

# COMPLETE OR PARTIAL ACCOMMODATION: AN ANALYSIS OF THE FEDERAL CIRCUIT SPLIT OVER THE DUTY OF THE EMPLOYER TO REASONABLY ACCOMMODATE THE RELIGIOUS BELIEFS OF THE EMPLOYEE

## INTRODUCTION

After a Chicago school district teacher quit her job in 2008 because the school district refused to accommodate her request to take time off in order to perform Hajj (a required pilgrimage to Mecca) per her Islamic beliefs, the federal government brought suit against the school district for violation of the Civil Rights Act of 1964.<sup>1</sup> Upon reaching a settlement between the school district and the teacher, the Department of Justice lauded the promises of the school district to ensure accommodation of religious beliefs among its employees.<sup>2</sup> Thomas Perez, Assistant Attorney General for the Civil Rights Division, asserted, “Employees should not have to choose between practicing their religion and their jobs.”<sup>3</sup> This sentiment follows from Title VII of the Civil Rights Act,<sup>4</sup> which, along with its protections against racial, sexual, and national origin discrimination, shelters an employee’s religious beliefs within the workplace.<sup>5</sup>

Americans value their freedom of religion, and this value is codified in the protections afforded by Title VII.<sup>6</sup> Americans also believe the inclusion of various religious beliefs within the workplace is actually beneficial to society.<sup>7</sup> Professor Keith S. Blair writes,

Just as society benefits from the inclusion of diverse voices and thoughts, the workplace also benefits from diversity. That was recognized by the passage of Title VII. Although the main impetus of the Civil Rights Act was to stop discrimination, part of the push came

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<sup>1</sup> Complaint at 1–3, *United States v. Bd. of Educ.*, No. 1:10-cv-07900 (N.D. Ill. Dec. 13, 2010).

<sup>2</sup> Press Release, Dep’t of Justice, Civil Rights Div., Justice Department Settles Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Oct. 13, 2011), *available at* <http://www.justice.gov/opa/pr/2011/October/11-crt-1362>.

<sup>3</sup> *Id.*

<sup>4</sup> *See* Civil Rights Act of 1964 §§ 701–716, 42 U.S.C. § 2000e-2 (2006).

<sup>5</sup> *Id.* § 2000e-2(a).

<sup>6</sup> *Id.* § 2000e; Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 516 (2010).

<sup>7</sup> Blair, *supra* note 6, at 517.

from people's realization that the inclusion of all members of society in the workplace benefits all society.<sup>8</sup>

Thus, the Title VII prohibition on religious discrimination deters certain discriminatory behavior while also fostering a particular societal benefit.

Recently, religious discrimination claims have been on a significant rise.<sup>9</sup> From 1997 to 2010, the number of complaints registered with the U.S. Equal Employment Opportunity Commission has risen from 1709 complaints to 3790 complaints.<sup>10</sup> Between 1997 and 2009, these claims rose eighty-two percent while race or color discrimination claims rose only sixteen percent and sex discrimination claims only fifteen percent.<sup>11</sup> Raymond F. Gregory writes that this rise in religious discrimination claims is due to several primary reasons: "(1) the desire of workers to practice and apply their religious beliefs at work, (2) the 'spread the faith' rationale of evangelical Christians, (3) the aging of the workforce, (4) the growth of a more diversified workforce, and (5) the expanded public role of religious experience."<sup>12</sup>

Current law against religious discrimination in the workplace bars discrimination on the basis of religion and requires that an employer reasonably accommodate the religious beliefs of an employee unless doing so would create an undue hardship on the employer.<sup>13</sup>

Recently, a division has arisen among the federal circuits as to what constitutes an appropriate accommodation.<sup>14</sup> There are currently two different tests for determining whether a reasonable accommodation has been offered by an employer.<sup>15</sup> As referred to in this Note, these two tests are the "complete accommodation test" and the "partial accommodation test."<sup>16</sup> The complete accommodation test ensures that the accommodation totally eliminates the conflict between the employee's religious beliefs and the employment requirements.<sup>17</sup> The partial accommodation test does not necessarily eliminate this conflict.<sup>18</sup> Rather,

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<sup>8</sup> *Id.* at 517–18.

<sup>9</sup> RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE: THE LEGAL RIGHTS AND RESPONSIBILITIES OF WORKERS AND EMPLOYERS 28 (2011).

<sup>10</sup> *Religion-Based Charges: FY 1997–FY 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Oct. 23, 2012).

<sup>11</sup> Blair, *supra* note 6, at 518.

<sup>12</sup> GREGORY, *supra* note 9.

<sup>13</sup> Civil Rights Act of 1964 §§ 703(a), 709(c), 42 U.S.C. §§ 2000e-2(a), -8(c) (2006).

<sup>14</sup> *See infra* Part II.

<sup>15</sup> *See infra* Part II.A–B.

<sup>16</sup> *See infra* Part II.

<sup>17</sup> *See infra* Part II.A.

<sup>18</sup> *See infra* Part II.B.

the test only demands that the accommodation be “reasonable” in light of the circumstances, even if this requires a compromise of the employee’s religious beliefs.<sup>19</sup>

Many of the federal circuit courts hold to the complete accommodation test.<sup>20</sup> But in 2008, the Fourth and Eighth Circuits both embraced the partial accommodation test.<sup>21</sup> These two decisions mark a definitive split among the circuits over the protection afforded to employees to exercise their religious beliefs within the workplace.

Part I of this Note briefly explores the history of Title VII and the specific accommodation requirement found in § 701(j) of the Civil Rights Act. It also provides a synopsis of the only two Supreme Court decisions that have interpreted § 701(j).

Part II examines the circuit split over the complete and partial accommodation tests.<sup>22</sup> It summarizes the key cases in five of the United States Courts of Appeals that hold to the complete accommodation test. Then, it studies the Fourth and Eighth Circuits’ decisions that adopted the partial accommodation test. It provides an account of the facts, as well as an overview of the arguments made in both cases.

Part III looks at the problems with the partial accommodation test. First, the test is flawed in its formation according to the legislative intent behind and statutory construction of § 701(j), as well as according to the precedent provided by the Supreme Court. Second, the test is unlawful in its implications by allowing the courts to unconstitutionally decide on the reasonableness of an employee’s religious beliefs.

Finally, Part IV suggests that the Supreme Court should clarify which accommodation test (complete or partial) is correct in light of § 701(j). It provides several reasons why the Supreme Court should hear this issue, and it also suggests how the Court should decide.

#### I. HISTORY OF TITLE VII AND SUBSEQUENT SUPREME COURT DECISIONS

In 1963, President John F. Kennedy proposed legislation to prohibit discrimination in voting rights, schools, workplaces, and places of public accommodation.<sup>23</sup> The next year, Congress passed the Civil Rights Act of

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<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> See *infra* Part II.A.

<sup>21</sup> See *infra* Part II.B.

<sup>22</sup> See *infra* note 68 and accompanying text for information regarding the status of these tests in the remaining circuits.

<sup>23</sup> GREGORY, *supra* note 9, at 27.

1964.<sup>24</sup> Title VII of the Act provides protection for employees against discrimination by their employers.<sup>25</sup> The Act reads:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>26</sup>

While the original wording of this portion of the Act clearly proscribed discrimination by an employer against an employee, it failed to give any instruction as to the employer's duty to accommodate the employee's religious beliefs.<sup>27</sup> Thus, an employer's only detailed duty under the original Act was to refrain from discriminating against an employee.<sup>28</sup>

The Act also established the U.S. Equal Employment Opportunity Commission ("EEOC").<sup>29</sup> The Act charged this administrative body with the responsibility to "administer the title and process claims made pursuant to its provisions."<sup>30</sup> In 1967 and in 1968, the EEOC produced two different sets of guidelines interpreting the duty of an employer to refrain from discriminating against an employee based on the employee's religious beliefs.<sup>31</sup> These two differing sets of guidelines demonstrate the ambiguity created by the Act regarding an employer's duty to accommodate the religious beliefs of an employee.<sup>32</sup>

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<sup>24</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (2006)).

<sup>25</sup> *Id.* § 703(a), 78 Stat. at 255.

<sup>26</sup> *Id.*

<sup>27</sup> Janell M. Kurtz & Bradley J. Sleeper, *Religion vs. Work: Can Accommodation Fail to Accommodate?*, 23 *MIDWEST L.J.* 75, 77 (2009).

<sup>28</sup> § 703(a), 78 Stat. at 255.

<sup>29</sup> *Id.* § 705(a), 78 Stat. at 258.

<sup>30</sup> GREGORY, *supra* note 9.

<sup>31</sup> Compare 29 C.F.R. § 1605.1(a)(2) (1967) (requiring the employer to provide a reasonable accommodation for the religious practices of an employee unless doing so would create a "serious inconvenience to the conduct of the business"), with 29 C.F.R. § 1605.1(b) (1968) (requiring the employer to provide a reasonable accommodation for the religious practices of an employee so long as doing so would not create an "undue hardship" for the employer).

<sup>32</sup> Giles Roblyer, Case Note, *Half-Answered Prayers: Sturgill v. United Parcel Service*, 77 *U. CIN. L. REV.* 1683, 1685 (2009).

In 1970, the conflicting regulations came to a head in the case of *Dewey v. Reynolds Metals Co.*<sup>33</sup> In *Dewey*, the United States Court of Appeals for the Sixth Circuit held that the termination of an employee who refused to show up for his scheduled work shift on a Sunday did not violate Title VII.<sup>34</sup> The employee decided that working on Sundays was wrong, based on his religious beliefs.<sup>35</sup> He also believed that it was wrong to ask another employee to switch his Sunday shifts with him.<sup>36</sup> The court held, however, that under either set of “inconsistent regulations,”<sup>37</sup> the employer still acted within his rights under Title VII.<sup>38</sup> The Supreme Court granted certiorari on the employee’s petition, but, because the Court was equally divided, it failed to clarify the issue in its judgment that affirmed the Sixth Circuit’s decision.<sup>39</sup>

Seeking to clarify the issue left unsettled by *Dewey* as to what type of duty an employer had to accommodate an employee’s religious beliefs,<sup>40</sup> Congress amended Title VII in 1972.<sup>41</sup> This amendment added § 701(j) to the Civil Rights Act and defined what constitutes “religion” for discriminatory purposes: “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 to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>42</sup> Thus, the Title VII standard for determining whether an employer has discriminated against an employee based on the employee’s religious beliefs hinges on whether the employer has provided a reasonable accommodation for the employee’s religious “observance or practice.”<sup>43</sup> If an employer does not provide a reasonable accommodation, its only defense against liability for discrimination is by proving that providing a reasonable accommodation would create an “undue hardship” on its business.<sup>44</sup>

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<sup>33</sup> See 429 F.2d 324, 330 (6th Cir. 1970).

<sup>34</sup> *Id.* at 328–30.

<sup>35</sup> *Id.* at 329.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 330.

<sup>38</sup> *Id.* at 330–31.

<sup>39</sup> *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 689 (1971) (per curiam) (affirming the decision of the lower court without opinion).

<sup>40</sup> 118 CONG. REC. 705, 705–06 (1972) (statement of Sen. Jennings Randolph).

<sup>41</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e(j) (2006)).

<sup>42</sup> *Id.* sec. 2, § 701, 86 Stat. at 103.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

In 1977, the Supreme Court affirmed this standard in its decision in *Trans World Airlines, Inc. v. Hardison*.<sup>45</sup> Larry Hardison, an employee of Trans World Airlines, Inc. (“TWA”), became a member of the Worldwide Church of God that taught an individual must observe the Sabbath by refraining from working from sunset on Friday until sunset on Saturday.<sup>46</sup> After rejecting all of Hardison’s proposed accommodations, TWA eventually terminated Hardison when he refused to report to work on account of his religious beliefs.<sup>47</sup> The accommodations examined by the Court would have required TWA to shift another employee or supervisor to fill Hardison’s role or to renege on its collective-bargaining contract seniority provisions by making someone with more seniority take Hardison’s Saturday shift.<sup>48</sup> The Court held that making another employee cover his shift would have either caused TWA’s business operations to suffer or forced TWA to pay premium overtime to another employee.<sup>49</sup> The Court concluded that both of these accommodations would have created an undue hardship on TWA.<sup>50</sup> Likewise, an accommodation that would have forced TWA to violate the seniority provisions of the union contract would also have created an undue hardship.<sup>51</sup> Finally, the Court discussed the standard for what constitutes an undue hardship, holding that an accommodation is an undue hardship when it requires the employer “to bear more than a *de minimis* cost in order” to accommodate the employee’s religious beliefs.<sup>52</sup>

The Supreme Court revisited the issue of the extent of an employer’s duty to accommodate in *Ansonia Board of Education v. Philbrook*.<sup>53</sup> Ronald Philbrook, a teacher for the Ansonia Board of Education, held religious beliefs requiring him to observe certain religious holy days.<sup>54</sup> But the school board had a policy that only allowed an employee to take off a certain amount of paid days for religious reasons.<sup>55</sup> Philbrook brought suit under Title VII after the school board rejected two of his proposed accommodations that would have allowed him to take time off work to observe his holy days without forgoing pay

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<sup>45</sup> 432 U.S. 63, 75 (1977).

<sup>46</sup> *Id.* at 66–67.

<sup>47</sup> *Id.* at 68–69.

<sup>48</sup> *Id.* at 66–68.

<sup>49</sup> *Id.* at 76–77.

<sup>50</sup> *Id.* at 77.

<sup>51</sup> *Id.* at 76–77. The Court stated that an employer’s seniority system is not unlawful “even if the system has some discriminatory consequences.” *Id.* at 82.

<sup>52</sup> *Id.* at 84.

<sup>53</sup> See 479 U.S. 60, 66 (1986).

<sup>54</sup> *Id.* at 62.

<sup>55</sup> *Id.* at 63–64.

for any additional days taken off for religious reasons.<sup>56</sup> The Court, however, held that the school board's policy of allowing Philbrook to take days off of work for religious observance (albeit without pay) constituted a reasonable accommodation.<sup>57</sup> The Court stated, "The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work."<sup>58</sup> The Court also held that when there are multiple reasonable accommodations proposed by the employer and the employee, the employer is under no obligation to pick the one that is most favorable to the employee.<sup>59</sup> Rather, the employer may choose any of the proposals so long as it meets the criteria of reasonably accommodating the employee's religious beliefs.<sup>60</sup>

*Hardison* and *Philbrook* comprise the only two significant Supreme Court cases on the issue of an employer's duty to reasonably accommodate an employee's religious beliefs as required by § 701(j).<sup>61</sup> As discussed below, there is a split among the federal circuit courts on the issue of defining what constitutes an accommodation. While both sets of circuits rely on the precedent from *Hardison* and *Philbrook*, one set argues that an employer's accommodation must *completely* eliminate any conflict between the employee's religious beliefs and the employment requirements,<sup>62</sup> and the other set argues that the accommodation need only *partially* resolve the conflict depending on the reasonableness of the circumstances.<sup>63</sup>

## II. THE CIRCUIT SPLIT

Since the Supreme Court's decisions in *Hardison* and *Philbrook*, the Second, Third, Sixth, Seventh, and Ninth Circuits have adopted the complete accommodation test.<sup>64</sup> But in the 2008 cases of *EEOC v. Firestone Fibers & Textiles Co.*<sup>65</sup> and *Sturgill v. United Parcel Service*,

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<sup>56</sup> *Id.* at 64–65.

<sup>57</sup> *Id.* at 70.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 68.

<sup>60</sup> *Id.*

<sup>61</sup> Roblyer, *supra* note 32, at 1687.

<sup>62</sup> *See infra* Part II.A.

<sup>63</sup> *See infra* Part II.B.

<sup>64</sup> *Baker v. Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006); *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 225–26 (3d Cir. 2000); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1996); *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996); *EEOC v. Univ. of Detroit*, 904 F.2d 331, 335 (6th Cir. 1990).

<sup>65</sup> 515 F.3d 307 (4th Cir. 2008).

*Inc.*,<sup>66</sup> the Fourth and Eighth Circuits, respectively, created a distinct split from their sister circuits by adopting the partial accommodation test that maintains that an accommodation for an employee's religious belief need only partially accommodate the belief so long as the accommodation is reasonable.<sup>67</sup> The remaining circuits have either not expressly adopted one of these tests or have provided conflicting decisions as to which approach they follow.<sup>68</sup> A brief overview of the various opinions among the circuits is helpful in understanding these two different tests.

#### A. Circuits Holding to the Complete Accommodation Test

In *Baker v. Home Depot*, the Second Circuit held that Home Depot's proposed solution to a conflict between its employee Bradley Baker's religious beliefs and his job requirements failed to accommodate the

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<sup>66</sup> 512 F.3d 1024 (8th Cir. 2008).

<sup>67</sup> *Firestone Fibers & Textiles Co.*, 515 F.3d at 313; *Sturgill*, 512 F.3d at 1033.

<sup>68</sup> The Tenth, D.C., and Federal Circuits have not adopted the complete accommodation test or partial accommodation test in any of their decisions. The First Circuit recently decided the case of *Sánchez-Rodríguez v. AT & T Mobility Puerto Rico, Inc.*, in which it provided a rather unclear statement of the appropriate test to use. 673 F.3d 1, 12 (1st Cir. 2012). While the court adopted the totality of the circumstances test used by the Eighth Circuit, *see infra* note 112 and accompanying text, the court only examined accommodations that completely resolved the conflict between the employee's religious beliefs and the employment requirements. *Sánchez-Rodríguez*, 673 F.3d at 5, 12.

The Fifth Circuit has produced two conflicting decisions. In *EEOC v. Universal Manufacturing Corp.*, the court held that a solution by the employer that eliminated only one of the two conflicts between the employee's religious beliefs and the employment requirements did not constitute a reasonable accommodation. 914 F.2d 71, 73 (5th Cir. 1990). However, in a 2001 decision that positively references the court's opinion in *Universal Manufacturing Corp.*, the court held that the solution offered by a medical center to one of its employees who had religious convictions against offering advice concerning homosexual sexual relationships was an accommodation when the solution "reduced" the "likelihood of encountering further conflicts." *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 497, 501 (5th Cir. 2001). Thus, it is unclear as to whether the Fifth Circuit still holds to the complete accommodation test that it seemed to embrace in *Universal Manufacturing Corp.*

Similarly, it is unclear which test the Eleventh Circuit follows. In a 2007 decision, the court stated that the standard for a reasonable accommodation is that it must "eliminate[] the conflict between employment requirements and religious practices." *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322 (11th Cir. 2007) (quoting *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986)). However, the court held that allowing an employee to *attempt* to swap shifts with other employees on days that she could not work due to her religious beliefs sufficed as an accommodation. *Id.* at 1323. Although the court uses the language of the complete accommodation test, it is unclear whether it fully embraces the test. While the solution provided to the employee *could* have eliminated the conflict between her religious beliefs and her work requirements, the nature of swapping her shifts makes uncertain whether the conflict *would* necessarily be eliminated.



totality of Baker's religious beliefs when it addressed only one of his two religious concerns.<sup>69</sup> Baker's religious beliefs dictated that he must attend a church service on Sundays and that he must not work at all during the day on Sundays.<sup>70</sup> Home Depot offered to allow Baker to keep his job if he would work on Sunday afternoons or evenings so he could still attend his church service on Sunday mornings.<sup>71</sup> The court, however, reasoned that "the shift change offered to Baker was no accommodation at all because, although it would allow him to attend morning church services, it would not permit him to observe his religious requirement to abstain from work *totally* on Sundays."<sup>72</sup> Thus, the court found that Home Depot had not provided an accommodation, and it held for Baker.<sup>73</sup>

The Third Circuit also affirmed the rule that an accommodation must completely eliminate the conflict between the employee's religious beliefs and the employment requirements in the case of *Shelton v. University of Medicine & Dentistry of New Jersey*.<sup>74</sup> The hospital terminated Yvonne Shelton, a nurse, from her employment when she refused to accept the hospital's attempt to accommodate her religious beliefs.<sup>75</sup> When Shelton, because of her religious beliefs, failed to perform required tasks involving abortions, the hospital, instead of terminating her, offered her a position in another section of the hospital.<sup>76</sup> Shelton refused to accept the position based on her unconfirmed belief that her new job would require her to allow "extremely compromised" infants to die.<sup>77</sup> While Shelton argued that the accommodation must "resolve[] the religious conflict," the court held for the hospital because Shelton failed to prove that "she would face a religious conflict" in the new section.<sup>78</sup> Though the court does not expressly adopt the complete accommodation test, it implies that it is the appropriate test in its analysis of Shelton's claim.<sup>79</sup>

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<sup>69</sup> *Baker*, 445 F.3d at 547–48.

<sup>70</sup> *Id.* at 543–44.

<sup>71</sup> *Id.* at 545.

<sup>72</sup> *Id.* at 547–48.

<sup>73</sup> *Id.*

<sup>74</sup> 223 F.3d 220, 226 (3d Cir. 2000).

<sup>75</sup> *Id.* at 222–24.

<sup>76</sup> *Id.* at 222–23.

<sup>77</sup> *Id.* at 223.

<sup>78</sup> *Id.* at 226.

<sup>79</sup> *See id.* ("In sum, Shelton has not established she would face a religious conflict in the Newborn ICU. The Hospital's offer of a lateral transfer to that unit thus constituted a reasonable accommodation.").

In *EEOC v. University of Detroit*, the Sixth Circuit held for an employee whose employer did not offer a complete accommodation for his religious beliefs.<sup>80</sup> Part of the terms of his employment with the University of Detroit required Robert Roesser to either join a professors union or pay the union an amount equal to union dues.<sup>81</sup> While Roesser initially paid the union, he stopped doing so when he discovered that the union gave part of the money to organizations that campaigned for abortions, contrary to his religious beliefs that he neither support abortions nor associate with such activity.<sup>82</sup> The only solution provided by the union and the employer was that Roesser reduce his payments to the union by the percentage of the money that went to politics.<sup>83</sup> The court held that this reduced-fee proposal did not constitute an accommodation because it failed to resolve the issues between all of Roesser's religious beliefs and employment conflicts.<sup>84</sup> While the proposal may have solved the conflict regarding supporting abortions through union fees, it did not truly accommodate his religious beliefs because it failed to provide a solution that would also not require association with the organizations promoting abortion rights.<sup>85</sup>

In *EEOC v. Ilona of Hungary, Inc.*, the EEOC sued on behalf of two employees, Lyudmila Tomilina and Alina Glukhovsky, whose employer, Ilona of Hungary, Inc., terminated them after they failed to report to work so that they could observe Yom Kippur according to their religious beliefs.<sup>86</sup> The employer's only attempt to resolve the issue had been to offer the employees to take off on another day.<sup>87</sup> The Seventh Circuit held that such an accommodation was not reasonable because "it [did] not eliminate the conflict between the employment requirement and the religious practice."<sup>88</sup>

In *Opuku-Boateng v. California*, the Ninth Circuit adopted the theory that the accommodation must completely eliminate the conflict between the employee's religious beliefs and the employment requirements.<sup>89</sup> Kwasi Opuku-Boateng was a member of the Seventh-day Adventist Church whose religious beliefs forbade him from working from

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<sup>80</sup> 904 F.2d 331, 335 (6th Cir. 1990).

<sup>81</sup> *Id.* at 332.

<sup>82</sup> *Id.* at 332-33.

<sup>83</sup> *Id.* at 333.

<sup>84</sup> *Id.* at 334-35.

<sup>85</sup> *Id.* at 334.

<sup>86</sup> 108 F.3d 1569, 1572 (7th Cir. 1996).

<sup>87</sup> *Id.* at 1576.

<sup>88</sup> *Id.*

<sup>89</sup> 95 F.3d 1461, 1467 (9th Cir. 1996).

sunset on Friday to sunset on Saturday.<sup>90</sup> When the state took a state department position appointment away from him because of his refusal to work during that time, Opuku-Boateng brought suit against the state employer.<sup>91</sup> In ruling for Opuku-Boateng, the court held that “[w]here the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee’s proposal or demonstrate that it would cause undue hardship were it to do so.”<sup>92</sup>

These five cases represent the main consensus among the federal circuit courts regarding an employer’s duty to completely accommodate the religious beliefs of an employee. But as described below, the recent 2008 cases decided by the Fourth and Eighth Circuits have created a clear split from the traditional approach adopted by these five circuits.

### *B. Circuits Holding to the Partial Accommodation Test*

In *EEOC v. Firestone Fibers & Textiles Co.*, the Fourth Circuit held that Firestone’s partial accommodation to an employee’s religious beliefs satisfied Firestone’s obligation under Title VII.<sup>93</sup> The employee, David Wise, was a member of the Living Church of God, and his religious beliefs prohibited him from working from sundown on Friday until sundown on Saturday, as well as on certain religious holidays.<sup>94</sup> But Firestone’s work schedule would not permit Wise to permanently schedule off on those days.<sup>95</sup> Firestone, though, did allow an employee to have vacation days, floating holidays, and a limited number of days of unpaid leave, as well as allow an employee to make a limited number of shift swaps with other employees.<sup>96</sup> When Wise used up all of his yearly vacation days, floating holidays, and unpaid leave days, he refused to report to work during a particular religious holiday.<sup>97</sup> Firestone subsequently fired him from his employment.<sup>98</sup> The Fourth Circuit affirmed the district court’s decision that Firestone had reasonably accommodated Wise’s religious beliefs by allowing Wise to take off as many hours as he already had.<sup>99</sup>

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<sup>90</sup> *Id.* at 1464.

<sup>91</sup> *Id.* at 1466–67.

<sup>92</sup> *Id.* at 1467, 1475 (citing *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988)).

<sup>93</sup> 515 F.3d 307, 319 (4th Cir. 2008).

<sup>94</sup> *Id.* at 309.

<sup>95</sup> *Id.* at 310.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 311.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 319.

In reaching its decision, the Fourth Circuit disagreed with the EEOC and Wise's argument that the employer's accommodation must "eliminate[] the conflict between the religious practice and the work requirement."<sup>100</sup> Instead, the court held that an employer need only give a "reasonable, though not necessarily a total, accommodation."<sup>101</sup> The court produced several arguments to support this interpretation of accommodation. First, the court made a textual argument based on the observation that the crafters of the legislation placed the word "reasonably" as a modifier to "accommodate" in the language of § 701(j) instead of using other qualifiers such as "totally" or "completely."<sup>102</sup> Second, the court looked at the Supreme Court's prior decision in *Hardison*.<sup>103</sup> Noting that the Supreme Court struggled to "locate the degree of accommodation required" under Title VII, the Fourth Circuit interpreted the Court's decision to require only reasonable accommodation versus total accommodation.<sup>104</sup>

Third, the court compared § 701(j)'s accommodation requirement to the Supreme Court's interpretation<sup>105</sup> of the similar requirement under the Americans with Disabilities Act ("ADA"), calling for "reasonable accommodation' absent 'undue hardship'".<sup>106</sup> Relying on the Supreme Court's determination that "'reasonable' in the disability context incorporates considerations other than those involving the effectiveness of the accommodation as it relates to the employee's needs," the court argued that to "reasonably accommodate' in the religious context incorporates more than just whether the conflict between the employee's beliefs and the employer's work requirements have been eliminated."<sup>107</sup> Thus, based on these reasons, the Fourth Circuit held that a partial accommodation by an employer to an employee's religious beliefs satisfies § 701(j) so long as the accommodation is reasonable.

In *Sturgill v. United Parcel Service, Inc.*, the Eighth Circuit examined the validity of a trial court jury instruction that stated an

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<sup>100</sup> *Id.* at 313 (internal quotation marks omitted).

<sup>101</sup> *Id.* at 315.

<sup>102</sup> *Id.* at 313 ("If Congress had wanted to require employers to provide complete accommodation absent undue hardship, it could easily have done so. For instance, Congress could have used the words 'totally' or 'completely,' instead of 'reasonably.' It even could have left out any qualifying adjective at all. Rather, Congress included the term reasonably, expressly declaring that an employer's obligation is to 'reasonably accommodate' absent undue hardship—not to totally do so.").

<sup>103</sup> *Id.* at 313.

<sup>104</sup> *Id.* at 313–14.

<sup>105</sup> *Id.* at 314.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

employer's "accommodation is reasonable if it *eliminates* the conflict between [the employee's] religious beliefs and [the employer's] work requirements."<sup>108</sup> Todd Sturgill, a package car driver for United Parcel Service, Inc. ("UPS"), became a member of the Seventh-day Adventist Church and, because of his new religious beliefs, was unable to work from sundown on Friday to sundown on Saturday.<sup>109</sup> When UPS terminated Sturgill for refusing to deliver all of his packages one Friday evening because he could not do so before sundown, Sturgill sued UPS under Title VII for failing to provide him with an accommodation.<sup>110</sup> The Eighth Circuit held that the trial court's jury instruction that a reasonable accommodation must entirely eliminate the conflict between the employee's religious beliefs and the employment requirements was in error.<sup>111</sup> Instead of affirming the complete accommodation test, the court stated, "What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict."<sup>112</sup>

The court provided two different basis for its particular interpretation of accommodation. First, the court looked at the Supreme Court's decision in *Philbrook*.<sup>113</sup> The Eighth Circuit interpreted the Supreme Court's reasoning as holding that while an accommodation eliminating the conflict is reasonable, it does *not* follow that an accommodation *must* eliminate the conflict in order to be reasonable.<sup>114</sup> Just as *Philbrook* held that employees cannot always get their preferred accommodations because such a practice would frustrate the policy of encouraging "bilateral cooperation" between the employer and the employee, so also requiring that an accommodation always eliminate the conflict would frustrate this bilateral cooperation.<sup>115</sup>

Second, the Eighth Circuit relied on its own previous decisions and decisions from other circuits that it believed supported its interpretation of accommodation.<sup>116</sup> Thus, based on its analysis of *Philbrook* and other supportive precedent, the court stated,

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<sup>108</sup> 512 F.3d 1024, 1030 (8th Cir. 2008).

<sup>109</sup> *Id.* at 1027–28.

<sup>110</sup> *Id.* at 1027, 1029.

<sup>111</sup> *Id.* at 1030, 1033.

<sup>112</sup> *Id.* at 1030.

<sup>113</sup> *Id.* at 1030–31.

<sup>114</sup> *Id.* at 1031.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1031–32. The Eighth Circuit makes a distinctly different analysis of the Third Circuit's reasoning in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 226 (3d Cir. 2000), than the analysis in this Note. Compare *Sturgill*, 512

Bilateral cooperation under Title VII requires employers to make serious efforts to accommodate a conflict between work demands and an employee's sincere religious beliefs. But it also requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions.<sup>117</sup>

For these reasons, the Eighth Circuit held that the jury instruction requiring a complete accommodation of Sturgill's religious beliefs absent undue hardship was erroneous.<sup>118</sup>

The Fourth Circuit's decision in *Firestone* and the Eighth Circuit's decision in *Sturgill* represent a distinct rift between them and several other sister circuits in their interpretation of § 701(j)'s requirement that an employer reasonably accommodate the religious beliefs of an employee. Instead of hinging the employer's accommodation solely on whether it satisfies the employee's religious beliefs or concerns, the Fourth and Eighth Circuits have instituted a new test that may require employees to compromise their religious beliefs in order to keep their jobs if the employer and, ultimately, the court decide that the proposed accommodation is reasonable. In determining what is reasonable under this new test, it is necessary to look at *both* the religious beliefs of the employee *and* the needs of the employer.

### III. PROBLEMS WITH THE PARTIAL ACCOMMODATION TEST

The test conceived by the Fourth and Eighth Circuits for determining what constitutes a reasonable accommodation creates two types of problems. The first problem regards the soundness of the formation of the new test. This problem questions, "Did the Fourth and Eighth Circuits properly extrapolate this test from Title VII and the Supreme Court's decisions in *Hardison* and *Philbrook*?" The second problem regards the effect of this test. It queries, "Are the implications of applying the partial accommodation test lawful?"

The answer to the questions posed by both of these problems is "no." First, the formation of the partial accommodation test is unsound because it is inconsistent with the Supreme Court's opinions in *Hardison* and *Philbrook*, the intent of the parties and the Court in *Philbrook*, and the legislative intent behind and statutory construction of § 701(j)'s definition of religion requiring reasonable accommodation absent undue

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F.3d at 1031, *with supra* note 68. Likewise, the Eighth Circuit relied on the unclear reasoning of the Fifth Circuit. *Sturgill*, 512 F.3d at 1031-32. *But see supra* note 68.

<sup>117</sup> *Sturgill*, 512 F.3d at 1033.

<sup>118</sup> *Id.*

hardship.<sup>119</sup> Second, the effect of applying this test is incompatible with the Supreme Court's decision in *United States v. Ballard*,<sup>120</sup> and it allows the courts to wander into a field proscribed by the Constitution's protection against the establishment of religion.<sup>121</sup>

#### A. Problems in Formation

##### 1. Inconsistency with the Supreme Court's Opinions and the Intent in *Hardison* and *Philbrook*

Both the Fourth Circuit and the Eighth Circuit looked at the Supreme Court's decisions in *Hardison* and *Philbrook* in creating their partial accommodation tests. While the Fourth Circuit relied mainly on *Hardison* in its analysis in *Firestone*,<sup>122</sup> the Eighth Circuit relied on the *Philbrook* decision in *Sturgill*.<sup>123</sup> But both of these Supreme Court decisions support the complete accommodation test and not the partial accommodation test.

In *Hardison*, it is important to note that nowhere in its opinion does the Supreme Court say that an accommodation can be anything less than complete.<sup>124</sup> While the Fourth Circuit latches on to the fact that the Supreme Court says that it has "no guidance for determining the degree of accommodation that is required of an employer,"<sup>125</sup> this statement is a mere *inference* from which the Fourth Circuit builds its conclusory determination that "the degree of accommodation . . . [is] one of reasonable, not total, accommodation."<sup>126</sup> Not only does the Fourth Circuit rely on this inference, but the inference is *unsupported*. By reading on in the Supreme Court's opinion in *Hardison*, it seems more likely that the Court is pondering not how much accommodation should be given but, rather, the interplay between an employer's duty to reasonably accommodate and the undue-hardship clause.<sup>127</sup> The Court looks at the accommodations offered by the employer (all of which are total accommodations) and holds that these accommodations would create an undue hardship on the employer.<sup>128</sup> Thus, *Hardison* never

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<sup>119</sup> See *infra* Part III.A.

<sup>120</sup> 322 U.S. 78 (1944).

<sup>121</sup> See U.S. CONST. amend. I; *infra* Part III.B.

<sup>122</sup> EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313–14 (4th Cir. 2008).

<sup>123</sup> See *supra* note 113 and accompanying text.

<sup>124</sup> See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

<sup>125</sup> *Firestone*, 515 F.3d at 313 (quoting *Hardison*, 432 U.S. at 74).

<sup>126</sup> *Id.* at 313–14.

<sup>127</sup> See *Hardison*, 432 U.S. at 75–77.

<sup>128</sup> *Id.* at 76–77. The three accommodations suggested by the employee were (1) to permit the employee to work a four-day week, (2) to fill the employee's shift with another

expressly supports a partial accommodation test. Rather, its analysis and discussion of the proposed accommodations in that case seem to support a test calling for complete accommodation.

If the Supreme Court's approval of the complete accommodation test is unclear in its decision in *Hardison*, it is much more evident in the *Philbrook* decision. Before delving into an analysis of the Court's opinion in this case, it is helpful to make two general observations. First, just as in *Hardison*, nowhere in the Supreme Court's opinion in *Philbrook* does the Court ever expressly support a partial accommodation test.<sup>129</sup> Second, the only accommodation discussed in *Philbrook* was a complete accommodation.<sup>130</sup>

While the Eighth Circuit tries to infer from the Supreme Court's discussion of the policy of encouraging "bilateral cooperation" between the employer and the employee that the duty to accommodate may sometimes require employees to compromise their religious beliefs,<sup>131</sup> such an extrapolation is contrary to the Supreme Court's opinion in *Philbrook*.<sup>132</sup> After its discussion of the policy of bilateral cooperation, the Supreme Court addresses whether the employer's policy is a reasonable accommodation.<sup>133</sup> The Supreme Court held that the accommodation "eliminate[d] the conflict between employment requirements and religious practices."<sup>134</sup> The Court held this accommodation also to be "a reasonable one."<sup>135</sup> This language suggests that there was an accommodation provided by the employer because the solution eliminated the conflict between the employee's religious beliefs and the employment requirements. Not only did the employer provide an accommodation, but the accommodation was reasonable. This appears to be the standard. Such a reading fails to support the Eighth Circuit's theory that the elimination of the conflict between the employee's religious beliefs and the employment requirements is not a prerequisite to an accommodation being reasonable.<sup>136</sup>

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employee, or (3) to swap the employee's shift for another's employee's shift or just for Sabbath days. *Id.* at 76.

<sup>129</sup> See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

<sup>130</sup> *Id.* at 70. The school board allowed Philbrook to take off of work for the remainder of the religious holidays not covered under his contract, albeit without pay. *Id.* This accommodation constitutes a complete accommodation because it allowed Philbrook to observe his religious beliefs while still letting him keep his employment.

<sup>131</sup> *Sturgill v. United Parcel Serv.*, F.3d 1024, 1031 512 (8th Cir. 2008) (quoting *Philbrook*, 479 U.S. at 69).

<sup>132</sup> *Philbrook*, 479 U.S. at 70.

<sup>133</sup> *Id.* at 69–70.

<sup>134</sup> *Id.* at 70.

<sup>135</sup> *Id.*

<sup>136</sup> *Sturgill*, 512 F.3d at 1031.



While the understanding of the parties in a case as to a particular issue is not authoritative in case law, it can provide insight into interpreting what a court meant in its decision. Thus, it is helpful to look at the briefs and oral arguments of both parties in *Philbrook* to determine what constitutes a reasonable accommodation.<sup>137</sup> In their briefs, none of the parties argued for a test resembling the partial accommodation test created by the Fourth and Eighth Circuits.<sup>138</sup> In fact, the petitioner school board (the employer) stated that its solution to the problem posed by the employee's religious belief "does not hamper him in the exercise of his religious beliefs" and, thus, "fully discharges the [employer's] obligation to accommodate under Title VII."<sup>139</sup> Thus, the party with the most to gain by arguing for a partial accommodation test instead fit its case within the confines of a complete accommodation approach.

The transcript from the oral argument before the Supreme Court is particularly insightful in understanding the Supreme Court's view of accommodation based on the petitioner's own arguments. A relevant excerpt of the transcript is set as follows:

[Unknown Justice]: Mr. Sullivan, how would you define what is a reasonable accommodation under Title VII?

Mr. Sullivan [Counsel for Petitioner]: Your Honor, I would define a reasonable accommodation as one that resolves the conflict between the employee's religious needs, in this case in terms of religious observance, and his job requirements.

And that is, I think, the crucial factor in this case. Because the employer has implemented an accommodation, which resolves the conflict between Philbrook's need to be on the job and his need for religious observance, a reasonable accommodation has been made.

And the statute has been satisfied as a result.<sup>140</sup>

Once again, the emphasis is on a complete accommodation test for determining what constitutes a reasonable accommodation. A reasonable accommodation is one that "resolves the conflict between the employee's religious needs . . . and his job requirements."<sup>141</sup> That these statements

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<sup>137</sup> This Note focuses on the intent of the parties and Court in *Philbrook* rather than in *Hardison* because the *Philbrook* decision was the first (and last) Supreme Court case to interpret both the statute and the Supreme Court precedent regarding the statute. See *supra* note 61 and accompanying text.

<sup>138</sup> See Brief for the Petitioners, *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (No. 85-495), 1986 WL 728382; Brief for the Respondent Ronald Philbrook, *Philbrook*, 479 U.S. 60 (No. 85-495), 1985 WL 670267; Reply Brief for the Petitioners, *Philbrook*, 479 U.S. 60 (No. 85-495), 1985 WL 670270.

<sup>139</sup> Brief for the Petitioners, *supra* note 138, at \*25.

<sup>140</sup> Transcript of Oral Argument, *Philbrook*, 479 U.S. 60 (No. 85-495), 1986 U.S. Trans. LEXIS 24 at \*10-11.

<sup>141</sup> *Id.*

came from the employer in this dispute strengthens the conclusion that the Court and both parties thought a complete accommodation test was the standard when the Supreme Court made its decision in *Philbrook*.

Thus, a close reading and analysis of the understanding behind the Supreme Court's opinions in *Hardison* and *Philbrook* demonstrate that the Supreme Court assumed as the norm a complete accommodation test. Not only was partial accommodation not discussed, but the inferences made by the Fourth and Eighth Circuits are certainly unsupported as evidenced by a closer analysis of the Supreme Court opinions. Thus, the Fourth and Eighth Circuit's reliance on these cases for their partial accommodation test is unfounded.

## 2. Inconsistency with the Historical and Textual Analysis of § 701(j)

### *a. Legislative Intent and Statutory Construction*

Like the Supreme Court decisions, the legislative record behind the passage of the 1972 amendment that produced § 701(j) fails to give one definitive statement explaining that the complete accommodation test is the only appropriate test for determining what constitutes an accommodation. Thus, an extrapolation of the partial accommodation test based on Congress's wording of the legislation is certainly *possible*. But by examining the congressional record and by making a logical assessment of the wording of the text in § 701(j), it is clear that the argument for complete accommodation is the *most plausible* explanation of the text.

The 1972 amendment establishing the duty of religious accommodation<sup>142</sup> was introduced in the U.S. Senate by Senator Jennings Randolph, a Seventh-day Baptist, who was motivated to protect fellow Sabbatarians within his denomination who believed they should not work from sundown on Friday to sundown on Saturday by ensuring that their employers provide them with a reasonable accommodation.<sup>143</sup> But because Congress recognized the need to also protect employers from always being forced to give an accommodation,

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<sup>142</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (1972) (codified as amended at 42 U.S.C. § 2000e(j) (2006)) ("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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

<sup>143</sup> 118 CONG. REC. 705, 705 (1972) (statement of Sen. Jennings Randolph). While Senator Randolph had motivation to protect the religious beliefs of his fellow Sabbatarians, the broad language of the amendment, as well as the legislative intent behind the amendment, demonstrate that Congress designed the amendment to protect the religious beliefs of all individuals within the workplace. *See id.* at 705-06.

Congress qualified this duty by making an exception to providing an accommodation when doing so would create an undue hardship on the employer's business.<sup>144</sup> Thus, § 701(j) appears to provide two sets of protections. First, there is a protection for the *employee* that the employer must *reasonably accommodate* the employee's religious beliefs. Second, there is a protection for the *employer* that it need not accommodate if doing so would create an *undue hardship*.

The Fourth Circuit, picking up on these two distinct protections, nevertheless attempted to mix them. The court states,

Although we hold the "reasonably accommodate" and "undue hardship" inquiries to be separate and distinct, this does not mean they are not interrelated. Indeed, there is much overlap between the two. For instance, an accommodation that results in undue hardship almost certainly would not be viewed as one that would be reasonable.<sup>145</sup>

Thus, the Fourth Circuit hinges one of its major arguments for the partial accommodation test on the theory that the term "reasonable" is meant to also protect the employer and not just the employee.

While this interpretation is certainly a possible inference from the wording of the statute, it is not the most logical. Giving the employer protection in the employee's only provision of protection (reasonable accommodation) is redundant when the employer already has its own provision of protection (undue hardship). If reasonableness is also the standard for protecting the employer, then it was unnecessary for Congress to include the "undue hardship" provision. But the existence of the "undue hardship" provision makes it far more likely that the protection of "reasonableness" belongs solely to the employee. This is the position taken by the Supreme Court in *Philbrook*. The Supreme Court used the term "reasonable" to determine whether the accommodation proposed by the employer subjected the employee to other discrimination.<sup>146</sup> If, indeed, reasonableness should only be defined in light of the employee's needs, then the Fourth Circuit's argument for partial accommodation is left without support.

This interpretation of the text of § 701(j) may cause some to ask, as did the Fourth Circuit,<sup>147</sup> "Why would Congress modify the term 'accommodation' with the word 'reasonable' if an accommodation is only meant to be a complete accommodation?" If the accommodation totally eliminates the conflict between the employee's religious beliefs and the employment requirements, then why should it also need to be

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<sup>144</sup> *Id.* at 706.

<sup>145</sup> *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 314 (4th Cir. 2008).

<sup>146</sup> *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70–71 (1986).

<sup>147</sup> *Firestone*, 515 F.3d. at 313.

reasonable? The answer to these questions is that it is possible to have a complete accommodation that is, nonetheless, unreasonable.

For example, a full-time factory worker may have the religious belief that it is wrong for him to work on a Saturday. When the employee expresses his desire for an accommodation to his religious beliefs, his employer provides him with an accommodation plan where he is only ever scheduled to work on Mondays. While the accommodation is complete because it eliminates the conflict between the employee's religious beliefs (not working on Saturday) and the employment requirements (only working on Monday), it is certainly not reasonable for a full-time employee.<sup>148</sup> Both words in the phrase "reasonably accommodate" must be present in order to prevent an employer from unlawfully discriminating against an employee based on the employee's religious beliefs. Clearly, reasonableness is yet another protection for the employee under this interpretation of the statute.

Thus, while the legislative record and the statute itself do not expressly state the conclusion that an accommodation is meant to be complete and that the term "reasonable" is meant as a sole protection for the employee, the debate behind the amendment and an analysis of the amendment's textual construction support the complete accommodation test. The Fourth and Eighth Circuits' textual arguments in support of the partial accommodation test fail to be the most sound when put to the logical test. Therefore, the argument for partial accommodation fails, once again, on the basis of its formation.

*b. Section 701(j) and the ADA*

It is often helpful to study how other statutes have been interpreted when analyzing a statute with a similar language construction. In *Firestone*, the Fourth Circuit relied on the Supreme Court's interpretation of a similar provision in the ADA that prohibits employer discrimination against employees with disabilities.<sup>149</sup> The ADA language reads that an employer unlawfully discriminates against an employee with a disability if the employer does not make "reasonable

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<sup>148</sup> While § 703 generally proscribes discriminatory conduct by the employer, some of the circuits have held to this particular interpretation of the word "reasonable" when dealing with the employer's proffered accommodation to the employee. See *Wright v. Runyon*, 2 F.3d 214, 217–18 (7th Cir. 1993) (holding that an accommodation of a change in work positions was reasonable because the positions were "essentially equivalent," but noting that a reduction in pay, a loss of benefits, or a change from a skilled position to a non-skilled position could be unreasonable); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) (holding that a transfer to a lower position was still a reasonable accommodation because the accommodation resulted in higher gross pay).

<sup>149</sup> *Firestone*, 515 F.3d at 314.

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . the accommodation would impose an undue hardship on the operation of the business.”<sup>150</sup> In *U.S. Airways, Inc. v. Barnett*, the Supreme Court ruled that the word “reasonable” in this provision does not mean that the accommodation must be effective.<sup>151</sup> The Court stated, however, that an accommodation may be unreasonable if it adversely affects fellow employees.<sup>152</sup> Relying on this decision, the Fourth Circuit discounted the complete accommodation test.<sup>153</sup> The court inferred that the “term ‘reasonably accommodate’ in the religious context incorporates more than just whether the conflict between the employee’s beliefs and the employer’s work requirements have been eliminated.”<sup>154</sup>

The Fourth Circuit is mistaken in believing that the Supreme Court’s decision in *Barnett* eliminates the complete accommodation test. In fact, the very nature of what the ADA is trying to protect makes it impossible to believe that “reasonable accommodation” can mean a partial accommodation that does not entirely eliminate the conflict between the employee’s inherent characteristics (religious or physical) and the demands of employment. It is not possible to partially accommodate all disabilities. For example, providing a blind worker with an employment task she could perform without her sight half of the time but would require full seeing capabilities for the other half of the time fails to accommodate the worker. An employer’s offer would only constitute an accommodation if it entirely eliminated the conflict between the employee’s blindness and the employer’s requirements. The Supreme Court says the same in its decision in *Barnett*: “An *ineffective* ‘modification’ or ‘adjustment’ will not *accommodate* a disabled individual’s limitations.”<sup>155</sup> Essentially, the accommodation must be complete. The Court states, “It is the word ‘accommodation,’ not the word ‘reasonable,’ that conveys the need for effectiveness.”<sup>156</sup> To be an

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<sup>150</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2006).

<sup>151</sup> 535 U.S. 391, 400 (2002).

<sup>152</sup> *Id.* at 400–01. This statement by the Supreme Court marks a difference in interpretation of the separate protections offered by the two provisions “reasonable accommodation” and “undue hardship” argued for in this Note. *See* discussion *supra* Part III.A.2.a. However, this interpretation is still viable for two reasons. First, the Supreme Court’s interpretation is particular to the ADA. It is not binding on Title VII. Second, the Supreme Court’s interpretation of the ADA provision seems inconsistent per the same textual analysis of Title VII’s provisions made in this Note. *See* discussion *supra* Part III.A.2.a.

<sup>153</sup> *Firestone*, 515 F.3d at 314.

<sup>154</sup> *See id.*

<sup>155</sup> 535 U.S. at 400.

<sup>156</sup> *Id.*

accommodation, the modification or adjustment offered by the employer must be effective (i.e. complete). After ensuring that the accommodation is effective, the analysis then shifts to whether the accommodation is reasonable.<sup>157</sup> Thus, the ADA and the Supreme Court's decision in *Barnett* actually support the requirement of a complete accommodation under § 701(j).

*B. Problems in Effect: An Unlawful Violation of the First Amendment  
Protection Against Establishment of Religion*

Not only is the partial accommodation test improperly formed, but it is also unlawful in its effect. By using the partial accommodation test, a court delves into an inquiry of the reasonableness of the employee's religious beliefs. As argued in this Section, this practice violates the constitutional protection of the Establishment Clause found in the First Amendment.<sup>158</sup>

1. *United States v. Ballard* and the Prohibition of a Judicial Determination  
on the Reasonableness of a Religious Belief

In *United States v. Ballard*, the Supreme Court held that a trier of fact cannot question the issue of whether an individual's religious beliefs are true.<sup>159</sup> Such an act, the Court held, is forbidden by the First Amendment.<sup>160</sup> The Court stated,

[Man] was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused . . . might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.<sup>161</sup>

The Court's ruling in *Ballard*, that a court must not delve into the reasonableness of a religious belief, has become an established protection in the Court's First Amendment jurisprudence.<sup>162</sup> To question the

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<sup>157</sup> *Id.* at 400–01.

<sup>158</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”)

<sup>159</sup> 322 U.S. 78, 86 (1944).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 87.

<sup>162</sup> *See Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 144 n.9 (1987) (“In applying the Free Exercise Clause,

reasonableness of an individual's religious beliefs is to wander outside of a court's constitutional sphere of power.

In *Thomas v. Review Board of the Indiana Employment Security Division*, the Supreme Court reaffirmed this principle.<sup>163</sup> Eddie Thomas's employer, a machinery plant, transferred him to a department where he discovered that he would have to help manufacture turrets for military tanks.<sup>164</sup> Because his personal religious beliefs as a Jehovah's Witness forbade him from working directly on weaponry, he felt forced to quit his job.<sup>165</sup> The Indiana Supreme Court then denied Thomas unemployment benefits because his asserted religious beliefs were more of a "personal philosophical choice rather than a religious choice."<sup>166</sup>

But the U.S. Supreme Court reversed the decision and held that the Indiana Supreme Court had improperly reached its conclusion by making a judgment on the reasonableness of Thomas's religious beliefs.<sup>167</sup> Noting that the lower court had looked at the consistency of Thomas's beliefs and how they matched up to those of a fellow Jehovah's Witness who worked at the plant, the Supreme Court held that "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>168</sup> Instead, the Supreme Court held that the "narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that [the employee] terminated his work because of an honest conviction that such work was forbidden by his religion."<sup>169</sup> The Court, thus, reaffirmed its decision in *Ballard* that a court cannot make a judgment determining the reasonableness of a religious belief.<sup>170</sup> The court may only make a judgment as to whether that belief is sincere.<sup>171</sup>

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courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.").

<sup>163</sup> 450 U.S. 707, 714 (1981).

<sup>164</sup> *Id.* at 709.

<sup>165</sup> *Id.* at 710.

<sup>166</sup> *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 391 N.E.2d 1127, 1131, 1134 (Ind. 1979).

<sup>167</sup> *Thomas*, 450 U.S. at 715–16, 720.

<sup>168</sup> *Id.* at 714–15.

<sup>169</sup> *Id.* at 716.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 726.

## 2. *Ballard* and the Partial Accommodation Test

The Fourth and Eighth Circuit's partial accommodation test that is based on a standard of reasonableness determined from the circumstances violates the rule established in *Ballard* because the test allows a court to decide on the reasonableness of an employee's religious beliefs. While such a scenario is not as clear-cut as one where the court attempts to decide whether an individual's religious beliefs are true, the actions of the court in determining the reasonableness of a partial accommodation clearly violate the religious protections recognized by the Supreme Court in *Ballard*.

As mentioned above, the established rule from *Ballard* is that a court cannot make a decision as to whether an individual's religious beliefs are reasonable. If a court does make a decision on the reasonableness of an individual's religious beliefs, then it is in violation of the First Amendment. Under the partial accommodation test, an employee may have to compromise his religious beliefs in order to create a "reasonable" solution with his employer. Because the employee is being forced to compromise, he is coerced into accepting a practice of his religious beliefs that the court finds reasonable in light of his employment circumstances.

If an employee fails to accept what the court deems to be a reasonable accommodation, then the court holds him to be unreasonable and unworthy of protection under Title VII. But the employee's decision not to accept the proposed accommodation is based on his religious beliefs. The court, therefore, is actually saying the employee's religious beliefs are unreasonable.

Now, it is possible that one might object and say the court is not really making a decision as to the reasonableness of the employee's religious beliefs. Rather, it is only making a decision as to the reasonableness of the employee's willingness to work out a solution. But this is not the case. The employee is acting reasonably according to his religious beliefs. What the court is adjudicating then is the reasonableness of those religious beliefs that cause the employee to be willing or not willing to accept a particular accommodation.

An example is helpful in understanding the connection between the implementation of the partial accommodation test and a court's illegal stroll into the constitutionally forbidden realm of adjudicating on the reasonableness of an individual's religious beliefs. Suppose an employee has the religious conviction that she cannot work on Saturdays and Sundays. When she approaches her employer to seek an accommodation under Title VII, the employer, looking at what it considers a reasonable solution for both the business and the employee based on the employment circumstances, provides the employee with an



accommodation that she may have Saturdays off but not Sundays. The employee declines the accommodation and, after being terminated, brings suit under Title VII. The court, then, must make a determination on whether the proposed accommodation is reasonable. If the court agrees with the employer that the accommodation of having Saturdays but not Sundays off is reasonable, then it is effectively deciding that the employee is being unreasonable if she does not accept the accommodation. In reality, though, the court is actually making a judgment as to the reasonableness of the employee's religious beliefs. It is not the case that the employee is acting unreasonably. If her religious beliefs dictate that she must not work on Saturdays and Sundays, then she is acting logically according to those beliefs. In other words, she is acting *reasonably* according to her religious beliefs. Thus, the court is really making a judgment on the reasonableness of those beliefs. But such a determination is outside of the scope of a court to make. Doing so, according to *Ballard*, violates the First Amendment protections given to the employee.

Specifically, when a court is in the practice of deciding upon the reasonableness of an employee's religious beliefs, the court is, in effect, violating the Establishment Clause.<sup>172</sup> The Establishment Clause prohibits "forms of state intervention in religious affairs."<sup>173</sup> Yet, by determining the reasonableness of various religious beliefs, a court gives unconstitutional preferential treatment to adherents of some religions but not to adherents of other religions depending on which religious beliefs are more reasonable for accommodation purposes.<sup>174</sup>

Even assuming that the construction of the partial accommodation test by the Fourth and Eighth Circuits was proper, the implications of this test render it unconstitutional. In an attempt to provide employers with greater protection at the expense of employees' devotion to their religious beliefs, the Fourth and Eighth Circuits have opened the door for courts to make judgments on the reasonableness of employees' religious beliefs. The Supreme Court's First Amendment jurisprudence clearly proscribes such activity.

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<sup>172</sup> U.S. CONST. amend. I.

<sup>173</sup> *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (citing *Buckley v. Valeo*, 424 U.S. 1, 92-93 & n.127 (1976) (per curiam)).

<sup>174</sup> *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that a government may not "prefer one religion over another"); *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The First Amendment does not select any one group or any one type of religion for preferred treatment.").

## IV. HEALING THE SPLIT

A jurisdictional difference exists in the application of § 701(j) resulting from variant interpretations of the intent and wording of the statute. The extent of the rift between the circuits over the breadth of an accommodation under Title VII as a measure against religious discrimination renders the issue ripe for the review of the Supreme Court. If a case arises that addresses the issue of complete versus partial accommodation, the Supreme Court should grant certiorari for several reasons.

First, the partial accommodation test embraced by the Fourth and Eighth Circuits is at odds with the current EEOC guidelines regarding an employer's duty to accommodate the religious beliefs of an employee. The current EEOC Compliance Manual states,

An accommodation is not "reasonable" if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship. Eliminating the conflict between a work rule and an employee's religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment.<sup>175</sup>

Realizing that the Fourth and Eighth Circuits have strayed from the approach that "a reasonable accommodation must eliminate the conflict between work and religion," the Commission holds that its own interpretation is "more straightforward and more in keeping with the purpose of Title VII's accommodation requirement."<sup>176</sup>

Affirmation by the Supreme Court of either test would create the necessary uniformity and certainty that is currently lacking in employment religious discrimination jurisprudence due to the circuit split and the EEOC guidelines. The rights of employees are either more or less protected depending on the state in which they bring suit, despite the fact that § 701(j) is part of a federal statute that applies equally across the states. Also, in circuits where there is no clear adoption of one test, the legal rights of employees are uncertain as a court could follow either the traditional or more recent interpretation of what constitutes a reasonable accommodation.

Second, the Supreme Court should decide on the constitutionality of the partial accommodation test because of the First Amendment concerns raised by allowing a court to force employees to compromise their religious beliefs if they want protection under § 701(j). In *Ballard*,

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<sup>175</sup> EEOC, NO. 915.003, DIRECTIVES TRANSMITTAL: EEOC COMPLIANCE MANUAL 51-52 (2008), available at <http://www.eeoc.gov/policy/docs/religion.pdf>.

<sup>176</sup> *Id.* at 52 n.130.

the Supreme Court noted that when courts adjudicate on the reasonableness of an individual's religious beliefs, "they enter a forbidden domain."<sup>177</sup> Yet this domain, fiercely guarded by the First Amendment, is invaded by the courts through the partial accommodation test because the test allows a court to decide what parts of an employee's religious beliefs are unreasonable and worthy of compromise.

Third, the Supreme Court should clarify this issue of law because the partial accommodation test marks a significant shift in protection under § 701(j). Under this test, the religious beliefs of an employee are more likely to be compromised than they were before.<sup>178</sup> Under the complete accommodation test, employees only have to choose whether to compromise their religious beliefs if a reasonable accommodation is not available because it would cause an undue hardship on the employer. Under the partial accommodation test, an employee may be forced to decide whether to compromise based on whether the employer and court think that an "accommodation" is "reasonable," regardless of whether a complete accommodation would create an undue hardship. The Supreme Court should decide whether a shift in the protection of the employer over the employee is actually in keeping with the intent behind Title VII.

In the event that the Supreme Court decides to review this particular issue, what should it do? First, it should specify what constitutes an accommodation under § 701(j). Must an accommodation completely eliminate the conflict between the employee's religious beliefs and the employment requirements, or need it only partially eliminate the conflict by providing room for "reasonably" compromising the employee's religious beliefs? The position taken in this Note is that requiring a complete accommodation is the appropriate standard for protecting against religious discrimination within the workplace.

Second, the Supreme Court should clarify which party the term "reasonably" protects under § 701(j). Does it solely protect the employee, or does it also cover the employer and potential third-party employees? As seen throughout this Note, the confusion over the application of the term "reasonably" has been a major contributor to the current circuit split.

Finally, the Supreme Court should reaffirm the protection of employees and their religious beliefs. There are currently two worldviews at clash over this issue. The first attempts to provide greater protection for the employer, even if this calls for violating the conscience of the employee. This worldview is best seen in the Eighth Circuit's

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<sup>177</sup> *Ballard*, 322 U.S. at 87.

<sup>178</sup> *Sturgill v. United Parcel Serv.*, 512 F.3d 1024, 1033 (8th Cir. 2008).

decision in *Sturgill* where the court states that “a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions.”<sup>179</sup> The second worldview is based on protecting the employee—a view embraced by the drafters of Title VII.<sup>180</sup> “The religious-discrimination provision of Title VII is an accommodation to the employee, not to the employer. The legislative history of Title VII shows that the drafters of the bill had the needs of the religious employee at the forefront of their efforts.”<sup>181</sup>

The Fourth and Eighth Circuits’ decisions in 2008 demonstrated the implications of the former worldview in their adoption of the partial accommodation test. The Supreme Court should subscribe to the view held by the drafters of Title VII that protects *both* the freedom of religion *and* the employee’s right to work. One fundamental way of doing this is to hold that all accommodations of an employee’s religious beliefs *must* eliminate the conflict between those beliefs and the employment requirements.

*Andrew J. Hull*

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<sup>179</sup> *Id.*

<sup>180</sup> Blair, *supra* note 6, at 518–19.

<sup>181</sup> *Id.* at 519.