

WHEN RELIGIOUS EXPRESSION CREATES A HOSTILE WORK ENVIRONMENT: THE CHALLENGE OF BALANCING COMPETING FUNDAMENTAL RIGHTS

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Introduction	82
I. The Supreme Court Interprets Title VII’s Requirement of Religious Accommodation and Prohibition of Hostile Work Environment Harassment	87
A. Religious Accommodation Under Section 701(j) ..	87
B. Hostile Work Environment Harassment	91
C. The Overlap Between Section 701(j)’s Requirement of Religious Accommodation and Title VII’s Prohibition of Hostile Work Environment Harassment	97
II. Constitutional Issues	102
A. Private Employees	102
B. Private Employers	107
C. Government Employees	107
III. Lower Court Cases Involving the Direct Conflict Between the Right to Religious Expression in the Workplace and the Countervailing Right to Be Free From Hostile Work Environment Harassment	109
A. Section 701(j) Cases—The Courts’ Failure to Adequately Analyze the Harassment Issue and the Courts’ Bias Against Unusual Religious Expression	110
B. The Abortion Controversy	120
C. Must a Speaker Know that the Speech Is Unwelcome?	123

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D. The Power Differential—When the Religious Speaker Is an Employer or Supervisor.....	133
1. Employer Cases.....	133
2. Supervisor Cases.....	135
IV. Proposals for Addressing the Conflict Between the Right to Religious Expression in the Workplace and the Countervailing Right to Be Free from Hostile Work Environment Harassment.....	137
Conclusion.....	142

INTRODUCTION

The question of when, and if, expressions of religious belief in the workplace constitute actionable harassment is an issue of growing importance and concern in this country. In a nation founded as a haven for religious refugees, religion has always mattered, and continues to matter a great deal to many Americans. A recent Gallup poll indicates that about ninety-five percent of Americans say they believe in God or a universal spirit.¹

In recent years, public expressions of religious belief—including religious discussion in the workplace—are on the rise. The taboo against talking about God at work has been replaced by a new spirituality, evidenced by prayer groups at Deloitte & Touche as well as Talmudic studies at New York law firms.² When asked whether they have had occasion to talk about religious faith in the workplace in the past twenty-four hours, forty-eight percent of Americans answer yes.³

A number of explanations for this trend have been suggested. One is the rise of the religious right and Christian fundamentalism in which “the church not only preaches faith or belief systems, but also advocates religious-based, political activism.”⁴ Another explanation is the fact that Americans now spend more time in the workplace, working in excess of one month more per year than they did a decade ago.⁵ Therefore, aspects of an individual’s life previously kept private—such as religious belief and expression—are more likely to be

1. Michelle Conlin, *Religion in the Workplace: The Growing Presence of Spirituality in Corporate America*, BUS. WK., Nov. 1, 1999, at 153.

2. *Id.* at 152.

3. GEORGE GALLUP, JR. & TIMOTHY JONES, THE NEXT AMERICAN SPIRITUALITY: FINDING GOD IN THE TWENTY-FIRST CENTURY 72 (2000).

4. Dean J. Schaner & Melissa M. Erlemeier, *When Faith and Work Collide: Defining Standards for Religious Harassment in the Workplace*, EMPLOYEE REL. L.J., Summer 1995, at 7, 10 (discussing changing role of religious establishments in modern society).

5. Conlin, *supra* note 1, at 153.

come part of an individual's work day. Some employers even encourage religion in the workplace on the grounds that it is good for business. According to *Business Week*, "the largest driver of this trend is the mounting evidence that spiritually minded programs in the workplace not only soothe workers' psyches but also deliver improved productivity."⁶

Furthermore, in recent years Americans have also become significantly more concerned with issues of spirituality: While only twenty percent of Americans felt the need to experience spiritual growth in 1994, in 1999 the number grew to seventy-eight percent.⁷ Since Americans work such long hours, it is not surprising that this increased spiritual awareness is observed in "the workplace—and not churches or town squares."⁸

In addition to an increase of religious expression in the workplace, there has also been an increase in religious diversity in the American workforce. This led one commentator to predict a few years ago that "[g]iven our increasingly pluralistic and diverse population, it is likely that religious conflict in the workplace may increase, unfortunate as this might be. It is especially true as religions whose practices do not follow more familiar patterns are more widely represented in our work force."⁹ In fact, since 1992 the Equal Employment Opportunity Commission (EEOC) has reported a thirty percent increase in the number of religious-based discrimination charges.¹⁰

6. *Id.* ("[A] recently completed research project by McKinsey & Co. Australia shows that when companies engage in programs that use spiritual techniques for their employees, productivity improves and turnover is greatly reduced.").

7. *Id.* at 154.

8. *Id.* at 153. In a slightly different context, vice-presidential candidate and Orthodox Jew Joseph I. Lieberman, the first Jew to run on a major party's presidential ticket, recently generated controversy with declarations of his religious faith and his call for more religion in public life. *Mr. Lieberman's Religious Words*, N.Y. TIMES, Aug. 31, 2000, at A24. His statement that "George Washington warned us to never indulge in the supposition 'that morality can be maintained without religion'" was particularly controversial and was criticized on church-state grounds as offensive to ethical citizens who are not religious. *Id.* Lieberman, however, was defended by the Christian right—many of whom seek a larger role for religion in public life. *Id.* The controversy generated by Mr. Lieberman's statements—while not directly connected to the issue of religious expression in the workplace—illustrates the importance Americans place on both the right to religious expression and the right to be free from unwanted and offensive religious statements.

9. *The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcomm. on Courts and Admin. Prac. of the Senate Comm. on the Judiciary*, 103d Cong. 54 (1994) [hereinafter *Hearing*] (prepared statement of Robert S. Peck).

10. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, RELIGION-BASED CHARGES, FY 1992-FY 1999, at <http://www.eeoc.gov/stats/religion.html> (last modi-

The fact that Americans are very concerned with the right to religious expression in the workplace is perhaps best seen in the public uproar following the EEOC's proposed 1993 guidelines on harassment in the workplace.¹¹ These proposed guidelines set forth general standards for determining when conduct in the workplace constituted illegal harassment based on race, color, religion, gender, national origin, age, or disability. While the EEOC's primary concern in issuing the guidelines was racial harassment¹² and the fact that "the national obsession with sexual harassment had obscured the corollary prohibitions on all forms of harassment in the workplace,"¹³ it was the inclusion of religious harassment that proved to be the guidelines' downfall.¹⁴

Initially opposed primarily by conservative religious groups, the guidelines were eventually opposed by a broad spectrum of political organizations that criticized their potential for chilling religious expression in the workplace.¹⁵ Opponents called the guidelines overly broad and unconstitutionally vague, and they argued that the guidelines also failed to recognize that religious speech is entitled to special constitutional protection. As a result, there was concern that employers attempting to minimize their liability would severely limit—if not eliminate—religious expression in the workplace.¹⁶

fied Jan. 12, 2000). The EEOC does not keep separate statistics on religious harassment and religious discrimination. While not all cases of religious discrimination involve harassment, "some of the complaints of religious discrimination without elements of harassment may well have begun as harassing incidents." *Hearing, supra* note 9, at 54 (prepared statement of Robert S. Peck).

11. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993). For a general discussion of the guidelines and their history, see Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953 (1996); Russell S. Post, Note, *The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177 (1997).

12. See Post, *supra* note 11, at 190-91 n.59.

13. *Id.* at 190.

14. See *id.*

15. Groups including the American Jewish Congress, the Anti-Defamation League, the American Civil Liberties Union, the Union of Orthodox Jewish Congregations of America, the Southern Baptist Convention, and the Traditional Values Coalition expressed concern regarding the guidelines' chilling effect. *Hearing, supra* note 9, at 22.

16. One opponent of the guidelines testified that "the Guidelines eliminate religious harassment in the workplace only by eliminating religion altogether." *Hearing, supra* note 9, at 36 (prepared statement of Dudley C. Rochelle).

Eventually, the EEOC received over 100,000 comments, mostly in opposition to the guidelines, and the guidelines were withdrawn.¹⁷ The huge public outcry represented, however, “the largest firestorm of criticism in [EEOC] history.”¹⁸ The fact that groups on both the right and left, and both secular and religious, were alarmed about the guidelines’ potential to eliminate religious expression in the workplace indicates the importance that the public places on the right to religious expression.

This article addresses the legal issues that stem from religious expression in the workplace, and focuses primarily on the conflict between an employee’s right to religious expression in the workplace and the countervailing right of other employees to be free from a hostile or harassing work environment.¹⁹ This conflict arises, in large part, under Title VII of the Civil Rights Act of 1964.²⁰ Section 701(j) of Title VII requires an employer to reasonably accommodate an employee’s religious needs, including the need for religious expression in the workplace.²¹ However, Title VII also prohibits the creation of a hostile work environment based upon any of the protected categories and therefore prohibits religious expression which is sufficiently harassing.²²

17. 59 Fed. Reg. 51,396 (Oct. 11, 1994); see J. Leslie Sopko & Kathleen Driscoll, *Religion Catching on in Secular Workplace*, GANNETT NEWS SERVICE, (Dec. 25, 1994), at 2.

18. Dunkum, *supra* note 11, at 954.

19. In a previous article, the author explained that while the courts have in general interpreted section 701(j) narrowly, with some courts actually expressing hostility toward religion, there are also some cases that have required a more meaningful level of accommodation of religious employees. This has led to a number of conflicting decisions regarding an employer’s obligation to accommodate an employee’s religious needs under section 701(j). See Debbie N. Kaminer, *Title VII’s Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575 (forthcoming Fall 2000). This article, however, focuses specifically on cases involving the conflict between an individual’s right to religious expression and the countervailing right of others to be free from hostile work environment harassment. As explained throughout this article, courts generally tend to apply a somewhat different analysis in these “conflict cases.”

20. Equal Employment Opportunity Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (1994)).

21. 42 U.S.C. § 2000e-2 (1994).

22. This article also analyzes a few cases based on related state statutes. This article does not address the easier question of when animus-based religious expression such as religious epithets or slurs—which are not entitled to any unique constitutional protection—constitutes actionable harassment. As Professor Laycock explained, Religious epithets, slurs, and negative stereotypes about the personal characteristics of a religious group may generally be treated as harassment, and are actionable if they are sufficiently severe or pervasive. To say that Jews are dishonest, or that atheists are immoral, or that evangeli-

This article also addresses an *employer's* right to religious expression in the workplace when employees complain that the religious expression is harassing. These are clearly related issues, since Title VII prohibits hostile work environment harassment, regardless of whether it is created by an employer or by other employees. However, cases involving an employer's religious speech differ in two important ways. First, an employer's right to religious expression is directly protected by the Free Speech and Free Exercise Clauses of the United States Constitution and not by Title VII. Second, because of the power differential between employers and employees, courts tend to view an employer's religious expression as inherently more coercive than the religious expression of employees.

This article argues that to some extent the courts and the EEOC have failed to adequately address and recognize the inherent conflict between one employee's right to religious expression in the workplace and the countervailing right of other employees to work in an environment free of religious harassment. However, to the extent that the legal system has recognized the conflict, it has been more concerned with prohibiting hostile work environment harassment than with accommodating religious expression in the workplace and has not adequately recognized that religion is entitled to unique statutory and constitutional protection.

Part I of this article examines the Supreme Court's interpretations of both Title VII's requirement of religious accommodation in the workplace and Title VII's prohibition of hostile work environment harassment. This part also analyzes the overlap between these two sections of Title VII. Part II of this article analyzes the constitutional implications of prohibiting non-animus-based religious expression in the workplace. Part III of this article examines the lower court cases that specifically address the conflict between the right to religious expression in the workplace and the countervailing right to be free from hostile work place harassment. Finally, Part IV suggests how courts may better balance these conflicting rights.

cal Christians are hateful, is to make a claim about observable facts that do not depend on propositions of faith.

Hearing, supra note 9, at 41 (prepared statement of Prof. Douglas Laycock). See generally Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 COLUM. J.L. & SOC. PROBS. 39, 44 (1997) (distinguishing between different types of religious harassment in workplace).

I

THE SUPREME COURT INTERPRETS TITLE VII'S
REQUIREMENT OF RELIGIOUS ACCOMMODATION AND PROHIBITION
OF HOSTILE WORK ENVIRONMENT HARASSMENTA. *Religious Accommodation Under Section 701(j)*

The Civil Rights Act of 1964 was enacted to prohibit discrimination against minority groups in the United States. As originally passed, with regard to prohibitions on employment discrimination, Title VII treated religion the same as “race, color, sex or national origin.”²³ However in 1972, Congress amended Title VII to include an affirmative duty of accommodation which is incorporated rather awkwardly into Title VII’s definition of religion. Under section 701(j) of the Civil Rights Act of 1964, as amended, “[t]he 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.”²⁴

Religion is therefore defined broadly by section 701(j) to include “*all aspects of religious observance and practice.*”²⁵ The majority of section 701(j) cases, including the two Supreme Court cases interpreting this section, involve employees who need time off from work for religious reasons.²⁶ However, the lower courts have also applied section 701(j) to cases in which an employee has a religious need to proselytize or make other religious statements, as well as to cases in which an employee’s religious beliefs compel that employee to wear particular religious symbols or garb.²⁷

While religion is defined broadly under section 701(j), the Supreme Court has twice addressed the scope of section 701(j) and has

23. The Act provides:

(a) 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[.]

42 U.S.C. § 2000e-2(a)(1) (1994).

24. 42 U.S.C. § 2000e(j) (1994).

25. *Id.* (emphasis added).

26. *See infra* notes 29-57 and accompanying text.

27. *See infra* Part III.A.

both times narrowly defined an employer's obligation to accommodate a religious employee under Title VII.²⁸

In *Trans World Airlines v. Hardison*,²⁹ the Court addressed both the definition of "undue hardship" and the deference that should be given to a seniority provision of a collective bargaining agreement that prohibits a religious employee from getting time off for religious needs. This decision is perhaps best known for its determination that an employer is not required to bear any cost greater than *de minimis* in accommodating a religious employee.³⁰

Larry Hardison, a member of the Worldwide Church of God, was discharged by Trans World Airlines (TWA) because of his refusal to work on his Sabbath.³¹ TWA hired Hardison to work in a department that operated twenty-four hours a day, 365 days a year,³² and like all other employees, Hardison was subject to a seniority system governed by a collective bargaining agreement.³³ After receiving a requested transfer to the day shift where he was the second from the bottom on the seniority list, Hardison was asked to work on his Sabbath when another employee went on vacation.³⁴ While TWA did permit the union to seek to change Hardison's work assignment, the union was unwilling to do so because it would have violated the collective bargaining agreement.³⁵ TWA also rejected Hardison's proposal that he work a four-day week.³⁶ No accommodation was reached and Hardison was ultimately discharged on grounds of insubordination for refusing to work on his Sabbath.³⁷

Addressing the definition of undue hardship under section 701(j), the Supreme Court determined that requiring TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off would have constituted an undue hardship.³⁸ Permitting Hardison to have his Sabbath off and replacing him with either supervisory personnel or em-

28. The lower courts have for the most part followed Supreme Court precedent and narrowly interpreted section 701(j). However, there are courts which require a more significant level of accommodation and this has led to some conflicting decisions regarding an employer's duty to accommodate under section 701(j). See generally Kammer, *supra* note 19. The following summary of the facts of these two Supreme Court cases is taken in part from a previous article by the author. See *id.*

29. 432 U.S. 63 (1977).

30. *Id.* at 84.

31. *Id.* at 67-69.

32. *Id.* at 66.

33. *Id.* at 67.

34. *Id.* at 68.

35. *Id.*

36. *Id.*

37. *Id.* at 69.

38. *Id.* at 84.

ployees from other departments would lead to lost efficiency and therefore constitute more than a *de minimis* cost.³⁹ Similarly, paying premium wages to another employee who was not scheduled to work on Saturday would also cause TWA to bear additional costs and thereby constitute more than a *de minimis* cost.⁴⁰

The Supreme Court also determined that employers and unions are not required to violate a seniority system to accommodate an employee's religious needs. Emphasizing that the purpose of Title VII is to eliminate discrimination and not to discriminate in favor of religious employees, the Court stated that "[w]ithout a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances."⁴¹

In an angry dissent, Justice Marshall, joined by Justice Brennan, persuasively argued that the majority's interpretation of section 701(j) essentially rendered the statute meaningless. The dissent explained that section 701(j) by definition requires some unequal treatment of religion and that if "an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif[y] nothing.'"⁴²

Nine years later, the Supreme Court again narrowly interpreted section 701(j).⁴³ In *Ansonia Board of Education v. Philbrook*, the Court held that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship."⁴⁴

Ronald Philbrook, another member of the Worldwide Church of God, was a high school teacher who needed to be absent from school

39. *Id.*

40. *Id.*

41. *Id.* at 79. The Court further supported its conclusion by the fact that seniority systems are in fact provided with special treatment under Title VII:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin

Id. at 81-82 (quoting 42 U.S.C. § 2000e-2(h) (1994)).

42. *Id.* at 87 (Marshall, J., dissenting).

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

44. *Id.* at 68.

about six days a year to celebrate his religious holidays.⁴⁵ Under the terms of the collective bargaining agreement in place, teachers were entitled to both three paid days off for religious reasons⁴⁶ and three paid days off for personal reasons.⁴⁷ However, personal days were limited to uses not otherwise specified in the agreement and therefore could not be used for religious reasons.⁴⁸

Philbrook initially resolved his conflict by taking unauthorized leave—or time without pay—for additional holidays. Eventually, however, he could not afford the pay cut and began either to schedule hospital visits on his religious holidays so that they would qualify as personal days or to work on his holidays.⁴⁹ Philbrook was dissatisfied with this arrangement and suggested to the Board that he be permitted to use personal leave to celebrate the additional religious holidays on which he could not work.⁵⁰ Philbrook alternatively suggested that he receive full pay for the days that he could not work for religious reasons and that he, in turn, would pay the cost of a substitute.⁵¹

The Supreme Court, in an opinion authored by Chief Justice Rehnquist, remanded the case after determining that unpaid leave, in general, would be a reasonable accommodation since an employee would merely be giving up pay for a day that he did not work.⁵² The Court concluded: “Generally speaking, [t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.”⁵³ The Court did determine, however, that “unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.”⁵⁴

In so concluding, the majority opinion rejected the EEOC’s position, on which the Second Circuit had relied,⁵⁵ that “the employer . . .

45. *Id.* at 62-63.

46. *Id.* at 63-64.

47. *Id.* at 64.

48. *Id.*

49. *Id.*

50. *Id.* at 64-65.

51. As the Court explained, “The suggested accommodation would reduce the financial costs to Philbrook of unauthorized absences. In 1984, for example, a substitute cost \$30 per day, and respondent’s loss in pay from an unauthorized absence was over \$130.” *Id.* at 65 n.3.

52. *Id.* at 70.

53. *Id.* at 70-71 (quoting *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977)).

54. *Id.* at 71.

55. See *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 485 (2d Cir. 1985).

must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.’”⁵⁶ Rather, the Supreme Court held that “[t]o the extent that the guideline . . . requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute.”⁵⁷

Therefore, under the Supreme Court’s narrow interpretation of section 701(j), an employer is required to accommodate an employee’s religious need to proselytize, engage in other religious speech, or wear religious garb only if such an accommodation would not result in more than a *de minimis* cost to the employer. Furthermore, once the employer has reasonably accommodated the religious employee, the employer is not required to provide the employee with his or her preferred alternative accommodation, even if the preferred accommodation would not cause undue hardship.

B. Hostile Work Environment Harassment

The language of Title VII does not explicitly state that an employer must maintain a workplace free from sexual, racial and religious harassment. Rather, the statute states that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁵⁸ However, both the lower courts and the Supreme Court have determined that Title VII’s prohibition on discrimination in the “terms, conditions, or privileges of employment”⁵⁹ includes the requirement that employers maintain a workplace where employees are free from harassment based upon a protected status.⁶⁰

Title VII was first held to prohibit hostile work environment harassment by the Fifth Circuit in a 1971 race discrimination case, *Rogers v. EEOC*.⁶¹ Five years later, a federal court in *Compston v.*

56. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 n.6 (quoting 29 C.F.R. § 1605.2(c)(2)(ii) (1986)).

57. *Id.*

58. 42 U.S.C. § 2000e-2(a)(1) (1994).

59. *Id.*

60. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993). For a discussion of these cases, see *infra* notes 69-89 and accompanying text.

61. 454 F.2d 234 (5th Cir. 1971). For a discussion of this case, see Post, *supra* note 11, at 181.

*Borden*⁶² determined for the first time that a hostile work environment could also be created by harassment based upon an employee's religion.⁶³ There the employer was held liable for a supervisor's verbal abuse of Compston, an employee of Jewish descent.⁶⁴ The supervisor referred to Compston as "the Jew-boy," "the kike," "the Christ-killer," "the damn Jew," and "the goddamn Jew."⁶⁵ According to the court, "When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment."⁶⁶ Hostile work environment law has also been applied in cases involving harassment based on sex⁶⁷ and harassment based upon national origin.⁶⁸

The Supreme Court has twice decided cases involving hostile work environment law under Title VII, both of which involved sexual harassment.⁶⁹ *Meritor Savings Bank v. Vinson* is the first case where the Court determined that the creation of a hostile work environment could violate Title VII. The Court explained that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."⁷⁰ Broadly interpreting Title VII, the Court determined that the phrase "'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."⁷¹

62. 424 F. Supp. 157 (S.D. Ohio 1976).

63. See Terry Morehead Dworkin & Ellen R. Peirce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44, 49 (1995) (making recommendations as to whether all harassment should be judged by same standard relative to competing interests of First Amendment and Title VII).

64. See *Compston*, 424 F. Supp. at 158.

65. *Id.* This is clearly a case of animus-based harassment.

66. *Id.* at 160-61.

67. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993). For a discussion of these cases, see *infra* notes 69-89 and accompanying text.

68. See *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1130-32 (4th Cir. 1995). See also Theresa M. Beiner & John M.A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 584 n.44 (1997) (discussing hostile work environment law and different approaches courts have taken to claims of religious employees versus those of non-religious employees).

69. See *Meritor*, 477 U.S. at 57; *Harris*, 510 U.S. at 17.

70. *Meritor*, 477 U.S. at 64.

71. *Id.* (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

By broadly interpreting Title VII, the Court endorsed the concept of harassment that had been advocated by the lower courts⁷² as well as by the EEOC Guidelines on Discrimination Because of Sex.⁷³ Writing for the majority, Justice Rehnquist stated, “In concluding that so-called ‘hostile environment’ (*i.e.*, non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”⁷⁴ The Court explained that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII.”⁷⁵ Rather, harassment is actionable only if it is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁷⁶ The Court determined that the trier of fact must look at the “totality of circumstances”⁷⁷ in deciding whether actionable harassment occurred, including the nature of the complained about conduct and the context in which the conduct occurred.

The Court in *Meritor* specifically relied on the lower court decisions in *Rogers*, a race discrimination case, and *Compston*, a religious discrimination case.⁷⁸ In so doing, “the Supreme Court explicitly endorsed the uniformity—and the interdependency—of harassment doctrine under Title VII.”⁷⁹ However, the Supreme Court did not

72. See *id.* at 65-66 (citing several federal district court cases which applied principle of hostile environment harassment to harassment based on race, religion, and national origin).

73. The guidelines state that sexual harassment which does not result in an economic injury is nonetheless actionable if “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 CFR § 1604.11(a)(3) (1985), quoted in *Meritor*, 477 U.S. at 65.

74. *Meritor*, 477 U.S. at 65.

75. *Id.* at 67.

76. *Id.* Whether the harassing conduct is in fact “severe or pervasive” has become “the gravamen of harassment litigation, distinguishing between conduct which is merely incidental and that which rises to the level of a Title VII offense.” Post, *supra* note 11, at 187.

77. *Meritor*, 477 U.S. at 69.

78. See *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971); *Compston v. Borden*, 424 F. Supp. 157 (S.D. Ohio 1976). For discussion of these cases, see *supra* notes 61-66 and accompanying text.

79. Post, *supra* note 11, at 187. Previous lower court cases had recognized the interdependency of harassment law. See *Weiss v. United States*, 595 F. Supp. 1050, 1056 (E.D. Va. 1984). *Weiss*, a religious harassment case, declared “[r]eligious harassment, like sexual harassment, can take many forms Continuous abusive language, whether racist, sexist, or religious in form, can often pollute a healthy working environment.” See also Dworkin & Peirce, *supra* note 63, at 76 n.150. Furthermore,

recognize that religious speech is entitled to unique statutory and constitutional protection, and that there is a potential conflict between one employee's right to religious expression and another employee's right to be free from hostile work environment harassment. In other words, one employee's need to proselytize or engage in religious speech in the workplace could conceivably infringe upon another employee's right to be free from such religious behavior and/or speech in the workplace.

Seven years later, in *Harris v. Forklift Systems*,⁸⁰ the Supreme Court further developed the standard articulated in *Meritor*. The Court concluded that tangible psychological injury is not a necessary component of a hostile work environment claim, thereby reaffirming the *Meritor* standard and stating that it represents "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."⁸¹ The Court emphasized that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."⁸²

Expanding on the severe and pervasive standard, the Court determined that a hostile work environment could be created only if the conduct in question was determined by the factfinder to be both *objectively* and *subjectively* harassing:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation.⁸³

The Court in *Harris* also reiterated the interdependency of harassment law and again failed to acknowledge that religious harassment was in any way different from other forms of harassment. According to the Court, "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin of—

as another commentator explained, "It is a measure of the interdependence that harassment law has achieved, and the recognition that religious harassment doctrine has been accorded, that *Weiss* has been widely cited by courts adjudicating all manner of harassment disputes." Post, *supra* note 11, at 186 n.39.

80. See *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

81. *Id.* at 21.

82. *Id.* at 22.

83. *Id.* at 21-22.

fends Title VII's broad rule of workplace equality."⁸⁴ In so determining, the Court "explicitly reaffirmed the uniformity of harassment law under Title VII."⁸⁵

The Court acknowledged the vagueness of its standard for determining whether a hostile work environment had been created,⁸⁶ and emphasized that the factfinder must look "at all the circumstances."⁸⁷ The Court then listed a number of specific factors that might be relevant in determining whether a hostile work environment was created, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁸⁸

Justice Scalia, in a concurring opinion, strongly expressed concern with the vague standard articulated by the Court. However, he nonetheless concluded that, "I know of no alternative to the course the Court today has taken I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts."⁸⁹

The Supreme Court has also recently expanded an employer's potential liability in cases where a supervisor harasses an employee without the employer's knowledge. In two sexual harassment decisions, *Burlington Industries v. Ellerth*⁹⁰ and *Faragher v. City of Boca Raton*,⁹¹ the Court determined that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee"⁹² even if the employer is una-

84. *Id.* at 22.

85. *See Post, supra* note 11, at 189.

86. *See Harris*, 510 U.S. at 22.

87. *Id.* at 23.

88. *Id.*

89. *Id.* at 24-25 (Scalia, J., concurring).

90. 524 U.S. 742 (1998).

91. 524 U.S. 775 (1998).

92. *Burlington*, 524 U.S. at 765. This article does not attempt to thoroughly analyze when an employer is liable for a hostile work environment that is created by its employees. For a more thorough analysis of these two cases and their potential applicability to cases of religious harassment, see Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After Ellerth and Faragher*, 42 *How. L.J.* 327 (1998) (arguing that courts should recognize special position occupied by religion and presume that religious expression is protected unless such expression is truly hostile or abusive). *See also* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 *HARV. J.L. & PUB. POL'Y* 959, 969-70 (1999) (arguing that courts must recognize both right to religious expression in workplace and right to be free from religious harassment).

ware of the harassment. In cases where no tangible employment action is taken against the employee, the employer may raise as an affirmative defense that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer”⁹³ However, in cases in which “the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment,” no affirmative defense is available.⁹⁴

These decisions have been criticized for their expansion of an employer’s liability in cases of supervisor harassment and their failure to adequately protect employers. For example, in his dissenting opinion in *Burlington Industries*, Justice Thomas argued that while the Court recognized an affirmative defense, “it provides shockingly little guidance about how employers can actually avoid vicarious liability.”⁹⁵ As a result of this expanded liability, “[i]n practice . . . employer liability very well may be the rule.”⁹⁶

While *Burlington Industries* and *Faragher* involve sexual harassment and not religious harassment, some commentators have argued that courts may likely apply the reasoning of these cases in religious harassment cases because of the interdependency of harassment law.⁹⁷ As Gilmer and Anderson explain:

The history of harassment doctrine reveals an important lesson: decisions in sexual harassment cases bear serious implications for every other kind of harassment case. Thus, as courts expand the scope of liability in sexual harassment cases, they (perhaps unwittingly) do the same for religious harassment cases. And in those cases—where the tension between accommodation and harassment-prevention is so significant—the consequences of expanded liability could be severe.⁹⁸

93. *Burlington*, 524 U.S. at 765.

94. *Id.*

95. *Id.* at 773 (Thomas, J., dissenting).

96. *Id.*

97. See generally Berg, *supra* note 92; Gilmer & Anderson, *supra* note 92.

98. Gilmer & Anderson, *supra* note 92, at 334.

C. *The Overlap Between Section 701(j)'s Requirement of Religious Accommodation and Title VII's Prohibition of Hostile Work Environment Harassment*

Under *Hardison's* narrow interpretation of section 701(j),⁹⁹ an employer need not accommodate an employee's religious need to proselytize, engage in other religious speech, or wear religious garb if such an accommodation would result in more than a *de minimis* cost to the employer.¹⁰⁰ Relying on *Hardison*, lower courts have unanimously agreed that employers are not required to violate valid statutes in accommodating a religious employee since requiring such a violation would constitute more than a *de minimis* cost.¹⁰¹

Since Title VII prohibits hostile work environment harassment, section 701(j) does not require an employer to accommodate a religious employee if such an accommodation would result in a hostile work environment. Therefore, Title VII's prohibition of hostile work environment harassment trumps the statute's requirement of accommodation of religious employees, and as this article argues, courts are more concerned with prohibiting hostile work environment harassment than with accommodating religious employees.

Since the courts' primary concern is prohibiting religious harassment, it is essential to determine when non-animus-based religious expression in the workplace constitutes actionable harassment. Based upon the preceding discussion of the Supreme Court case law involving both section 701(j) and hostile work environment harassment, a few general trends can be observed.

First, it is important to recognize that the Supreme Court, as well as the lower courts, have emphasized that the various forms of hostile work environment harassment are interconnected, and in doing so have failed to recognize that religion differs from Title VII's other protected categories. The flaw in this approach is that religious speech is entitled to special protection under both section 701(j) of Title VII and the First Amendment to the United States Constitution.¹⁰² Courts do not seem to have intentionally ignored the unique-

99. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). See *supra* notes 29-42 and accompanying text.

100. While *Hardison* dealt exclusively with time off for religious observance, the lower courts have also applied § 701(j) in cases where employees have a religious need to proselytize or otherwise express their religious views in the workplace. See *infra* Part III.A.

101. See Sara L. Silbiger, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 *FORDHAM L. REV.* 839 (1985); see generally Kaminer, *supra* note 19.

102. For a discussion of these constitutional issues, see *infra* Part II.

ness of religion when developing a unified theory of hostile work environment harassment. Rather, the standard for determining whether a hostile work environment existed developed during a period in which most cases of religious harassment involved animus-based harassment,¹⁰³ and there were few cases involving the conflict between one employee's right to religious expression and another employee's right to be free from hostile work environment harassment.

Similarly, the EEOC ignored the uniqueness of religion when proposing its "Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability."¹⁰⁴ As the title indicates, the guidelines did not primarily concern religion but rather attempted to state uniform regulations on workplace harassment generally. At the Congressional hearings regarding the effect of the EEOC's proposed guidelines, the acting legal counsel of the EEOC stated that the purpose of the guidelines was to address animus-based harassment generally.¹⁰⁵ The guidelines failed to address the issue of non-animus-based religious harassment because the guidelines were based on the relevant case law¹⁰⁶ at a time when there was little, if any, case law on non-animus-based religious harassment.

Critics of the guidelines acknowledged that the EEOC did not intend to ignore the uniqueness of religion, but, rather, failed to see the potential consequences of those guidelines. For example, a representative of the American Civil Liberties Union testified before Congress that the guidelines did not adequately protect constitutionally protected speech, but he also stated, "We believe this occurred without any improper or hostile intent, but solely because the drafters did not realize how the guidelines could be construed."¹⁰⁷ Nonetheless, the result of this unified harassment theory, and the failure to acknowl-

103. See Kate Thomas, *Spreading God's Word on the Job: Courts Are Asked to Decide When Religious Expression Amounts to Harassment*, NAT'L L.J., Sept. 16, 1996, at A1. Furthermore, all successful federal religious harassment cases through 1994 involved clear examples of animus-based harassment. See Dworkin & Peirce, *supra* note 63, at 78.

104. 58 Fed. Reg. 51,226 (1993).

105. "Quite frankly, as you can probably tell from reading the guidelines, we talk about harassment including epithets, slurs, that sort of thing, and what we were frankly thinking about when the guidelines were drafted was this kind of taunting and abuse and name-calling." *Hearing, supra* note 9, at 19 (testimony of Elizabeth M. Thornton).

106. See Post, *supra* note 11, at 179 ("The Guidelines did not represent a case of administrative activism, but a fair restatement of the law of religious harassment."). However, other commentators have argued that to some extent the guidelines actually went beyond what was contained in the relevant case law. See Dunkum, *supra* note 11, at 957.

107. *Hearing, supra* note 9, at 53 (prepared statement of Robert S. Peck).

edge that non-animus-based religious speech differs from animus-based speech, is that Title VII's prohibition of hostile work environment harassment tends to take precedence over the statute's requirement of religious accommodation.

Second, the Supreme Court has been reluctant to read Title VII in a manner that would provide religious employees with "preferential" or "special" treatment. In this regard, the Court's failure to recognize the uniqueness of religion is not an oversight, but rather a specifically articulated policy. The Court justified its narrow interpretation of section 701(j) based on Title VII's general prohibition of employment discrimination. In articulating the *de minimis* standard and determining that TWA was not required to give Hardison his Sabbath off, the Court found that requiring TWA to accommodate Hardison would in essence be discrimination in favor of religious employees:

[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities.¹⁰⁸

The Court concluded, "[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."¹⁰⁹ The Court took pains to reach the conclusion that Title VII was enacted to prohibit employment discrimination generally and not to provide religion with any favored treatment. In so doing, the Court essentially ignored the fact that section 701(j) was specifically enacted for the purpose of protecting Sabbatarians.¹¹⁰

108. *Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977).

109. *Id.* at 85.

110. Senator Randolph, a Seventh Day Baptist, introduced the amendment with the express purpose of protecting Sabbatarians:

There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh-day Adventists.

. . . .

[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 in the nature of hire on particular days.

118 CONG. REC. 705 (1972).

It is also striking to note that the Court in *Meritor* relied on the relevant EEOC guidelines in broadly prohibiting hostile work environment harassment,¹¹¹ while the *Philbrook* Court simply dismissed the guidelines in narrowly interpreting section 701(j). Justice Marshall, in his *Philbrook* dissent, criticized this, explaining:

Just last Term, [in *Meritor*] . . . we expressly relied on an EEOC guideline in holding that sexual harassment charges could provide the basis for a Title VII claim. The Court's reluctance to accord similar weight to the EEOC's interpretation here rests on nothing more than a selective reading of the express provisions of Title VII and the guidelines.¹¹²

The Supreme Court's failure to require greater accommodation of religious expression in the workplace is not surprising, since courts generally tend to focus on Title VII as an anti-discrimination statute and hesitate to require differential or preferential treatment based on any of the protected categories. As one legal commentator explained:

Title VII's prohibition of discrimination has generally been read as requiring that employers apply workplace requirements and regulations "neutrally." As a result of this reading, courts and scholars have long had a difficult time justifying affirmative action, since affirmative action requires treating members of some groups differently from members of other groups.¹¹³

Accommodation of religious expression can be viewed as a form of affirmative action¹¹⁴ which the Court is reluctant to endorse.

A third trend arising from the Supreme Court's analysis of cases involving section 701(j) and hostile work environment harassment claims is that it is unclear whether a plaintiff must prove, as an element of a religious harassment complaint, that the alleged harassment was unwelcome. The Supreme Court determined that in sexual harassment cases the plaintiff must prove that the harassment was "un-

111. Justice Rehnquist explicitly relied on the guidelines, explaining that "while not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

112. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 73-74 (1986) (Marshall, J., dissenting).

113. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 320 (1997).

114. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 126 (1993) ("The accommodation of a religious group's faith traditions in an otherwise applicable legal framework can best be envisioned as a form of affirmative action.").

welcome.”¹¹⁵ This requirement recognizes the fact that some sexual comments or advances in the workplace may be welcome and therefore are not inappropriate or discriminatory.

Welcomeness, however, need not be proven in cases of animus-based harassment. One commentator stated that “the unwelcome nature of the harassment is presumed where it is based on racial grounds. This makes sense; it is hard to imagine a situation in which a person would welcome harassment based on his or her race.”¹¹⁶ This reasoning is equally applicable to cases of national origin harassment and cases of animus-based religious harassment.¹¹⁷

However, in cases of non-animus-based religious harassment, it may be unclear whether the complained of speech is in fact unwelcome, since two employees may voluntarily engage in a religious discussion which involves proselytizing or statements regarding the superiority of a particular religion. If courts presume that non-animus-based religious speech is unwelcome, it will be possible for plaintiffs to establish that a hostile work environment was created, even if the religious speaker assumed the religious discussion was consensual.

The question of whether a speaker’s non-animus-based religious expression can create a hostile work environment absent that speaker’s knowledge that his or her religious expression is unwelcome was discussed in some detail at the Senate hearing on “The Effect of the EEOC’s Proposed Guidelines on Religion in the Workplace.”¹¹⁸ The proposed guidelines did not include the requirement that the speaker be informed that his or her religious expression was unwelcome in order for it to constitute actionable harassment. Some commentators found this problematic. For example, Professor Laycock explained:

The problem of unwelcome proselytizing is in many ways analogous to the problem of unwelcome request for dates. It is not harassment to politely invite a co-worker out to dinner once; unless one gets an unusually definitive rejection, it is not harassment to politely invite [that co-worker] out to dinner a second time. It probably is harassment to invite [that co-worker] out to dinner over and over, despite repeated rejections, however politely it is done.

115. “The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” *Meritor*, 477 U.S. at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

116. See Beiner & DePippa, *supra* note 68, at 585 (citation omitted).

117. See Dworkin & Peirce, *supra* note 63, at 61 (“There appears to be a strong presumption in race, national origin, and religion cases that discriminatory acts and comments such as jokes, graffiti, etc. are *per se* offensive.”).

118. See generally *Hearing*, *supra* note 9.

Similarly, the proselytizer is entitled to continue until it is clear that [the] approaches are unwelcome.¹¹⁹

In conclusion, the Supreme Court is more concerned with prohibiting hostile work environment harassment than with accommodating an employee's religious expression in the workplace. To some extent the Court, in emphasizing the unity of the various forms of hostile work environment harassment, has inadvertently failed to address the fact that religious expression is entitled to unique statutory and constitutional protection. However, to the extent that the Court has addressed this issue, it is reluctant to read Title VII in a manner that would provide religious employees with "preferential" or "special" treatment. Based on Supreme Court precedent, it is unclear whether an employee can create a hostile work environment absent knowledge that the employee's religious expression is unwelcome.

II

CONSTITUTIONAL ISSUES

Restrictions on an individual's right to religious expression in the workplace give rise to potential First Amendment concerns. These First Amendment issues arise in a slightly different context depending upon whether the individual whose religious expression is being restricted is an employee working for a private employer, a private employer, or a government employee.

A. *Private Employees*

The First Amendment of the United States Constitution protects an individual's right to both free speech and the free exercise of religion by restricting governmental interference with these rights.¹²⁰ The First Amendment does not, however, restrict private actors, including private employers, from interfering with an individual's right to free speech or the free exercise of religion. Therefore, a private employer can independently decide to ban religious speech or religious expression in the workplace, and such a ban would not raise constitutional concerns.¹²¹

119. *Hearing, supra* note 9, at 41 (prepared statement of Prof. Douglas Laycock).

120. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." U.S. CONST. amend. I.

121. Of course, a broad ban on religious expression in the workplace by a private employer would arguably violate § 701(j)'s requirement of reasonable accommodation.

However, government mandates that require private employers to ban religious expression in the workplace raise constitutional concerns. It is in this manner that Title VII's prohibition of hostile work environment harassment raises potential First Amendment concerns. As one commentator has explained:

Ordinarily, the First Amendment does not apply to nongovernmental regulation of expression, and private sector employers may restrict their workers' speech in whatever way they choose. However, because the government has become involved in the process through judicial enforcement of hostile environment regulations, sufficient 'state action' exists to trigger First Amendment protections.¹²²

Similarly, as Professor Laycock stated:

Neither Title VII nor the proposed guidelines purports to directly regulate the activities of employees. Nevertheless, an employee whose religious speech is restricted by an employer attempting to comply with the guidelines should be able to assert a claim against the Government based on [the Religious Freedom Restoration Act] or the First Amendment It would be outrageous for the EEOC to pressure employers into adopting workplace regulations that would be unconstitutional if imposed by the Government itself.¹²³

Furthermore, as explained in Part I.B, the Supreme Court recently expanded an employer's potential liability in cases of hostile work environment harassment. This, of course, increases the likelihood that employers will restrict religious expression in the workplace in an effort to comply with federal law and thereby avoid potential liability. This has led commentators to express concern that in order to insulate themselves from liability some employers may forbid all religious expression, creating a "zero-tolerance policy" for religion in their workplaces.¹²⁴

Legal scholars have debated whether, and the extent to which, harassing expression in the workplace is entitled to constitutional pro-

122. Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 400 n.5 (1996).

123. *Hearing, supra* note 9, at 43-44 (prepared statement of Prof. Douglas Laycock) (citation omitted). Congress enacted the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb (1995)) to ensure that government would "not substantially burden religious exercise without compelling justification." *Id.* RFRA was declared unconstitutional as applied to state law in *City of Boerne v. Flores*, 521 U.S. 507 (1997). It is unclear whether RFRA is constitutional as applied to federal law. See Gilmer & Anderson, *supra* note 92, at 344. For a thorough discussion of RFRA see Dunkum, *supra* note 11, at 973-84.

124. Gilmer & Anderson, *supra* note 92, at 339-40.

tection under the Free Speech Clause.¹²⁵ Some argue that Title VII's general prohibition of harassing speech in the workplace raises serious First Amendment concerns.¹²⁶ According to Professor Volokh, who has written extensively on this topic, "harassment law restricts a good deal of what seems like core protected speech—both speech that's actually barred by harassment law and speech that's chilled."¹²⁷ Professor Volokh is particularly concerned with the vagueness of the hostile work environment standard and its potential to chill speech, explaining that, "If one takes at all seriously what the Supreme Court has said, . . . [v]agueness [will lead] people to 'steer far wider of the unlawful zone,' than if the boundaries of the forbidden areas were clearly marked. Those . . . sensitive to the perils . . . posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe."¹²⁸ Therefore, "[t]he employer's only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with any other statements, may lead to a hostile environment. This is what many employment experts in fact advise."¹²⁹

Other commentators argue that hostile work environment law, as currently applied, does not violate the First Amendment. As Professor Oppenheimer argues, "Title VII law, while prohibiting much work-

125. See, e.g., Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 306 n.5 (1996) [hereinafter Volokh, *Thinking Ahead*]. While much of this debate has focused on sexual harassment, the debate is also generally applicable to other forms of harassment, including religious harassment. As Professor Sangree explains, "Volokh and Browne would probably agree that the bulk of problematic scenarios arise under sexual harassment litigation. The analysis this paper presents [] will apply as well to the other types of discriminatory harassment." Suzanne Sangree, *Title VII's Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 464 (1995).

126. This article does not attempt to fully discuss or analyze the First Amendment concerns raised by the doctrine of hostile work environment harassment. Rather, the author intends to emphasize that there is currently a debate among legal scholars regarding this issue.

127. Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 569 (1995).

128. Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 636 (1997) [hereinafter Volokh, *What Speech*] (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). See generally Volokh, *Thinking Ahead*, *supra* note 125 (further examining what speech is restricted under harassment law).

129. Volokh, *What Speech*, *supra* note 128, at 638-39. See generally Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (discussing how prohibitions on hostile work environment harassment may violate First Amendment).

place harassment, has steered clear of any Constitutional violation.”¹³⁰ Therefore, “[u]nwelcome conduct, whether words or deeds, which constitutes intimidation, ridicule or insult and is objectively sufficiently severe or pervasive to alter the conditions of the workplace, making it abusive to employees, may be properly regarded as outside the protection of the First Amendment.”¹³¹ Professor Suzanne Sangree also argues that hostile work environment law as currently applied is constitutional, and in fact “actually furthers First Amendment interests By fostering equality in the economy, discrimination law fosters democracy.”¹³² Other commentators have taken a middle position.¹³³

This general debate on the constitutionality of government restrictions on harassing expression in the workplace has not focused on religious speech, and until recently, few have commented as to how the doctrine would extend to religious harassment.¹³⁴ In recent years, however, a number of commentators have analyzed the constitutionality of the EEOC’s proposed guidelines and in doing so have specifically focused on the unique constitutional issues raised when government attempts to restrict religious expression in the workplace. The First Amendment implications of limiting religious expression in the workplace were also discussed in detail at the Senate hearings on the effect of the EEOC’s proposed guidelines.¹³⁵

Religious expression and exercise is clearly entitled to unique constitutional protection under both the Free Speech and Free Exercise Clauses of the First Amendment.¹³⁶ As Professor Laycock, a leading expert on religious liberty, explained, “Religious speech is speech of

130. David Benjamin Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 BERKELEY J. EMP. & LAB. L. 321 (1996).

131. *Id.* at 323. Professor Oppenheimer also explains that “even if verbal workplace harassment is entitled to some Constitutional protection under the First Amendment, protected speech is subject to government regulation.” *Id.*

132. Sangree, *supra* note 125, at 480-81.

133. *E.g.*, Epstein, *supra* note 122, at 401 (“This article stakes out a middle ground between Sangree on the one hand and Browne and Volokh on the other I believe that hostile environment harassment law generates a fundamental conflict between equality of opportunity and freedom of expression. But a thorough examination of the nature and weight of each of these fundamental interests, in the distinct context of the workplace, demonstrates that a balance can be struck.”).

134. *See* Dunkum, *supra* note 11, at 973.

135. As previously explained, the EEOC’s Guidelines were widely criticized for their potential to chill religious expression in the workplace. *See supra* notes 15-18 and accompanying text.

136. *See* U.S. CONST. amend. I. This article does not attempt to fully discuss the free exercise and free speech concerns that are raised by Title VII’s restrictions on religious expression in the workplace. For a more detailed discussion of the constitutional implications raised by Title VII’s restrictions on religious expression, see Dun-

high constitutional value, central to the free speech clause and the free exercise clause.”¹³⁷ Similarly, Professor Gregory, who has written extensively on employment law and religion, explains, “While First Amendment freedom of expression, association, speech, and press may be implicated in some instances of possible sexual harassment, sexual harassment itself enjoys no constitutional protection. *However, free exercise of religion, expressly protected by the First Amendment, is perhaps the most fundamental human freedom.*”¹³⁸

Religious speech has been distinguished from the other protected categories of Title VII because only religious speech, exercise, and expression have “intrinsic, societally recognized and constitutionally enunciated value.”¹³⁹ As one legal commentator noted, “At best, racist speech is constitutionally tolerated; the practice of racism, in employment or elsewhere, ‘violates deeply and widely accepted views of elementary justice.’ The same can be said of practices that involve sexism or discrimination on the basis of national origin. Religion is different.”¹⁴⁰

The basic conflict raised by religion’s unique constitutional status was perhaps best articulated by Professor Laycock:

With respect to religious harassment, the risk of punishing or deterring protected speech is central. Claims of religious harassment present a conflict between every employee’s right to religious expression and every employee’s countervailing right not to be harassed because of [that employee’s] religion or lack thereof. Each of these countervailing rights is a form of religious liberty; each of these countervailing rights is part of the right not to be discriminated against in employment on the basis of religion. The Commission has made little effort to draw clear boundaries between these competing rights.¹⁴¹

Therefore, First Amendment concerns are clearly raised by the fact that Title VII limits an employee’s right to religious expression and exercise in the workplace. However, there appear to be no cases in which an employer has argued that the hostile work environment harassment doctrine is unconstitutional for this reason.

kum, *supra* note 11, at 973-84; Post, *supra* note 11, at 198-206. See generally *Hearing, supra* note 9.

137. *Hearing, supra* note 9, at 39 (prepared statement of Prof. Douglas Laycock).

138. David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC’s Proposed Guidelines*, 56 MONT. L. REV. 119, 138 (1995) (emphasis added).

139. Laura S. Underkuffler, “*Discrimination*” on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581, 610 (1989).

140. *Id.* (citation omitted).

141. *Hearing, supra* note 9, at 39 (prepared statement of Prof. Douglas Laycock).

B. Private Employers

First Amendment concerns are also raised by Title VII's prohibition of hostile work environment harassment to the extent that it restricts an employer's right to religious expression in the workplace. An employer's religious speech and expression is entitled to the same unique constitutional protection as that of an employee. However, with regard to private employers, prohibitions on hostile work environment harassment *directly* limit a private employer's protected speech. As Professor Laycock explained in his analysis of the EEOC's proposed guidelines, "Since the guidelines directly regulate protected speech and conduct of private employers, such employers could rely on the First Amendment . . . in defending against a religious harassment action brought by the EEOC or a private litigant."¹⁴²

This defense has, in fact, been raised by employers. In *EEOC v. Townley Engineering*, the plaintiff employers unsuccessfully argued that an interpretation of Title VII which required them to limit their mandatory devotional services violated their free exercise rights.¹⁴³ The court specifically recognized that "allowing a statute to limit a constitutional right alters the normal relationship between a statutory right and a constitutional one. Nevertheless, it is settled that the right to religious practice . . . may be limited by a statute if 'it is essential to accomplish an overriding governmental interest.'"¹⁴⁴

C. Government Employees

Finally, government employees are also directly protected by the First Amendment since any employer regulation of the employee's religious conduct is a form of state action.¹⁴⁵ Therefore, any ban on a government employee's religious expression and exercise in the workplace raises First Amendment concerns.¹⁴⁶

For example, in *Brown v. Polk County*, the Eighth Circuit held that Polk County violated the First Amendment rights of Brown, a management-level employee, when it ordered him to cease activities

142. *Id.* at 43 (citing *EEOC v. Townley Eng'g*, 859 F.2d 610 (9th Cir. 1988)).

143. *Townley*, 859 F.2d at 613. For a discussion of *Townley*, see *infra* notes 278-92 and accompanying text.

144. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

145. For a more detailed analysis of a public employee's First Amendment right to religious expression in the workplace, see generally MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 142-85 (1998); Robert F. Epperson, Jr., Note, *Protecting the Rights of Public Employees Under Title VII and the Free Exercise Clause*, 61 MO. L. REV. 719 (1996).

146. See *Hearing*, *supra* note 9, at 43 (prepared statement of Prof. Douglas Laycock).

that could be considered to be religious proselytizing, witnessing, or counseling.¹⁴⁷ The court indicated that this directive was clearly too broad, as it would prohibit Brown from inviting a co-worker to church or stating that his religion was important to him and therefore “exhibited a hostility to religion that our Constitution simply prohibits.”¹⁴⁸ Similarly, Polk County’s directive that Brown remove from his office all items with religious connotations, including a plaque of the serenity prayer and a poster with a non-religious inspirational message because the author, who held no religious office, had “Cardinal” in his name, was held unconstitutional.¹⁴⁹

Likewise, in *Tucker v. California Department of Education*,¹⁵⁰ the Ninth Circuit held that it was unconstitutional for the California Department of Education to ban the display of religious material in the workplace, with the exception of that displayed in an employee’s office or cubicle, as well as to ban all religious advocacy in the workplace. The Ninth Circuit noted that the Supreme Court has “made it clear that employees could not be forced to relinquish their First Amendment rights simply because they had received the benefit of public employment.”¹⁵¹ Nevertheless, the Court recognized that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”¹⁵²

The plaintiff in *Tucker*, due to his religious conviction that he should give credit to God for his work, placed the phrase “Servant of the Lord Jesus Christ” and the acronym “SOTLJC” on the label of a software program, and he also placed the acronym on other material on which he worked.¹⁵³ Tucker was ordered not to use the acronym, and soon afterwards he was also ordered to refrain from using any acronym with religious connotations, participating in any religious discussion, or displaying any religious materials outside of his office or cubicle. Eventually, the order was extended to all employees in Tucker’s division.¹⁵⁴

The Ninth Circuit determined that this ban violated the First Amendment and was not justified by any of the state’s asserted interests. With regard to the ban on religious speech, the court explained

147. 61 F.3d 650, 658-59 (8th Cir. 1995).

148. *Id.* at 659.

149. *Id.*

150. 97 F.3d 1204 (9th Cir. 1996).

151. *Id.* at 1210.

152. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

153. *Id.* at 1208.

154. *Id.*

that “there is no evidence in the record that any of his co-employees have complained about Tucker’s speech, [or] that any have complained about religious advocacy generally”¹⁵⁵ Furthermore, the court determined that the ban on the display of religious material “is unreasonable not only because it bans a vast amount of material without legitimate justification but also because its sole target is religious speech.”¹⁵⁶ The court concluded that the state’s interests, including promoting efficiency and protecting other employees, “are insufficient to support the ban on religious advocacy, and the order prohibiting the posting of religious material is clearly unreasonable.”¹⁵⁷

In conclusion, despite the fact that religious speech is entitled to unique constitutional protection, courts have sometimes limited an individual’s right to religious expression in the workplace in an effort to stop hostile work environment harassment. In so doing, courts have determined that the statutory right to be free from hostile work environment harassment takes precedence over the constitutional right to religious exercise and expression.

III

LOWER COURT CASES INVOLVING THE DIRECT CONFLICT BETWEEN THE RIGHT TO RELIGIOUS EXPRESSION IN THE WORKPLACE AND THE COUNTERVAILING RIGHT TO BE FREE FROM HOSTILE WORK ENVIRONMENT HARASSMENT

Analyzing lower court cases which involve the direct conflict between an employee’s or employer’s right to religious expression in the workplace and the right of other employees to be free from religious harassment also reveals several trends. Not surprisingly, lower courts focus on many of the same issues on which the Supreme Court focused in both interpreting section 701(j) and in determining when a hostile work environment is created under Title VII.¹⁵⁸ Lower courts tend to address these cases either as section 701(j) cases *or* as hostile work environment cases. In so doing, these courts similarly fail to recognize and address the conflict between the right to religious expression and the countervailing right to be free from a hostile work environment. This article argues that courts should explicitly consider both analyses.

155. *Id.* at 1212.

156. *Id.* at 1215.

157. *Id.* at 1217.

158. See *supra* Part I for a discussion of the Supreme Court case law involving both § 701(j) and hostile work environment harassment.

When lower courts do recognize the conflict, they tend to focus on Title VII as a broad anti-discrimination statute and are more concerned with prohibiting hostile work environment harassment than with accommodating religious expression. Lower courts also are particularly unwilling to require accommodation when the speech in question is uncommon. Some lower courts even presume that religious expression is usually unwelcome in the workplace and that religious speakers should realize this fact. However, even courts that do not presume that the religious expression is unwelcome still agree that Title VII's prohibition of hostile work environment harassment can trump both an individual's statutory and constitutional right to religious expression in the workplace. Finally, courts are particularly reluctant to permit employers or supervisory employees to engage in religious expression in the workplace and are more likely to determine that their speech constitutes actionable harassment.

A. *Section 701(j) Cases—The Courts' Failure to Adequately Analyze the Harassment Issue and the Courts' Bias Against Unusual Religious Expression*

A number of cases that address an employee's right to religious expression when the employee's colleagues or customers complain that the expression is harassing are analyzed primarily under section 701(j) and do not fully and adequately analyze the hostile work environment case law.¹⁵⁹ Rather, in analyzing these cases under section 701(j), lower courts often hold that an employee has no statutory right to impose his or her views on others.¹⁶⁰

In determining whether a religious employee has imposed his or her views on others, courts have tended to look at whether colleagues or customers have complained about the religious speech or reacted in a disruptive manner in response to the religious speech.¹⁶¹ This appears, at first glance, to give employees and colleagues veto power over religious expression in the workplace.

159. In some of these cases the complainants are not protected by Title VII either because they are customers and not employees, or because they are not complaining of discrimination based upon a protected category under Title VII.

160. *Cf. supra* Part I.C (explaining that Supreme Court also failed to adequately address conflict between individual's right to religious expression in workplace and countervailing right to be free from hostile work environment harassment, and that EEOC also did not address this conflict in its Proposed Guidelines on Harassment in the Workplace).

161. Referring to negative behavior by co-workers which has a disruptive effect on the workplace, one commentator argued that "courts are reluctant to give way to the religious employee's practices in the face of resulting time robbing." Beiner & DiPippa, *supra* note 68, at 601-02.

However, a closer examination of the cases proves this incorrect. Although these decisions are not directly based on hostile work environment case law and the harassment issue is not thoroughly analyzed, the courts have tended to look at whether the complaints or disruptive behavior in response to the religious speech is reasonable or justified. This in turn is based upon whether the court determines that the religious expression in question is *objectively* harassing, thus following the *Harris* court's determination that "[c]onduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment—an environment that a *reasonable* person would find hostile or abusive—is beyond Title VII's purview."¹⁶²

To the extent that the courts look at whether the religious expression in question is objectively harassing, courts are biased against uncommon religious speech. Judges are more likely to determine that an employee's religious speech is protected by Title VII when the speech is both mainstream and Christian. The Senate hearing on the "Effect of the EEOC's Proposed Guidelines on Religion in the Workplace" raised this very issue—that courts would show a bias against unusual religious expression. Indeed, Professor Laycock worried that "these undefined guidelines would be applied more stringently to some disfavored or controversial religious groups or employees than to others."¹⁶³

This bias against unusual speech can also be explained, in part, by the fact that courts are less likely to require accommodation of pervasive religious speech and more likely to require accommodation of occasional statements of religious belief. This result is not surprising since the Supreme Court has clearly stated that harassment is only actionable if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁶⁴ Even though these cases are analyzed under section 701(j), and not under the hostile work environment case law, the courts are still less likely to require accommodation of pervasive religious expression on the grounds that this speech cannot be reasonably accommodated without undue hardship.

162. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (emphasis added). However, some courts deciding § 701(j) cases that do not involve religious harassment have held that co-worker complaints regarding the accommodation of a religious employee are sufficient for a finding that these co-workers have been adversely affected in a manner that constitutes undue hardship for the employer. *See generally* Kaminer, *supra* note 19.

163. *Hearing*, *supra* note 9, at 45 (prepared statement of Prof. Douglas Laycock).

164. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

However, the lower courts' refusal to mandate accommodation of more pervasive religious expression may also be due to the fact that segments of American society generally display a lack of respect for individuals whose religious beliefs and practices are an integral part of their daily lives.¹⁶⁵ As Professor Carter explains, "Even within the acceptable mainline, we often seem most comfortable with people whose religions consist of nothing but a few private sessions of worship and prayer, but who are too secularized to let their faiths influence the rest of the week. This attitude exerts pressure to treat religion as a hobby"¹⁶⁶ This lack of respect is even more pronounced when the religion in question is less common. Therefore, while an employee's occasional statements of religious belief might be protected, more pervasive speech, particularly if uncommon or unusual, is usually not protected.

This bias against unusual speech raises potential constitutional concerns under the Establishment Clause of the First Amendment¹⁶⁷ since the Supreme Court has held that, at a minimum, the Establishment Clause prohibits discrimination among religions.¹⁶⁸ An interpretation of section 701(j) that mandates accommodation of more common religious expression but does not mandate accommodation of unusual religious expression might arguably be viewed as a violation of the Establishment Clause.¹⁶⁹

In *Chalmers v. Tulon Company*,¹⁷⁰ the Fourth Circuit both failed to adequately address the hostile work environment case law and also demonstrated a bias against unusual religious speech. The Fourth Cir-

165. See generally CARTER, *supra* note 114. Professor Carter notes that, "[O]ne's faith represents a kind of mystical irrationality, something that thoughtful, public-spirited American citizens would do better to avoid." *Id.* at 7.

166. See *id.* at 29.

167. U.S. CONST. amend. I. For a discussion of the constitutional issues regarding the right to free expression in the workplace, see generally *supra* Part II. This article will not analyze the constitutionality of § 701(j), which the author presumes is constitutional. The dissent in *Trans World Airlines v. Hardison*, for example, argued that accommodating Hardison under § 701(j) would not violate the Establishment Clause. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 90-91, 96 n.13 (1977) (Marshall, J., dissenting). For a discussion regarding the reasons why the Establishment Clause should permit legislative accommodation of religion, see generally Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992). See also generally CARTER, *supra* note 114.

168. *Larson v. Valente*, 456 U.S. 228, 244 (1982). In applying strict scrutiny to a state law that granted a denominational preference, the Court stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.*

169. This as an issue that should be further addressed by the courts, the EEOC, and legal commentators.

170. 101 F.3d 1012 (4th Cir. 1996).

cuit determined that an employer did not discriminate against a management-level employee discharged after her religious beliefs compelled her to send letters—characterized by the court as upsetting and distressing—to two of her colleagues at their homes.¹⁷¹

The court first determined that the plaintiff, Chalmers, had not even established a *prima facie* case of discrimination since she provided her employer with no notice of her need to send these letters.¹⁷² However, the court nonetheless proceeded to address the merits of what it clearly regarded as a rather odd request for religious accommodation under section 701(j).¹⁷³

The Fourth Circuit analyzed Chalmers's right to accommodation under section 701(j) but did not adequately address the harassment aspects of the case. The court determined that even "[i]f we had concluded that Chalmers had established a *prima facie* case, Chalmers' religious accommodation claim would nonetheless fail . . . because Chalmers' conduct is not the *type* that an employer can possibly accommodate, even with notice."¹⁷⁴ The court did acknowledge that Tulon, the employer, was "placed between a rock and a hard place" because if her employer had permitted Chalmers, a management-level employee, to write such letters, it would be subjecting itself to possible religious harassment lawsuits.¹⁷⁵ However, in reaching its cursory conclusion, the court did not adequately explain why this was so, or cite any harassment or hostile work environment case law. Rather, the court simply pointed out that "Title VII does not require an employer

171. One letter was sent to the employee's direct supervisor and stated in part, "One thing the Lord wants you to do is get your life right with him All you have to do is go to God and ask for forgiveness before it's too late." *Id.* at 1015. The supervisor's wife opened the letter and became extremely upset, believing that her husband was having an affair. The supervisor requested that the plaintiff be fired. The second letter was sent to an employee who had recently given birth out of wedlock and was suffering from an undiagnosed illness. This letter stated in part, "One thing about God, He doesn't like when people commit adultery God can put a sickness on you that no doctor can ever find out what it is." *Id.* at 1016. While the employee was upset, she stated it did not "offend" her or "damage her working relationship" with the plaintiff. Furthermore, she never complained to anyone at Tulon and she acknowledged to Tulon management her receipt of the letter only when they independently found out about it and contacted her. *Id.*

172. *See id.* at 1019.

173. The court stated that "[t]ypically, religious accommodation suits involve religious conduct, such as observing the Sabbath, wearing religious garb, etc., that result in indirect and minimal burdens, if any, on other employees." *Id.* at 1021 (citing as comparison *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995)).

174. *Id.* (emphasis added).

175. *Id.*

to allow an employee to impose [] religious views on others.”¹⁷⁶ The court failed, however, to address the basic question of what constitutes an imposition of one’s religious views.

To the extent that the Fourth Circuit did address the conflict between one employee’s right to religious expression in the workplace and the right of other employees to be free from hostile work environment harassment, it demonstrated a clear bias against unusual religious expression. The court clearly presumed that a reasonable person would find the letters in question to be objectively harassing. The court explained that the letters “impose[d] personally and directly on fellow employees, invading their privacy and criticizing their personal lives.”¹⁷⁷ Further emphasizing that a reasonable person would find these letters harassing, the Fourth Circuit added that even Chalmers herself realized that the letters might cause distress.¹⁷⁸ Thus, the court in essence determined that Tulon had no obligation to accommodate Chalmers’ religious expression, because, under *Harris*, the expression was *objectively* harassing to a *reasonable* person.

The dissent argued, however, that the majority opinion cast the letters in an unfairly unfavorable light and violated the court’s standard for reviewing summary judgments by taking facts in the light most favorable to the moving party.¹⁷⁹

Furthermore, while the majority focused on the fact that the letters were objectively harassing to a reasonable person, the court ignored the fact that one of the employees who received a letter was not offended.¹⁸⁰ The Court in *Harris* had previously clearly established that for speech to create a hostile work environment it must be *subjectively*—as well as *objectively*—offensive.¹⁸¹ In this case, once the *Chalmers* court viewed the religious speech in question as objectionable, it had trouble recognizing that one employee who received a letter did not herself find it harassing.

176. *Id.* (citing *Wilson*, 58 F.3d at 1342).

177. *Id.*

178. *See id.*

179. *See id.* at 1022 (Niemeyer, J., dissenting). According to the dissent: [T]he majority accepts Tulon’s characterizations and refers to the letters variously as disturbing, annoying, judgmental, accusatory and critical. The majority also accepts the disputed claim that the letter disturbed Tulon’s workplace and rejected Chalmers’ claim that it was sent as sensitive, caring advice, making no accusations and demanding no response.

Id. (Niemeyer, J., dissenting).

180. For a description of both letters and the contexts in which they were delivered and received, see *supra* note 171.

181. *See Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993). *See also supra* notes 80-89 and accompanying text.

Similarly, in *Wilson v. U.S. West Communications*,¹⁸² the Eighth Circuit failed to adequately address the harassment aspect of the case and showed a bias against unusual religious expression. The court in *Wilson* determined that an employer was not required to permit an employee to wear a graphic anti-abortion button which showed a color photograph of a fetus.¹⁸³ In response to the plaintiff's insistence on continually wearing the button, other employees complained of harassment, a forty percent decline in productivity occurred, and some employees refused to go to meetings attended by the plaintiff.¹⁸⁴ When the plaintiff refused to refrain from wearing the button, she was fired.¹⁸⁵ The Eighth Circuit analyzed this case under section 701(j) and did not directly address its harassment aspects. This is due in part to the fact that Wilson's colleagues did not claim harassment based upon a protected category and therefore were not protected by Title VII.¹⁸⁶

However, the court took pains to sidestep the question of Wilson's right to religious expression in the workplace. The court affirmed the district court's holding that Wilson's vow did not require her to be a "living witness"¹⁸⁷ and that her employer therefore offered her a reasonable accommodation in permitting her to wear the button if she kept it covered.¹⁸⁸ In reaching this conclusion, the Eighth Circuit essentially ignored the parties' stipulation that Wilson's religious beliefs were sincerely held. Instead, the court focused on the fact that this stipulation "does not cover the details of her religious vow."¹⁸⁹ It was clearly improper for the court to analyze the details of Wilson's vow, since a court's role is to determine whether a religious belief is sincerely held—not to determine the requirements of a particular religion.¹⁹⁰ Furthermore, this aspect of the Eighth Circuit's decision

182. 58 F.3d 1337 (8th Cir. 1995).

183. *Id.* at 1339.

184. *Id.*

185. *Id.* at 1340.

186. Wilson's colleagues did not claim that they were harassed based upon a protected status; rather, they felt harassed for non-religious, "personal" reasons, such as "infertility problems, miscarriage, and death of a premature infant, unrelated to any stance on abortion or religion." *Id.* at 1339.

187. Wilson argued that her vow required her to be a living witness. She explained that a living witness is someone who by her actions, and not simply her words, is a "witness to truth." She explained that in wearing the button she could continually remind people of abortions instead of preaching about them. *Id.* at 1340 & n.2.

188. *Id.* at 1341-42.

189. *Id.* at 1341.

190. See Beiner & DiPippa, *supra* note 68, at 602-03. The Supreme Court has stated that it is "no business of courts to say . . . what is a religious practice or activity." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

also eludes common sense, since a covered button is a rather ineffective means of opposing abortion.

To the limited extent that the court did address the harassment issue, it relied on the general reasoning of *Harris*, without citing the case, in essentially concluding that Wilson's co-workers' disruptive reaction to her button was justified because the pin was *objectively* offensive to a reasonable person. The court explained that the plaintiff's position would require U.S. West to allow her to impose her beliefs as she chose. The court further noted that even Wilson conceded the button caused substantial disruption at work: "To simply instruct [plaintiff's] co-workers that they must accept [her] insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation."¹⁹¹ The court concluded, "We reiterate that Title VII does not require an employer to allow an employee to impose . . . religious views on others."¹⁹² However, as in *Chalmers*, the court in *Wilson* failed to address the question of what constitutes an imposition of religious views.

In reaching its cursory conclusion that Wilson's colleagues' disruptive response to her unusual religious expression was justified, the court also displayed a clear bias against unusual religious expression. Striking a defensive tone, the court emphasized that it was only Wilson's button, and not her religious views on abortion, which were objectionable. The court noted that U.S. West did not object to various other religious articles that Wilson had in her work cubicle or to another employee's anti-abortion button. It was the color photograph of the fetus that offended Wilson's co-workers. Indeed, many employees who opposed Wilson's button actually shared Wilson's religion and views on abortion.¹⁹³

The Eighth Circuit even emphasized that Wilson's supervisors, who refused to allow her to wear the button uncovered, were also Roman Catholics who opposed abortion, thus implying that this could not possibly be a case of religious discrimination.¹⁹⁴ In making this distinction, the court makes clear that it is permissible to prohibit unusual or uncommon religious expression. In other words, Wilson's supervisors represent a "normal" comparison group of Roman Catholics, and

191. *Wilson*, 58 F.3d at 1341.

192. *Id.* at 1342.

193. *Id.* at 1341.

194. *See id.* at 1339.

Wilson's insistence on wearing the button is unreasonable since it deviates from what these "normal" Roman Catholics do.¹⁹⁵

If the court believed that U.S. West should not have been required to accommodate Wilson's need to wear her graphic anti-abortion button, it should have addressed this issue directly and honestly. The court should have acknowledged that Wilson had a religious need to wear the button that was not reasonably accommodated, but that accommodation was not possible because it would cause U.S. West undue hardship.

In *Johnson v. Halls Merchandising*, a federal district court granted summary judgment in favor of an employer who operated a retail business and claimed that it was impossible to accommodate, without undue hardship, an employee's religious need to preface almost every sentence with the phrase, "In the name of Jesus Christ of Nazareth."¹⁹⁶ In this case, the district court simply presumed that it was reasonable for customers to find the plaintiff's unusual and pervasive religious speech offensive. According to the court, the defendant attempted to reasonably accommodate the plaintiff's practices, but the plaintiff did not make any effort to cooperate with her employer or to accommodate her beliefs "in the legitimate and reasonable interests of her employer, *i.e.*, to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers."¹⁹⁷

In a recent New York case, *Ramprasad v. NYC Health & Hospital*,¹⁹⁸ a federal district court similarly avoided addressing the difficult issue of when unusual religious expression must be accommodated in the workplace. The court in *Ramprasad* dismissed the plaintiff's complaint that her employer had failed to reasonably accommodate her need to "speak in tongues"¹⁹⁹ under section 701(j) on the grounds that the plaintiff had not pled in her complaint that she had informed her employer that she was a born-again Christian.²⁰⁰ In dismissing the accommodation complaint, the district court avoided addressing

195. See Beiner & DiPippa, *supra* note 68, at 603.

196. *Johnson v. Halls Merch.*, 49 Fair Empl. Prac. Cas. (BNA) 527 (W.D. Mo. Jan. 17, 1989). This case does not directly involve the creation of a hostile work environment since the employer was concerned with prohibiting offensive speech to customers and not to other employees. However, this court similarly presumes uncommon religious speech is offensive.

197. *Id.* at 529 (emphasis added).

198. No. 98-1506, 1999 U.S. Dist. Lexis 5722 (E.D.N.Y. Mar. 4, 1999).

199. *Id.* at *3. According to the plaintiff, she "received the baptism of the Holy Spirit," which caused her at times to utter prayer and prophecy. *Id.* at *2-*3.

200. *Id.* at *7.

whether this type of unusual religious expression is permissible in the workplace.²⁰¹

Some courts, however, have determined that religious expression in the workplace is protected by Title VII because the expression in question is not objectively harassing. While courts never state directly that mainstream Christian speech is entitled to more protection under Title VII than other religious expression, this is the type of speech that courts are most likely to require an employer to accommodate.

For example, *Brown v. Polk County*²⁰² involved a management-level employee who “allowed prayers in his office during several department meetings and affirmed his Christianity and referred to Bible passages related to slothfulness and ‘work ethics’ during one department meeting.”²⁰³ The court analyzed this case under section 701(j). While it did not cite any hostile work environment case law, it did implicitly rely on the reasoning of *Harris* in determining that Brown’s speech was not *objectively* harassing and that therefore the complaints regarding his speech were *unreasonable*.

The court in *Brown* clearly believed that no reasonable person could find what it characterized as Brown’s occasional references to Christianity harassing. While the court acknowledged that some employees had expressed concern that Brown’s religious views could affect his personnel decisions, the court dismissed these concerns, stating that no evidence had been presented to show that “Brown’s personnel decisions actually were affected by his religious beliefs or that employee concerns in that respect were either *reasonable* or *legitimate*.”²⁰⁴ Further emphasizing that complaints regarding Brown’s religious speech were unreasonable, the court stated, “In our view, the defendants’ examples of the burden that they would have to bear by tolerating trifling instances such as those complained of are *insufficiently ‘real’* . . . and too *‘hypothetical’* to satisfy the standard required to show undue hardship. The defendants showed no ‘actual imposition on co-workers’”²⁰⁵

201. The court did determine that the plaintiff had “sufficiently pled her membership in a protected class for purposes of a ‘pretext’ religious discrimination claim” since “only ‘accommodation’ cases require a plaintiff specifically to plead in the complaint that he or she informed the employer of a religious belief that conflicted with a job requirement.” *Id.* at *8.

202. 61 F.3d 650 (8th Cir. 1995). For additional discussion of *Brown* in the context of religious speech of government employees and the Constitution, see *supra* notes 147-49 and the accompanying text.

203. *Brown*, 61 F.3d at 656.

204. *Id.* at 657 (emphasis added).

205. *Id.* (emphasis added) (citations omitted).

A district court applied similar reasoning in *Banks v. Service America Corporation*, a case in which two food service employees brought a religious discrimination suit after being fired for greeting customers with phrases such as “God bless you” and “Praise the Lord.”²⁰⁶ The employees had ignored their employer’s express instructions to refrain from using these religious greetings.²⁰⁷ The court determined that religious accommodation was required under section 701(j) since accommodation would not result in undue hardship. Relying on *Wilson, Brown, and Halls Merchandising*, the court acknowledged that Title VII does not “require an employer to allow an employee to impose [that employee’s] religious views on customers.”²⁰⁸ However, the court determined that it could not conclude that the plaintiffs attempted to proselytize employees or impose their religious views on others.²⁰⁹

Despite the fact that the plaintiffs frequently greeted their customers in the disputed manner,²¹⁰ the court was not concerned with the pervasiveness of the relatively common religious speech in question:²¹¹

The fast food service encounter . . . is a fleeting and spontaneous one. Plaintiffs did not extend religious greetings to each customer each day. The record reveals no evidence of polarization between Christian customers and other customers, any legitimate fear that plaintiffs might favor those with similar religious beliefs in performing their jobs, or evidence that plaintiffs’ religious practices adversely affected their job performances.²¹²

While the court did not cite any federal harassment case law—as the individuals complaining were not protected by Title VII since they were customers and not employees of the food service corporation—the court essentially determined that the plaintiffs’ religious expression was protected by section 701(j) because their expression was not objectively offensive to a reasonable person. Further, the court ex-

206. 952 F. Supp. 703, 707 (D. Kan. 1996).

207. *Id.* The two employees worked for Service America Corporation, which operated a cafeteria at a General Motors (GM) automobile plant. Service America trained employees to greet customers with statements such as “Hello. What can I get for you today?” *Id.*

208. *Id.* at 710.

209. *See id.* at 711.

210. “At certain times, because they felt that the Holy Spirit moved them to bless *all* with whom they came into contact, plaintiffs extended such blessings to *all* of their food service customers.” *Id.* at 707.

211. “God bless you” is, of course, a common expression. For example, it is customary to say “God bless you” when someone sneezes.

212. *Banks*, 952 F. Supp. at 711.

pressed disbelief that any reasonable person could find the plaintiffs' religious expression objectionable. For example, the court portrayed the plaintiffs' religious expression in a positive light, determining that their goal was to make statements that were "positive, uplifting and inspirational"²¹³ and that they conveyed their greetings in a "polite, pleasant and non-confrontational manner."²¹⁴ Further emphasizing that *reasonable* people would not find this religious expression offensive, the court noted that the vast majority of customers were not offended by the speech and that only an infinitesimal number of complaints were received regarding the speech.²¹⁵ The court in *Banks* essentially determined that the religious expression was not *objectively* offensive and that therefore the complaints regarding this speech were *unreasonable*.

These cases illustrate two trends regarding religious expression in the workplace. The first is that the courts do not adequately address the conflict between an employee's right to religious expression in the workplace and the right of others to be free from hostile work environment harassment. Rather, in cases where a plaintiff requests accommodation of his or her religious expression under section 701(j), courts tend to look at whether that plaintiff imposed his or her religious views on others without fully addressing when an imposition of religious views constitutes actionable harassment.

Second, to the extent that courts do address the harassment issue, they apply the reasoning of *Harris*, holding that speech which is objectively harassing to a reasonable person does not have to be accommodated under section 701(j). This has led courts to discriminate against unusual or uncommon religious speech. Therefore, the lower courts have determined that religious employees have the right to greet customers with phrases such as "God bless you" and "Praise the Lord," or on occasion read Biblical passages at meetings, but can be prohibited from prefacing virtually every sentence with the phrase "In the name of Jesus Christ of Nazareth," or continually wearing an uncovered anti-abortion button containing a graphic photograph of an aborted fetus.

B. *The Abortion Controversy*

The lower courts have also limited an employee's right to religious expression in the workplace by focusing on Title VII as a com-

213. *Id.* at 707.

214. *Id.*

215. *Id.* at 710 & n.7.

prehensive anti-discrimination statute that requires neutral treatment of all the protected categories. In doing so, the lower courts are clearly following Supreme Court precedent.²¹⁶ This focus on neutrality is apparent in cases involving employees' religious views on abortion.

As explained in Part III.A, the Eighth Circuit in *Wilson* determined that an employer was not required to accommodate an employee's religious need to wear a graphic anti-abortion button which led to major workplace disruptions.²¹⁷ The Eighth Circuit reached this conclusion based on its determination that U.S. West reasonably accommodated Wilson's religious beliefs by allowing her to wear the button at work but requiring that she keep it covered.²¹⁸ Despite this conclusion, the court took pains to emphasize that the employer was in no way discriminating against religious expression since "U.S. West did not oppose Wilson's religious beliefs, but rather, was concerned with the photograph."²¹⁹

Wilson has been compared to *Turic v. Holland Hospitality*,²²⁰ another case involving discussion of abortion in the workplace.²²¹ Turic, who worked at a hotel restaurant with a primarily Christian staff, became pregnant and considered having an abortion.²²² News of her considered abortion spread among the staff, and eventually staff members were openly discussing the topic in a manner disruptive to the work environment.²²³ Turic's supervisors, who believed she was "instigating" the turmoil, told her that her position would be terminated if she continued to discuss her considered abortion at work,²²⁴ and she was eventually fired for allegedly failing to perform her job adequately.²²⁵

The court in *Turic* determined, however, that the employer's decision violated Title VII's prohibition on sex discrimination included in the Pregnancy Discrimination Act (PDA)²²⁶ since "but for her con-

216. See *supra* Part I.

217. See *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995); *supra* notes 182-95 and accompanying text.

218. See *Wilson*, 58 F.3d at 1341-42.

219. *Id.* at 1341.

220. 849 F. Supp. 544 (W.D. Mich. 1994).

221. Beiner & DiPippa, *supra* note 68, at 579.

222. *Turic*, 849 F. Supp. at 546.

223. *Id.*

224. *Id.* at 547.

225. *Id.* at 547-48.

226. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended 42 U.S.C. § 2000e(k)).

sideration of abortion, [Turic] would not have been fired.”²²⁷ The court explained that Turic was discriminated against because, as a woman considering an abortion, she was a source of controversy. “In the context of race or religion, the illegality of this should be obvious—an African-American or Muslim employee could not be held responsible for ‘causing’ turmoil which flows from his or her presence. The same is true of a woman considering abortion.”²²⁸

Beiner and DiPippa have argued that while both *Turic* and *Wilson* involved a “controversy concerning abortion[,] [] there was a different result in each case.”²²⁹ They conclude that the most likely reason for this is the “courts’ preference for . . . religious claims by nonreligious employees over those of religious employees.”²³⁰ Therefore, the courts are more likely to require accommodation of a secular employee’s discussion of a possible abortion than a religious employee’s expression in opposition to abortion.

However, while some courts certainly do not view accommodation of religion as important,²³¹ these two seemingly disparate decisions can be better understood in the context of courts’ general tendency to focus on Title VII as a broad anti-discrimination statute and their discomfort with permitting discrimination either in favor of or against an individual based upon membership in a protected class. The court in *Turic* emphasized that Turic was discriminated against in a manner that violated Title VII since it was *only* Turic who was silenced by her employer:

An employer has a right to put a stop to conversations which are decreasing productivity, and it is undisputed that the staff’s discussion of abortion was disruptive. Therefore, if defendant had given each of the 10-15 staff members it knew were participating in the discussion the same warning it gave plaintiff—“if you discuss Kim Turic’s abortion decision, or abortion generally, you run the risk of termination” . . . the source of the rule [would] not [be] hostility toward plaintiff and her consideration of abortion, but a concern for the work environment.²³²

The court in *Wilson*, on the other hand, rejected Wilson’s proposed solution that she be permitted to wear her button uncovered and that only her *co-workers* be silenced since the court essentially viewed this as a request for discrimination in favor of religious expression.

227. *Turic*, 849 F. Supp. at 556.

228. *Id.*

229. Beiner & DiPippa, *supra* note 68, at 579.

230. *Id.* at 580.

231. *See generally* Kaminer, *supra* note 19.

232. *Turic*, 849 F. Supp. at 555.

According to Wilson, her supervisors “should have simply instructed the troublesome co-workers to ignore the button and get back to work.”²³³ The court clearly did not believe that Title VII gave Wilson’s speech this type of preferential treatment, explaining that “[t]o simply instruct Wilson’s co-workers that they must accept Wilson’s insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation.”²³⁴

As explained in the previous subpart, the court, through its willingness to determine what Wilson’s vow entailed, showed a reluctance to require accommodation of unusual religious speech.²³⁵ However, the court did not discriminate against religious speech in general since no employees were prohibited from discussing their religious views on abortion in the workplace, and, in fact, the employer permitted Wilson to keep religious articles at work.²³⁶

C. *Must a Speaker Know that the Speech Is Unwelcome?*

The courts have not clearly determined whether a hostile work environment can be created by a religious speaker in cases in which the speaker does not know that his or her religious expression is unwelcome. As explained in Part I, the Supreme Court determined that in sexual harassment cases the plaintiff must prove that the harassment was “unwelcome,” a requirement which recognizes that some sexual comments in the workplace are, in fact, welcome.²³⁷ This differs from cases of race-based harassment, national origin harassment, and animus-based religious harassment, where the unwelcome nature of the speech is presumed.²³⁸

Courts which determine that a speaker should realize that his or her non-animus-based religious expression is unwelcome focus on Title VII as a broad anti-discrimination statute and treat non-animus-based religious expression which others find harassing the same as racist, sexist, or other bigoted comments. These courts fail to recognize that even though non-animus-based religious speech may be in-

233. *Wilson*, 58 F.3d at 1341.

234. *Id.*

235. *See supra* notes 193-95 and accompanying text.

236. *Wilson*, 58 F.3d at 1341. In addition, another employee also had an anti-abortion button. *Id.*

237. In *Meritor*, the Court held that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

238. While all the cases in this subpart address the unwelcomeness issue at least indirectly, a number of these cases do not directly acknowledge that they are doing so.

herently offensive to others,²³⁹ it is still entitled to special constitutional protection.

However, there are also cases which recognize that religious expression is entitled to special constitutional protection and hold that a hostile work environment cannot be created absent the speaker's knowledge that his or her religious expression is unwelcome. Nonetheless, these decisions also emphasize the importance of Title VII as a broad anti-discrimination statute and explain that once an individual knows his or her religious expression is unwelcome, this unwelcome religious expression may lose its constitutional protection and become actionable harassment.

In other words, regardless of how a court rules specifically on the unwelcomeness issue, the courts in these cases tend to focus on the importance of Title VII as a broad anti-discrimination statute and emphasize that Congress' goal of eradicating discrimination in the workplace can, at some point, outweigh an individual's constitutional right to religious expression in the workplace.²⁴⁰ This demonstrates once again the courts' tendency to accord religious speech minimal, if any, special protection in the workplace when others complain that the speech is offensive or harassing.

For example, in *Chalmers*, the Fourth Circuit determined that an employer did not discriminate against a management-level employee who was discharged after her religious beliefs compelled her to send letters characterized by the court as upsetting and distressing to the homes of two of her colleagues.²⁴¹ The majority opinion clearly pre-

239. The fact that non-animus-based religious speech may be offensive was explained at the Congressional Hearings on the Proposed Guidelines: "Jesus Christ claimed to be the only Way to God the Father and to heaven. (John 14:6) All other ways are, according to Jesus, wrong or false. That is why the New Testament says the Gospel always contains an offense. (1 Peter 2:8) If that is what is meant by 'disparaging' the religious beliefs of others, then true Christianity is inherently disparaging and hostile to other religions." *Hearing, supra* note 9, at 64 (prepared testimony of Michael K. Whitehead, General Counsel, Southern Baptist Convention, Christian Life Commission). Similarly, as Professor Laycock explained, "[m]any religions have teachings that others find offensive But those who are offended cannot invoke the Commission's regulatory power to cut off all discussion of these issues in the workplace." *Id.* at 42 (prepared testimony of Prof. Douglas Laycock).

240. This subpart includes an analysis of cases in which the alleged hostile work environment was created by the employer, as well as cases in which the alleged harassment was caused by another employee. The primary focus of this article is an *employee's* right to religious expression in the workplace when another employee claims that the expression is harassing. However, cases involving employer speech are included in this subpart because the analyses applied by courts in these cases is similar to that used in cases involving employee speech.

241. *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1016, 1019 (4th Cir. 1996). For a discussion of this case, see *supra* notes 170-81 and accompanying text.

sumed that the speaker should realize her religious expression was unwelcome.

However, the dissent correctly explained that the “majority [] repeatedly and unfairly cast Chalmers’ religious activity in the worst possible light”²⁴² and that this approach is “unnecessarily hostile to Chalmers’ religious practice.”²⁴³ For example, Chalmers sent one of the letters to her supervisor, Richard LaMantia, in response to his practice of misrepresenting to customers Tulon’s ability to fill orders. The letter stated in part, “One thing the Lord wants you to do is get your life right with him . . . you are doing somethings [sic] in your life that God is not please [sic] with and He wants you to stop. All you have to do is go to God and ask for forgiveness before it’s too late.”²⁴⁴

LaMantia’s wife opened the letter and became extremely upset, believing that her husband who had committed adultery in the past, was again having an affair.²⁴⁵ She called Chalmers to inquire if the letter referred to adultery, whereupon Chalmers apologized and told Mrs. LaMantia that she was unaware that Mr. LaMantia had committed adultery in the past and assured Mrs. LaMantia that the letter referred only to her husband’s business practices.²⁴⁶ Still, the LaMantias’ relationship became strained and eventually LaMantia requested that Chalmers be fired.²⁴⁷

While the majority did not directly address the unwelcomeness issue, it clearly presumed that Chalmers knew that the letter was in fact unwelcome.²⁴⁸ However, the majority failed to recognize that a religious person may not assume his or her views are unwelcome simply because they may be upsetting for others to hear. In essence, the majority wrongly assumed that because Chalmers behaved in a manner that would generally be considered socially inappropriate, she should have known that her speech was unwelcome.

In fact, Chalmers had a number of reasons to assume that LaMantia did welcome the expression of her religious views. The two had engaged in numerous religious discussions, often initiated by LaMantia, and LaMantia discussed his own religious encounters with Chalmers.²⁴⁹ Furthermore, LaMantia knew Chalmers was particularly

242. *Chalmers*, 101 F.3d at 1022 (Niemeyer, J., dissenting).

243. *Id.*

244. *Id.* at 1015.

245. *Id.* at 1023 (Niemeyer, J., dissenting).

246. *Id.*

247. *Id.* at 1023-24.

248. “Chalmers concedes in the letters themselves that she knew the letters . . . might cause [her co-workers] distress.” *Id.* at 1021.

249. *Id.* at 1023 (Niemeyer, J., dissenting).

religious, and respected this, generally refraining from using profanity around her.²⁵⁰ As the dissent explained, “LaMantia never discouraged these [religious] discussions, never expressed discomfort, and never indicated that it was improper for Chalmers to try to influence others in a religious way.”²⁵¹ The dissent concluded that this “could support the conclusion that he was encouraging her to continue her practices.”²⁵²

Chalmers particularly had no reason to know that the views expressed in her letter to LaMantia were unwelcome, since they were unwelcome primarily, if not exclusively, because they led Mrs. LaMantia to assume that her husband was having another affair. However, since Chalmers was unaware that Mr. LaMantia committed adultery in the past, it would simply have been impossible for her to realize that her views would be unwelcome on this ground. Nonetheless, the majority simply ignored the fact that LaMantia had previously participated in religious discussions with Chalmers and that she had reason to believe that her religious views might in fact be welcome. In so doing, the court determined that a speaker does not need to know that his or her religious expression is unwelcome to create a hostile work environment.

The Seventh Circuit, in *Venters v. City of Delphi*,²⁵³ also assumed that a speaker should realize when his or her non-animus-based religious speech is unwelcome, and that actual knowledge is therefore not required. Jennifer Venters, a radio dispatcher for the police department, was subjected to repeated religious lectures regarding her prospects for salvation from Larry Ives, the police chief.²⁵⁴ Ives also told her that she had led a sinful life, asked highly personal questions about her private life, and implied that suicide would be preferable to the sinful life that she led.²⁵⁵ The defendants, however, claimed that Venters never informed the police chief that these discussions were unwelcome and even participated in them. They appear to suggest that “if this was harassment, it was welcomed by Venters.”²⁵⁶

The Seventh Circuit determined, however, that on February 14, 1994, Venters stated that she informed Ives that his conduct was un-

250. *Id.*

251. *Id.*

252. *Id.* at 1026. The dissent further explained that Chalmers had also asserted that LaMantia had “asked her on several occasions, When are you going to start a Bible study here.” *Id.* at 1023 n.1.

253. 123 F.3d 956 (7th Cir. 1997).

254. *Id.* at 963.

255. *Id.* at 964.

256. *Id.* at 976.

welcome, and therefore “whatever questions there might have been as to whether Venters welcomed these discussions were answered as of that date.”²⁵⁷ The court therefore sidestepped the issue of whether an individual engaging in non-animus-based religious speech in the workplace needs actual knowledge that his speech is unwelcome.

However, the court relied on statements made by Ives to Venters before this date, and while Venters claimed that the proselytization continued until the date of her discharge eight months later, she provided no specific examples of statements made by Ives to her after February 14. Nonetheless, the court concluded that “given the specificity with which she has described the discussions that predated that warning, we may assume that there was no significant change in Ives’ purported behavior.”²⁵⁸

Therefore, the Seventh Circuit relied on statements made by Ives at a time when it was not clear that his expression of his religious views was unwelcome. The court did so because it found Ives’ speech to be so offensive that it simply presumed that Ives should have realized his speech was unwelcome. According to the court, the speech was:

intrusive, touched upon the most private aspects of her life, [was] delivered in an intimidating manner, in some cases [was] on [its] face scandalous, and [was] unrelenting throughout the entire period post-dating his appointment as chief of police, continuing even after she had informed him that his comments to her were inappropriate.²⁵⁹

However, in *Meltebeke v. Bureau of Labor and Industries*,²⁶⁰ the Oregon Supreme Court determined that religious speech that constitutes a religious practice can violate harassment law only if the person engaging in the religious speech has *knowledge* that his or her speech was unwelcome.²⁶¹ While this case involved Oregon state law and not

257. *Id.*

258. *Id.*

259. *Id.*

260. 903 P.2d 351 (Or. 1995).

261. *Id.* at 362. *Meltebeke* differs from *Chalmers* and *Venters* in that it involves religious speech by an employer and not religious speech by another employee. Also, while an employer’s right to religious expression is protected by the Free Exercise Clause, an employer does not have the right to have his or her speech accommodated under § 701(j). However, the reasoning applied by the *Meltebeke* court as to why a religious speaker must know that his or her speech is unwelcome is also applicable to cases involving an employee’s religious speech.

Title VII, the analysis applied was similar to that applied in Title VII cases.²⁶²

James Meltebeke, an evangelical Christian, owned a painting business and was normally the complainant's direct supervisor for the period during which the complainant was employed.²⁶³ During this time, Meltebeke, who believed that he had a religious obligation to inform others about God and sinful conduct, invited the complainant to church eight times and informed the complainant that he was a sinner and would go to hell for sleeping with his girlfriend and not attending church.²⁶⁴ He also told the complainant that "he had to be a good Christian to be a good painter, and that he should go to church to be a good painter."²⁶⁵

The complainant never directly informed Meltebeke that his religious speech was unwelcome and never asked Meltebeke to cease his religious speech.²⁶⁶ As a result, the Oregon Bureau of Labor and Industries (BOLI) determined that the employer "did not know that his comments were unwelcome or offensive"²⁶⁷ However, the complainant argued that Meltebeke should have realized that his religious speech was unwelcome. According to the complainant, "I told him I couldn't make it [to church] all the time. He should have got the hint, and I ain't a rude person that tells someone that's his religion, that's not mine."²⁶⁸ The complainant was also concerned that his job might be affected by his unwillingness to go to church.²⁶⁹

Eventually, Meltebeke fired the complainant for poor work performance, and the complainant filed a complaint with BOLI claiming that he was a victim of religious harassment.²⁷⁰ BOLI determined that Meltebeke was liable for religious harassment.²⁷¹ The Oregon Court

262. The relevant Oregon statute provides in part: "[I]t is an unlawful employment practice . . . [f]or an employer, because of an individual's . . . religion . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." OR. REV. STAT. § 659.030(1) (1999), *quoted in Meltebeke*, 903 P.2d at 355.

263. *Meltebeke*, 903 P.2d at 353.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* The court noted that the complainant was considered learning disabled and had only a tenth grade education. *Id.*

269. *Id.* at 353-54.

270. *Id.* at 354 & n.3.

271. *Id.* at 354.

of Appeals reversed this decision, and was itself ultimately affirmed by the Oregon Supreme Court.²⁷²

The Oregon Supreme Court determined that an employer could be liable for creating a hostile work environment only if the employer knew that he or she was creating such an environment. The court ruled:

When a person engages in a religious practice, the state may not restrict that person's activity unless it first demonstrates that the person is consciously aware that the conduct has an effect forbidden by the law that is being enforced With respect to an employer whose activity that violates BOLI's rule constitutes a religious practice, as is the case here, the employer must know that that activity created an intimidating, hostile, or offensive working environment.²⁷³

The court emphasized that knowledge of the unwelcome nature of the speech was required regardless of "whether or not a reasonable person might have inferred otherwise."²⁷⁴

The court further explained that its holding was required by the Oregon Constitution since,

[The] government may not constitutionally impose sanctions on an employer for engaging in a religious practice without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer's enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control.²⁷⁵

However, while the court in *Meltebeke* explicitly held that an employer was not liable for religious harassment absent knowledge that his religious expression was unwelcome, the court did not go so far as to hold that knowledge of unwelcomeness must come from the complainant. *Meltebeke* had argued that in unintentional cases of harassment the employee should be required to put the employer on explicit notice that his religious conduct was unwelcome. However, the court concluded that while this was one way that knowledge could be

272. *Meltebeke v. Bureau of Labor & Indus.*, 852 P.2d 859 (Or. Ct. App. 1993), *aff'd*, 903 P.2d 351 (Or. 1995).

273. *Meltebeke*, 903 P.2d at 362.

274. *Id.* at 363.

275. *Id.* The court noted that the applicable provisions of the Oregon Constitution "are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference." *Id.* at 359.

proved, “[w]e decline to limit the means by which such knowledge may be proved by BOLI or gained by the employer.”²⁷⁶

The Oregon Supreme Court, therefore, clearly recognized the unique nature of religious speech and the fact that religious speech is entitled to special constitutional protection. However, the court also emphasized the importance of prohibiting employment discrimination in general, including religious harassment, and took pains to explain that the BOLI rule prohibiting religious harassment was facially constitutional. As the court explained, “The law prohibiting employment discrimination, including the regulatory prohibition against religious harassment, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions.”²⁷⁷ Therefore, while the court in *Meltebeke* determined that an employer must be put on notice that his or her religious expression is unwelcome for it to constitute actionable harassment, once the employer receives such notice, that employer’s right to religious expression can be restricted.

In a slightly different context, the Ninth Circuit in *EEOC v. Townley Engineering* also determined that religious expression is protected in the workplace until the speaker is made aware that his or her religious expression is unwelcome.²⁷⁸ When Townley Manufacturing Company (Townley), a closely held corporation, was founded, its owners “made a covenant with God that their business ‘would be a Christian, faith-operated business.’”²⁷⁹ As part of this covenant, the owners of Townley held weekly devotional services that all employees were required to attend, and absence from the services was regarded as failure to attend work.²⁸⁰ Louis Pelvas, an atheist who worked as a machinist at Townley, asked to be excused from the services.²⁸¹ While his supervisor would not excuse him, he told Pelvas that he could sleep or read the newspaper during the services.²⁸² Pelvas, dissatisfied with this arrangement, filed a complaint with the EEOC, which in turn filed an action against Townley.²⁸³

276. *Id.* at 362 n.18.

277. *Id.* at 361-62.

278. 859 F.2d 610, 621 (9th Cir. 1988). This case differs because it involved *mandatory* employer-sponsored prayer, and not religious expression by another employee, or the employer, during the course of the day. The plaintiff in this case requested accommodation under § 701(j). *Id.* at 613.

279. *Id.* at 612.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

The federal district court granted the EEOC's motion for summary judgment with regard to its charges that Townley violated Title VII "by requiring its employees to attend devotional services, [and] by failing to accommodate Pelvas' objection to attending the services" ²⁸⁴ However, the Ninth Circuit determined that the lower court's injunction was too broad and that only those employees who objected to the religious nature of the services and asked to be excused from attendance should be excused. "The goal of Title VII is served by protecting only those who have religious objections to the services. To protect those who do not have such objections is not necessary." ²⁸⁵ In other words, Townley could continue to hold mandatory devotional services and was required to excuse *only* those employees who made clear that the religious nature of the services was *unwelcome*.

In reaching its conclusion, the Ninth Circuit emphasized the importance of Title VII as a broad anti-discrimination statute and the fact that those employees who found the religious nature of the prayer objectionable must be excused. The court emphasized that, "The strength of the government's interest in eradicating discrimination through Title VII is [] clear. We have stated that 'Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.'" ²⁸⁶ The court further explained, "We recognize that allowing a statute to limit a constitutional right alters the normal relationship between a statutory right and a constitutional one. Nevertheless, it is settled that the right to religious practice . . . may be limited by a statute if 'it is essential to accomplish an overriding governmental interest.'" ²⁸⁷ In other words, while the Townleys clearly had free exercise rights in the workplace, once they were told their religious expression was unwelcome, Title VII's broad ban on discrimination took precedence over the free exercise right. ²⁸⁸

In a strongly worded dissent, Judge Noonan criticized the court's broad reading of Title VII and argued that Pelvas's rights to be free

284. *Id.*

285. *Id.* at 621.

286. *Id.* at 620 (quoting *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982)).

287. *Id.* at 621 (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)). The court appeared concerned that its decision could be broadly read to limit First Amendment rights and therefore stated that its decision did "not mean that statutory rights generally are entitled to primacy over First Amendment rights. We only address the facts of this case." *Id.* at 621 n.17.

288. The general reasoning of this case is also applicable to an employee's free exercise rights in the workplace.

from harassment under Title VII should not have taken precedence over the Townleys' First Amendment rights. Judge Noonan emphasized that Townley had already accommodated Pervas by permitting him to wear ear plugs and read or sleep during the mandatory services. Judge Noonan explained, "[W]hat Pervas was permitted to do was the antithesis of worship, the opposite of indoctrination. He was allowed to disassociate himself in the most public way from the devotional services that were conducted."²⁸⁹

Judge Noonan also argued that the American legal system had difficulty recognizing the unique nature of religious speech and the fact that non-animus-based religious speech which others find harassing is significantly different from simple bigotry. As he explained, "The EEOC has had success in eliminating racial bigotry. It has proceeded in this case as though the defendant was simply one more racist bigot."²⁹⁰ He further argued that the courts did not understand or value the importance of religious expression:

Respect for the religious beliefs of others is particularly difficult when one does not share those beliefs. Judges are no more immune than congressmen from prejudices that are not only officious and overt but subtle and latent and incline one to take less than seriously notions of religious belief that depart markedly from one's own or some assumed norm.²⁹¹

Despite the fact that in *Townley* the court ultimately determined that Title VII trumped the Free Exercise Clause, the Ninth Circuit explicitly recognized the conflict between an employer's right to religious expression in the workplace and an employee's countervailing right to work in an environment free of harassment. In narrowing the district court's injunction of all mandatory religious services, and in essence requiring each potential plaintiff to put the employer on notice that he or she found the religious expression in question to be unwelcome, the court attempted to balance these conflicting rights. As has been argued, this judicial tailoring of both parties' interests may hold the key to the satisfactory construction of future EEOC guidelines.²⁹²

Thus, courts do not agree on whether religious expression in the workplace constitutes actionable harassment if the speaker does not actually know that his or her speech is unwelcome. Furthermore, in a number of these decisions, courts have not directly addressed the unwelcomeness issue but have only alluded to it. Some courts essen-

289. *Townley*, 859 F.2d at 622 (Noonan, J., dissenting).

290. *See id.* at 624.

291. *Id.*

292. *See* Gregory, *supra* note 138, at 132.

tially treat non-animus-based religious harassment the same as race-based, national origin-based, and animus-based religious harassment, and do not require the plaintiff to demonstrate the unwelcome nature of the religious speech in question. However, even courts which recognize that religion is entitled to special constitutional protection also emphasize the importance of prohibiting discrimination in general. These courts have therefore determined that once a speaker is made aware that his or her religious speech is unwelcome, the goal of eradicating discrimination may well outweigh the constitutional right to religious expression.

*D. The Power Differential—When the Religious Speaker
Is an Employer or Supervisor*

1. Employer Cases

There are two important distinctions between cases involving the religious speech of employers and cases involving the religious speech of employees. First, as discussed in Part II.B, an employer is not entitled to accommodation of his or her religious needs under section 701(j). Rather, an employer's right to religious expression in the workplace is directly protected by the Free Exercise and Free Speech Clauses of the First Amendment to the United States Constitution.²⁹³ Second, due to the power differential between employers and employees, courts are more likely to limit an employer's religious expression in the workplace.

This concern with the power differential between employers and employees was perhaps best stated in *Townley*.²⁹⁴ As previously explained, the owners of Townley held mandatory weekly devotional services and an employee's absence was deemed a failure to attend work.²⁹⁵ In determining that the Townleys' Free Exercise rights were not violated in requiring that they accommodate the plaintiff's request to be excused from the mandatory services, the court explicitly noted the special concerns involved with an employer's religious speech, explaining that "[w]here the practices of employer and employee conflict, . . . it is not inappropriate to require the employer, who structures the workplace . . . to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."²⁹⁶

293. See *supra* Part II.B.

294. *EEOC v. Townley Eng'g*, 859 F.2d 610 (9th Cir. 1988). For a discussion of *Townley*, see *supra* notes 278-91 and accompanying text.

295. *Townley*, 859 F.2d at 612.

296. *Id.* at 621.

It is also noteworthy that in discussing whether the Townleys would suffer undue hardship in accommodating the plaintiff, the court expressed little concern with an employer's right to religious expression in the workplace and any spiritual hardship an employer would suffer if this expression were limited. Rather, the court determined that "Townley, the corporate entity, must connect the asserted spiritual hardship to an adverse impact on the conduct of the business [Section 701(j)] posits a gain-seeking employer exclusively concerned with preserving and promoting its economic efficiency. This is a legitimate supposition with respect to corporate employers."²⁹⁷

Similarly, in *Brown Transport Corp. v. Pennsylvania Human Relations Commission*, a Pennsylvania state court mandated accommodation of a religious employee who complained that he was harassed by his employer's inclusion of religious articles in its employee newsletter and Bible verses on its employee paychecks.²⁹⁸ However, the court provided little explanation for its reasoning, simply stating:

[T]he Bible verses on his paychecks and the religious material in [the newsletter] caused [the employee] to question his job security and led him to believe that a[n] employee needed to be Christian to be promoted into upper management. This testimony supports the . . . conclusion that [the] conditions of employment constituted religious harassment²⁹⁹

While the court offers little explanation for its reasoning, clearly an employee is more likely to question his job security and his promotion opportunities when the religious speech comes from an employer rather than from another employee.³⁰⁰

Likewise, in *Hilsman v. Runyon*, the EEOC determined that the Post Office created a hostile work environment when it permitted the daily broadcast of prayers during a one-year period over its public address system.³⁰¹ In determining that such broadcasts created a hostile work environment, the EEOC emphasized the pervasive nature of the religious expression in question, stating that, "[I]n this case, appellant's complaint asserted that the [the Post Office's] actions have occurred daily over a one-year period [T]his allegation is sufficient

297. *Id.* at 615-16.

298. 578 A.2d 555, 561 (Pa. Commw. Ct. 1990). This case was based on state law and not Title VII.

299. *Id.* at 562.

300. Additionally, the court may have found the speech harassing because it was unusual. Certainly the majority of employers do not include Bible verses on paychecks. For a discussion of the courts' bias against unusual religious speech, see *supra* Part III.A.

301. No. 4D-200-1168-94, 1995 WL 217486, at *3 (E.E.O.C. Mar. 31, 1995).

to allege the existence of a hostile working environment predicated on religious discrimination.”³⁰² While the EEOC did not explicitly focus on the distinction between the religious speech of an employer and the religious speech of employees, only an employer has the ability to broadcast prayers throughout the workplace on a daily basis.³⁰³

The courts therefore are particularly willing to limit an employer’s right to religious expression in the workplace due to the power differential between employers and employees and the fact that it is the employers who “structure[] the workplace.”³⁰⁴ In so ruling, these courts have essentially, although not explicitly, determined that an employer’s religious expression is more likely to be both “severe [and] pervasive” as required by the Court in *Meritor*.³⁰⁵

2. *Supervisor Cases*

As discussed throughout this article, the religious speech of a supervisor is entitled to protection under section 701(j), just as the religious speech of a non-management-level employee is entitled to section 701(j)’s protection. However, the speech of a manager presents a greater risk of causing a hostile work environment since employees are more likely to feel harassed by the speech of someone with supervisory power over them than by similar speech by co-workers.³⁰⁶ The

302. *Id.*

303. As in *Brown Transport*, the speech in question was likely viewed by the court as unusual since the majority of employers do not broadcast prayers on a daily basis. See *supra* note 300.

304. *Townley*, 859 F.2d at 621.

305. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). For a discussion of *Meritor*, see *supra* notes 70-78. This trend has been criticized. As has been explained,

Although employer actions are more likely to constitute tangible employment actions or create a pervasively hostile environment, courts should avoid speculation about “inherent” coercion. Courts cannot assume that every instance of workplace religious speech or activity by an employer is coercive or intolerable to the reasonable employee. If courts make such an assumption, they have effectively ruled that employers may not bring their faith into the economic marketplace

See Berg, *supra* note 92, at 1005-06.

306. See Berg, *supra* note 92, at 987. This article does not attempt to present a detailed analysis of when a supervisor’s speech generally rises to the level of creating a hostile work environment. Rather, the author simply intends to point out that lower courts have acknowledged there is an increased risk of harassment when the religious speaker is a supervisor. It should be noted that the two Supreme Court cases that addressed the factors courts should rely upon in determining whether a hostile work environment is created, *Meritor* and *Harris*, discussed in Part I.B, involved harassment by a supervisor. Furthermore, the Supreme Court has recently expanded an employer’s potential liability in cases in which an employee is harassed by his or her supervisor and the employer has no knowledge of the harassment. See Burlington

limited case law on a supervisor's right to religious expression in the workplace has, for the most part, recognized this increased risk of harassment.

In *Chalmers*, for example, the Fourth Circuit directly recognized that there is an increased risk that a hostile work environment will be created when the employee engaging in the questionable religious speech has a supervisory role.³⁰⁷ Interestingly, in this case Chalmers had expressed her religious views both to her immediate supervisor and to an employee whom she directly supervised, and only Chalmers' supervisor complained about her religious expression.³⁰⁸

In *Venters*, the Seventh Circuit also focused on the increased risk of harassment when the religious speaker has a supervisory role.³⁰⁹ Venters, a police department radio dispatcher, was subjected to repeated religious lectures regarding her prospects for salvation by the police chief.³¹⁰ In determining that the plaintiff had submitted adequate evidence to allow her claim of workplace harassment to proceed to trial, the court acknowledged that the harassment came from a management-level employee. The court explained that Venters "describe[d] a work environment *dominated by a supervisor bent on reforming her religious life . . .*"³¹¹ The court further stated that "[w]hen a person vested with *managerial responsibilities* embarks on a course of conduct calculated to demean an employee before [his or her] fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of [his or her] employment."³¹²

In *Brown*, the Eighth Circuit did not adequately focus on the fact that the religious speaker was a manager.³¹³ The court determined that the employer would not suffer undue hardship in accommodating a management-level employee who allowed prayers during several de-

Indus. v. Ellerth, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). See generally *supra* notes 90-96.

307. "Chalmers' supervisory position . . . heightens the possibility that [the employer] (through Chalmers) would appear to be imposing religious beliefs on employees." *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1021 (4th Cir. 1996). For further discussion of *Chalmers*, see *supra* notes 170-81 and accompanying text.

308. *Chalmers*, 101 F.3d at 1016.

309. 123 F.3d 956 (1997). For further discussion of *Venters*, see *supra* notes 253-59 and accompanying text.

310. *Venters*, 123 F.3d at 964.

311. *Id.* at 974 (emphasis added).

312. *Id.* at 976 (quoting *Compston v. Borden*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976)) (emphasis added).

313. *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995). For further discussion of *Brown*, see *supra* notes 147-49 and accompanying text.

partment meetings, affirmed his Christianity, and referred to Bible passages during one department meeting.³¹⁴ The court's failure to focus on Brown's managerial role is particularly striking since his employees were specifically concerned that because Brown was a supervisor his religious beliefs could affect his personnel decisions.

IV

PROPOSALS FOR ADDRESSING THE CONFLICT BETWEEN THE RIGHT TO RELIGIOUS EXPRESSION IN THE WORKPLACE AND THE COUNTERVAILING RIGHT TO BE FREE FROM HOSTILE WORK ENVIRONMENT HARASSMENT

As this article has indicated, the case law regarding the conflict between an employee's or employer's right to religious expression in the workplace and the right of other employees to be free from hostile work environment harassment is somewhat limited. However, based upon the examination of the relevant Supreme Court cases, lower court cases, and proposed EEOC guidelines, a number of trends can be observed.

First, the courts and the EEOC have failed to adequately recognize and address this conflict. The Supreme Court, in adopting a uniform theory of hostile work environment harassment, has neglected to recognize that religious expression is entitled to special statutory and constitutional protection. Similarly, the lower courts, when analyzing a request for religious accommodation under section 701(j), in general do not adequately analyze the harassment element of the case. The EEOC also failed to sufficiently address this conflict in its proposed guidelines, which were primarily concerned with animus-based harassment. However, the public outcry in response to the EEOC guidelines demonstrates that the public is aware of this conflict and very concerned that it be properly addressed.

Second, when courts do recognize the conflict, they tend to focus on Title VII as a broad anti-discrimination statute and are more concerned with prohibiting the creation of a hostile work environment than with the accommodation of religious expression. The Supreme Court has done so by selectively reading the EEOC guidelines and interpreting Title VII as basically prohibiting differential or preferential treatment. The lower courts have also focused on Title VII as a statute that mandates neutrality and prohibits discrimination in favor of or against the protected categories. Some lower courts have specifically determined that at some point the right to be free from hostile

314. *Brown*, 61 F.3d at 656.

work environment harassment trumps even the constitutional right to free exercise of religion. They may be particularly concerned that either mandating accommodation of—or even permitting—religious expression in the workplace that others find harassing would smack of government favoritism of religion since there are no other contexts in which courts mandate accommodation of harassing speech.

As previously explained, the courts have generally interpreted section 701(j) narrowly,³¹⁵ even though the majority of section 701(j) cases involve employees requesting time off for religious reasons, and other federal statutes mandate that employers provide employees with a significant amount of time off.³¹⁶ Therefore, requiring a more meaningful level of religious accommodation in these time off cases would arguably not provide religious adherents with preferential treatment. However, the federal government does not generally mandate accommodation of nonreligious expression in the workplace, and, of course, prohibits expression that causes a hostile work environment. Courts may be particularly concerned that any type of governmental sanction of harassing religious expression in the workplace would appear to be governmental favoritism of religion.

Third, lower courts hesitate to require accommodation of unusual religious expression and are more likely to find such expression harassing. Commentators discussing the EEOC's proposed guidelines were concerned that unusual religious expression might not be entitled to the same level of protection as more common religious expression. This raises potential constitutional concerns, since, at the very least, the Establishment Clause prohibits preferential treatment of favored religions.

Fourth, courts appear particularly reluctant to permit employers and supervisory employees to engage in religious expression in the workplace and are more likely to determine that their speech constitutes actionable harassment.

Finally, courts have not adequately addressed whether the speaker must know that his or her religious expression is unwelcome for the expression to constitute actionable harassment. This issue was also not adequately addressed by the EEOC. Some courts have basi-

315. Some decisions, however, have required a more significant level of accommodation, and this has led to conflicting decisions regarding an employer's duty to accommodate under § 701(j). See generally Kaminer, *supra* note 19.

316. For example, the Family and Medical Leave Act requires that an employer generally permit employees twelve weeks of unpaid leave for various family and medical reasons, even if the leave would cause the employer undue hardship. 29 U.S.C. § 2612 (1994).

cally determined that a speaker should realize when his or her religious expression is unwelcome in the workplace. However, even courts which do not presume religious expression is unwelcome still agree that once the speaker knows his or her religious expression is unwelcome, Title VII's prohibition of hostile work environment harassment can trump both an individual's statutory and constitutional rights to religious expression in the workplace.

For all of these reasons, this article proposes that the EEOC draft new guidelines on religious harassment in the workplace that specifically address the conflict between an individual's right to religious expression in the workplace and the countervailing right to be free from religious harassment. As explained, religious speech is entitled to unique statutory and constitutional protection, and it is therefore essential that the EEOC draft guidelines that specifically address an individual's right to religious expression in the workplace.³¹⁷ These new guidelines should be drafted in a manner that takes the following issues into consideration, and the courts should also take these issues into consideration when deciding cases involving non-animus-based religious harassment:

1. Non-animus-based religious harassment represents a conflict between every employee's and every employer's right to religious expression and every employee's countervailing right not to be harassed because of his or her religion or lack thereof.³¹⁸ In deciding cases involving non-animus-based religious harassment, it is essential that the courts and the EEOC directly address and fully analyze both of these competing interests.³¹⁹ As explained in this article, the courts and the

317. The issue of religious harassment could either be included "in an overall set of harassment guidelines while adding sections clarifying what religious expression should be allowed or by drafting a separate set of guidelines for religion." Dunkum, *supra* note 11, at 987.

318. See *Hearing*, *supra* note 9, at 39 (prepared statement of Prof. Douglas Laycock).

319. In 1997, President Clinton issued "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace" which apply to "all civilian executive branch agencies, officials, and employees in the Federal workplace." Press Release, Office of the Press Secretary, The White House, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997), reprinted in WOLF ET AL., *supra* note 145, at 251 [hereinafter *White House Guidelines*]. These guidelines directly address the conflict between the right to religious expression and the right to be free from religious harassment; however, these guidelines do not apply to nongovernmental employers and their employees. For an analysis of these guidelines, see Stephen S. Kao, *The President's Guidelines on Religious Exercise and Religious Expression in the Federal Workplace: A Restatement or Reinterpretation of Law?*, 8 B.U. PUB. INT. L.J. 251 (1999).

EEOC have both intentionally and inadvertently failed to directly address this conflict.

2. Whether religious expression is sufficiently severe or pervasive to constitute a hostile work environment is always a fact-specific determination. In an effort to add clarity to this inherently vague standard, the EEOC should include examples of common religious expression that do and do not constitute a hostile work environment.³²⁰ For example, passive religious expression such as wearing religious jewelry, displaying religious symbols in private work space, or occasionally stating one's religious beliefs ordinarily would not create a hostile work environment.³²¹
3. The EEOC and the courts should recognize that proselytizing is a form of religious expression entitled to statutory and constitutional protection in the workplace.³²² However, continued proselytizing, if sufficiently severe and pervasive, can constitute a hostile work environment.³²³
4. Generally more than one incident of objectionable religious expression is necessary for a hostile work environment to be created.³²⁴
5. Religious expression cannot constitute actionable harassment unless the speaker has actual knowledge that his or her speech is unwelcome.³²⁵ This recognizes the fact that some non-ani-

320. Professor Laycock offered a number of hypothetical examples in an effort to clarify the EEOC's proposed guidelines. See *Hearing, supra* note 9, at 46-48 (prepared statement of Prof. Douglas Laycock). The White House Guidelines also offer a number of hypothetical examples. See *White House Guidelines, supra* note 319, reprinted in WOLF ET AL., *supra* note 145, at 259-60.

321. See *Hearing, supra* note 9, at 41, 46, 82-83 (prepared statements of Prof. Douglas Laycock and Marc Stern); Dunkum, *supra* note 11, at 987; *White House Guidelines, supra* note 319, reprinted in WOLF ET AL., *supra* note 145, at 259-60.

322. See *White House Guidelines, supra* note 319, reprinted in WOLF ET AL., *supra* note 145, at 254.

323. *Hearing, supra* note 9, at 41 (prepared statement of Prof. Douglas Laycock).

324. *White House Guidelines, supra* note 319, reprinted in WOLF ET AL., *supra* note 145, at 254. However, as the President's guidelines noted, "[a] single incident, if sufficiently abusive, might also constitute statutory harassment." *Id.* at 258.

325. This is the standard used by the Oregon Supreme Court in *Meltebeke v. Bureau of Labor and Indus.*, 903 P.2d 351, 362 & n.18 (Or. 1995). The White House Guidelines similarly maintain that:

[e]mployees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome.

mus-based religious speech is inherently offensive and that a religious speaker may not presume that his or her speech is unwelcome for this reason alone. While the speaker must have actual knowledge that his or her speech is unwelcome, this notice should not have to come directly from the employee who finds the religious speech harassing³²⁶ since an employee may not always feel comfortable asking the speaker to cease his or her speech.³²⁷

6. A supervisor's right to religious expression in the workplace is protected by both Title VII and the Constitution. However, because of the power differential between supervisors and nonsupervisory employees there is an increased risk that a supervisor's speech could create a hostile work environment.³²⁸
7. An employer's religious expression in the workplace, while not protected by Title VII, is protected by the Constitution. It is therefore wrong to presume that an employer's speech is inherently coercive or that it will necessarily create a hostile work environment. However, due to the power differential between employers and employees, there is an increased risk that an employer's speech will cause a hostile work environment.
8. The doctrine of hostile work environment harassment should not be applied in a manner that demonstrates a bias against unusual religious speech. Clearly some unusual religious speech cannot be accommodated and may cause an employer

White House Guidelines, *supra* note 319, reprinted in WOLF ET AL., *supra* note 145, at 254 (emphasis added).

326. In *Meltebeke*, the Oregon Supreme Court specifically "decline[d] to limit the means by which such knowledge may be proved." *Meltebeke*, 903 P.2d at 362 n.18.

327. It should be remembered that in *Meltebeke* the plaintiff was considered learning disabled and did not ask his boss to stop discussing religious topics because, as he explained, "you don't say that to your boss." *Id.* at 353.

328. The President's guidelines specifically recognize the unique issues related to a supervisor's right to religious expression in the workplace: "[w]here a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech." However,

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive even if it was not intended as such [S]upervisors should . . . ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.

White House Guidelines, *supra* note 319, reprinted in WOLF ET AL., *supra* note 145, at 256-57.

to suffer undue hardship. However, the courts and the EEOC should not presume that religious expression is unwelcome or inherently offensive simply because it is unusual.

9. The previous eight proposed suggestions primarily involve the determination of when non-animus-based religious expression creates a hostile work environment. In addition, section 701(j) should be amended in a manner that would mandate a more meaningful and consistent level of accommodation of an employee's religious needs.³²⁹

CONCLUSION

The EEOC's failure to promulgate new guidelines in the wake of the controversy regarding the proposed 1993 Guidelines on Harassment in the Workplace clearly did not eliminate the problem of non-animus-based religious harassment. Rather, this problem continues to be an issue of growing importance in our nation as Americans become increasingly concerned with issues of spirituality. The EEOC should therefore draft new guidelines that recognize both the statutory and constitutional right to religious expression in the workplace, and that also recognize the equally compelling right to be free from religious harassment in the workplace. Similarly, the courts should directly address these countervailing claims.

329. The author has previously proposed suggestions for an amendment to § 701(j) that would mandate more meaningful and consistent protection of religious employees in the workplace. See generally Kaminer, *supra* note 19.