughtful manner can serve to help any organization effectively minimize the disruption and costs associated with serious workplace issues."

Number 11—Failure to Be Able to Explain What You Did in the Investigation and Why You Did It

When assessing the objectivity and thoroughness of an investigation, hindsight brings a number of concerns to light. At the time of the investigation, something the investigator did seemed like a good idea then, and yet many years later in a deposition or threatened litigation, these actions are called into question or criticized as compromising the integrity of the investigation. Each decision the investigator makes (about what to ask, whom to ask, the order of witnesses, the length of time spent with a witness, the presence of note-takers and/or scribes, and so on) must be made logically and thoughtfully. Even the simplest things can be questioned—why were certain notes written and others typed? For each of these, the investigator must be able to explain why she did what she did when she did it to demonstrate that each witness was appropriate to the investigation, that no important witnesses were omitted, that each was given full opportunity to present observations and that any conclusions drawn were plausible based on the evidence available at the time of the investigation.

Number 12—Failure to Use the Matter as an Opportunity to Improve the Organization and Its Employee Relations Practices

Every organization should use a workplace investigation as a learning experience. It should assess how policies can be improved, how they are communicated to employees, and how they are administered. Organizations should also seek to improve their investigation strategies. How can the process be improved? How can the skills of internal investigators be improved? How can feedback be communicated effectively so as to resolve the issue fairly? What additional training needs become apparent? What should have been done but was not and why? And lastly, how can the organization get back on track right away so as to minimize the disruption that a lengthy investigation may cause?

Conclusion

Approaching any workplace investigation in a methodical and thoughtful manner can serve to help any organization effectively minimize the disruption and costs associated with serious workplace issues. By avoiding the dirty dozen, investigators can promote fair and objective investigations, minimize the potential for risk and enable the organization to get back on track more quickly.

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Proposed Changes in the Department of Labor's FMLA Regulations from the Employees' Perspective

By Geoffrey A. Mort

On February 11, 2008, the U.S. Department of Labor (DOL or the "Department") published proposed revisions to the Family and Medical Leave Act (FMLA) regulations. These regulations address a number of critical topics, including, but not limited to, eligibility requirements, the effect of an early start to a leave, the definition of "periodic" doctor visits to determine whether a condition is "chronic," substance abuse, intermittent leave, substitution of paid leave, the effect of leave on bonuses, waivers of FMLA rights, employers' responses to requests for leave, employees' notice obligations and certification by health care providers. The proposed regulations do not address the January 2008 amendments to the Act that created FMLA rights with respect to employees' family members who are in military service.

The Labor Department accepted comments on the proposed new regulations during the spring, and final regulations are expected to be issued later this year. Although the Department of Labor proposal presents an extensive rewrite of the existing regulations, many of the changes merely clarify current practice. However, the proposed new regulations do contain some significant provisions that, if adopted, could make it considerably more difficult for employees to exercise their FMLA rights.

In response to the Department of Labor's Request for Information (RFI) and Notice of Proposed Rule Making (NPRM), many organizations representing both employees' and employers' interests submitted comments to DOL. Organizations and others who support employees' rights have opposed many of the proposed new regulations, viewing them as an attempt by the Bush administration to undermine the protections of the FMLA. For example, the Vice Chair of the Congressional Joint Economic Committee, Rep. Carolyn B. Maloney (D-N.Y.), stated that:

> The Department of Labor's proposed regulations for FMLA chip away at employee rights and make it harder to take leave. I am concerned that a change allowing employers to call their employees' doctors to verify medical information has the potential to compromise privacy rights. With respect to unscheduled leave, the regulations stipulate that failure to provide notice according to the employer's procedures can be punished, leaving the door open for employers to deny leave to eligible employees. The new rules would also allow employers to compel employees to use any paid time off when taking FMLA, which may leave workers without time to tend to the common cold.

This paper will present a brief background summary of the FMLA and will then discuss those proposed regulations that potentially could have the most far-reaching impact on the rights of employees to take FMLA leave.

Background

The Family and Medical Leave Act grants eligible workers the right to take up to 12 weeks of leave per year to care for their own or a family member's serious health condition or to bond with a new child. The FMLA also requires that workers be reinstated to their same or equivalent positions following the leave. Covered employers are prohibited from interfering with, denying or restraining the exercise of an employee's FMLA rights, and from retaliating against workers for opposing unlawful practices under the Act.

The passage of the FMLA was a landmark for millions of workers in the United States. For the first time, federal law provided eligible workers with unpaid leave to care for close family members or to address serious personal health concerns. The law has enabled both women and men to better meet their work and family obligations without sacrificing their jobs and long-term economic stability.

It is well established that the FMLA is working very well for the vast majority of employers and employees. As the Department has stated:

> The Department is pleased to observe that, in the vast majority of cases, the FMLA is working as intended. For example, the FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to care for family members with serious health conditions. The FMLA also appears to work well when employees require block or foreseeable intermittent leave because of their own truly serious health condition.[1]

Absent the protections of the FMLA, many of these workers might not otherwise be permitted to be absent from their jobs when they need to be.

Through the statute, approximately 100 million workers have been able to access the leave they needed to care for a family member or for themselves in time of medical crisis. As the comments received by DOL illustrate, the FMLA's guarantee of job-protected leave and continuation of health insurance are crucial to the economic, mental, and physical well-being of many workers in the United States. Significantly, this enormous benefit to covered workers does not weigh heavily on employers. The last rigorous survey of employers done by the Department showed that the vast majority of them were able to implement the law's requirements with minimal difficulty. When surveyed in 2000, almost two-thirds of covered employers found that complying with the FMLA was very or somewhat easy.[2] The same survey showed that the FMLA had either a positive or no effect on business productivity, profitability or growth, and had either a positive or neutral effect on employee productivity, turnover, career advancement or morale.[3] In fact, 24% of respondents found that FMLA benefits improved employee morale. Additionally, intermittent leave was not exceptionally difficult for employers to manage. According to the 2000 Report, 81.2% of employers found that intermittent leave had a positive or neutral effect on productivity and 93.7% found that it had a positive or neutral effect on profitability.[4]

Many of the regulations that DOL seeks to change have been in place for 15 years and were the result of careful consideration and evaluation by the Department in 1993 and 1995. Survey results in 1995 and 2000 showed that the regulations were successful in striking a balance between employers' and employees' needs. Since 2000, DOL has not conducted any rigorous surveys or analysis of how the FMLA is working. Thus, there is no empirical evidence supporting DOL's proposed changes—instead, these changes seem to be fueled in part by the complaints of a self-selected group of employers, some of whom never supported the law at all, and by political considerations.

As observed in the 2007 DOL Report, employers' complaints concerning the FMLA center on what employers perceive as abuses of FMLA leave by employees. Even if such abuses exist, they should be addressed through management of individual workers, rather than wholesale changes of federal regulations that will impact every worker, the vast majority of whom do not abuse their FMLA leave. The FMLA is clear that if leave is used for an inappropriate purpose, there is no job protection.[5] Given these rules, employers have sufficient authority to address perceived abuses of FMLA leave. If DOL enacts the proposed regulatory changes, employees will need to learn a host of new FMLA procedures including new ways to give notice, new time-frames for notice, new procedures to give notice, new recertification requirements, new fitness-for-duty requirements, new substitution of paid-leave requirements, and new requirements regarding contact between their health care provider and their employer.

Specific Proposed Changes in the DOL Regulations

Section 825.110 (Employee Eligibility: Twelve Months of Service Must Occur Within Five Years)

In order to be eligible for FMLA leave, an employee must have worked for 12 months for the employer. Currently, the 12 months need not be consecutive, and employees can apply any time they worked for the employer toward the 12-month requirement. The proposed change would create, for the first time, a requirement that the 12 months of employment required to create FMLA eligibility must occur within the span of five years. This change conflicts with DOL's decisions in the 1995 regulations, is not supported by the legislative history of the Act, and DOL has not analyzed how it will affect workers. The Department confronted this issue in the 1995 FMLA rule-making when employers requested that DOL set limits on how the 12 months of service should be measured. At that time, DOL determined that the legislative history of the Act was clear that the 12 months did not have to be served consecutively. Additionally, DOL could not find any legislative history showing that Congress supported any limit on how far back the 12 months could go. Thus, DOL placed no limit on the twelve month look back provision.

DOL relies on *Rucker v. Lee Holding, Co.* for the need to create a limit for the 12-month period.[6] In *Rucker*, however, the court simply found that work over the span of five years would all count toward the 12-month threshold: it did not set the boundary for counting work at five years. DOL has not offered any analysis regarding the effect of the five-year limit on workers and on different groups of workers such as minorities and women, or on workers in specific industries, or how another limit, such as six or seven years, might have a less harmful effect. In all likelihood, this proposed change poses the greatest risk for women, who tend to take longer spells away from the workforce to raise children and provide other forms of care.

Sections 825.113, 825.114, and 825.115 (Definition of Serious Health Condition)

DOL has suggested two changes to the current definition of serious health condition. The first involves the part of the definition that considers a serious health condition as one in which the employee experiences three or more days of incapacitation and two or more visits to a health-care provider. Currently, there is no time-frame for the visits to a health-care provider. Under the proposed regulations, the two visits to a health-care provider must occur within 30 days of the beginning of the period of incapacity. The second change involves the part of the

definition that considers a serious health condition a chronic condition that requires "periodic" medical visits. Currently, there is no definition of "periodic." Under the proposed regulation, "periodic" is defined as twice in 12 months. DOL is proposing these changes without data to show what the effect will be on employees. For example, there may be situations where it is difficult for an employee to schedule and attend the second medical visit within 30 days, especially for employees who live in rural areas. Further, for some conditions a health-care provider may require a follow up visit, but may want it to be more than 30 days later. In these situations, DOL's proposed change would create an additional, unnecessary medical visit.

Section 825.207 (Substitution of Paid Leave)

Currently, employees may substitute their earned vacation or personal leave while on FMLA leave relatively freely. This allows employees to receive a paycheck while on FMLA leave, which is critical for many employees' ability to take this leave. Under the proposed regulations, employees will have to follow the employers' rules for taking vacation or personal leave in order to take that leave with their FMLA leave. Thus, if an employer does not allow vacation leave during certain times of the year, requires five days' notice for vacation time, or requires that vacation time be taken in four blocks, an employee will have to abide by these rules when taking leave concurrently with FMLA leave in order to be paid while on FMLA leave.

DOL's proposed change may make it harder for employees to access paid leave, especially if the FMLA leave they are taking is for a short period of time or for an unforeseeable serious health condition for themselves or their family member. The Department's proposal could harm workers' ability to access FMLA leave and seems contrary to the intent of the statute.

DOL's own research establishes that the most common reason that FMLA-eligible employees do not take leave is because they cannot afford to take unpaid leave.[7] Many employees cut their leaves short because they cannot afford to go too long without a paycheck.[8] DOL's proposed new rule may increase the number of employees who will have to face the choice between a paycheck and their health or the health of a loved one.

DOL has already recognized that paid leave should be freely substituted for FMLA leave. According to the 1995 preamble, "there are no limitations. . . . An employer may not override an employee's initial election to substitute appropriate paid leave for FMLA leave."[9] The current rule strikes a fair balance between employees and employers. An employee may freely elect to use his or her vacation time; if he or she does not choose to do so, an employer may require him or her to use it. An employee may not refuse the employer's decision to use paid leave; similarly, an employer may not overrule an employee's decision to use paid leave. Under the proposed change, however, employers would be given the right to override employee decisions.

DOL claims that this change is necessary because the current rule places the employee who uses FMLA leave and vacation leave simultaneously at an "unfair advantage" over a co-worker who uses his or her vacation or personal time for non-FMLA reasons. Being able to use vacation leave while on unpaid FMLA leave is not an "advantage"—rather it was Congress' way to try to make FMLA leave, a federal right, affordable for workers who could not skip a paycheck.

Finally, in its recently passed expansion to the FMLA for military family members, Congress included language identical to that in the current FMLA regarding the substitution of paid leave. Therefore, Congress had a recent opportunity to change DOL's interpretation of how paid leave may be used under the FMLA and chose to leave it the same.

Section 825.215 (Equivalent Position: Bonuses and Perfect Attendance Awards)

Currently, an employer cannot deny an employee a bonus or perfect attendance award if the employee would be entitled to such a bonus or award absent the taking of FMLA leave. DOL proposes to change this rule to allow employers to deny perfect attendance awards or bonuses to employees who take FMLA leave.

As DOL itself has recognized, allowing employers to create financial incentives for employees to forgo FMLA leave will discourage employees from taking FMLA leave, which is prohibited by the statute.[10]

DOL has not explained how offering financial incentives to employees so that employees will refrain from taking FMLA leave does not violate the Act. Rather, DOL defends this decision as one based on employee morale, as described by employers. This does not seem to be a sufficient justification for changing DOL's legal conclusion. Finally, DOL's proposed change ignores the fact that for the vast majority of FMLA leave takers, FMLA leave is necessary because an employee has to attend to his or her serious health condition or that of a family member. Employees in this situation should not be punished with a loss of income for using the leave that federal law provides.

Section 825.220 (Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights: Light Duty)

Currently, time on light duty does not count against an employee's 12 weeks of FMLA leave; however, it does count against an employee's right to job reinstatement. Thus, an employee who is on FMLA leave for eight

weeks and light duty for five weeks (a total of 13 weeks) does not have the right to be reinstated to his or her former position. Under the proposed change, light duty will not count for either the leave ceiling or the reinstatement ceiling.

Section 825.220 (Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights: Waiver of Claims)

Currently, courts are split as to whether a worker can waive his or her FMLA rights in a severance package or settlement agreement without court or DOL approval of that waiver. DOL is proposing that employees be able to make such waivers without court or DOL approval.

The FMLA is a basic labor standard and is based on the Fair Labor Standards Act (FLSA). Under the FLSA, waivers of claims must be reviewed by a court or DOL; logically, the same rule should hold true for the FMLA. As the Fourth Circuit stated in its *Taylor* decision:

> As with the FLSA, private settlements of FMLA claims undermine Congress' objectives of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statue. Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards.[11]

When DOL published the FMLA regulations in 1995, it had the opportunity to set up a system that allowed waiver without review; it specifically did not, and the examples in the 1995 preamble make clear that DOL anticipated that FMLA claims would not be waived without approval from a court or DOL.[12] The Department has given careful consideration to the comments received on this section and has concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute "sound public policy under the FMLA [as with] other labor standards such as the FLSA." DOL has not explained why the rationale it put forward in 1995 has changed.

Finally, DOL's apparent attempt to now treat the FMLA like Title VII or other civil rights statutes fails to recognize that the FMLA is unlike such statutes in that there is no requirement that a worker file a charge with an agency and there is no possibility of an agency going forward once an employee has settled his claim. Thus, if the individual signs away her rights, there is no way to enforce the FMLA rights in the name of the public, and the employer will escape liability.

Sections 825.300 and 825.301 (Employer-Notice Provisions)

The Department has proposed several changes with regard to employer notice requirements. Few of the changes, however, address the issue of improving employee knowledge of the FMLA, and many of them—particularly the provision increasing the amount of time employers have to inform an employee that the employee is eligible for FMLA leave—could actually harm employees by making it more difficult to take FMLA leave.

Currently, an employer has two business days to inform an employee if he or she is eligible for FMLA leave; the Department's proposed change extends that time to five days. Throughout the NPRM, there are proposed changes that shorten employees' time-frames for meeting requirements for FMLA leave while employers would be given more time to respond to requests for FMLA leave. In fact, most organizations spend only between 30 and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion.[13] Therefore, it would not seem that employers need the additional time that DOL's proposals give them.

DOL also proposes increasing the amount of time employers have to inform an employee that the employee's leave qualifies or does not qualify for FMLA leave. Currently, an employer has two business days to inform an employee if that employee's leave qualifies for FMLA leave. The Department's proposed change extends this to five days. This proposed change provides another example of the pattern in the NPRM of employees requesting leave having less time to meet new requirements and time-frames, and employers having more time to respond to request.

Section 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave)

The Department has a host of proposals under this section to tighten the requirements for employees requesting foreseeable leave under the FMLA. None of these changes seems necessary because, as the responses to the RFI highlighted, foreseeable leave is simply not a problem for employers under the FMLA.[14] Furthermore, DOL is proposing to make these changes without requiring more FMLA education, with the result that employees who have used FMLA leave before and employees who are using it for the first time could have their leave denied or delayed if they fail to meet all of these new requirements.

- ***Timing of Notice.*** The Department proposes that if an employee gives notice of foreseeable leave less than 30 days before the need for leave, the employee must respond to an employer's inquiry regarding why 30 days notice was not given. The

Department, however, does not explain the purpose for this change, why it is necessary, and what will happen to an employee if the employer does not believe the employee's reasons as to why notice was not given 30 days prior to the leave.

- ***Shortening the Time in Which an Employee Must Give Notice of Foreseeable Leave.*** Currently, employees have up to two business days in which to inform the employer if they need foreseeable leave when they are within the 30-day window. Thus, if a pregnant employee discovers that her caesarean section date has been moved up, she has up to two days to inform her employer of this fact. Under the proposed changes, the employee would have to inform the employer that day or the next business day. Moreover, at the same time, DOL is proposing to extend the time employers have to respond to that notice, thus upsetting the balance of the FMLA that has worked well for 15 years. Of course, employees should provide notice to their employers for foreseeable leave as soon as they can. However, they should not be penalized with the loss or delay of FMLA leave because of the difference between one or two days.

- ***Increasing the Content of the Notice That Employees Must Give.*** The Department's proposal would increase the amount of information that an employee must provide when contacting the employer in order to signal to the employer that FMLA leave may be appropriate. Under the Department's proposal, the employee must indicate that he or she cannot perform the functions of his or her job (or that his or her family member cannot), the length of the absence, and whether the employee intends to visit a health care provider or is receiving continuing treatment. This proposed change raises several disturbing issues. First, it is the employer's responsibility, under both the proposed and current regulations, to determine whether leave should be designated as FMLA leave. Second, DOL has not provided for sufficient education to the employees about these new requirements in the proposed regulations; employees could have their leave delayed or denied because they may not know what they need to tell the employer under the new regulations. Third, visiting a health care provider and being under a continuous course of treatment are not required for all of the definitions of a serious health condition requiring this information, as proposed in DOL's changes; it will likely be of little use for some employees and may lead an employer to fail to inquire about other possible criteria for FMLA leave.

- ***Requiring Employees to Use Employer's Usual and Customary Procedures for Requesting Leave in Order to Request FMLA Leave***. Currently, an employer may not delay or deny FMLA leave if an employee fails to use the employer's usual and customary practices for requesting leave. Under DOL's proposal, an employee would be required to use the employer's customary leave procedures for whom to call and how to contact that person in order to request leave or risk having the FMLA leave delayed or denied. There is no evidence that the current procedures have been a burden for employers, and DOL has not explained how this requirement comports with court decisions which found that all that is required for employees to take FMLA leave is that the employer be given sufficient notice of that leave. Again, under the proposed regulations, employees are likely to receive minimal information regarding this change, and those who have used FMLA leave before will not know to change their practices.

Section 825.303 (Employee Notice Requirements for Unforeseeable FMLA Leave)

The Department has proposed a wide range of changes for unforeseeable leave that may make it harder for employees to take it. Many serious conditions simply do not manifest themselves to employees in sufficient time to allow employees to provide employers prior notification before an absence is necessary. To the extent that employers feel that employees are abusing unforeseeable leave, especially intermittent unforeseeable leave, employers can address those problems as an issue of management of their employees.

- ***Timing of Notice.*** DOL is proposing to change when an employee must call in for unforeseeable leave. Currently, an employee is supposed to call in as soon as practicable and has until two days after the leave is taken to do so. Although DOL does not claim to have researched when employees actually call in, how much notice they usually give employers and whether employers are actually harmed by the timing of the notice, it nonetheless proposes to change this rule to require that "absent extraordinary circumstances" employees are to call in before their shift starts. If the employee fails to make this deadline, FMLA leave may be delayed or denied, and the employee could be subject to employer discipline. However, the very nature of unforeseeable leave is that employees cannot predict when they will need it and how severe the situation will be. It is unclear how employers will ascertain whether the employee could have called in earlier or not and who will determine if "extraordinary

circumstances" actually existed. Additionally, the proposed regulation does not address when employees who need to use FMLA leave unexpectedly at work should give notice.

- ***Increasing the Content of the Notice That Employees Must Give*.** Similar to the proposed changes for foreseeable leave, the Department proposes that employees seeking unforeseeable leave should also have to provide more information to the employer, even though it is the employer's responsibility to inquire into the situation and designate leave. These changes are being proposed with minimal education to the employees, and, thus, employees may face having their FMLA leave delayed or denied because they may not know of the new requirements.
- ***Requiring Employees to Use Employer's Usual and Customary Procedures for Requesting Leave in Order to Request FMLA Leave***. As with foreseeable leave, under DOL's proposed regulations an employee must use the employer's customary procedures regarding whom to call and how to contact that person in order to request leave. Again, FMLA leave at present cannot be delayed or denied because an employee does not follow the employer's customary practice, and DOL's proposal is inconsistent with court decisions that have found that all that is required for FMLA leave is that the employer be given sufficient notice of the need for leave even if no procedure is followed. And, under these proposed changes employees are likely to receive minimal information regarding this change, and those who have used FMLA leave before may not know to change their practices.

Section 825.305 (Medical Certification: Insufficient and Incomplete Certifications)

Currently, an employer can deny FMLA leave if the medical certification provided is insufficient, but it must give the employee a chance to correct the defect if the certification is incomplete. DOL's proposed rule change requires that employees be given a chance to correct defects in the certification regardless of whether the defect makes the certification incomplete or insufficient.

Section 825.306(a)(1) (Medical Certification: Proposed Requirements)

DOL is proposing that the medical certification be changed to include more details regarding the serious health condition, including symptoms, hospitalization, prescription of medication, and diagnosis. Because the medical certification is intended to supply the employer with the information necessary to determine if the serious health condition in question meets the definition supplied by DOL, it would seem that there is no need in many cases for the health-care provider to include symptoms and a diagnosis.

Section 827.307(a) (Medical Certification: Permitting Direct Contact Between Employer and Employee's Health-Care Provider)

Currently, if an employer needs clarification of information on a medical certification form, the employer may contact the health-care provider of the employee but may do so only (1) after obtaining the employee's permission and (2) if the contact is made by a health-care provider representing the employer. The Department proposes to change this practice to allow the employer to directly contact the employee's health-care provider for clarification of matters on the certificate once the employee has given his or her permission. Currently, if an employer wants to authenticate a medical certification, the employer must follow the same two-step process used for clarification. Under the Department's proposal, an employer will be allowed to contact an employee's health-care provider directly, without obtaining the employee's authorization, for authentication of the certificate.

In the 1995 final rules, DOL allowed contact between the employer and the health-care provider as long as it was through a health-care provider representing the employer. According to DOL, employers simply do not have the knowledge to pose questions for clarification purposes, and therefore employers would have to go through a knowledgeable health-care provider.[15] Now, DOL proposes to change this practice and allow employers to directly contact employees' health-care providers.

There is much concern that this change will impinge upon employees' medical privacy. There is nothing in DOL's proposed regulation regarding who at the employer may make the inquiry to the health-care provider, and there is nothing to stop an employee's supervisor or even co-worker from being the employer's representative making the call to the health-care provider. Once the employer's representative is in contact with the health care provider, there is little to stop the employer from asking the health-care provider for more details ("clarification"), including symptoms (which DOL plans to list as something that can be on the medical clarification) and diagnosis (which may also now be included on the form). There are many serious health conditions that carry a strong social stigma, and a worker with any of these stands in danger of having his or her supervisor or co-workers learn about his or her condition. Obviously, this could have a chilling effect on workers requesting and taking FMLA leave. In the proposed regulations, DOL also makes it clear that if a worker (or the worker's family member for whom the worker needs caretaking leave) refuses to authorize the employer to contact the health-care provider, FMLA leave can be denied. Thus, consent from the employee or the family member is essentially being forced by the employer.

Conclusion

From the perspective of the Plaintiffs' Bar, the Department of Labor's proposed revisions in the FMLA regulations are a regrettable step backward. Many of the proposed changes appear to have little or no empirical basis, in that they would alter processes that experience suggests have been working well and have not imposed undue burdens on employers. There seems little doubt that, as a whole, the DOL changes would place a number of new obstacles in the path of employees who legitimately require and attempt to take FMLA leave. Although the core of the statute will be left intact even assuming that all of the DOL changes are adopted, it is likely that some number of employees who previously would have been able to take FMLA leave will in the future run afoul of the new procedural requirements imposed by the regulations and be prevented from obtaining it.

Endnotes

1. U.S. Dep't of Labor, The Family and Medical Leave Act Regulations: A Report on the Department of Labor's Requests for Information 2007 Update (June 2007) (DOL 2007 Report) 72 Fed. Reg. 35550, 35552.
2. David Cantor *et al*., Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update 6-8 (2000) (DOL 200 Report).
3. *Id*. at 6–11.
4. *Id*. at 6–12.
5. 29 C.F.R. § 825.3129 (g); *see also Crouch v. Whirlpool Corp*., 447 F.3d 984, 986 (7th Cir. 2006).
6. 471 F.3rd 6 (1st Cir. 2006).
7. DOL 2000 Report at 2–16 (Seventy-eight percent of the employees who qualified for FMLA leave and needed FMLA leave who did not take the leave did not do so because they could not afford to take unpaid leave.).
8. *Id*.
9. 60 Fed. Reg. at 2205 (emphasis supplied).
10. See Letter Opinion March 21, 1994. (Interfering with the exercise of an employee's rights' would include refusal to grant FMLA leave, or discouraging an employee from taking FMLA leave. An employer's denial of a bonus to an employee, who otherwise was qualified for the bonus except for taking FMLA leave, would be considered to be a violation of FMLA. . . . To deny such bonuses to an employee returning from FMLA leave has the effect of interfering with the exercise of the employee's rights by discouraging the use of FMLA leave.)
11. *Taylor v. Progress Energy, Inc*. 493 F.3d 454, 460 (4th Cir. 2007), petition for *cert*. pending.
12. 60 Fed. Reg. at 2218 (employer groups "recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims as part of a severance package" (as allowed under title VII and ADEA claims, for example)).
13. World at Work, FMLA Perspectives and Practices, 2, 6–7 (2005).
14. DOL 2007 report, 72 Fed. Reg. at 35551 (noting that responses to the RFI fell into three broad categories: gratitude from employees for the FMLA leave they had taken; request to increase FMLA leave to include paid leave and to expand the family members for whom it applied; and complaints by employers regarding unscheduled intermittent leave).
15. 60 Fed. Reg. at 2224 ("most employers are not medically qualified to pose clarifying questions to the employee's health care provider.").

Changing Labor Laws in China and Japan: How Will They Affect You?

By Robert P. Lewis

I. Introduction

Both Japan and China have recently enacted important changes to their labor laws. U.S. employment and labor law practitioners whose clients have operations in China and/or Japan need to be cognizant of these changes when providing legal advice. Following is a description of these important changes.

II. China

On June 29, 2007, after more than two years of deliberation, the Standing Committee of the National People's Congress passed the Employment Contract Law (ECL). The ECL has been a source of much controversy and attention, both within China and abroad, ever since it was first issued in draft form for public comment in March 2006. The ECL became effective on January 1, 2008.

During the drafting process, numerous changes were made to the original draft based on comments from the All-China Federation of Trade Unions, Chinese workers, and local and foreign business groups. Overall, the ECL expands protection of individual employees in some areas and strengthens collective rights through unions, employee representative congresses, and collective contracts.

Because the ECL generally applies to existing employment contracts and employee handbooks, certain provisions of these documents may have become unenforceable or superseded after the ECL became effective. As a result, the ECL will likely require employers to change employment contracts, handbooks and practices.

Some provisions of the ECL are drafted in vague or ambiguous language. The Ministry of Labor and Social Security and the Shanghai authorities reportedly are drafting implementing regulations which shall be promulgated later this year.

The comparison chart below highlights the ECL's changes to the former law. Comments are also provided regarding the impact of the more important changes.

ISSUE	CURRENT	ECL	COMMENTS
Company Rules	Company rules enforceable if: (i) they do not violate laws or regulations; (ii) publicized to employees; and (iii) passed by a "democratic process" (this term is not defined in the law).	Adoption of company rules requires: (i) discussion with all employees or an employee representative congress ("Employee Congress"); (ii) proposal and comments by all employees or Employee Congress; (iii) negotiations with union or employee representatives; and (iv) publication.	The changes will strengthen enterprise unions and may lead to the establishment of Employee Congresses. In practice, such Employee Congresses may be established at any single facility of a multi-facility business. While their role is not well defined, Employee Congresses may also be involved in collective bargaining.
Collective Bargaining	Collective bargaining regulations focus on bargaining both at the enterprise and the individual facility level.	Industry-wide or regional collective bargaining agreements encouraged in certain industries, but limited in geographical scope (below county level).	Collective bargaining agreements could cover competing employers in the same industrial sector located in the same district.
Individual Employment Contracts	Individual employment contracts must be in writing and signed by each employee.	If no employment contract is signed within one month of commencement of employee's work, employee is entitled to double wage. If no employment contract is signed within one year of commencement of employee's work, the parties are deemed to have signed an open-term contract.	Employers face increased risk if contracts are not signed or renewed in a timely manner.

ISSUE	CURRENT	ECL	COMMENTS
Fixed-Term v. Open-Term Contract	No limit on the number of fixed-terms. Employee can demand open-term contract in limited circumstances. No severance payable upon expiration of fixed-term contract.	After an employee has completed two fixed-term contracts, an open-term contract should be concluded in certain circumstances. Upon expiration of a fixed-term contract, severance is generally payable. An employer must pay double salary if it insists on a fixed-term contract when the employee is entitled to an open-term contract.	There are two possible interpretations in regards to the two fixed-term contracts rule. Sources close to the NPC indicate that an open-term contract should only be concluded if both employer and employee agree that they wish to continue the employment relationship after the conclusion of the second term. However, the ECL can be interpreted to give the employee the unilateral right to demand an open-term contract at the end of the second term.
Probationary Period	Maximum allowable probationary period depends on length of contract term.	Allowable probationary periods slightly shortened. During probationary period, wage may not fall below certain minimum.	Even during the probationary period, no "at-will" termination.
Training Contracts	Training bonds are allowed.	A company may impose a minimum service period only if it provides "special funding" and gives the employee "professional technical training."	It is unclear when training expenses would be considered "special funding." This may lead to uncertainties as to whether training bonds are enforceable.
Non-Compete Restrictions	Maximum (3) three-year term following termination. Compensation must be paid in consideration for non-compete restriction. However, no details mentioned regarding timing of payment.	Maximum (2) two-year term following termination. Compensation must be paid in monthly installments during the post-termination non-compete period.	ECL clarifies that wages paid during active employment are not sufficient compensation, but does not clarify how much must be paid to make non-compete enforceable. Local regulations may apply.
Liquidated Damages	No specific restrictions on liquidated damages.	Liquidated damages may be imposed on an employee only for breach of non-compete restrictions and minimum-service periods in training contracts.	This restriction will make it more difficult for employers to claim damages from employees for breach of contract.
Unilateral Termination of Employee (summary dismissal)	No "at-will" termination. Employer can terminate employee with immediate effect (no severance) only in four circumstances: (i) immediate discharge; (ii) dereliction of duty; (iii) criminal offense; and/or (iv) during probationary period.	Additional grounds: (i) material conflict of interest caused by employment with another employer; (ii) employee uses deception or coercion to cause employer to sign employment contract.	More grounds to terminate employees without requirement to pay severance. No change with regard to termination with notice and severance (e.g., performance, illness).

ISSUE	CURRENT	ECL	COMMENTS
Collective Dismissals	Collective dismissals are allowed in case of: (i) change of "objective circumstances"; or (ii) serious difficulties in production or operations. "Objective circumstances" include sale of major assets and relocation of a plant, but not reductions in force. For dismissals on the ground of "serious difficulties in production or operations" (e.g., inability to pay salary for several months), union consultation and submission of redundancy plan to labor bureau is required. In practice, collective dismissals permitted only in limited circumstances. No social selection criteria.	Collective dismissals also allowed if the employer switches mode of production, introduces major new technology, revises its operational methods, or based on "objective economic circumstances." Union consultation and submission of redundancy plan are required for any: (i) dismissals of 20 or more employees; or (ii) dismissals of 10% or more of the workforce. Employer shall give priority to retaining the employees who have the following criteria: (i) have long fixed-term contracts; (ii) have open-term contracts; and/or (iii) are the sole breadwinners in their families.	This provision expands the grounds upon which collective dismissals may be carried out, but increases procedural requirements.
Protected Categories of Employees	Currently, there are three categories of employees with protection from termination: (i) loss of ability to work due to industrial injury; (ii) during the "medical treatment period" (3-24 months), and/or (iii) during pregnancy and lactation period.	The following protected categories are added: (i) those exposed to occupational disease hazards before or under medical checkup; (ii) long-serving employees close to retirement.	The additions provide more protection to employees.
Termination Payments	In case of termination with notice, employee is entitled to severance of "one month's wage" for each year of service. "One month's wage" is calculated by computing the total earnings of the individual employee in the 12 months prior to termination, and dividing the total amount by 12. In case of termination by mutual agreement or unilateral termination on the ground that the employee is incompetent, severance is capped at 12 months' wages.	In case of termination with notice, employee is entitled to severance of "one month's wage" for each year of service, but computation changed. If employee' s average monthly wage exceeds three times the average wage of all employees in the municipality where the employee works, then his or her "average monthly wage" is capped at three times the average municipal wage. Statutory severance capped at 12 months' wage in all cases requiring statutory severance to be paid.	The average wage cap may significantly reduce separation costs in relation to senior management employees. The general cap of 12 months' wages as maximum severance reduces the severance entitlements of long-term employees.

ISSUE	CURRENT	ECL	COMMENTS
Unlawful Termination	If employee is unlawfully terminated, remedy is reinstatement, back payment of wages, and penalty. No clear guidance on damages if reinstatement is not possible.	If employee does not request reinstatement or if reinstatement is not possible, then employee shall be paid damages equal to double severance.	This article provides clearer guidance in regard to remedies for unlawful termination. Unclear when reinstatement is deemed to be impossible.
Secondment/ Temporary Agency Workers	No detailed regulations or restrictions on secondment/ temporary arrangements.	Restriction on hiring employees through multiple short-term secondment arrangements. Secondment arrangements are generally limited to temporary, auxiliary, or substitute job positions. Seconded employees are entitled to equal pay for equal work. Seconded employees have the right to join the labor union of the staffing agency or that of the company contracting for the temporary worker.	Reduces ability to use agency workers.
Part-time Employment	Part-time employees may not work more than five (5) hours per day or 30 hours per week for the same employer. The payment schedule for part-time employees may be set by hour, day, week or month.	Part-time employees may not work more than four (4) hours per day or 24 hours per week for the same employer. The compensation for part-time labor may not be lower than the minimum hourly wage rate. The payment schedule for part-time employees may not exceed once every 15 days.	Confirms "at-will" employment of part-time workers, but reduces maximum hours.

III. Japan

Japan's new Labor Contracts Law, which came into effect on March 1, 2008 (the "Law"), codifies unwritten principles and long-established case law in connection with the establishment and change of employment contracts. The purpose of the Law is to protect employees and to stabilize employment relationships through the basic principle that employment contracts should only be entered into, or changed, by voluntary negotiation between employers and employees, along with other basic rules.

The Law, however, does not deny the necessity of the Work Rules (*shugyo kisoku*), which have been used in practice to set forth detailed working conditions of employment contracts. Rather, the Law clarifies the factors to determine whether the working conditions or the amended working conditions provided in the Work Rules would be deemed as the working conditions of the employees.

The main areas covered by the Law are as follows:

A. Basic Rules of Labor Contracts (Articles 3, 4, and 5 of the Law)

The Law states that it is a basic principle that a labor contract must be established and changed based on mutual agreement between an employer and an employee with equal bargaining power (Article 3, Section 1). It further provides that labor contract must be established or changed to achieve a balance based on the actual working conditions (Article 3, Section 2), and to achieve a work-life balance for the employee (Article 3, Section 3). An employer and an employee must be in compliance with the labor contract, and act in good faith (Article 3, Section 4), and in exercising any of their rights under the labor contracts, not abuse such rights (Article 3, Section 5).

An employer is also required under the Law to use its best efforts to help employees understand the working

conditions set out in a labor contract (Article 4, Section 1), in order to avoid dispute between the employer and the employee due to misunderstanding of working conditions. The Law further requires an employer to confirm the working conditions in writing as much as possible, including the terms and conditions of an employment with a limited term (Article 4, Section 2). This obligation of an employer should be interpreted broadly to apply at various stages, including: prior to entry of labor contract, at the time of entering into a contract, and at the time of amendment to a contract, which is broader than the requirement under the Article 15 of the LSL, which merely requires an employer to present certain items of the working conditions to newly hired employees.

There may be various ways of "helping employees to understand." If there are significant changes in working conditions, an employer must diligently explain such changes to its employees or provide an explanation in response to the employees' questions in good faith. Even if there is no change, an employer must explain the working conditions in good faith in response to its employees' inquiries.

In the "terms and conditions of an employment with a limited term," certain items that an employer must clearly present to an employee as suggested in the "Standard of Establishment, Renewal and Non-Renewal of a Limited Term Employment" (Number 357, Public Notice of the Ministry of Labor, Health and Welfare, 2003) must be included, such as whether the contract is renewable, or the criteria to determine whether the contract should be renewed.

In addition, the Law provides that an employer must take necessary measures to ensure safety of its employees' life, body, etc. at the workplace (Article 5). This obligation is implied when an employer enters into a labor contract, and the employer has the obligation even if the labor contract does not expressly provide such an obligation. The "safety of employees' life, body, etc." includes the employees' physical and mental health.

The "necessary measures" to be taken by an employer must be determined on a case-by-case basis based on various factors related to the subject employees' work environment, including the type of work, duties, and location of the workplace, in addition to the measures required under the Industrial Safety and Health Act and related laws.

B. Establishment of Labor Contracts (Articles 6 and 7 of the Law)

A labor contract is established when an employee agrees to provide labor and an employer agrees to pay for such labor (Article 6). Therefore, a labor contract may be established without a written contract, and it may be established without an agreement in relation to the detailed working conditions.

If a company has existing Work Rules (*shugyo kisoku*) that provide reasonable working conditions, and the Work Rules are made known to the employees by the employer, the working conditions provided in the Work Rules are deemed to be the working conditions of the employees, unless different conditions than the conditions provided in the Work Rules are separately agreed between the employer and an employee (Article 7). Employers can make the Work Rules "known" to the employees through various methods, including: posting the Work Rules at the workplace, storing the Work Rules at a place where they are accessible to everyone, delivering the Work Rules to all employees, or making the Work Rules available by electronic means and providing equipment on which the electronic data may be seen by the employees.

These provisions, however, are not applicable where new Work Rules are adopted after a labor contract is already established. It should also be noted that the Work Rules under this section are not limited to the Work Rules which must be prepared pursuant to Article 89 of the LSL by an employer who regularly employs 10 or more employees. These provisions of the Law apply to Work Rules that are not required under Article 89 of the LSL (i.e., the Work Rules prepared by an employer who does not employ 10 or more employees).

C. Change of Labor Contracts (Articles 8, 9, 10 and 11 of the Law)

A labor contract can be changed by mutual agreement between an employer and an employee (Article 8). If a company has Work Rules, an employer cannot change the working conditions, or include additional conditions, to the detriment of its employees by simply amending the Work Rules (Article 9).

In order to change the working conditions by amending the Work Rules (including creation of new provisions), the following conditions must be met: i) the amendment must be reasonable, taking into consideration various factors, including the degree of disadvantage that the employees would incur due to the change; the necessity for the company to change the working conditions; the reasonableness of the working conditions after the change and whether the company negotiated with the labor union, or other representative of its employees, regarding the change; and ii) the employer must make the changed Work Rules known to the employees (Article 10).

With respect to requirement i) above, an employer has the burden of proving that the amendment was reasonable. Also, the change becomes effective only when it was objectively acknowledged that the employer made the change known to the employees.

Irrespective of the change to the Work Rules, where an employer and an employee separately agree on working conditions, and they agree that the working conditions will not be altered by an amendment of Work Rules, the agreed working conditions will apply (Article 10).

With respect to the procedures to amend Work Rules, the requirements under Articles 89 and 90 of the Law will apply (Article 11).

D. Validity of Labor Contracts (Articles 12 and 13 of the Law)

If the working conditions separately agreed between the employer and the employee are less favorable to the employee than the working conditions provided in the Work Rules, such as a lower wage level than the wage level provided in the Work Rules, the working conditions provided in the Work Rules will apply (Article 12). Also, if certain working conditions provided in the Work Rules are in violation of laws, regulations, or a labor-management agreement, then the working conditions required by the laws, regulations or the labor-management agreement will apply (Article 13).

E. Continuation and Termination of Labor Contracts (Articles 14, 15 and 16)

1. Secondment

Where an employer has a unilateral right to request an employee to go on secondment (e.g., Work Rules or employment agreement provide that the employer may unilaterally request a secondment), such request for the employee to go on secondment will be void if the request is deemed to be an abuse of the employer's right (Article 14). Whether the request is an abuse will be determined taking into consideration various factors, including the necessity of the secondment or the selection process for determining which employee would be seconded.

For the purpose of Article 14, "secondment" means an arrangement where an employee of an employer is ordered to provide services to another company under the instruction of the company, without terminating employment relationship with the original employer.

2. Disciplinary Action

Where an employer has a right to take disciplinary action against an employee (e.g., Work Rules or employment agreement provide a right to the employer to take disciplinary action in certain specified cases), the disciplinary action will be deemed to be an abuse of the employer's right, and therefore void, if it lacks objectively reasonable grounds and is not socially acceptable. Whether the disciplinary action is an abuse of right and therefore void will be determined taking into consideration various factors in relation to the specific situation, including the type, nature and degree of the employee's misconduct.

Under the Article 89, item 9 of the LSL, an employer is required to provide the types and degrees of possible disciplinary actions, if the employer adopts a policy regarding disciplinary actions.

Finally, a dismissal of an employee is deemed to be an abuse of the right of an employer, and therefore void, if the dismissal is not based on objectively justifiable grounds and is not socially acceptable. In the event of a dismissal, the employer has the burden of proving that the dismissal is based on objectively justifiable grounds.

F. Labor Contracts with Limited Term (Article 17)

With respect to a labor contract with a fixed or limited term, an employer cannot terminate the labor contract prior to expiration of the term unless there is an unavoidable reason for such termination (Article 17, Section 1). In order to avoid repeated renewals of labor contracts, an employer must not make the term of a labor contract shorter than necessary, taking into consideration the purpose of the employment (Article 17, Section 2).

The scope of "unavoidable reason" should be interpreted more narrowly than the standard for "objectively reasonable ground" which is applied in the case of the dismissal of employees. Even if an employer and an employee agree in a labor contract with a limited term that the contract can be terminated prior to expiration of the term, such a provision would not necessarily satisfy the requirement to have an "unavoidable reason" to terminate the contract. Whether or not there was an unavoidable reason must be determined on a case-by-case basis based on the actual circumstances of the termination. The employer has the burden of proving that the termination is based on unavoidable reason.

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Expatriate Checklist

By Donald C. Dowling, Jr.

A multinational operating outside the U.S. often determines that it needs to post into the new location one or more expatriates (be they experienced company people from headquarters or "third country nationals" from up-and-running operations outside the headquarters country) to oversee the launch and sometimes to stay on indefinitely.

But "seconding" an expatriate opens Pandora's box—especially if this will be the organization's first-ever expatriate posting, at least into this new country. Most large multinationals with big expat populations have already opened this Pandora's box and confronted the demons that flew out, having promulgated expat policies—sometimes 50 pages long—and having created form "secondment" agreement templates and other "global mobility" infrastructure. At other employers, though, expat assignments are less frequent—and so tend to get patched together on an *ad hoc* basis.

Any multinational with no existing procedures for expatriate assignments—but that now needs a way to send an expat into the new start-up—almost invariably starts by asking around for other employers' form expat policies and agreements. And expat forms, of course, can be helpful. But expat assignment terms and offerings diverge so widely from company to company that replicating *someone else's* programs, by cloning their forms, can be dangerous.

Warren Heaps, a New York-based international compensation consultant with the Birches Group, says that because expat "assignment policies are really very tailored to" each employer and are "designed with specific business objectives in mind," expat "benchmarking is of less value" because "the market may provide certain benefits or allowances which may be unneeded" at certain organizations—especially across industries. So when placing an expatriate into a start-up operation in a new country, never clone other employers' forms. Instead, craft organic expat policies and agreements that reflect the organization's own actual policies and needs.

This checklist that touches on most of the issues a multinational should address in an expat assignment, whether the expat is going into a country new for the employer or otherwise.

Expat Program Structure

- **Inclusion of stakeholders:** Involve all necessary in-house players such as home and host-country line management; home and host-country human resources; relocation; travel; finance/tax; benefits/compensation; risk management/insurance; legal.
- **Types of expatriates:** Distinguish "career expat" vs. project-based assignee vs. expat to start up operation and train successor vs. "commuter expat."
- **Types of assignments:** Distinguish long-term vs. short-term vs. long business trips vs. "commuter."
- **Exclusion of "cross-border employees":** Implement some mechanism for excluding from the expat program: voluntary/requested overseas transferees; locally hired headquarters-country citizens; overseas-company-hired "trailing spouses," etc.
- **Expat employer entity:** Distinguish home-country/headquarters entity vs. host-country affiliate vs. dual employers vs. global expat services affiliate; account for the "permanent establishment" issue if a home country entity will employ abroad.
- **Corporate payor entity:** Which affiliate will tender base pay? Expat benefits? Bonuses? As to each element of expat compensation paid by home-country entity, how to handle host country withholdings and social contributions?
- **Intra-company payment/chargeback logistics:** Design logistics for intra-company expat reimbursements; design a process for intra-company chargebacks; address corporate tax treatment.

- **Form intra-company "secondment" agreement (between home- and host-country entities, expat is not a party):** Write up an agreement between the expat's home and host country employer entities that addresses reporting; supervision; power to discipline/terminate assignment; tendering payments/benefits to expat; intra-company charge-backs and apportionment of liabilities.
- **Form expat assignment agreement (between employer entity and expat personally):** Design an employment assignment agreement for the expat that dovetails with the expats' existing employment agreement/policies (or else expressly "hibernates" them); address special issues like restrictive covenants, alternate dispute resolution, etc., as enforceable across borders.
- **Non-discriminatory expat selection procedure.**
- **Protocol for when/how to "localize" expats:** Devise some method for extinguishing the expat assignment relationship if and when the expat is to be "localized" (to defer this issue will make it much tougher to "localize" later, because the expat will push back).

Expat Dependents

- **Dependent visas:** Apply early for visas for expats dependents, such as any "trailing spouse," unmarried partner, children, dependent parents, household help/servants. Will dependents' visas be work visas, or residency only?
- **Dependent-specific benefits**: Placement assistance; education/tuition/arrange schooling; compensation for career interruption; support for special-needs dependents.
- **Contingency for family emergencies and divorce/separation**
- **To what extent do dependents get expat logistical support and benefits?** Separately account for each element addressed below, as to dependents.

Foreign Assignment Logistics

- **Expat visa/work permit:** Apply very early.
- **Pre-decision trips** (and how reimbursed?).
- **Foreign payroll/benefits delivery logistics:** Where paid? How to comply with host- and home-country reporting/withholding/social contributions obligations? How to comply with currency/foreign exchange and payroll laws? (for example, in Mexico, pay every 15 days).
- **Medical, security and personal-injury claims exposure**
  - Medical exams/clearances; vaccinations; access to medical care and medication abroad (routine and emergency); participation in local government ("socialized") medical system; expat medical insurance; medical-crisis evacuation to home country.
  - Disability accommodation.
  - Personal security; legal representation abroad; kidnap/emergency response; emergency evacuation.
  - Strategy for minimizing exposure to overseas-arising personal injury claims: workers' compensation Bar; "supplementary/voluntary" workers' comp coverage; duty of care; defense strategy for expat and dependents' personal injury claims arising outside work hours/off-premises.
  - Expat insurance (beyond medical and workers' comp): life; disability; evacuation; kidnap; directors and officers.
- **Legal compliance**
  - Tools enabling expat to comply with destination-specific business laws.
  - Compliance strategy as to mandatorily applicable home-country laws (extraterritorial reach of U.S./home-country discrimination laws; U.S. laws applicable to business abroad, such as Sarbanes-Oxley accounting provisions and Foreign Corrupt Practices Act; etc.).
  - Compliance strategy as to mandatorily applicable local host-country employment laws (local host-country caps on hours and other wage/hour laws; break times; leaves; profit sharing; 13th month pay; termination procedures/notice/severance pay; payroll/currency laws; laws capping percentage of non-citizens in workplace; etc.).
  - Choice-of-law provision backfiring: (A choice-of-home-country-law clause in expat documents rarely works to divest the application of host-country employment laws, so devise a strategy to curtail the expat's power to "cherry pick" the more favorable rules from two legal regimes.)
  - Local caps/rules: Comply with host-country rules on expatriates (Brazil and other countries put caps on the percentage of foreigners in a workplace; Middle Eastern countries prohibit

paying expats more than locals; in China, different employment laws can govern expats vs. locals.).

  - Workers' compensation: A too-often-ignored but potentially big-ticket expatriate issue is the very real risk of expats (or their families) getting injured or killed and then bringing an uncapped personal injury or wrongful death claim; where possible, preserve the workers' compensation Bar affirmative defense; get "voluntary supplemental" workers' compensation insurance; on U.S. government jobs, comply with the Defense Base Act of 1941; heed the duty of care; consider waivers or acknowledgments.

  - As to these issues, see Donald C. Dowling, Jr., "XB: The Ultimate (Forum) Shopping Trip: Choice-of-Law and the Expatriate Employee," 32 *NYSBA L&E Newsletter* no. 1, p. 27 (Spring 2007).

- **Vacation and holidays:** Reconcile home- vs. host-country vacation policies while complying with local vacation laws; address extra home leave for regular vs. "hardship" assignments.

- **Cultural training and/or language training and/or destination counseling (for expat and particularly family):** On-off intensive course vs. ongoing training?

- **"Buddy":** Assign a company point person/mentor and/or HR liaison in home and host countries and develop tools for expat to maintain a working link to home country office.

- **Mail forwarding.**

- **Expense management; expense approval; reimbursement processes.**

Expat Compensation and Benefits Offerings

- **Select which one of the three possible expat compensation philosophies applies:** 1. replicate home country package; 2. replicate host country package; 3. replicate packages among company expats worldwide.

- **Cost containment philosophy:** "Lean and mean" vs. generous vs. somewhere in between.

- **Cost-of-living adjustments** ("location differential").

- **Expat compensation package "fit" with local pay practices:** Justify pay differences in advance; comply with local laws requiring equal pay among similarly situated employees and laws prohibiting paying foreigners more.

- **"Hardship allowance"/location differential:** (Use "hardship" ratings such as those available from International Civil Service Commission, ORC, AIRINC.).

- **Currency exchange:** (When compensation is set in one currency and paid in another).

- **Home country home disposition:** Pay broker fee? Support rental? Pay mortgage?

- **Host-country housing:** Facilitate search? Reimburse expenses? Employer guarantee lease for employee vs. employer signs lease as tenant? Provide loan? Caps?

- **Moving expenses:** Packing? Ship appliances or fund new purchases? Sea or air shipment? Cap quantity moved? Special items like pets, wine, guns? Storage of goods? Electrical conversion? vs. flat moving expense?

- **Travel:** Class of service; extra paid trips home (regular vs. "hardship" assignments); dovetail with company business travel policy; policy for how to handle requests that payment for trips home be diverted for foreign travel to equal/less expensive destinations.

- **Settling-in assistance** (and local facilitation smoothing bureaucratic/cultural barriers).

- **Company-provided personal servants, including bodyguard, driver** (or contrast local company car/local driver's license facilitation/local auto insurance).

- **Club memberships.**

- **Company-provided cell phone/BlackBerry/laptop.**

- **Incidental expenses**: Hotel, phone hook-ups, telephone calls home, etc. vs. lump-sum option.

Expat Tax, Social Security, Pension

- **Tax policy**: Tax equalization; tax gross-up; effect of tax credits; tax treaties; taxation of expat benefits; dual-jurisdiction expat tax-return preparation (address each by tax year, not by term of expat assignment).

- **Compensation elements beyond base pay**: Bonuses, savings plans, stock options/equity; local plans vs. continued participation in home-country plans; tax treatment.

- **Social Security:** Mandatory Social Security contributions in host country; Social Security equalization; effect of Social Security totalization treaty; compensation for loss of home-country credits.

- **Pension continuation:** Local pension participation; pension equalization; host-country tax treatment of contributions to home country pension plan/§ 401k.

Repatriation

- **Repatriation job guarantee:** Contrast no guarantee vs. flat guarantee vs. express employer reservation of no right to repatriated job vs. employer "best efforts" to place in repatriated job.
- **Disposition of host-country house and car.**
- **Return travel** (including job/house-hunting trips, dependents, pets).
- **Repatriation expense reimbursement:** Items covered, including moving, brokers, rental expenses, extra mortgage, temporary living expenses, reimbursement procedures.
- **Tools for reintegrating expat into home company:** How to leverage expat overseas experience? How to temper "reverse culture shock"/prevent "repatriation failure"/tackle post-repatriation retention challenges?
- **Integration vs. termination:** For each of the above, distinguish repatriation support for expat returning to home-country company job vs. repatriation support for a terminated/resigned expat.

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PERB UPDATE

By Philip L. Maier

The following is a digest of recent decisions issued by the Public Employment Relations Board from January to October 1, 2008.

Good-Faith Bargaining

County of Columbia, 41 PERB ¶3023 (2008). The Board affirmed an ALJ decision finding that the County violated the Act when it created a new shift and assigned an employee to that shift without prior negotiation with the union. The Board rejected the County's arguments based upon waiver and duty satisfaction, finding that the parties' agreement was not reasonably clear on the subject matter at issue. The agreement was inconsistent, if not contradictory on the issue of daily work hours and assignment of employees, and was susceptible to more than one interpretation.

City of Albany, 41 PERB ¶3019 (2008). The Board affirmed in part and reversed in part an ALJ decision which held that the City violated the Act when it implemented new procedures with respect to requests by bargaining unit members to use accrued time and incidental leave. The City unilaterally implemented time frames relating to the approval of compensatory and incidental leave time. A rule setting forth the time when a request may be submitted, and a rule stating when a supervisor can begin to act on such a request are mandatory subjects of bargaining. The Board concluded, however, that the City's rule that requests be held in abeyance until 48 hours prior to the opportunity for overtime expires was not a violation of the Act because it was subject to a contract reversion defense. The contract clause, however, was ambiguous, leading the Board to rely upon parole evidence. The testimony showed that the opportunity for voluntary overtime was closed 48 hours before the shift in question. Accordingly, that portion of the ALJ decision which found a violation of the Act on that basis was reversed.

New York City Transit Authority, 41 PERB ¶3014 (2008). The Board affirmed an ALJ decision, on other grounds, which held that the NYCTA satisfied its duty to bargain regarding requiring employees to wear uniforms. The Board reversed that part of the decision, however, which had held that the union had abandoned an issue raised in the charge alleging that the NYCTA violated the Act by not bargaining with it concerning the provision of bulletproof vests since it was not raised in its brief. The matter was remanded for further processing.

City of Oswego, 41 PERB ¶3011 (2008). The Board affirmed the Assistant Director's decision finding that the City violated the Act by eliminating the past practice of allowing employees the use of the City's facilities to wax and wash their cars during work time. The Board modified the remedial order because the stipulated record did not support a finding that the City had provided the materials to allow the employees to engage in the practice. The Board found that the criteria establishing a past practice were present, as evidenced by the parties' stipulated record, and specifically rejected the contention that the union did not demonstrate that the Chief had actual authority and knowledge of the practice. The Board also stated that since the affirmative defenses of waiver and duty satisfaction were not pled, they were properly dismissed.

Hampton Bays Union Free School District, 41 PERB ¶3008 (2008). The Board affirmed an ALJ decision finding that the District violated the Act when it failed to provide documents to the union seeking to investigate and prosecute a grievance. The Board stated that an employee organization is not precluded from receiving requested information and documents with respect to contract provisions that reiterate or modify statutory rights. Prior to refusing to release requested information, the party refusing the demand must engage in a good-faith effort with the requesting party aimed at accommodating the need for the requested information. The Board rejected the defense that the documents need not be produced because the demand for information related solely to procedures under the Education Law, and found that disclosure was required because the parties had codified in their agreement both procedures and criteria for the evaluation of probationary teachers. The request was sufficiently specific to demonstrate the need for such information. The Board also rejected the District claim that FERPA precluded the information from being released

State of New York-Unified Court System, 41 PERB ¶3009 (2008). The Board affirmed that part of an ALJ's decision finding that the UCS violated § 209-a.1(d) of the Act by failing to provide information to DC 37 in order to assist it to represent an employee in a disciplinary proceeding brought against him. The Board stated that a union has the right to receive information for use in negotiations and to administer the negotiated agreement. This right is subject to a showing of reasonableness, relevancy and necessity. The Board rejected UCS' contention, in reliance upon *County of Ulster*, 26 PERB ¶3008 (1993), that it was not obligated to provide the information because the parties' agreement adopted the disciplinary procedures promulgated by the Chief Judge. The Board stated that *Ulster* was modified by the Board's

decisions in *City of Cohoes*, 31 PERB ¶3020 (1998) (subsequent history omitted) and *Town of Evans*, 37 PERB ¶3016 (2004) to the extent that it suggests that the reiteration or incorporation of a statutory disciplinary procedure into an agreement might obviate the duty to provide information under the Act. The Board rejected the argument that DC 37's request amounted to an impermissible request for pre-hearing discovery. The Board did find, however, that DC 37's request for documents "including without limitation any memorandum between and among agents of UCS relating to the employee's alleged behavior" was overbroad. The remainder of the information sought, such as witness statements and the evidence which UCS intends to introduce at the hearing, was required to be disclosed.

Fashion Institute of Technology, 41 PERB ¶3010 (2008). The Board affirmed an ALJ decision which held that FIT violated § 209-a.1(d) of the Act by unilaterally terminating the past practice of calculating the pay of adjunct professors on the basis of 16 weeks of work, thereby reducing their salaries by one-sixteenth. The faculty were paid on this basis from 1978 until the practice was stopped in 2006. FIT argued that because the faculty were no longer assigned duties during one of the 16 weeks, it was privileged to stop the calculation upon which they were paid. The evidence showed that despite the failure to assign faculty during that week, they nevertheless continued to be paid on the basis of 16 weeks. The Board stated that the evidence supported the finding that the "practice was unequivocal and continued uninterrupted for a period of time under the circumstances to create the reasonable expectation among the affected unit employees that the practice would continue," and that FIT had actual or constructive knowledge of the practice. The length of time that the practice continued was sufficient to establish a *prima facie* case on this element, thereby shifting the burden to FIT to show that it did not know of the practice. The Board also rejected FIT's waiver defense, since it was not raised as an affirmative defense, and the argument that payment for work not performed is non-mandatory, since payment of wages is clearly a mandatory subject of bargaining. The Board also rejected the argument that the payment constituted an unconstitutional gift of public funds since a past practice creates a legally enforceable obligation.

Manhasset Union Free School District, 41 PERB ¶3005 (2008). The Board affirmed an ALJ decision which held that the District violated the Act by unilaterally subcontracting its bus transportation of students to private contractors. The Board's decision, aided by the solicitation and submission of *amicus* briefs, contains an extensive discussion of both notice-of-claim issues and subcontracting principles as developed at this Board. In this matter, the Board held that the claim accrued after good-faith negotiations reached an impasse. (Compare *Board of Education of Union-Endicott Union Free School District v. PERB*, 29 PERB 3056 (1996), *rev'd*, 250 AD2d 82, 31 PERB ¶7016 (3d Dep't 1998), *lv. den.*, 93 NY2d 805, 32 PERB ¶7006 (1999)). A violation of the Act was not ascertainable until after the District made a final decision to subcontract after an impasse had been reached because the parties were engaged in good-faith negotiations. The notice of claim was timely because it was served within 90 days following the conclusion of negotiations. Alternatively, the Board concluded that filing a notice of claim is not a prerequisite to filing a charge due to the Court of Appeals' decision in *Freudenthal v. Nassau County*, 99 NY2d 285 (2003), which calls into question the validity of contrary decisions in the Appellate Division, Third Department. The Board affirmed, in a fact-specific inquiry, the finding that certain "substitute" employees were unit members. The Board stated that the *amicus* briefs did not persuade it to abandon its precedent that has applied a past-practice analysis for analyzing the related issues of unit work, discernible boundary and exclusivity. In analyzing these issues, the Board will determine whether a past practice exists by applying the test recently stated in *Chenango Forks Central School District*, 40 PERB ¶3012 (2007). A *prima facie* showing is made when the facts demonstrate that "the practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." This showing is subject to a defense that an employer lacked actual or constructive knowledge and a lack of a bilateral acceptance of, or acquiescence in, the practice. Constructive knowledge exists when the past practice is reasonably subject to the employer's managerial and/or supervisory responsibilities and obligations. The Board overruled those cases that relied upon the "core component" criteria to the extent that they are inconsistent with past-practice analysis. Based upon past-practice analysis, the Board concluded that a discernible boundary existed around the work alleged to by transferred. The District made an explicit and unequivocal decision, which was clear and explicit, to use unit members to transport pubic school students. The practice was clear and unequivocal and gave rise to the reasonable expectation that it would continue, and the evidence shows that the District had both actual and constructive knowledge of the practice.

Lake Mohegan Fire District, 41 PERB ¶3001 (2008). The Board affirmed the dismissal of a charge after the presentation of the Association's case due to the failure to state a *prima facie* case. The charge alleged that the District violated the Act by changing its policy unilaterally regarding the dispatch of a vehicle to certain calls. The District changed the policy by not automatically dispatching the vehicle in response to an incident, thereby reducing the number of employees responding to an incident. As a result, there is no guarantee of timely

assistance to non-critical calls. The Board stated that a motion to dismiss a charge at the close of a charging party's case will be granted when, assuming the truth of the evidence presented and granting all reasonable inferences, it is plainly insufficient to warrant a finding that the charge should be sustained. In determining whether a bargaining demand implicating safety and staffing is a mandatory subject of bargaining, the Board will focus on the primary and predominant characteristics of the demand. The Board stated that the predominant nature of the change remains deployment of staff rather than safety, and affirmed the dismissal of the charge.

Interference and Discrimination

Board of Education of the City School District of the City of New York (Grassel), 41 PERB ¶3024 (2008). The Board affirmed the dismissal of a charge alleging that the employer violated § 209-a.1(a) of the Act when it failed to reinstate Grassel following a March 1, 2007 withdrawal of pending disciplinary charges. Grassel alleged that the delay in reinstating him was the result of him filing a grievance in 1997. The Board found that he failed to establish a *prima facie* case because he failed to demonstrate evidence leading to an inference of improper motivation The Board also held that the delay in reinstating him was not sufficient to establish unlawful motivation, and also rejected a number of procedural arguments that were raised.

United Federation of Teachers, Local 2, AFT, AFL-CIO and Board of Education of the City School District of the City of New York (Jenkins), 41 PERB ¶3007 (2008). The charge alleged that the District violated §§ 209-a.1(a) and (c) of the Act, and that the UFT breached its duty of fair representation. The ALJ dismissed the charge, holding that Jenkins did not prove a *prima facie* case and, alternatively, the District's actions were taken for legitimate business reasons. The ALJ also held that the UFT did not violate its duty of fair representation. The Board reversed the ALJ conclusion that Jenkins did not prove a *prima facie* case, but affirmed the decision in all other respects. The Board also undertook a review of the elements of a charge alleging discrimination or interference. The Board stated that in order to demonstrate a violation of §§ 209-a.1(a) and (c), a charging party has the burden of proof to demonstrate by a preponderance of the evidence that he engaged in protected activity, such activity was known to the person taking the employment action, and the action would not have been taken "but for" the protected activity. Most violations require proof of unlawful motivation that can be proven through either direct or circumstantial evidence. At a minimum, circumstantial evidence needed to establish a *prima facie* case must be sufficient to give rise to an inference that unlawful motivation was a factor in the employer's conduct. The timing and context of an employer's conduct may be sufficient to establish an inference of improper motive, thereby shifting the burden of persuasion to the respondent to demonstrate a non-discriminatory basis for the conduct. The Board overruled *Roswell Park Cancer Institute*, 34 PERB ¶3040 (2001) to the extent that it suggests otherwise. The burden of proof shifts to the respondent to demonstrate that the employment action was motivated by a legitimate non-discriminatory reason. At all times, the burden of proof rests with the charging party to establish causation. Jenkins satisfied the first two prongs and must also have shown that the District would not have taken such action but for his engagement in protected activity. The Board concluded that Jenkins did not demonstrate a *per se* violation of the Act based upon his allegation that he was ordered to stop filing grievances because the credible evidence, as found by the ALJ, did not support such a finding. The ALJ's conclusion was reversed regarding the failure to establish a *prima facie* case because the timing, content and context of statements made by District representatives shifted the burden of persuasion to it to come forward. The Board, however, found that the ALJ correctly held that the District met its burden of persuasion, refuting the inference of unlawful motivation raised by Jenkins' testimony. Additionally, the Board concluded that there was no showing that the UFT breached its duty of fair representation. Accordingly, the charge was dismissed.

Representation

Mount Morris Central School District, 41 PERB ¶3020 (2008). The Board reversed an ALJ decision which held that a proposed unit limited to the titles of principal K-8, principal 9-12, and assistant principal 6-8 was the most appropriate unit, rejecting the contention that they were managerial employees. The Board concluded that the evidence established that the employees participated in executive sessions where personnel matters such as hiring, tenure and discipline are discussed, were required to attend Board meetings and attend public Board meetings, and serve in the superintendent's place in her absence. The Board stated that while credibility determinations in resolving conflicting testimony based upon witness demeanor are entitled to deference, factual findings are not entitled to such deference. The duties performed, together with the small size of the district, supported a finding that they were managerial employees. Accordingly, the petition was dismissed.

Jurisdiction and Deferral

County of Sullivan and Sullivan County Sheriff, 41 PERB ¶3006 (2008). The Board affirmed an ALJ decision which found that the County violated §§ 209-a.1(d) and (e) of the Act by unilaterally implementing a system for recovery of leave accruals and when it deducted hours from an employee's leave accruals. The charge also

alleged violations of §§ 209-a.1(a) and (c), which were dismissed. A grievance was pending to which the ALJ declined to defer. The Board addressed whether, pursuant to its decision in *Town of Carmel*, 29 PERB 3073 (1996), it would be consistent with public policy to on its own motion defer the remaining §§ 209-a.1(d) and (e) after the §§ 209-a.1(a) and (c) allegations had been dismissed and the merits of the §§ 209-a.1(d) and (e) allegations had been reached. The Board stated that on a case-by-case basis, when it determines that it is appropriate to defer an alleged violation of § 209-a.1(d), and the alleged violation of § 209-a.1(e) rests upon the same facts, it will ordinarily also defer the § 209-a.1(e) allegation. The Board will retain jurisdiction of a charge alleging a violation of § 209-a.1(e) at the Board's discretion when the parties' have evidenced their mutual preference for PERB to determine the contractual issue. This can be shown by the charging party not having filed a grievance or that a grievance is held in abeyance, and the respondent is not seeking deferral. Generally, the practice of deferring § 209-a.1(e) allegations will continue. To the extent that *Carmel* suggests that the Board on its own motion will issue a merits deferral of §§ 209-a.1(d) and (e) allegations following development of a full record it is overruled. Reaching the substantive issues, the Board held that the County violated § 209-a.1(d) by unilaterally implementing a non-contractual method of recovering leave accruals and holiday pay paid to the employee. The Board also affirmed the ALJ's conclusion that the County violated the Act by unilaterally deducting leave time from the employee's accrued time.

Practice and Procedure

United Federation of Teachers and Board of Education of the City School District of the City of New York (Gray), 41 PERB ¶3025 (2008). The Board denied leave to file exceptions to an interim ruling denying the amendment of a charge because there was no showing that the ALJ's interim ruling has resulted or will necessarily result in a denial of due process or undue prejudice.

Triborough Bridge and Tunnel Authority, 41 PERB ¶3021 (2008). The Board denied a motion for leave to appeal a decision by an ALJ denying a request for the issuance of a subpoena *duces tecum*. It stated that the movants failed to demonstrate extraordinary circumstances, such as severe prejudice, warranting the granting of interlocutory relief. The Board concluded that the denial of the subpoena requests did not constitute extraordinary circumstances at that juncture of the proceeding. For the same reasons, the Board also denied a request for interlocutory review of the denial of a request to adjourn the hearing.

City of Elmira, 41 PERB ¶3018 (2008). The Board affirmed an ALJ decision dismissing a charge on the grounds that it was untimely. The charge alleged the unilateral implementation of a work rule requiring police officers to call headquarters two hours prior to an off-duty court appearance in response to a subpoena. The PBA alleged that the ALJ erred by adjourniong the hearing at the conclusion of its case, and that the call-in procedure was not final and the charge therefore timely. The Board stated that an ALJ may raise *sua sponte* a timeliness issue if first revealed during the course of the hearing. The Board also concluded, with regard to the timeliness issue, that the PBA had actual knowledge of the implementation of the call-in procedure and that there was no basis to conclude that the PBA had a reasonable belief that the implementation of the new call-in procedure was temporary or was to be rescinded. An employer's mere reexamination of a policy does not render the policy temporary for purposes of the timeliness of the charge. There was also no basis to conclude that the City is equitably estopped from asserting a timeliness defense when the City did not make an affirmative response to the PBA's indication that it would delay filing a charge or that it indicated the policy was temporary.

Board of Education of the City School District of the City of New York (Grassel), 41 PERB ¶3016 (2008). The Board denied a motion seeking leave to file exceptions and to compel the recusal of an ALJ. Finding that the motion failed to identify the order for which review was sought, and that no extraordinary circumstances were present, the motion was denied.

Honeoye Falls-Lima Central School District and Honeoye Falls-Lima Education Association, NYSUT (Macolm), 41 PERB ¶3015 (2008). The Board dismissed exceptions to a Director's decision because they were not timely served upon the opposing parties.

Niagara Charter School, 41 PERB ¶6501 (2008). The Board affirmed an ALJ decision which dismissed a declaratory ruling petition on the grounds that it did not present a justiciable controversy under section 210.1(a) of the Rules of Procedure. The school had sought a ruling as to whether the recognition and/or certification procedures of the Act are applicable to it. The Board stated that the purposes of such a petition are to determine whether an individual or entity is subject to the Act or whether a particular subject is mandatory, non-mandatory or prohibited. The school's petition sought a ruling as to an interpretation of the applicability of the Rules and the provisions of the Charter School Act, specifically Education Law § 2854(1)(a) and 2854(3)(b-1)(i). The Board also stated that section 210.2(a) of the Rules does not provide an additional basis upon which to entertain a petition, but grants the Director the authority to dismiss a petition if not in the public interest.

Duty of Fair Representation

District Council 37, AFSCME, AFL-CIO (Maltsev), 41 PERB ¶3022 (2008). The Board affirmed the dismissal of a charge alleging that the union violated the Act by not responding to inquiries and by failing to take a grievance to arbitration. Contrary to the ALJ, however, the Board held that Maltsev had standing to file the charge because the grievance was filed while he was employed and related to non-contractual job related issues which may directly affect compensation. The Board stated that a union has a wide degree of discretion in determining whether to bring a case to arbitration. The Board also stated that the ALJ correctly determined that the charge in this regard was untimely, as was that aspect alleging a failure to respond to his inquiries.

Amalgamated Transit Union (Delahaye), 41 PERB ¶3004 (2008). Delahaye appealed the dismissal of her charge by the Director on the grounds that the charge was untimely and that it did not provide sufficient facts to constitute an improper practice under the Act. The Board affirmed the decision, finding the charge to be untimely and devoid of factual specificity.

Rochester Teachers Association (Danna), 41 PERB ¶3003 (2008). The Board affirmed the Director's dismissal of a charge alleging that the Association violated the Act when it refused to take Danna's grievance to arbitration. The Board reaffirmed that a union has a wide range of discretion when determining whether to bring a grievance to arbitration, and that the charge did not allege any facts that would support the conclusion that the Association was arbitrary, discriminatory or acted in bad faith when it refused to proceed to arbitration.

Miscellaneous

City of Binghamton, 41 PERB ¶3002 (2008). The Board dismissed exceptions filed by the City to an arbitration award issued by the Assistant Director of Conciliation. The only avenue to appeal an arbitration award issued by a staff member appointed pursuant to the parties' request is under CPLR Article 75. Accordingly, exceptions field pursuant to 213.2 of the Rules of Procedure are prohibited under the mediation/arbitration procedures offered by the agency. Additionally, this Board lacks jurisdiction to interpret collective bargaining agreements except as necessary to exercise its improper-practice jurisdiction.

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Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(J)

By Bilal Zaheer

I. Introduction

In the post-September 11th world, Americans have increasingly mixed feelings about religion and the role it should play in the public and private spheres.[1] More and more, Americans believe that organized religion should have less influence in the public sphere. At the same time, they remain steadfast in their personal religious convictions, with roughly sixty percent consistently indicating that religion is very important to them.[2] The implicit tension between these two views becomes explicit in the employment context, where an individual's private life and the public sphere collide, raising difficult questions as to what role religion should have in the workplace.

Conflicts between work and religion are especially acute for Americans who practice a minority religion. For most of the United States' history, Christianity has been the only religion with a meaningful presence, and thus has almost exclusively shaped the work calendar.[3] Before 1972, employers had no affirmative obligation to accommodate religion, and employees who practiced minority faiths faced difficult choices when confronted with conflicts between work and religion.[4] In 1972, Congress amended Title VII to add section 701(j), which requires employers to "reasonably accommodate" an employee's religious practices.[5] Subsequent Supreme Court decisions, however, have drastically narrowed section 701(j)'s accommodation requirement.[6]

As religious convictions in the United States continue to diversify, the Court's narrow interpretation of religious accommodation in the workplace poses serious problems for millions of religiously observant Americans who practice minority or nontraditional religions.[7] The EEOC has observed a nearly twofold increase in religious discrimination claims over the last fifteen years,[8] which can be attributed, at least in part, to changing demographics and immigration patterns.[9] Many commentators and analysts predict that Islam will soon surpass Judaism as the largest minority faith in the United States, marking the first time in recent American history that a non-Judeo-Christian religion is the most practiced minority faith in the United States.[10] Thus, it is time for courts to reformulate section 701(j) and make it more beneficial to members of minority faiths as Congress originally intended.

This note offers a new framework for accommodating religious practices under section 701(j) of Title VII by using Islam as a test case for exposing problems with the current interpretation of section 701(j). Part II is divided into two sections with the first section providing a brief overview of Islamic practices and American Muslims, and the second section tracing the history of religious accommodation in American statutory and constitutional law. Part III then describes and analyzes the Supreme Court's current interpretation of section 701(j), which requires employers to reasonably accommodate their employees' religious practices, unless accommodation results in an undue hardship. Next, Part IV proposes a new interpretation of section 701(j), one that better balances an employee's religious rights and responsibilities against an employer's business needs by imposing a centrality requirement for religious accommodations. Finally, Part V applies Part IV's interpretation of section 701(j) to Islamic practices to provide employers with a guide to accommodating the religious practices of their Muslim employees.

II. Background

A fair amount of groundwork must be laid before arguing that section 701(j) should be reinterpreted and that American Muslims are or will become critical to any reinterpretation efforts. This Part endeavors to do exactly that, first by providing a brief overview of American Muslims, Islamic duties, and cases involving Muslims in the workplace, and second by describing current statutory and constitutional provisions governing the accommodation of religion.

A. American Muslims: A Brief Overview

Because most Americans think of Islam as a "thoroughly foreign religion," lack of knowledge, rather than open hostility, represents the most potent barrier to properly accommodating Muslims in the workplace.[11] This Section provides a brief overview of Islamic practices and recounts how Muslims seeking religious accommodations have fared in court.

1. Why Muslims?

At the outset, a threshold question must be asked and answered: why should Muslims, as opposed to any other minority faith, guide an analysis of religious accommodation under Title VII? There are two interrelated responses to this question. First, while there is debate over the exact number of American Muslims,[12] there is a general consensus that the number of Muslims in America has increased rapidly over the last century and is continuing to increase.[13] Indeed, Islam is or will become the most populous minority faith in the United

States in the coming century.[14] More important is the unprecedented increase in visibility, via increased media coverage, that Muslims have received since September 11, 2001.[15] Unfortunately for Muslims and non-Muslims alike, this increased attention has been largely negative.[16] The increased attention has, in turn, led many American Muslims to experience "marginalization . . . and powerlessness" and has generally highlighted a wide gap of misunderstanding between American Muslims and their coworkers, employers, and colleagues.[17]

With the number of American Muslims set to eclipse all other minority religions in the United States, employers and federal courts will find themselves increasingly confronted with difficult questions concerning how to accommodate Islamic practices under section 701(j).[18] Unfortunately, the Supreme Court's decisions interpreting section 701(j) have nullified the provision, effectively leaving the statute unable to handle a practice-intensive faith, such as Islam, even though Congress passed the amendment with the intention of making religious adherence in the workplace easier for members of minority faiths.[19] Thus, Islam is an appropriate lens through which to analyze section 701(j), both because Muslims are the most likely group to seek its protection in the coming century and because Islam's practice-intensive nature, which varies significantly from mainstream American religion, highlights many of the problems with the Court's current interpretation of section 701(j).[20]

2. Islam: Beliefs and Practices

Islamic law derives from two main sources: (1) the Qur'an,[21] which Muslims believe contains the direct words of God,[22] and (2) the *ahadith*, which is a voluminous collection of sayings and actions from the Prophet Muhammad, the messenger of Islam.[23] Islam places a heavy emphasis on actions in conformity with belief;[24] thus, Islamic law defines not only a Muslim's duties to God but also a Muslim's duties towards the wider community[25] and generally covers almost every aspect of life.[26] The remainder of this Section discusses the former set of duties.[27]

Every Muslim has five primary duties to God, known as the "pillars of Islam":[28] (1) bearing witness that God exists (*shahadah*);[29] (2) five daily prayers (*salah*), including a special Friday afternoon prayer (*jummah*); (3) fasting for one month during the lunar calendar year (*sawm*); (4) paying a fixed percentage of one's disposable income towards charity (*zakat*);[30] and (5) making a pilgrimage to Makkah, Saudi Arabia, once in one's lifetime (*hajj*). Islam's heavy emphasis on the five daily prayers as a means for both spiritual guidance and salvation, coupled with its emphasis on praying at regular intervals, makes *salah* the most challenging pillar for an employer to accommodate.[31]

In at least four different Qur'anic verses, Muslims are admonished to pray regularly and on time.[32] The Prophet Muhammad, in a well-known hadith, called praying on time one of the three best deeds a Muslim can perform.[33] Every day, a Muslim must pray five prayers at relatively fixed times: before sunrise (*fajr*), around noon (*dhur*), at midday (*'asr*), at sunset (*magrib*), and after sunset (*'isha*).[34] Each of these prayers lasts about five to ten minutes[35] and must be preceded by a ritual cleansing, known as *wudu*, which consists of washing one's mouth, nose, face, forearms and feet with water.[36] Furthermore, Muslims are highly encouraged, but not required, to perform these prayers in congregation at a designated place of worship, known as a *masjid*.[37] In addition to the five daily prayers, a special congregational prayer, known as *jummah*, is held each Friday in place of the regular noon prayer.[38] *Jummah* prayer, generally lasting an hour, is mandatory for every Muslim male, must be prayed at a *masjid*, and Muslims must not engage in business until the prayer ends.[39]

Another challenging pillar for an employer to accommodate is a Muslim's duty to fast during *Ramadan*. For one month each lunar year, known as *Ramadan*, Muslims are required to abstain from food and drink during daylight hours.[40] At sunset of each day during *Ramadan*, Muslims must break their fast with a meal,[41] and they are highly encouraged, but not required, to attend special night prayers at a local *masjid*.[42] Because Islam bases its calendar on the lunar year, *Ramadan* moves up approximately eleven days each year.[43] The first day after *Ramadan* is *Eid ul-Fitr*, which is one of two annual Muslim holidays.[44] Both the Qur'an and practice of the Prophet Muhammad have designated *Eid ul-Fitr* as a day of celebration.[45]

Finally, every Muslim who can afford the trip is required to make a pilgrimage (*hajj*) to Makkah, Saudia Arabia, at least once in one's lifetime.[46] *Hajj* lasts six days and, like the month of *Ramadan*, falls on different dates each year relative to the solar calendar.[47] Once the *hajj* ends, Muslims celebrate their second annual holiday, *Eid ul-Adha*.[48] Regardless of whether one has performed *hajj*, every Muslim around the world celebrates *Eid ul-Adha*, which, like *Eid ul-Fitr*, has been designated as a day of celebration.[49] Due to the cost involved in making a trip to Saudi Arabia and the inflexible timing of *hajj*, Muslim employees fortunate enough to save the requisite money to embark on the trip would need to make the pilgrimage immediately. This immediacy requirement presents a potential accommodation problem for Muslims who work in lower-paying jobs and their employers, as the Muslim employees would have little flexibility in choosing when to perform *hajj* and would need to take at least one week off from work to complete the trip.

Other than the five pillars, Muslim men and women have certain dress requirements they must fulfill. Al-

though the Qur'an does not specify a dress code for Muslims, it does emphasize modesty in dress for both men and women.[50] Muslim women have traditionally covered their heads with a headscarf (called *hijab*), and although there is some debate even amongst Muslims about whether Islamic law strictly requires *hijab*, Muslim women have consistently covered their heads since the time of Islam's inception.[51] Thus, at a minimum, *hijab* constitutes a very strong Islamic tradition. Although not required to cover their heads, Muslim men are encouraged to do so with a prayer cap, are required to dress modestly, and are encouraged to keep a beard in honor of the Prophet Muhammad.[52]

Thus, unlike Judeo-Christian religions, which traditionally observe a day of Sabbath and various religious holidays on fixed days of the year, Islamic law has no required weekly Sabbath. In contrast, Islamic law spreads out religious obligations over smaller time increments and does not observe holidays at consistent times each year. These differences make accommodating Islam in the workplace more difficult and costly than accommodating other religions. The next Section will discuss some of the difficulties Muslim employees have faced in trying to obtain accommodations from their employers, and Part III will analyze why the current interpretation of section 701(j) is inadequate for accommodating Islam and other minority religions.

3. Muslims in American Jurisprudence

While the number of religious discrimination complaints filed by Muslims with the EEOC has more than doubled since September 11, 2001,[53] the number of actual court cases involving religious accommodation of Islamic practices has remained low.[54] However, with the increase of Muslim immigration to the United States and subsequent likely increase of Muslims in the labor force, the number of conflicts involving accommodating Muslims will likely rise, unless a new religious accommodation framework is developed.[55] This Section details a few of the more instructive federal court cases involving accommodating Islam and highlights the difficulties Muslims have faced in receiving accommodations from their employers for some of Islam's most central practices.

Most federal and state cases involving the accommodation of Islamic practices deal with accommodating prayer schedules, particularly Friday prayer. For example, in two New York cases, Muslim plaintiffs requested accommodations for Friday prayers. In the first case, the court held that the employee was bound to accept a very unappealing accommodation granted by the employer.[56] In the second case, the court held that accommodating the Muslim employee's request to attend Friday prayers would result in more than a de minimis cost to his employer, and therefore, the employer was not required to accommodate him under Title VII.[57] Thus, in both cases, the courts accorded the employer's business needs primacy over the religious needs of the employee,[58] and the employees found themselves faced with the difficult decision of finding another job or foregoing a central religious practice.[59]

In *Tyson v. Clarian Health Partners, Inc.*,[60] Fatou Tyson, a Muslim woman, worked at a hospital in Indiana as a Patient Service Assistant.[61] One week after starting work, Tyson notified her supervisor that she was Muslim and would need accommodations for her daily prayers. Initially, her supervisor agreed to accommodate Tyson's request.[62] About six months after Tyson started work, she was preparing for prayer in the bathroom of an empty patient room when her supervisor saw her performing *wudu*.[63] Using the bathroom of an empty patient room apparently violated a hospital "policy," so Tyson received a reprimand for her actions even though *wudu* is a mandatory religious prerequisite to prayer and her supervisor had already agreed to accommodate her prayer schedule.[64] One week later, the hospital fired Tyson, basing its decision partly on her performing *wudu* in a patient room.[65] In other words, the hospital fired Tyson, in part, for performing an indispensable religious practice.

Finally, in *Khan v. Federal Reserve Bank of New York*,[66] a Muslim computer programmer for the Federal Reserve Bank of New York, Zarin Khan, requested an adjustment to her work schedule while she fasted during *Ramadan*.[67] The Federal Reserve normally required its employees to work from 9:00 a.m. until 5:45 p.m. with a one hour lunch break. Khan proposed that she instead work from 8:00 a.m. to 4:00 p.m. without a lunch break.[68] Her supervisor rejected the proposed accommodation and cited an "official bank policy" that barred employees from working through lunch.[69] Although the court ultimately decided the case on other grounds,[70] the decision still demonstrates the relative difficulty Muslims have faced in obtaining religious accommodations from their employers.

B. Religious Accommodation in Statutory and Case Law

Currently, First Amendment jurisprudence permits, but does not require, the accommodation of religion, and only section 701(j) of Title VII directly addresses accommodating religion in the workplace. However, the Workplace Religious Freedom Act of 2005, which has circulated through the last five sessions of Congress (albeit without success), would significantly amend section 701(j). This Section describes all three provisions and their effect on workplace religious accommodations.

1. Constitutional Provisions Governing the Accommodation of Religion

The Constitution contains two clauses governing the relationship between religion and the government: "Congress shall make no law respecting an establishment

of religion, or prohibiting the free exercise thereof. . . ."[71] The twin religion clauses have produced an immense amount of litigation concerning the tension between what jurists refer to as the Free Exercise Clause and the Establishment Clause.[72] In the context of accommodating religion, courts have had an especially difficult time grappling with this tension. While accommodating religious practice accords with the notion of protecting the free exercise of religion,[73] constitutionally mandating the accommodation of religion could violate the Establishment Clause. Over the last quarter century, the Supreme Court has inconsistently drawn the line between free exercise and establishment of religion.[74] Current Supreme Court jurisprudence holds that the Constitution does not require accommodating religious practices and that any accommodations must be created by the legislature.[75]

2. Statutory Provisions Governing the Accommodation of Religion

Before Congress passed Title VII, no overarching statutory laws governed the accommodation of religion in the workplace. Title VII, as originally enacted, prohibited discrimination on the basis of religion but included neither a statutory definition of religion nor any mention of religious accommodations, thus leaving open the question of whether employers had an affirmative duty to accommodate religion in the workplace.[76] The question remained unanswered until 1970, when the Sixth Circuit Court of Appeals addressed it in *Dewey v. Reynolds Metals Co*.[77]

Dewey involved a member of the Faith Reformed Church, Robert Dewey, who was a union member and employee of Reynolds Metal. After Reynolds negotiated with the union for mandatory employee overtime shifts, Dewey objected to the extra hours and refused to work on Saturdays, arguing that his religious beliefs prohibited him from working on his Sabbath.[78] Reynolds eventually fired Dewey for his refusal to work on Saturday, and Dewey filed suit against Reynolds, arguing that Reynolds violated Title VII by discriminating against him because of his religion.[79] The Sixth Circuit rejected Dewey's claim, stating, "[n]owhere in the legislative history of [Title VII] do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another."[80] On appeal, the Supreme Court affirmed the Sixth Circuit's decision in a 4-4 per curium decision, thus leaving unresolved many questions surrounding religious accommodation.[81]

In 1972, Congress responded to *Dewey* by adding section 701(j) to Title VII.[82] Section 701(j) states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[83] Thus, section 701(j) essentially codified the EEOC's 1967 regulations, which also required an employer to reasonably accommodate the religious needs of its employees "where such accommodations can be made without undue hardship" to the employer's business needs.[84] When the amendment was introduced in the Senate, Senator Jennings Randolph, the main proponent of section 701(j), expressed his desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."[85]

Senator Randolph belonged to a religious minority, the Seventh-Day Baptists, and expressed strong concern over court decisions that did not protect the right of an employee to observe the Sabbath on a day other than Sunday.[86] He also expressed concern that should the amendment not pass, employees who were not receiving religious accommodations might soon find themselves in the unfortunate position of choosing between work and religion.[87] Thus, Senator Randolph introduced, and the Senate passed, section 701(j) with the express intention of superseding *Dewey* and, at a minimum, requiring employers to accommodate employees' religious obligation to observe their Sabbath.[88] Because Congress failed to define "reasonable accommodation" or "undue hardship," the judiciary has retained considerable discretion in defining the scope of an employer's religious accommodation duty. As Part III.A will demonstrate, the Supreme Court has interpreted these two terms in a manner extremely favorable to employers, essentially nullifying section 701(j).[89]

3. The Proposed Workplace Religious Freedom Act of 2005

Since 1996, Congress has introduced some variant of an amendment to section 701(j) in every session.[90] The most recent bill, called the Workplace Religious Freedom Act (WRFA) of 2005, defines "undue hardship" as "requiring significant difficulty or expense" and includes a nonexhaustive list of factors that courts should consider in determining what constitutes an "undue hardship."[91] The proposed amendment also seeks to increase protection for employees wishing to take time off from work for a "religious observance or practice."[92] According to Senator Rick Santorum, one of the bill's co-sponsors, the WRFA would restore "a balanced approach to religious freedom in the workplace" by "clarif[ying] current law."[93] So far, the WRFA has not passed, and it seems unlikely to pass any time soon.[94] However, the mere fact that members of Congress have proposed the bill more than once warrants further analysis of the WRFA and what effect it would have, if enacted, on the recommendation this note makes in Part IV. Accordingly, Part III analyzes the WRFA's relationship to section 701(j) in the context of congressional intent, and Part IV proposes a solution that resembles parts of the WRFA, while adding a few limitations that better balance the rights of employees and employers than the proposed WRFA.[95]

III. Analysis

The text of section 701(j), read in conjunction with the legislative history discussed above, suggests that section 701(j) should have provided strong support to employees in need of religious accommodations. In practice, the Supreme Court has interpreted an employer's duty to accommodate religion so narrowly that some commentators question whether the duty still exists.[96] This Section describes and analyzes two seminal Supreme Court cases interpreting section 701(j), and then argues that these two cases interpret section 701(j) in a manner inconsistent with the statute's plain meaning and purpose as well as in a manner that disproportionately affects members of minority religions.

A. Supreme Court's Interpretation of Section 701(j)

Although the Supreme Court has never directly decided whether section 701(j) passes constitutional muster,[97] the Court has on two separate occasions interpreted the scope of an employer's duty under section 701(j).[98] In *Trans World Airlines, Inc. v. Hardison*,[99] the Court defined "undue hardship" and its relationship to what constitutes a reasonable accommodation. Nine years later, the Court elaborated on the scope of reasonable accommodation in *Ansonia Board of Education v. Philbrook*.[100] Together, these two cases have significantly narrowed an employer's duty to accommodate religion in the workplace.

1. *Trans World Airlines, Inc. v. Hardison*

The issue in *Hardison* was "the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays."[101] Larry Hardison, who was a member of a religion that required its followers to observe a Saturday Sabbath, worked as a desk clerk for TWA, which never closed even for traditional holidays.[102] When Hardison's transfer to a new building at TWA reduced his seniority level, his union refused to depart from its seniority system and permit Hardison to take Saturdays off.[103] Hardison proposed several alternative work arrangements to TWA, but TWA eventually rejected all of them.[104] After TWA fired him for refusing to work on Saturday, Hardison sued TWA, arguing that the airline had discriminated against him on account of his religion.[105]

The Court began its analysis by noting that Congress passed Title VII to "eliminat[e] discrimination in employment; [thus] similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."[106] Therefore, the Court concluded that religious accommodations resulting in preferential treatment for an employee violate Title VII's antidiscrimination principle and are necessarily unreasonable.[107] Furthermore, the Court held that requiring an employer "to bear more than a de minimis cost" in providing a religious accommodation constitutes an undue hardship to the employer.[108]

Thus, under *Hardison*'s narrow interpretation of section 701(j), Title VII permits only religious accommodations that do not result in preferential treatment for an employee and incur no more than a de minimis cost to the employer. More astounding than this narrow holding, however, is that it would have cost TWA, a multinational corporation, only $150 to accommodate Hardison's Sabbath observance, but the Court still deemed this insignificant cost an undue hardship.[109] Rather than focusing on an employee's right to religious accommodation, which section 701(j) creates, the Court instead focused on Title VII's overall antidiscrimination mandate in holding that employers need not accommodate religious practices if doing so would result in "preferential" treatment for employees.[110]

However, "if an accommodation can be rejected simply because it involves preferential treatment, then . . . [section 701(j)], while brimming with sound and fury, ultimately signif[ies] nothing."[111] The very idea of accommodating a religious practice involves exempting an employee from an otherwise neutral employment rule.[112] Thus, the issue is not whether an employee receives preferential treatment, but rather whether granting this treatment results in an undue hardship to the employer.[113] In reaching its holding, the Court clearly signaled that employer business needs and the rights of other employees heavily outweigh an employee's right to religious accommodation.[114] This reasoning not only directly contradicts the plain language and congressional intent behind section 701(j), but also disproportionately impacts the rights of adherents to minority religions.[115]

2. *Ansonia Board of Education v. Philbrook*

Nine years after *Hardison*, the Supreme Court again addressed the extent of an employer's duty to reasonably accommodate religion in *Ansonia*, and rather than mitigate *Hardison*'s harsh result, the Court further narrowed the employer's accommodation duty.[116] Under the Ansonia School District's collective bargaining agreement, each teacher received three days of paid leave to attend religious holidays and three days of paid leave to attend to "necessary personal business," which could *not* include religious holidays.[117] Robert Philbrook, a teacher, subscribed to a faith that required him to observe six religious holidays a year.[118] Prior to 1976, Philbrook took unpaid leave to observe the extra three religious holidays; however, in 1976, Philbrook proposed two alternative arrangements to the school board, both of which the school board rejected.[119] Philbrook responded by filing a complaint against the school board, alleging that it had discriminated against him on the basis of his religion.[120]

Although the Supreme Court ultimately remanded the case to the district court for further findings, it did address the question whether, in trying to reasonably accommodate an employee's religious practices, an employer must accept the employee's preferred ac-

commodation, unless that accommodation results in an undue hardship.[121] The Court answered this question in the negative, finding "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation."[122] Furthermore, the Court held that "*any* reasonable accommodation by the employer is sufficient to meet its [Title VII] obligation."[123] In so holding, the Court implicitly raised and answered a central question that underlies section 701(j)'s reasonable accommodation requirement: for *whom* should the accommodation be reasonable?

The Court's holding strongly suggests that in determining whether an accommodation is reasonable, the Court views "reasonableness" from the perspective of the employer, not the employee. For example, in requiring the Ansonia school board to provide a reasonable accommodation to Philbrook, the Court concluded that allowing Philbrook to take unpaid leave to observe religious holidays "eliminate[d] the conflict between employment requirements and religious practices," and thus constituted a reasonable accommodation.[124] In this case, however, the school board's proposed accommodation only *superficially* eliminated the religious conflict for Philbrook. Although he could take unpaid leave to observe religious holidays, Philbrook still faced the difficult choice of foregoing three days of income to stay faithful to his religion, or earning income but violating his faith by working during a religious holiday.[125]

As Justice Marshall argued in his partial dissent, Congress passed section 701(j) precisely to alleviate this conflict,[126] and in ignoring congressional intent, the Court's interpretation essentially lifts any duty on the employer to work with the employee to find a reasonable accommodation.[127] An employer can easily devise any number of "accommodations" that at least superficially eliminate the employee's religious conflict but in actuality still leave the employee with a difficult choice between religious duty and work obligations.[128] Until an accommodation "*fully* resolves the conflict between the employee's work and religious requirements" or at least *mostly* resolves the conflict, the accommodation is of little use to an employee.[129] As Part III.B will argue, the *Ansonia* Court's decision to view reasonableness from the perspective of the employer poses several additional problems, including contravening congressional intent.

B. Criticisms of the Current Section 701(j) Interpretation

The Court's current interpretation of section 701(j) poses three interrelated problems. First, it violates the plain meaning of the amendment by interpreting "undue hardship" to mean the opposite of its ordinary meaning. Second, the Court's narrow, employer-friendly reading of section 701(j) contradicts the purpose of the amendment. Finally, because the current interpretation heavily favors employers, it disadvantages employees who practice minority religions such as Islam.[130]

1. Plain Meaning

Perhaps one of the most firmly rooted canons of statutory interpretation is that the language of a statute is the starting point for interpretation.[131] Only when there is express congressional intent supporting an interpretation contrary to the plain language of the statute,[132] or where the statutory language is ambiguous, do courts look beyond the statute.[133] In trying to determine the plain meaning, courts frequently consult canons of statutory interpretation and dictionary definitions of relevant terms in the statute.[134] Notably, the Court's current interpretation of section 701(j) contradicts both the statute's plain meaning and the underlying congressional intent.[135]

The Oxford English Dictionary defines "undue" as "[g]oing beyond what is appropriate, warranted, or natural," including "excessive" as a synonym.[136] Furthermore, *Oxford Dictionary* defines "hardship" as "an infliction of severity or *suffering*."[137] Taken together, a dictionary definition of "undue hardship" essentially equates the phrase with an excessive amount of suffering. *Black's Law Dictionary* defines an analogous phrase, "undue burden," as a burden that is "excessive or unwarranted."[138] In contrast to "undue burden," *Black's Law* defines "de minimis" as "trifling" and "so insignificant that a court may overlook it in deciding an issue or case."[139] Thus, the plain meaning of undue hardship is diametrically opposed to the plain meaning of de minimis. By interpreting section 701(j)'s undue hardship language as requiring an employer to bear no more than a de minimis cost to accommodate an employee's religious practices, the Supreme Court has disregarded the plain meaning of section 701(j) and "effectively nullif[ied]" the statute.[140]

Indeed, the Court's interpretation of undue hardship in the religious accommodation context differs markedly from its application of this phrase and similar phrases in other contexts, further highlighting the atypical nature of the Court's current interpretation. For example, in deciding whether a particular law regulating abortion is valid, the Court has held that any law that imposes an "undue burden" on a woman's right to choose to have an abortion violates the Due Process Clause.[141] In this context, the Court defines undue burden as any law or regulation that has the "purpose or effect of placing a *substantial obstacle* in the path" of a woman seeking an abortion.[142] Congress also employed the phrase "undue hardship" in the Americans with Disabilities Act (ADA), but unlike section 701(j), the ADA includes a definition of that phrase—a definition that significantly differs from the Court's interpretation of this same phrase in the religious discrimination context.[143] The ADA defines "undue hardship" as "action requiring *significant difficulty or expense*"[144] when considered in light of several factors listed in subsection 101(B).[145] Thus, it appears that only for religious accommodations has the Court interpreted "undue hardship" in a manner at odds with its ordinary

meaning, and this deviation has significantly hampered section 701(j)'s effectiveness.

The Court's current interpretation of section 701(j) departs so significantly from the plain meaning of the statute that it raises the question: what motivated the Court to choose the interpretation it ultimately settled on in *Hardison*? As Justice Marshall pointed out in his *Hardison* dissent, the majority's opinion, while ignoring the plain language of the statute, possessed the "singular advantage" of avoiding any potential constitutional problems with section 701(j).[146] In deciding *Hardison*, the Court could have chosen one of two routes: (1) interpret section 701(j) as requiring employers to accommodate *all* religious practices, unless doing so results in *significant* hardship, and thereby subject section 701(j) to constitutional attacks,[147] or (2) interpret section 701(j) as requiring employers to accommodate only those religious practices that result in a less than de minimis cost to the employer. The *Hardison* majority ultimately chose the second route, and avoided any potential constitutional difficulties with section 701(j). However, as Part IV will show, another framework for interpreting section 701(j) exists—one that reaches a better balance between plain meaning, congressional intent, and the Constitution.[148]

Although the Court's current interpretation of section 701(j) contradicts the statute's plain meaning, its approach has some advantages. First, as mentioned above, by equating undue hardship with de minimis cost, the *Hardison* majority avoided confronting the potentially difficult issue of whether the Establishment Clause would permit "interpreting [Title VII] to compel employers . . . to incur substantial costs to aid the religious observer."[149] This advantage has been seriously eroded, however, by subsequent Supreme Court decisions that have all but confirmed that the Court will find section 701(j) consistent with the Establishment Clause.[150] Second, the Court's current interpretation creates a simple, bright-line rule, which results in easy application and prevents employers from having to deal with a potentially high number of accommodation requests, many of which could be trivial or insincere.[151] In creating this bright-line rule, however, the Court effectively has eliminated an employee's ability to obtain religious accommodations and has tipped the scale too far in the favor of employers.[152] Part IV develops a framework that better balances an employee's religious needs with an employer's business needs.[153]

2. Congressional Intent

The Court's current interpretation of section 701(j) also directly contradicts congressional intent.[154] The *Hardison* majority asserted that "[t]he brief legislative history of § 701(j) is . . . of little assistance."[155] However, as Part II.B demonstrated, the legislative history of section 701(j), although admittedly short, deals directly with the factual scenario that the *Hardison* Court faced.[156] Moreover, while the *Hardison* majority insisted that the "reach" of the duty to reasonably accommodate "has never been spelled out by Congress,"[157] the congressional record contains two hypothetical situations posed to Senator Randolph by other Senators wishing to clarify the scope of the duty imposed by the amendment.[158]

For example, when attempting to clarify what might constitute an undue hardship, Senator Williams outlined the scenario of an employee hired to work a weekend-only job.[159] If this employee could not work one of the two days because of a religious observance, then that constituted an undue hardship that section 701(j) would not require the employer to accommodate.[160] On the other hand, no undue hardship would fall on an employer who had to create a flexible work schedule for an employee whose religion required him to work fifteen days and then take off fifteen days.[161] Thus, despite the *Hardison* majority's assertion that the legislative history of section 701(j) does not clarify the scope of an employer's duty, the Senate clearly contemplated a much higher level of accommodation than the Court currently requires.[162]

Senator Randolph's remarks reveal another important point that sheds light on the purpose of the amendment: the senator's deep concern over employees being forced to choose between religion and their jobs.[163] Thus, in proposing section 701(j), Senator Randolph hoped to eliminate that difficult choice for employees by requiring employers to make reasonable accommodations for the religious needs of employees.[164] This demonstrates that, at a minimum, reasonable accommodation includes those practices that, if prohibited, would force the employee to choose between religion and work.[165]

Furthermore, in holding that an employer satisfies its duty to accommodate an employee simply by choosing any "reasonable accommodation," the Court purportedly relied on section 701(j)'s legislative history, which calls for "flexibility" in devising reasonable accommodations.[166] However, as Justice Marshall noted in his partial dissent, the specific language on which the majority relied is ambiguous and can easily support the opposite of the Court's conclusion.[167] Much like in *Hardison*, the *Ansonia* Court seemingly ignored the overall message of section 701(j)'s legislative history and instead narrowed the employer's duty to accommodate even further, despite convincing evidence in the congressional record indicating a contrary intent.

Finally, the fact that members of Congress have repeatedly introduced some variant of the WRFA, essentially aimed at overruling *Hardison* and part of *Ansonia*, could point to Congress' awareness of the problems with the Court's interpretation of section 701(j). On the other hand, one might conclude from the WRFA's inability to pass, or even come to a vote, that a majority of Congress tacitly approves of the way courts have handled interpreting key terms in section 701(j).[168] However, the most

likely explanation for the WRFA's nonpassage lies not in any tacit congressional approval but in the strong lobbying efforts of powerful corporate interest groups set on ensuring that the WRFA does not pass.[169] The inability of the various versions of the WRFA to pass probably means that while Congress recognizes problems with current section 701(j) jurisprudence, it is unsure how best to correct the problem in a manner satisfactory to both corporate and religious lobbying coalitions.[170]

3. Effect of Current Interpretation on Minority Religions

Lastly, the Court's imposition of a de minimis ceiling on the cost of religious accommodations and its narrow definition of "reasonable accommodation" results in a very employer-friendly application of section 701(j), making it nearly impossible for an employee who practices a minority religion to obtain meaningful accommodations from an employer. Due to the United States' largely Christian history, the vast majority of work calendars are well equipped to handle Christian holidays and religious practices.[171] For example, most businesses close, or have reduced hours on, Christmas and Sundays.[172] Therefore, employees who subscribe to a majority sect of Christianity will find it relatively easy to practice their religion, as most of the necessary holidays are already built into the employer's work calendar and impose no additional costs on the employer.

Furthermore, the cost to accommodate members of a majority religion will almost always be significantly less than the cost to accommodate members of minority religions because of sheer numbers. Employers will generally find it less costly to make one accommodation for a large group of employees subscribing to one faith, as opposed to a number of different accommodations for employees practicing minority religions. As discussed above, however, Congress passed section 701(j) mainly to protect minority religious practices, not to place an extra burden on them.[173] Thus, in making the attainment of religious accommodations more difficult for members of minority religions, the Court's current interpretation again contravenes section 701(j)'s purpose.

Moreover, in allowing employers to reject an accommodation simply because it results in more than a de minimis cost, the Court has effectively placed an insurmountable burden on employees seeking religious accommodations, while vitiating employers' affirmative duty to accommodate religious practices. Employers can easily demonstrate that a requested accommodation imposes a de minimis cost on their operations because by definition every accommodation involves an exemption from an otherwise neutral employment rule or practice.[174] And almost every exception to such a rule or practice will cost an employer *something*.[175] In the vast majority of cases, it will be impossible for an employee to argue that a given religious accommodation does not impose even a de minimis cost on an employer.[176] Thus, the Court's current interpretation poses an almost insurmountable burden on religious employees, while imposing no burden on employers. Because adherents to majority religions will not need to request accommodations as frequently as adherents to minority religions, this insurmountable burden falls squarely on the shoulders of adherents to minority faiths. This outcome is in direct opposition to Congress' intent.

Finally, the Court's holding that an employer need only accept any reasonable accommodation to satisfy its section 701(j) obligation also disproportionately affects members of minority religions. By holding that a reasonable accommodation is one that merely "eliminates"[177] the conflict between religious and work obligations, the Court has essentially given employers complete freedom to choose the accommodation most convenient to them, no matter how much of a burden that accommodation may place on the religious employee.[178] Because fully accommodating minority religious practices will almost always be inconvenient for employers, employees adhering to minority faiths are far less likely to receive accommodations of which they can actually take advantage. Therefore, the Court's current interpretation of section 701(j) excludes the very class of employees that Congress intended it to protect.

Using Islam as an example, imagine a Muslim who works as a janitor in an office building for an eight-hour shift with only one hour-long break allowed for lunch each day. Imagine further that this break must be used all at once and cannot be split.[179] The employee would naturally prefer to take three ten-minute breaks during the day to pray his required prayers and shorten his lunch by thirty minutes. All the employer would have to do to avoid accommodating this Muslim employee, however, is show that this accommodation would result in more than a de minimis cost, which it almost certainly would because it would require the Muslim employee to take more breaks during his shift. And if, somehow, no proposed accommodation actually resulted in more than a de minimis cost, the employer could reject the employee's proposed accommodation and instead offer the Muslim employee an eight-hour night-shift, which would not conflict with any of his prayers and would thus satisfy the reasonable accommodation standard.

In this situation the Muslim employee would have to decide between three very unappealing choices: (1) elect to work an eight-hour night-shift at least five days a week, (2) continue to work the day shift but neglect one of the most central Islamic duties, or (3) find a new job that will somehow accommodate his religious obligations. The employee in this situation would clearly prefer his proposed accommodation of splitting up his one-hour

lunch break to perform his prayers, and in most respects, the employee's proposed accommodation is undoubtedly more reasonable than making him substantially rearrange his life by working the night-shift. However, under the Court's current interpretation of section 701(j), the employer would have no duty to accept this employee's accommodation, and the employee would likely have to choose between work and fulfilling a central religious obligation.

IV. Recommendation

The above analysis demonstrates that Congress had two main concerns in passing section 701(j): (1) allowing religiously observant employees to both practice their religion and retain their jobs, and (2) protecting the religious practices of adherents to minority religions. The Court's current interpretation seriously hinders both of these goals. Thus, a new interpretation of the statute is necessary to extend its reach and better implement Congress' vision of section 701(j). The remainder of this Section develops a new framework for accommodating the needs of religious employees, addresses potential objections to this framework, and analyzes what effect passage of the WRFA would have on this proposal.

A. Reviving Section 701(j): Developing a Framework That Accommodates Those Religious Practices Most in Need of Accommodation

Rather than allowing employers to reject accommodations that result in more than a de minimis cost, thereby eliminating virtually all religious accommodations, courts should require employers to accommodate all religious practices deemed "central" to the employee's faith, unless accommodation of those practices would result in an undue (i.e., *significant*) hardship to the employer.[180] The less central a particular religious practice is to a given faith, the less cost an employer should be required to bear in accommodating the practice. Thus, if a given practice is a religious preference as opposed to a religious mandate, then employers would not be required to incur more than a de minimis cost to accommodate this preference.[181] If, however, an employee demonstrates that a given practice is central to his faith, then an employer would be required to accommodate this practice, unless it could not do so without incurring *significant* expense. Central religious practices include those practices without which an employee's ability to practice religion is substantially undermined.[182]

To prove centrality and receive the higher level of accommodation, employees would be required to: (1) notify the employer of the need for a religious accommodation; (2) present evidence that not accommodating the practice at issue poses a substantial threat of frustrating religious practice and undermines employees' ability to stay faithful to their religion (i.e., prove that the practice is "central"); (3) be honest and sincere in their claim of centrality; and (4) propose a reasonable accommodation.[183] Thus, the employee would have the burden of both proving the centrality of the religious practice in need of accommodation and devising a reasonable way to accommodate this practice.

Once an employee has met this burden, the employee's proposed accommodation would be presumed reasonable unless the employer could demonstrate that the proposed accommodation results in an undue hardship to the employer. In proving undue hardship, employers would be required to produce affirmative evidence of the undue hardship and would not be allowed to reject an accommodation based on speculation that it *might* result in an undue hardship.[184] Although an employer could prove an undue hardship in several ways, some of the most common would include: (1) demonstrating that the accommodation results in an undue financial hardship; (2) showing that the accommodation would expose the employer to criminal or civil liability; (3) demonstrating that the accommodation would *actively* invade the rights of coworkers or supervisors; or (4) showing that the accommodation would pose health or safety risks.

Thus, for example, an employer could successfully reject, on undue hardship grounds, accommodating the Sikh religious practice of carrying a large sharpened sword in public because it creates a safety risk.[185] An employer would also not be required to accommodate an employee who insisted that racial segregation was a central tenet of his faith, as doing so would expose the employer to civil liability.[186] More difficult questions arise with religious employees who argue that their religion mandates proselytizing, even at work.[187] Assuming other employees oppose such religious solicitation, an employer could reasonably argue that accommodating this practice results in an undue hardship because it *actively* invades the rights of coworkers. An employer could not, however, ban headscarves or beards on the theory that it makes other workers uncomfortable and therefore constitutes an undue hardship. The mere fact that an employee dislikes looking at a woman's headscarf or a man's beard does not *actively* invade that employee's rights.

Reinterpreting section 701(j) to require employers to bear higher costs in order to accommodate "central" religious practices poses several distinct advantages over the Court's current interpretation. First, it shifts the burdens of devising and implementing religious accommodations to the parties best able to handle them. Because employees, especially members of minority religions, will understand the nature of their religious obligations much better than their employers, they will be far more adept at finding reasonable solutions to conflicts between religious and work requirements. Thus, it makes sense to put the burden of devising an accommodation and

proving its reasonable nature on the employee seeking the accommodation. Furthermore, because employers are in the best position to assess the cost a proposed accommodation would impose on their business, they should shoulder the burden of proving that the employee's proposed accommodation would inflict an undue hardship on the employer's business.

Second, the proposed interpretation strikes a better balance between congressional intent and the plain meaning of section 701(j). As Part III.B.1 demonstrated, a straightforward textual interpretation of section 701(j) would require employers to accommodate *every* sincere religious practice, no matter how trivial that particular practice may be to the employee's overall faith, unless accommodation resulted in an undue hardship. Such an interpretation would inflict significant costs on employers because while one accommodation might be inexpensive, small accommodations aggregated together could result in large costs and completely disrupt the workplace. However, the Court's current interpretation places no burden on the employer and nearly extinguishes the employee's right to any religious accommodations. By interpreting undue hardship in its ordinary sense but also imposing a centrality requirement, the proposed interpretation requires employers to bear more costs to accommodate those practices most in need of accommodation, thereby staying within constitutional boundaries by removing a burden on religious practice without promoting religion. Requiring employers to bear more financial costs to accommodate only central religious practices also significantly decreases the likelihood that an employee might be forced to choose between work and religion, thereby aligning this interpretation with congressional intent.

Finally, by requiring an employer to assume more costs to accommodate religious practices, this new framework improves a minority-religion member's chances of receiving religious accommodations in the workplace. Because accommodating minority religious practices will cost more than accommodating majority religions, requiring employers to bear higher costs for religious accommodations ensures that minority religious practices are not excluded from the workplace simply because they cost more.[188] Also, requiring employers to accept the employee's proposed accommodation, unless that accommodation causes significant hardship, further improves accommodation opportunities for members of minority religions.

B. Objections to the "Centrality" Requirement in Determining Religious Accommodations

Requiring employers to make special efforts to accommodate religious practices deemed central to an employee's faith raises two possible objections: (1) such a rule could potentially entangle the judiciary in theological debates outside its authority, and (2) nothing in the language of section 701(j) appears to suggest that its protection should be limited to religious practices central to an employee's faith.

1. Objection 1: Courts Are Not Ecclesiastical Bodies or Arbiters of Religion

First, federal courts have by and large declined explicit invitations[189] to evaluate the place a particular belief or practice holds in a religion.[190] These courts have argued that the judiciary is neither equipped to decide such questions nor given the authority to do so,[191] and they have further argued that allowing a court to evaluate the place a particular religious practice occupies within a religion would put courts in the untenable position of instructing "some religious adherents [that they] misunderstand their own religious beliefs."[192]

In fact, two Supreme Court cases have explicitly rejected the centrality test for religious accommodations in the free exercise context on the grounds that such a test would force courts into constitutionally improper theological debates. In *Employment Division v. Smith*, Justice Scalia, writing for the majority, rejected an invitation to apply the centrality principle to allow religious exemptions to an otherwise "generally applicable criminal law."[193] According to Justice Scalia, the Free Exercise Clause protects all forms of religious belief and prohibits the government from singling out any religious practice, not just central practices, for prohibition or other forms of discrimination.[194] As long as a law does not target any specific religion or practice, however, religiously observant citizens cannot find sanctuary for violating a neutral law in the Free Exercise Clause.[195]

But while *Smith* ultimately concluded that the Free Exercise Clause does not mandate religious exemptions from generally applicable rules or laws, it did note that legislatures are free to enact religious-practice exemption laws.[196] Section 701(j) is one such law.[197] Furthermore, Justice Scalia conceded in *Smith* that "if general laws are to be subjected to a 'religious practice' exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must be reasonably considered."[198] Thus, though the Court rejected the centrality requirement in the free exercise context, it explicitly recognized that any law[199] that requires religious accommodation and allows religious exemptions from neutral rules must be subject to a centrality requirement to be fairly applied. Because section 701(j) creates exactly this sort of situation (i.e., general employment rules subject to a religious exemption requirement),[200] a centrality requirement is the only reasonable way to balance the employer's business needs against the employee's religious needs.

Furthermore, implementing a centrality requirement for religious accommodations would not actually

drag courts into protracted theological debates. In *Lyng v. Northwest Indian Cemetery Protective Association*, the majority rejected Justice Brennan's call to use a centrality test to determine which religious practices the Free Exercise Clause required the government to accommodate, concluding that such a test would improperly entangle courts in theological debates by "cast[ing] the Judiciary in a role . . . we were never intended to play."[201] However, as Justice Brennan argued in his dissent, making a determination of what beliefs are central to a religion does not in fact place courts in this position because courts would not be called upon to determine whether a religious adherent *understands* a given faith.[202] Instead, courts would be called upon to determine whether the proponent of the religious accommodation has met the *burden* of demonstrating that the practice in need of accommodation is central to the faith.[203] Thus, requiring an employee to demonstrate the centrality of a religious practice before an employer must assume significant cost to accommodate that practice will not have the effect of dragging federal courts into theological disputes.

2. Objection 2: The Proposed Interpretation Ignores Religious Practices That Congress Intended to Protect

A second possible objection to the centrality requirement is that nothing in the language of section 701(j) suggests that extra accommodation protections should be afforded to religious practices deemed central to one's faith.[204] In fact, on its face, section 701(j) appears to require employers to accommodate *all* religious practices, no matter how trivial, unless the employer can demonstrate an undue or significant hardship. But as Part II.B.2 demonstrated, Congress amended Title VII in 1972 based mainly on the views of the amendment's chief proponent, Senator Jennings Randolph, who proposed the amendment in large part to alleviate the difficulty that many religious employees faced—having to choose between work and religion.[205] As long as an employer accommodates, subject to the "undue hardship" limitation, those religious practices without which an employee's ability to practice his faith would be substantially undermined (i.e., central practices), employees will no longer find themselves in the difficult position of choosing between work and religion. Thus, requiring employers to bear more costs to accommodate central religious practices and beliefs falls squarely in line with the purpose of the amendment, even if it does not square exactly with the amendment's literal language.

Furthermore, imposing a centrality requirement might be the only way to fairly balance employee religious practice rights with the employer's right to run an efficient and orderly work environment. In noting that any religious exemption law must necessarily have a centrality component, Justice Scalia observed that without a centrality requirement, the custom of throwing rice at church weddings would receive the same level of protection that the practice of having a wedding in a church would receive, even though these religious practices clearly do not carry the same importance.[206] In the employment context, without a centrality requirement, employers could find themselves flooded with accommodation requests that, although sincere, are not actually necessary to remove a burden on religious practice. Moreover, not imposing a centrality requirement for religious accommodations leaves section 701(j) prone to use as a tool to harass employers with insincere accommodation requests and threatens to undermine the protection Congress intended section 701(j) to give religion in the workplace.

C. Effect of WRFA on the Proposed Interpretation of Section 701(j)

Should the WRFA finally pass, it would have a substantial effect on workplace religious accommodations, but it would not necessarily create the proper balance between employee accommodation rights and employer business needs. Whereas the current interpretation of section 701(j) overemphasizes the employers' business needs, the WRFA suffers from the opposite problem: it significantly broadens the scope of an employer's duty to accommodate religion without a corresponding requirement that employers bear significant accommodation costs only for central religious practices. This would leave the WRFA, and by extension section 701(j), open to constitutional attacks for crossing the line, painstakingly drawn by Free Exercise and Establishment Clause jurisprudence, between removing burdens on religious practice and promoting religion.[207] As Part II.B.2 demonstrated, Congress primarily intended section 701(j) to remove those burdens on religious practice that might force an employee to choose between religion and work (i.e., those practices that this note has defined as central to a given religion). By not including a centrality requirement in the WRFA, Congress risks courts holding the WRFA, or even all of section 701(j), unconstitutional.

If the WRFA does pass, and courts are forced to consider its constitutionality, they can avoid declaring it unconstitutional by reading into the WRFA the centrality requirement developed above.[208] As the Supreme Court has repeatedly held, courts are permitted to interpret statutes in a manner that avoids constitutional questions when such an interpretation "is not plainly contrary to the intent of Congress."[209] The legislative history recounted in Part II and the related analysis contained in Part III demonstrate that a centrality requirement squares with congressional intent. Thus, courts fairly could read in a centrality requirement for religious accommodations under section 701(j), even if Congress passes the WRFA, in order to preserve section 701(j)'s constitutionality.

V. Application of Recommendation: Accommodating Muslims in the Workplace

Having proposed a new framework under which courts can analyze religious accommodation claims, it is time to apply this framework to the group most likely to seek section 701(j) protection in the coming century: American Muslims. Because satisfied employees foster a productive work environment, it behooves employers to learn how best to accommodate the religious practices of their employees, particularly when those employees practice a religion with which the employer is likely unfamiliar, such as Islam.[210] Furthermore, as Part II.A.3 demonstrated, the current interpretation of section 701(j) has done, at best, a mediocre job of accommodating Islam's central practices. Meanwhile, the number of American Muslims has grown dramatically and continues to rise, so employers will increasingly find themselves faced with questions of how to accommodate their Muslim employees.[211] This Section seeks to provide employers and courts with a guide for accommodating Islamic practices under Part IV's proposed interpretation of section 701(j).

Part II.A.2 outlined five central Islamic duties, known as the "pillars of Islam," that every Muslim must perform, three of which have the potential to interfere with work obligations: prayers, fasting, and *hajj*.[212] Because the pillars of Islam constitute the very foundation of a Muslim's relationship to God, these pillars clearly qualify as "central" religious obligations, as defined above.[213] Thus, under the framework proposed in Part IV, employers should accommodate their Muslim employees' obligations to pray, fast, and attend *hajj*, unless the employer can prove that the accommodation would result in significant hardship. Because dress requirements likely will not cost anything, employers should accommodate a Muslim woman's desire to cover her head or a Muslim man's desire to keep a beard and wear a prayer cap.[214]

Establishing *which* Islamic practices an employer should accommodate, however, is a far easier task than determining *how* these practices might reasonably be accommodated in a work environment admittedly not designed to accommodate such practices. While the best approach is for employers to work together with their Muslim employees to resolve the specific conflict between work and religion, a few general guidelines will help identify the best accommodations for Muslim employees. First, where possible, employers must not insist on rigid work schedules because the prayer times, the month of fasting, and the pilgrimage occur at different times each year. If, for example, employees are permitted only a one-hour lunch break each work day, employers should permit Muslim employees to divide that break and use parts of it to pray at stated prayer times. Flexible work schedules become even more important during *Ramadan*. To accommodate fasting, employers should allow their Muslim employees to work through lunch breaks, rearrange working hours, or start and leave work earlier if necessary.

Second, employers should work with their Muslim employees to devise the necessary accommodations for daily prayers, such as a location to pray and perform *wudu*, as well as methods whereby Muslim employees can notify supervisors before they begin praying, so as to avoid any later confusion.[215] As for a location to pray, empty offices, conference rooms, or hallways would work for employees who do not have their own office. Employers may also wish to educate non-Muslim employees about a Muslim's need to perform *wudu* and designate certain bathrooms or sinks as appropriate places for Muslim employees to wash their feet in preparation for prayers.[216]

Finally, even if courts do not reinterpret section 701(j) and Congress never passes the WRFA, employers should remember that it makes good business sense to go beyond the legal minimum in accommodating the religious practices of its employees.[217] A study conducted by the Tanenbaum Center for Interreligious Understanding found that Muslims are the religious group most vulnerable to religious discrimination in the workplace.[218] The study further found that not only do Muslims experience workplace discrimination, but they *expect* it.[219] Thus, employers should take special care to learn about Islam and reach out to their Muslim employees, whose numbers will only increase in the coming years.[220]

VI. Conclusion

Even though Congress enacted section 701(j) to help members of minority faiths obtain religious accommodations in the workplace, the Supreme Court's narrow interpretation of the statute has allowed employers to escape their religious accommodation obligations. As the United States continues to diversify religiously, an increasing number of religiously observant Americans may find themselves forced to choose between their careers and their faith, unless swift action is taken to restore section 701(j)'s original meaning. Above all, if courts want to reaffirm this nation's commitment to religious pluralism, section 701(j) must be reinterpreted to better protect minority religious practices; otherwise, 701(j) will remain an empty protection.

Endnotes

1. *See* Albert L. Winseman, *Religion Remains Front and Center—But Should It?*, The Gallup Poll, Feb. 1, 2005, http://www.poll.gallup.com/content/?ci=14773.
2. *Id.*
3. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85–87 (1977) (Marshall, J., dissenting) (noting that most businesses close on Sundays and traditional Christian holidays); Tanenbaum Ctr. for Interreligious Understanding, The Tanenbaum Center and Society for Human Resource Management 2001 Survey of HR Professionals, http://www.tanenbaum.org/programs/diversity/

survey2.aspx (last visited Nov. 12, 2006) (conducting a survey that found that in 99% of workplaces Christian holidays are the only official holidays).

4. *See infra* Part II.B.2.

5. *See infra* Part II.B.2.

6. *See infra* Part III.A.

7. *See* Michael Wolf et al., Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities xiii (1998) ("As the population diversifies, conflicts between work and religion inevitably arise.").

8. *See* U.S. EEOC, Religion Based Charges FY 1992–2005, http://www.eeoc.gov/stats/religion.html (last visited Sept. 15, 2006).

9. *See* Ctr. for Immigration Stud., Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act (1995), http://www.cis.org/articles/1995/back395.html (last visited Oct. 21, 2006) (noting that since the 1965 Immigration Act was passed, U.S. immigrants have largely come from Asia and Latin America); *see also* Steven A. Camarota, *The Muslim Wave: Dealing with Immigration from the Middle East*, Nat'l Rev., Sept. 16, 2002, at 24.

10. *See infra* Part II.A.1; *see also* John L. Esposito, What Everyone Needs to Know About Islam 172 (2002) (noting that until recently, the vast majority of religious and ethnic minorities in the United States have been Judeo-Christian).

11. *See* Esposito, *supra* note 10, at 172–73.

12. *See* Jane I. Smith, Office of Int'l Info. Programs, U.S. Dep't of State, Patterns of Muslim Immigration, http://usinfo.state.gov/products/pubs/muslimlife/immigrat.htm (last visited Oct. 21, 2006) (noting that because the U.S. Census Bureau survey forms do not include religious preference on them, there is no official count of the number of American Muslims). *Compare* Council on American-Islamic Relations, About Islam and American Muslims, http://www.cair-net.org/default.asp?Page=aboutIslam (last visited Sept. 15, 2005) (estimating the number of American Muslims at seven million), *with* Camarota, *supra* note 9, at 24 (estimating the number of American Muslims at three million).

13. Esposito, *supra* note 10, at 169; Smith, *supra* note 12; *see also* Camarota, *supra* note 9, at 24.

14. Esposito, *supra* note 10, at 169; *see also* Personnel Policy, Inc., Religious Accommodations: Going Beyond the Law Makes Business Sense, http://www.ppspublishers.com/articles/religious_accomodation.htm (last visited Oct. 22, 2006) (noting that "Islam will soon pass Judaism as the second-most practiced religion in [the United States]").

15. Esposito, *supra* note 10, at 171–73.

16. *Id.*; *see also* Islamophobia Watch, http://www.islamophobia-watch.com (last visited Sept. 15, 2006) (further illustrating negative media coverage of Muslims).

17. Esposito, *supra* note 10, at 172–74. In fact, a *USA Today*/Gallup poll found that a substantial percentage (nearly forty percent) of Americans admit to having "at least some feelings of prejudice against Muslims." Lydia Saad, *Anti-Muslim Sentiments Fairly Commonplace*, The Gallup Poll, Aug. 10, 2006, http://www.galluppoll.com/context/default.aspx?ci=24073.

18. Consider the additional fact that, so far, American Muslims are a highly educated group and thus likely to be employed in influential sectors of the economy. *See* Smith, *supra* note 12 (noting that Muslims are increasingly "highly educated, successful professionals").

19. *See infra* Part III.B.2.

20. *See infra* Part II.A.2. This is not to suggest that other minority religions would not benefit from a new interpretation of section 701(j) or that Islam should exclusively shape any new interpretation. Rather, this note argues only that Muslims are an appropriate test case for a new interpretation of Title VII and that the general failure to accommodate central religious practices of the United States' soon-to-be second largest faith highlights critical problems with the Supreme Court's current interpretation of section 701(j).

21. *See* The Noble Qur'an 28 (Thomas B. Irving trans., Amana Books 1992) ("[T]he Qur'an was sent down as guidance for mankind."). The Qur'an was originally written and has been preserved in Arabic. Esposito, *supra* note 10, at 8–9. The main text, along with the chapter and verse designations, is constant across translations, though the translations themselves are not entirely consistent with each other. *See id* at 8–10. Thomas Irving's translation has been chosen because of the clarity and modernity of the English that Professor Irving uses. Therefore, the listed page numbers correspond with Professor Irving's translation. The chapter and verse numbers for each cited verse have also been noted after the page numbers so that readers may refer to other Qur'anic translations, if they wish.

22. Esposito, *supra* note 10, at 10.

23. John Esposito, Islam: The Straight Path 80–81 (1998); *see* The Noble Qur'an, *supra* note 21, at 420 ("In God's messenger [Muhammad] you have a fine model. . . ."). Like the Qur'an, the *ahadith* (singular: *hadith*) were originally written and have been preserved in Arabic. Ismail al-Bukhari's compilation of *ahadith* is considered the most authoritative collection, and thus all of the *ahadith* quoted in this note come from Bukhari's compilation. Esposito, *supra*, at 82. Muhammad Muhsin Khan's translation of Bukhari's compilation is the most widely used by Muslims and non-Muslims and is the translation this note will use; to ease access to the *ahadith,* parallel citations to an internet database of Dr. Khan's translation have been provided as well.

24. Esposito, *supra* note 23, at 69.

25. Abdullah bin Bayyah, Muslims Living in Non-Muslim Lands (July 31, 1999), http://www.themodernreligion.com/world/muslims-living.html.

26. Esposito, *supra* note 23, at 75.

27. Muslims' duties to the wider community are not discussed in this note because most Muslim scholars agree that Islamic communal duties are enforceable only in a state that has a valid Islamic government. *See* Bayyah, *supra* note 25.

28. 1 The Translation and Meanings of Sahih Al-Bukhari 17 (Muhammad Muhsin Khan trans., Kazi Publ'ns 6th ed. 1983) [hereinafter Bukhari], *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/002.sbt.html#001.002.007; *see also* Esposito, *supra* note 23, at 90 (calling the five pillars of Islam "the five essential and obligatory practices all Muslims accept and follow").

29. Because an employer could interfere with a Muslim's duty to believe in God only in extreme circumstances, *shahadah* will not be discussed further.

30. Because *zakat*, like *shahadah*, generally falls outside of the employer-employee relationship, it will not be discussed in this note.

31. *See* The Noble Qur'an, *supra* note 21, at 313, 20:14 ("[K]eep up prayer to remember [God] by.").

32. *See* The Noble Qur'an, *supra* note 21, at 95, 4:103 ("Prayer is a timely prescription for believers. . . ."); *id.* at 7, 2:43 ("[K]eep up prayer, pay the welfare tax, and worship along with those who bow their heads."); *id.* at 17, 2:110; *id.* at 313, 20:14.

33. 9 Bukhari, *supra* note 28, at 471, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/093.sbt.html#009.093.635 ("A man asked the Prophet 'What deeds are the best?' The Prophet said, '(1) To perform the (daily compulsory) prayers at their (early) stated fixed times, (2) To be good and

dutiful to one's own parents. (3) and to [struggle] in Allah's Cause.'").

34. Esposito, *supra* note 10, at 24. These times are "relatively fixed" because they change seasonally according to the sun's position. *See also* IslamicFinder.org, http://www.IslamicFinder.org (last visited Oct. 23, 2006) (yearly listing of prayer times in major cities).

35. *See Alsaras v. Dominick's Finer Foods, Inc.*, No. 99C4226, 2001 WL 740515, at *1 (N.D. Ill. June 28, 2001) (listing the prayer times as ranging from five to ten minutes). The length of time each prayer takes is not exact.

36. The Noble Qur'an, *supra* note 21, at 108, 5:6 ("[W]henever you intend to pray, wash your face and your hands up to the elbows, and wipe off your heads and [wash] your feet up to the ankles."). As one could imagine, *wudu*, more so than the actual prayers, is a difficult concept for non-Muslims to grasp. For example, see *Tyson v. Clarian Health Partners, Inc.*, No. 1:02-CV-01888-DFH-TA, 2004 WL 1629538, at *1 (S.D. Ind. June 17, 2004), where a Muslim plaintiff's supervisor at work found her performing *wudu* in an empty patient room and thought the plaintiff was trying to take a shower.

37. 1 Bukhari, *supra* note 28, at 352, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/008.sbt.html#001.008.466 ("[The Prophet Muhammad said], 'The reward of the prayer offered by a person in congregation twenty . . . times greater than that of the prayer in one's house or in the market."); *see also* IslamiCity, Understanding Islam and the Muslims—Prayer, http://www.islamicity.com/education/understandingislamandmuslims (follow "What Are The Five Pillars Of Islam?" hyperlink; then follow "Prayer" hyperlink) (last visited Oct. 21, 2006).

38. Esposito, *supra* note 23, at 91.

39. The Noble Qur'an, *supra* note 21, at 554, 62:9–11 ("[W]hen [the call to] prayer is announced on the day of Congregation, hasten to remember God and close your place of business."); *see also* The Muslim Forum of Utah, An Employer's Guide to Islamic Religious Practices, http://www.muslim-forum.org/documents/Employer.pdf (last visited Oct. 21, 2006) (noting that Friday prayers last forty-five to ninety minutes).

40. *See* The Noble Qur'an, *supra* note 21, at 28, 2:185; *id.* at 29, 2:187.

41. Esposito, *supra* note 23, at 91.

42. *See id.* at 930.

43. F.C. De Blois, *Ta'rikh, Dates and Eras in the Islamic World, In the Sense of "date, dating," etc.*, *in* 10 The Encyclopedia of Islam 258 (P.J. Bearman et al. eds., 1998).

44. IslamiCity, The Five Pillars of Islam, http://www.islamicity.com/mosque/pillars.shtml (last visited Sept. 18, 2006).

45. *See* Esposito, *supra* note 10, at 2. In fact, fasting has been specifically forbidden on *Eid-ul-Fitr*. 3 Bukhari, *supra* note 28, at 120, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/031.sbt.html#003.031.212 ("The Prophet forbade the fasting of *'Id-ul-Fitr* and *'Id-ul-Adha*. . . .").

46. The Noble Qur'an, *supra* note 21, at 62, 3:97 ("Pilgrimage to the House is a duty imposed on mankind by God, for anyone who can afford a way to do so."); *see also* Esposito, *supra* note 10, at 21.

47. *See* Islam.com, Hajj, http://www.islam.com/hajj/hajj.htm (last visited Mar. 17, 2006) (noting that *hajj* must be completed between the 8th and 13th day of the Islamic month of *Dul-Hajj*); Salam, The Islamic Calendar, http://www.salam.co.uk/themeofthemonth/june_index.php?1=2 (last visited Sept. 17, 2006).

48. Esposito, *supra* note 10, at 34.

49. *Id.*

50. The Noble Qur'an, *supra* note 21, at 353, 24:30–31

51. *See* Esposito, *supra* note 10, at 95–98.

52. *Id.* at 100–01.

53. *See* Press Release, Equal Employment Opportunity Comm'n, EEOC Provides Answers About Workplace Rights of Muslims, Arabs, South Asians, and Sikhs (May 15, 2002), *available at* http://www.eeoc.gov/press/5-15-02.html. The EEOC also reports that from September 2001 to May 2002, 497 charges of discrimination based on being Muslim were charged, compared to 193 the previous year. *Id.*; *see also* Stephanie Armour, *Post-9/11 Charges of Bias Continue*, USA Today, July 6, 2005, http://www.usatoday.com/money/workplace/2005-07-05-anti-arab-workplace_x.htm?POE=click-refer.

54. There are a number of possible explanations for this discrepancy, the most likely of which is that most cases reach a settlement before trial.

55. *See infra* Part IV.

56. *See Elmenayer v. ABF Freight Sys.*, No. 98-CV-4061, 2001 WL 1152815, at *1, *3–6 (E.D.N.Y. Sept. 20, 2001). Elmenayer was a Muslim truck driver in New York City who had requested an accommodation from his employer ABF that would enable him to attend Friday prayers. *Id.* at *2. Under a collective bargaining agreement, ABF employees were allowed a maximum one-hour lunch break and a subsequent fifteen-minute coffee break during their nine-hour driving shift; three such shifts existed: 12:00 a.m. to 9:00 a.m., 5:00 p.m. to 2:00 a.m., and 9:00 a.m. to 6:00 p.m. *Id.* at *2–3. Elmenayer, who worked the 9:00 a.m. to 6:00 p.m. shift, proposed that on Fridays ABF allow him to combine his lunch and coffee break (thus giving him a break totaling one hour and fifteen minutes), which would have given him enough time to complete his Friday prayers and return to work. *Id.* at *2. ABF rejected this accommodation and instead told Elmenayer that he could bid for the two night-shifts that did not conflict with his Friday prayers. *Id.* at *2. Thus, rather than simply allowing Elmenayer to combine his two breaks, ABF forced Elmenayer to choose between going to Friday prayers or working one of two very unappealing driving shifts every Friday. The court upheld ABF's decision under *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), holding that ABF's proposed solution was a "reasonable accommodation." *Id.* at *5.

57. *See Hussein v. Hotel Employees & Rest. Union, Local 6,* 108 F. Supp. 2d 360, 370–73 (S.D.N.Y. 2000). Part III.A.1 discusses the de minimis standard in detail.

58. This is not to suggest that the courts behaved in an anomalous or prejudicial fashion; rather, both courts applied the Supreme Court's current interpretation of section 701(j). Parts IV and V argue that the current interpretation should be changed to alter the results of cases like those discussed in this Section.

59. It is worth mentioning that in both of these cases, the courts at least partly based their decision to deny the employees' accommodation requests on the fact that granting the request would violate a pre-existing collective bargaining agreement. *See Hussein*, 108 F. Supp. 2d at 371; *Elmenayer*, 2001 WL 1152815, at *1. The mere existence of a collective bargaining agreement, however, does not absolve an employer's duty to comply with section 701(j). *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977) ("[N]either a collective-bargaining contract nor a seniority system may be employed to violate [Title VII]."). Furthermore, as Justice Marshall argued in his *Hardison* dissent, "an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations. . . ." *Id.* at 96. Thus, courts should remain primarily concerned with whether employers offered a reasonable accommodation, and the existence of a collective bargaining agreement should not affect the court's analysis.

60. No. 1:02-CV-01888-DFH-TA, 2004 WL 1629538, at *1 (S.D. Ind. June 17, 2004).

61. *Id.*

62. *Id.* at *4.

63. *Id.* at *3.

64. *Id.* It is not clear from the opinion which hospital policy Tyson violated, but the hospital alleged that she did violate a policy and that this violation was the ground for reprimanding her. *Id.* at *1.

65. *Id.*

66. *Khan v. Fed. Reserve Bank of N.Y.*, No. 02 Civ. 8893(JCF), 2005 WL 273027, at *1 (S.D.N.Y. Feb. 2, 2005).

67. *Id.*

68. *Id.*

69. *Id.* The Bank also argued that allowing Khan to work through lunch would create discord with her coworkers; it is unclear from the court's opinion what kind of discord among bank employees the Bank feared. *See id.*

70. *See id.* at *3.

71. U.S. Const. amend. I.

72. *See generally* 5 John E. Nowak & Ronald D. Rotunda, Treatise on Constitutional Law: Substance and Procedure § 21 (3d ed. 1999) (providing a detailed discussion of the history and subsequent jurisprudence of these two clauses).

73. *See id.*

74. *Compare Lynch v. Donelly*, 465 U.S. 668, 673 (1984) (declaring that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions. . . ."), *with Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (noting that religious accommodation, although legislatively permissible, is not constitutionally mandated).

75. *Smith*, 494 U.S. at 890.

76. Civil Rights Act of 1964, Pub. L. No 88-352, §§ 701–716, 78 Stat. 253 (current version at 42 U.S.C. § 2000e (2000)).

77. 429 F.2d 324 (6th Cir. 1970).

78. *Id.* at 327–28.

79. *Id.* at 327.

80. *Id.* at 334.

81. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) (per curiam).

82. Equal Opportunity Employment Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j) (2000)); *see* 118 Cong. Rec. 705, 705–06 (1972) (statement of Sen. Randolph); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73–75 (1977) (noting that Congress passed section 701(j) in response to *Dewey*).

83. 42 U.S.C. § 2000e(j).

84. Clare Zerangue, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 La. L. Rev. 1265, 1278 (1986) (quoting Guidelines on Discrimination in Religion, 29 C.F.R. § 1605.1(b) (1968)); *see also* Mich. Dep't of Civil Rights *ex. rel. Parks v. Gen. Motors Corp.*, 317 N.W.2d 16, 25 (Mich. 1982) ("[T]he passage of . . . [section 701(j)] . . . was hailed . . . as having laid to rest any doubts as to the effect of the EEOC guidelines.").

85. 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph). The congressional record is cited here, as opposed to other forms of legislative history (such as a committee report), because the brief debate preceding the passage of the amendment is the only form of legislative history available. Furthermore, the Supreme Court cited the congressional record in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and referred to it as the "legislative history" of section 701(j). *Id.* at 74; *see also* Sonny Franklin Miller, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. Corp. L. 789, 793 n.31 (1997) (noting that the floor debate constitutes all of section 701(j)'s legislative history).

86. *See* 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph) ("[T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days. So there has been . . . a dwindling of the membership of some of the religious organizations. . . .").

87. *See id.*

88. *See id.* at 705–06.

89. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67–71 (1986); *Hardison*, 432 U.S. at 75–85; *see also* Miller, *supra* note 85, at 797 (arguing that the Supreme Court's current interpretation of section 701(j) has transformed it into "an empty protection").

90. Robert A. Caplen, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. Fla. J.L. & Pub. Pol'y 579, 600–01 (2005).

91. Workplace Religious Freedom Act of 2005, S. 677, 109th Cong. § 2(a)(4) (2005).

92. *Id.* § 2(b).

93. 152 Cong. Rec. 1407–08 (daily ed. Feb. 16, 2006) (statement of Sen. Santorum).

94. Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187, 214 (2001).

95. *See infra* Parts III, IV. The recommendation in Part IV does not, however, depend on the WRFA passing; rather, it suggests that the judiciary should reinterpret key terms in section 701(j), and the recommended interpretations resemble the definitions in the proposed WRFA. *See infra* Part IV.

96. *See generally* Miller, *supra* note 85.

97. *See* Nowak & Rotunda, *supra* note 72, § 21.13, at 175; *see also* Miller, *supra* note 85, at 806. Although the Court has never directly addressed the constitutionality of section 701(j), *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), strongly suggests that when the Court does decide this question, it will hold that section 701(j) does not violate the Constitution. *Id.* at 711–12 (O'Connor, J., concurring). Justice O'Connor's concurring opinion in *Estate of Thornton* expressly found section 701(j) to be harmonious with the Court's Establishment Clause jurisprudence. *Id.*; *cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 91 (1977) (Marshall, J., dissenting) ("I think it beyond dispute that [section 701(j)] does—and, consistent with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process.").

98. *See Hardison*, 432 U.S. at 63; *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

99. 432 U.S. 63.

100. 479 U.S. 60.

101. 432 U.S. at 66.

102. *Id.* at 66–67.

103. *Id.* at 67–68.

104. *Id.* at 68–69.

105. *Id.* at 69.

106. *Id.* at 71.

107. *Id.* at 81.

108. *Id.* at 84.

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

110. *See id.* at 71 (majority opinion).

111. *Id.* at 87 (Marshall, J., dissenting) (internal quotation marks omitted).

112. *Id.* at 87–88.

113. *See id.* at 88.

114. *See* Zerangue, *supra* note 84, at 1288.

115. *See infra* Part III.B.

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

117. *Id*. at 63–64.

118. *Id*. at 62–63.

119. *Id*. at 64–65.

120. *Id*. at 65.

121. *Id*. at 66.

122. *Id*. at 68.

123. *Id*. (emphasis added).

124. *Id*. at 70.

125. Given that teachers already earn a low salary, foregoing three days of income would only have exacerbated this difficult choice for Philbrook. *See* Press Release, Nat'l Educ. Ass'n, Inflation Outpaces Teacher Salary Growth in More Than 40 States (Dec. 5, 2005), *available at* http://www.nea.org/newsreleases/2005/nr051205.html.

126. *Ansonia*, 479 U.S. at 74 (Marshall, J., concurring in part, dissenting in part).

127. Huma T. Yunus, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 Okla. L. Rev. 657, 662–63 (2004) (arguing that "[a]s a practical matter, almost any type of employer accommodation is sufficient to uphold the employer's duty to reasonably accommodate under Title VII").

128. *See Elmenayer v. ABF Freight Sys*., No. 98-CV-4061(JG), 2001 WL 1152815, at *3–4 (E.D.N.Y. Sept. 20, 2001) (employer "accommodated" Muslim employee by forcing employee to switch to one of two night shifts); *see also supra* note 56 (providing a more detailed description of *Elmenayer*'s facts).

129. *Ansonia*, 479 U.S. at 72–73 (Marshall, J., concurring in part, dissenting in part).

130. Included in "minority religions" are not only those religions that have fewer adherents than Christianity, but also (and perhaps especially) nontraditional religions, that is, religions that do not descend from the Judeo-Christian tradition or that most Americans do not believe descend from this tradition, such as Islam. *See* Esposito, *supra* note 10, at 172–73 (noting that most Americans think of Islam as a religion that is not part of the Judeo-Christian tradition).

131. *See, e.g.*, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See generally* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 1 (Amy Gutman ed., 1997). Of course, Justice Scalia believes the language of the statute is also the endpoint of statutory interpretation. *See id.* at 23–24.

132. *GTE Sylvania*, 447 U.S. at 108.

133. *See, e.g.*, *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). This case is most frequently cited for its famous declaration that "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Id.*; *see also* Scalia, *supra* note 131, at 20–21 (lamenting the fact that lawyers frequently cite *Holy Trinity* as support for looking beyond the statutory language to interpret it).

134. *See, e.g.*, *O'Gilvie v. United States*, 519 U.S. 79, 83 (1996).

135. See *infra* Part III.B.2 for a discussion of congressional intent.

136. 18 The Oxford English Dictionary 1010 (2d ed. 1989).

137. 6 *id*. at 1114 (emphasis added).

138. Black's Law Dictionary 732 (2d Pocket ed. 2001).

139. *Id*. at 192.

140. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting); *see also id.* at 92 n.6 ("As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost'. . . .").

141. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

142. *Id*. at 877 (emphasis added).

143. Americans with Disabilities Act, 42 U.S.C. § 12111(10)(A) (2000). Unlike section 701(j), the ADA provides an express definition of "undue hardship." *Id*. Some commentators have argued that the Court should adopt the ADA's undue hardship standard for section 701(j) religious discrimination cases. *See generally* Miller, *supra* note 85. Indeed, some commentator's have argued that the WRFA essentially codifies the ADA's standard for section 701(j) religious accommodations. *See* James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 Notre Dame L. Rev. 1023, 1024 (2004). However, because religious accommodation differs significantly from disability accommodation, this note develops a different framework. *See infra* Part IV.

144. 42 U.S.C. § 12111(10)(A) (emphasis added).

145. *Id.* § 12111(10)(B). Some of the factors affecting the nature of this burden include: (1) the nature and cost of the proposed accommodation, (2) the size of the employer, and (3) the financial resources of the employer. *Id.*

146. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89–90 (1977) (Marshall, J., dissenting). As Justice Marshall further argued, statutory interpretations that avoid constitutional problems are preferable to interpretations that might pose a constitutional problem only when the former interpretation is *reasonable*. *Id.* In light of Marshall's dissent, it is questionable whether the Court's holding in *Hardison* reached a reasonable compromise solution. *See id*.

147. *Id.* at 85 (Marshall, J., dissenting).

148. *See infra* Part IV.

149. *Hardison*, 432 U.S. at 90 (Marshall, J., dissenting).

150. *See Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring). In discussing the constitutionality of section 701(j), Justice O'Connor stated in her concurring opinion, "I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII . . . are . . . invalid. . . . Since Title VII calls for reasonable rather than absolute accommodation . . . I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion. . . ." *Id.* at 711–12; *see also Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that religious accommodations, although not mandated by the Constitution, can be created by the legislature).

151. *See, e.g., Hardison*, 432 U.S. at 85 n.15 (noting that accommodating the plaintiff's request to have Saturday off would result in a more-than-trivial cost to TWA because of "the likelihood that a company as large as TWA may have many employees whose religious observances . . . prohibit them from working on Saturdays or Sundays").

152. *See infra* Parts III.B.2, III.B.3.

153. *See infra* Part IV.

154. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting) ("[T]oday's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.").

155. *Id.* at 74.

156. *See supra* Part II.B; *see also Hardison*, 432 U.S. at 88 (Marshall, J., dissenting) ("In reaching [its] result, the Court seems almost oblivious of the legislative history of . . . [section 701(j)] . . . which . . . is far more instructive than the Court allows.").

157. *Hardison*, 432 U.S. at 75.

158. 118 Cong. Rec. 705, 705–06 (daily ed. Jan. 21, 1972).

159. *Id*. at 706.

160. *Id.* (statement of Sen. Randolph).

161. *Id.* It is unclear from the exchange between Senator Randolph and Senator Dominick exactly what kind of arrangement the employer would be required to make, but the critical point here is that the chief proponent of the amendment, which was unanimously passed by the Senate, did not imagine the described scenario would create an undue hardship. *Id*.

162. Miller, *supra* note 85, at 793.

163. 118 Cong. Rec. 705, 705 (daily ed. Jan. 21, 1972); *see also* Miller, *supra* note 85, at 792–93.

164. 118 Cong. Rec. 705, 705 (daily ed. Jan. 21, 1972).

165. *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 88 (1977) (Marshall, J., dissenting) (calling a hypothetical application of the majority's interpretation of section 701(j), which could result in an employee being forced to choose between work and religion, a "mockery of the statute").

166. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986). Although purporting to rely on the legislative history of section 701(j), the Court also stated that it thought this history was of "little help in defining the employer's accommodation obligation." *Id.*

167. *See id.* at 74 (Marshall, J., concurring in part, dissenting in part).

168. Sonne, *supra* note 143, at 1045.

169. *See* Kevin Eckstrom, *Bill Aimed at Protecting Faith While on the Job*, Wash. Post, May 10, 2003, at B8 ("Business lobbyists have stalled attempts to advance the bill for almost a decade."); *see also* Berg, *supra* note 94, at 214 ("[T]he [WRFA] is opposed by a virtually unbeatable coalition. . . . Unless the political dynamics change substantially, the bill is unlikely to pass. . . ."). *But see* Laura M. Johnson, *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, 302 (2005) (noting that supporters of the WRFA are hopeful that the post-9/11 resurgence of interest in religion leads to the WRFA passing).

170. *See* Johnson, *supra* note 169, at 303 (noting that the WRFA is "supported by a coalition of over twenty religious groups").

171. Thomas D. Brierton, *"Reasonable Accommodation" Under Title VII: Is it Reasonable to the Religious Employee?*, 42 Cath. Law. 165, 170 (2002) ("The vast majority of employers observe the traditional Christian holidays such as Christmas and Thanksgiving, leaving out the minority religions."); *see* Tanenbaum Ctr. for Interreligious Understanding, *supra* note 3 (conducting a survey that found that in 99% of workplaces Christian holidays are the only official nonsecular holidays).

172. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977) (Marshall, J., dissenting).

173. *See supra* Part II.B.2.

174. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

175. Justice Marshall noted in his *Hardison* dissent that nearly all of the religious accommodation litigation falls into four main categories: (1) religious dress, (2) attendance at a religious function, (3) compelled membership in a union, and (4) shifting work schedules. *Id*. Of these four categories, only the first one reasonably involves costless accommodations; the other three involve rearranging work schedules or salary benefits, both of which would result in at least de minimis costs to an employer. And because, as Justice Marshall noted, the largest class of religious accommodation centers on rearranging work schedules, *id.*, and rearranging work schedules will almost always entail some cost, it is reasonable to conclude that the vast majority of requests for religious accommodations will involve some sort of cost to the employer. Thus, an employer does not have to grant such requests under the Court's current interpretation of section 701(j). *See id.* at 93 n.6.

176. *See* Timothy H. Hall, *Religion, Equality, and Difference*, 65 Temp. L. Rev. 1, 86 (1992) ("Religious accommodations invariably entail some costs.").

177. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986); *see also supra* Part III.A.2 (arguing that this "elimination" standard does not adequately resolve the conflict between the employee's work and religious obligations).

178. *See, e.g.*, *Elmenayer v. ABF Freight Sys.*, No. 98-CV-4061, 2001 WL 1152815, at *5 (E.D.N.Y. Sept. 20, 2001). See *supra* note 56 for a brief factual description of *Elmenayer*.

179. This hypothetical was derived and modified from the facts of *Elmenayer*. *Cf. Elmenayer*, 2001 WL 1152815, at *1.

180. Undue hardship is used here in its textual or dictionary sense, not the way the Court defined it in *Hardison*, 432 U.S. 63. See *supra* Part III.B.1 for the textual definition.

181. In other words, religious preferences would be evaluated under the Court's current section 701(j) standards, and only central religious practices would receive heightened accommodations.

182. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 475 (1987) (Brennan, J., dissenting).

183. The second and third requirements have been adapted from the centrality test Justice Brennan proposed in *Lyng*, 485 U.S. at 475 (Brennan, J., dissenting). *Lyng* is a Free Exercise Clause case in which the Court ultimately rejected Justice Brennan's test. *Id.* at 457–58; *see infra* Part IV.B.1.

184. Though the Supreme Court has not addressed what evidence an employer must produce to prove the cost of an accommodation, the Sixth Circuit has held that employers cannot speculate about the cost of a proposed accommodation. *See Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975).

185. *See People v. Singh*, 516 N.Y.S.2d 412 (N.Y. Crim. Ct. 1987). The sword is called a *kirpan*, and Sikh men are required to carry it as a symbol of their religion. *Id.* at 413. If a Sikh employee devised a way to wear the *kirpan* that eliminated the safety risk, then the employer would have to accommodate the practice, unless the employer had other grounds for asserting undue hardship. *See Cheema v. Thompson*, 67 F.3d 883, 885 n.3 (9th Cir. 1995) (describing several ways school officials accommodated Sikh children who had to carry a *kirpan*).

186. *Cf. Brown v. Dade County Christian Sch., Inc.*, 556 F.2d 310 (5th Cir. 1977). The school in *Brown* sought to justify its refusal to admit African American students on the ground that the school's affiliated religion prohibited racial integration. *Id.* at 311. Both the trial court and the Fifth Circuit rejected this argument, holding that racial segregation could not be considered "religious" conduct in this case. *Id.* at 314. Judge Goldberg, in a concurring opinion, argued that the government has a compelling interest in ending discrimination, and thus, the Court would not sanction racial segregation, even if religiously motivated. *Id.* at 314 (Goldberg, J., concurring). This note adopts Judge Goldberg's position: even if an employee could prove that racial segregation was a central tenet of his faith, an employer could still refuse to accommodate this practice on undue hardship grounds.

187. *See generally* Michael D. Moberly, *Bad News for Those Proclaiming the Good News: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 Santa Clara L. Rev. 1 (2001). A full discussion of the special case of religious speech is outside of the scope of this note.

188. *See supra* Part III.B.3.

189. Interestingly enough, these invitations have frequently come from the person seeking a religious accommodation and not from the objecting party. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988).

190. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (noting that "[c]ourts are not the arbiters of scriptural interpretation").

191. *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (stating that it is not the judiciary's function to make determinations about religious practices). While many courts have explicitly rejected any attempt to evaluate the central nature of a religious practice, other courts have implicitly made this determination. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the state did not have a compelling interest in requiring Amish children to attend school until age sixteen and basing this holding, in part, on the significance (i.e., centrality) the Amish religion places on rejecting modern ways of life).

    Other courts have even made explicit centrality determinations. *See McCrory v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La. 1986) (holding that the plaintiffs could not sincerely claim that adultery was a central tenet of their faith because they were Baptists, and Baptism forbids adultery); *Brown v. Polk County*, 61 F.3d 650, 656 (8th Cir. 1995) (holding that a supervisor could not direct an employee to type his Bible-study notes under Title VII because that conduct was not mandated by his religion).

192. *Lyng*, 485 U.S. at 458.

193. *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

194. *Id.* at 877–78.

195. *Id.* at 890.

196. *Id.*

197. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) ("The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee.").

198. *Smith*, 494 U.S. at 887 n.4 (emphasis in original).

199. Here "law" should be distinguished from a constitutional mandate, which is what was at issue in *Smith*. *See id*. at 872.

200. *See Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

201. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988).

202. *Id.* at 475 (Brennan, J., dissenting).

203. *Id.* There is no reason to treat this evidentiary burden differently than the burden a plaintiff must carry to prove any fact in civil litigation; the plaintiff's assertion of centrality would still be subject to the normal rules of evidence as well as the requirement that the claim be both "genuine and sincere." *See id.*

204. 42 U.S.C. 2000e(j) (2000) ("The term 'religion' includes *all aspects of religious observance and practice*, as well as belief. . . .") (emphasis added).

205. *See supra* Part II.B.2.

206. *Employment Div. v. Smith*, 494 U.S. 872, 887 n.4 (1990). It seems that Justice Scalia assumed that throwing rice at weddings has religious significance; regardless of the validity of that assumption, his example is useful to demonstrate the necessity of a centrality requirement.

207. *See* Sonne, *supra* note 143, at 1026–27 (questioning the WRFA's compatibility with the Establishment Clause). *But see* Caplen, *supra* note 90, at 621–23 (concluding that the WRFA would not violate the Constitution).

208. *See supra* Part IV.A.

209. *Miller v. French*, 530 U.S. 327, 341 (2000) (internal quotation marks omitted).

210. Anayat Durrani, Religious Accommodation for Muslim Employees, http://www.workforce.com/archive/feature/22/26/98/index.php?ht=muslim%20muslim (last visited Mar. 16, 2006); *see also* Minn. Dep't of Human Rights, An Islamic Point of View, http://www.humanrights.state.mn.us/somali_islam_pov.html (last visited Mar. 5, 2006).

211. *See supra* Part II.A.3.

212. *See supra* Part II.A.2.

213. *See supra* Parts II.A.2, IV.A.

214. *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 88 (1977) (Marshall, J., dissenting) (arguing that allowing an employee to wear a headscarf for religious reasons would bring no "undue hardship" to an employer).

215. *See* Minn. Dep't of Human Rights, *supra* note 210 (describing the story of a Somali worker who was fired for refusing to break his prayer when his boss, who did not know the employee was praying, called him).

216. *See Tyson v. Clarian Health Partners, Inc.*, No. 1:02-CV-01888-DFH-TAB, 2004 WL 1629538, at *1 (S.D. Ind. June 17, 2004). For the facts of this case, see *supra* Part II.A.3.

217. Personnel Policy, Inc., *supra* note 14.

218. Tanenbaum Ctr. for Interreligious Understanding, *supra* note 3.

219. *Id.* Interestingly, this survey was conducted *before* September 11, 2001; thus, the need for employers to reach out to Muslim employees has only increased since the survey was conducted.

220. Personnel Policy, Inc., *supra* note 14.

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Deadlines for submission are January 15th, May 15th and September 15th of each year. If I receive your article after the submission date, it will be considered for the next issue.

Thank you for your cooperation.

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ISSN 1530-3950 (print) ISSN 1933-8481 (online)

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