MCLE Self-Study

Saints and Sinners in the Workplace: A Survey of Religious Accommodation Cases

By Andrew H. Friedman

Andrew H. Friedman is a partner with Helmer Friedman LLP in Los Angeles, where he primarily represents employees in all areas of employment law. Mr. Friedman is the author of a leading employment law practice guide—*Litigating Employment Discrimination Cases* (James Publishing, 2007).

INTRODUCTION

Religion is permeating the American workplace and creating headaches for employers, problems for employees, and opportunities for defense attorneys, plaintiffs' counsel, and neutrals.[1] Indeed, the number of religious discrimination charges filed annually with the Equal Employment Opportunity Commission (EEOC) has increased by nearly 50 percent in the last 10 years.[2] This article summarizes current law on workplace religious accommodation, with an emphasis on the growing body of case law allowing employees to use California state and federal anti-discrimination laws as a shield to protect their religious beliefs and practices but not as a sword to proselytize or attack other employees, vendors, or customers whom they believe to be sinners.

BACKGROUND

The California Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice for an employer (and certain other entities) to either: (a) discriminate against an employee (including applicants and independent contractors) because of religion or (b) fail to reasonably accommodate an employee's religious beliefs and practices unless so doing would result in an undue hardship.[3] Similarly, Title VII of the Civil Rights Act of 1964 (Title VII) makes it an unlawful employment practice for an employer "to discharge any individual . . . because of such individual's . . . religion."[4] Title VII defines religion to include "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."[5]

A reasonable accommodation of an employee's religion is one that "eliminates the conflict between employment requirements and religious practices."[6] FEHA provides that possible reasonable accommodations could include: "excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person."[7] Additionally, the California Fair Employment and Housing Commission (FEHC) suggests these accommodations: "job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances."[8] Similarly, the EEOC suggests the following accommodations: voluntary substitutes and swaps,[9] flexible scheduling,[10] lateral transfers, and change of job assignments.[11] However, neither FEHA nor Title VII necessarily guarantees that the employee will be given the accommodation of his or her choice.[12]

Both FEHA and Title VII exempt certain religious employers. Generally speaking, a "religious association or corporation not organized for private profit" is not an "employer" subject to FEHA.[13] Similarly, Title VII exempts hiring decisions made by religious employers on the basis of religion.[14] In addition to this statutory exemption, courts have carved out an additional exemption—the "ecclesiastical" or "ministerial" exception—which precludes the application of any of Title VII's anti-discrimination provisions (e.g., race, sex, national origin or religion) to the employment relationship between certain individuals—typically clergy and lay employees who have been deemed to be "ministers"[15]—and religious institutions.

TWO-PART BURDEN-SHIFTING ANALYSIS

California courts analyze FEHA religious accommodation claims using a two-part burden-shifting framework. First, the employee must establish a prima facie case of discrimination by proving that: (1) she had a bona fide or sincerely held religious belief, the practice of which conflicted with an employment duty; and (2) she informed her employer of the belief and conflict. Second, if the employee proves a prima facie case of discrimination, the burden shifts to the employer to either rebut one or more elements of the plaintiff's prima facie case; or show that (1) it offered a reasonable accommodation; or (2) it could not reasonably accommodate the employee's religious needs without undue hardship.[16] Although the two-part burden-shifting analysis is also applied in Title VII religious accommodation cases, the federal courts appear to have heightened the standard that plaintiffs must meet in order to make out a prima facie case.[17]

THE PLAINTIFF'S PRIMA FACIE CASE

It is generally easy for a plaintiff to establish a prima facie case. First, the plaintiff must demonstrate beliefs that are religious in nature. This task is not onerous as the term "religion" has been broadly defined. California defines religious belief to include not only "observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance"[18] but also "all aspects of religious belief, observance, and practice."[19] In addition to the statutory definitions, the FEHC defines "religious creed" broadly to include "any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions."[20]

Similarly, although Title VII does not define the term religion, the EEOC has defined religion to include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[21] Indeed,

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the EEOC has taken the position that simply because no religious group espouses the plaintiff's beliefs or the fact that the religious group to which the plaintiff professes to belong may not accept such belief will not determine whether the belief is a religious belief of the plaintiff.[22]

Based upon these statutes and the administrative regulations, the federal and state courts have applied the term "religion" expansively.[23] As a result, the courts have protected atheists,[24] members of the World Church of the Creator (which espouses white supremacy),[25] and Wiccans.[26] However, the courts have not extended the term "religion" to encompass what they characterize as purely social or political beliefs such as those espoused by the Ku Klux Klan[27] and National Socialist White People's Party,[28] or personal preferences such as veganism[29] or Kozy Kitten cat food.[30]

Given the liberal interpretation accorded the term "religion," courts have shied away from trying to define what, precisely, constitutes a religion. Instead, the courts typically focus their analysis on either the other elements of the plaintiff's prima facie case or whether the defendant can establish an undue hardship. For example, in *Cloutier v. Costco Wholesale Corp.*,[31] the plaintiff argued that her employer failed to accommodate her religious beliefs—she was a member of the Church of Body Modification—by refusing to exempt her from the "no facial jewelry" provision of its dress code. Although the First Circuit Court of Appeals affirmed summary judgment in favor of the defendant-employer, it deliberately avoided any analysis of whether the employee's affiliation with the Church of Body Modification and/or her facial piercings constituted a "religion" or a religious practice:

> Determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited. Fortunately, as the district court noted, there is no need for us to delve into this thorny question in the present case.[32]

Instead, the court of appeals conducted an undue hardship analysis and determined that the plaintiff's sole proposed accommodation—a blanket exemption from the no-facial-jewelry policy—would impose an undue hardship on the defendant by interfering with its dress code policies that were designed to appeal to customer preference and to promote a professional public image.

The second part of the plaintiff's prima facie case requires showing that he or she "sincerely" holds the beliefs claimed to be religious. Indeed, numerous cases stand for the propositions that a plaintiff's faith and commitment to religion can grow over time into a sincerely held religious belief [33] and that a plaintiff's subsequent loss of faith does not impact the prior sincerity of his or her religious beliefs.[34] Given that the finding as to whether the plaintiff sincerely holds a religious belief will depend on the fact-finder's assessment of the employee's credibility, it would seem that summary judgment on this ground is not appropriate.[35]

Finally, a plaintiff may easily establish the last part of the prima facie case—that he or she informed the employer of the religious beliefs and the accommodation needed. Courts have rejected employer arguments that employees must provide a comprehensive or detailed explanation of how and why their religious beliefs need accommodation.[36] Similarly, courts have rejected employer attempts to avoid liability for not providing reasonable accommodation by citing the employee's failure to comply with the employer's specific notice requirement procedures.[37]

THE DEFENDANT'S RESPONSE—WHAT IS AN "UNDUE HARDSHIP"?

If the plaintiff is able to establish a prima facie case, the burden shifts to the employer to show either that it: (1) did, in fact, offer a reasonable accommodation; or (2) could not reasonably accommodate the employee's religious needs without undue hardship. Most cases focus on whether the employer demonstrated undue hardship.

The Supreme Court held that a proposed accommodation poses an undue hardship if it would impose more than a de minimis cost on the employer.[38] The California courts appear to have adopted this definition.[39] On the one hand, an undue hardship is something more than a simple hardship,[40] and the employer does not necessarily have to actually experience a hardship in order for it to be recognized as too great to be reasonable.[41] On the other hand, many courts have rejected the idea of a speculative or hypothetical undue hardship.[42] Similarly, courts have held that the undue hardship must be a present hardship as opposed to an anticipated or multiplied hardship.[43] As a consequence, employers are on safer ground when they attempt a reasonable accommodation even if they later conclude that it imposes an undue hardship.[44]

The FEHC suggests that in determining whether a reasonable accommodation imposes an undue hardship on the operations of an employer, factors to be considered include, but are not limited to: (1) the size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters; (2) the overall size of the employer with respect to the number of employees, number and type of facilities, and size of budget; (3) the type of the employer's or other covered entity's operation, including the composition and structure of the workforce or membership; (4) the nature and cost of the accommodation involved; (5) reasonable notice to the employer of the need for accommodation; and (6) any available reasonable alternative means of accommodation.[45]

A recently introduced congressional bill may alter the definition of undue hardship. The Workplace Religious Freedom Act of 2007 (H.R. 1431)[46] would replace the current undue hardship standard with a much more onerous definition that would require employers to make a heightened showing of "significant difficulty or expense," and, in so doing, threaten to destroy the delicate balance reached by the courts in this area.

COURTS ALLOW EMPLOYEES TO USE THE RELIGIOUS ACCOMMODATION LAWS AS A SHIELD TO PROTECT THEIR RELIGIOUS BELIEFS AND PRACTICES

Employees can use religious accommodation laws to prevent employers from forcing them to participate in employer-mandated religious activities or discussions. For example, in *EEOC v. Townley Engineering & Manufacturing Co.*,[47] a manufacturing company owned and operated by "born again believers in the Lord Jesus Christ" required all of its employees to attend a 30- to 45-minute weekly

devotional service that included prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters. In an apparent effort to shield itself from liability, the company also required all new hires to sign an acknowledgement of receipt of the company's employee handbook that described the requirement to attend the weekly devotional service. In response to the request of an employee, an atheist, to be excused from attending the weekly devotional service, the company told the employee that attendance was mandatory but that he could sleep, listen to the radio, or read a newspaper during the service. The employee filed a charge of discrimination with the EEOC, which promptly filed a lawsuit against the company for failing to reasonably accommodate the employee's religious belief (atheism) by allowing him to skip the devotional service.

The company argued: (1) the employee had waived his right to any reasonable accommodation by signing the acknowledgement of receipt of the employee handbook; and (2) any attempted accommodation would have posed an undue hardship because it would have created some type of a "spiritual" hardship. The district court rejected the company's argument, granted the EEOC's motion for summary judgment, and entered an injunction against the company prohibiting it from holding any mandatory devotional services. On appeal, the Ninth Circuit Court of Appeals affirmed but instructed the district court to narrow the injunction such that the company was simply forbidden from forcing those employees with religious objections to attend the devotional service (e.g, the company could still force those with non-religious objections to attend).

Similarly, in *Young v. Southwestern Sav. & Loan Ass'n,*[48] the Fifth Circuit Court of Appeals held that it was not a reasonable accommodation for an employer to allow an employee to cover her ears during a mandatory monthly staff meeting that began with a short religious talk and a prayer, delivered by a Christian minister. Rather, the court held the employee should have been exempted from the part of the meeting involving the religious talk and prayer.

Finally, in *Buonanno v. AT&T Broadband, LLC,*[49] an employer distributed a new employee handbook and required each employee to sign an Acknowledgment of Receipt and Certification of Understanding Form agreeing to adhere to the company's "Diversity Policy." The policy provided that employees had to recognize, respect and value the differences among all employees. The plaintiff, a fundamentalist Christian who believed that the Bible is divinely inspired, refused to sign the acknowledgment. He explained that while his religion required that he treat all people with respect and that he would not discriminate against or harass anyone, he could not sign the form because his religion forbade him from "valuing" sinful behavior. The company fired plaintiff for not signing the form. Plaintiff filed a lawsuit against AT&T, alleging it violated Title VII by not accommodating his religion. At a bench trial, the judge found in favor of the plaintiff and held the company could have accepted the plaintiff's promise to treat everyone with respect regardless of their beliefs and behavior because such a promise would have been sufficient to accomplish the goals of the Diversity Policy.

Employees also may use religious accommodation laws to ensure their employment does not interfere with their religious beliefs and practices. For example, the courts have found that: (1) an employer must allow a Jewish employee time off from work to attend his wife's conversion from Catholicism to Judaism in anticipation of their oldest son's bar mitzvah;[50] (2) an employer must allow a Muslim woman, whose religious beliefs required her to wear a head covering at all times during Ramadan, to wear a head scarf even though it was a violation of the company uniform policy;[51] and (3) an employer's offer to schedule a Sabbatarian to work in the afternoons or evenings on Sundays, rather than the mornings, so that he could attend religious services, was no accommodation at all because it would not permit him to observe his religious requirement to abstain from work completely on Sundays.[52]

COURTS DO NOT ALLOW EMPLOYEES TO USE THE RELIGIOUS ACCOMMODATION LAWS AS A SWORD TO PROSELYTIZE OR ATTACK OTHER EMPLOYEES OR CUSTOMERS

The courts have generally not allowed employees to use religious accommodation laws as a sword to proselytize or attack others in the workplace. For example, in *Berry v. Dep't of Social Services,*[53] the plaintiff, a self-described evangelical Christian who held sincere religious beliefs that required him to share his faith and to pray with other Christians, requested that his employer reasonably accommodate his religious beliefs by allowing him to: (1) discuss religion with his clients; (2) display religious items in his cubicle including a Bible and a sign that said "Happy Birthday Jesus"; and (3) use a conference room for prayer meetings. When his employer refused, he sued. In affirming summary judgment in favor of his employer, the Ninth Circuit Court of Appeals held:

> The outer limits of "undue hardship" need not detain us as the Department has clearly demonstrated that it cannot accommodate either Mr. Berry's desire to discuss religion with the Department's clients or his preference for displaying religious items in his cubicle. As we have noted, allowing Mr. Berry to discuss religion with the Department's clients would create a danger of violations of the Establishment Clause of the First Amendment. This constitutes an undue hardship.[54]

In *Knight v. Connecticut Dep't of Public Health,*[55] the Second Circuit Court of Appeals reached a similar result in affirming summary judgment in favor of the employer. Plaintiffs—self-described born-again Christians—wished to discuss religion with their clients, including telling gay clients that God does not like the homosexual lifestyle and would punish them. In affirming summary judgment, the Second Circuit Court of Appeals wrote:

> Moreover, even assuming appellants did make out their *prima facie* cases, the accommodation they now seek is not reasonable. Permitting appellants to evangelize while providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter.[56]

Plaintiffs who sue non-governmental employers can distinguish these cases because private sector employers are not subject to Establishment Clause violations inherent in allowing proselytizing in

the workplace. However, there are also many private sector cases which prohibit proselytizing. For example, in *Peterson v. Hewlett-Packard Co.*,[57] the plaintiff was a self-described "devout Christian" who felt that he had a religious duty to expose the evil of homosexuality by, among other things, posting biblical scripture critical of homosexuality in the workplace. When informed that his conduct violated the company's diversity policies, plaintiff asked the company to accommodate his religious beliefs and practices either by allowing him to continue with his religious posts or by altering the company's diversity policies to exclude homosexuality. He was terminated after he continued to post anti-gay scriptural passages. In affirming summary judgment in favor of the employer, the Ninth Circuit wrote:

> Peterson's first proposed accommodation would have compelled Hewlett-Packard to permit an employee to post messages intended to demean and harass his co-workers. His second proposed accommodation would have forced the company to exclude sexual orientation from its workplace diversity program. Either choice would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation.[58]

The court specifically said that an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights.[59] Similarly, Title VII does not require an employer to accommodate an employee's desire to impose his religious beliefs upon his co-workers.[60]

Similarly, in *Bodett v. CoxCom, Inc.*,[61] the Ninth Circuit Court of Appeals held that an evangelical Christian supervisor was lawfully discharged for harassing her lesbian subordinate by, among other things, asking the subordinate to pray with her, by inviting the subordinate to a "Women of Faith Conference," and by telling the subordinate that homosexuality was against the supervisor's Christian beliefs, that "God's design for a relationship was between a man and a woman," and "that homosexuality is wrong, [and] considered by God to be a sin."

Likewise, in *Wilson v. U.S. West Communications*,[62] an employee claimed that her employer must reasonably accommodate her religious beliefs by allowing her to wear an anti-abortion button displaying a graphic picture of a fetus in front of co-workers. The employer refused to grant the employee's requested accommodation and, instead, offered to reasonably accommodate her religious views by allowing her to either: (1) wear the button only in her work cubicle, leaving the button in the cubicle when she moved around the office; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph. As a result, the employee failed to report to work and was fired. In affirming summary judgment in favor of the employer, the Eighth Circuit Court of Appeals held the employer's proposed accommodation was reasonable:

> Wilson argues that her religious beliefs did not require her or any other employee to miss or rearrange work schedules, as typically causes a reasonable accommodation dispute. She argues that it was her co-workers' response to her beliefs that caused the workplace disruption, not her wearing the button. Wilson contends that U.S. West should have focused its attention on her co-workers, not her . . . . Although Wilson's religious beliefs did not create scheduling conflicts or violate dress code or safety rules, Wilson's position would require U.S. West to allow Wilson to impose her beliefs as she chooses. Wilson concedes the button caused substantial disruption at work. To 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.[63]

Finally, in *Chalmers v. Tulon Co. of Richmond*,[64] the Fourth Circuit Court of Appeals held that an employer had no duty to accommodate an employee's religious need to write letters to her co-workers at their homes severely criticizing their private lives and urging religious solutions.

CONCLUSION

Many commentators believe that the courts have correctly balanced the religious accommodation laws so that employees can only use those laws to protect their religious beliefs and practices but not to proselytize or attack the religious beliefs and practices (or lack thereof) of others in the workplace. It remains to be seen whether Congress will alter the existing balance with the proposed workplace Religious Freedom Act.

ENDNOTES

1. H.J. Cummins, *Pork Problem Is Just the Latest Beef in Religion-Work Disputes*, Minneapolis Star-Trib., Mar. 22, 2007, at 1D; Kelley Holland, *When Religious Needs Test Company Policy*, N.Y. Times, Feb. 25, 2007, at § 3; Niala Boodhoo, *WORKPLACE: Faith-At-Work Movement Going Mainstream*, Miami Herald, Feb. 15, 2007, at § C; Randy Cohen, *Faith at Work*, N.Y. Times, Jan. 28, 2007, at § 6.
2. *See* EEOC, Charge Statistics, FY 1997 Through FY 2006 (February 26, 2007), available at http://www.eeoc.gov/stats/charges.html (1709 charges were filed in 1997; 2541 were filed in 2006).
3. Cal. Gov. Code § 12940(a) ("It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California . . . [f]or an employer, because of . . . religious creed . . . to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."); Cal. Gov. Code § 12940(1) ("It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification . . . [f]or an employer or other entity . . . to discriminate against a person . . . because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of

excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer . . .").

4. 42 U.S.C. § 2000e-2(a)(1).
5. 42 U.S.C. § 2000e(j).
6. *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 70 (1986).
7. Cal. Gov't Code § 12940(1).
8. Cal. Code Regs tit. 2, § 7293.3(a).
9. 29 C.F.R. § 1605.2(d)(1)(i).
10. 29 C.F.R. § 1605.2(d)(1)(ii).
11. 29 C.F.R. § 1605.2(d)(1)(iii).
12. *See Ansonia B.d of Educ. v. Philbrook, supra,* 479 U.S. at 68 ("By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."); *Soldinger v. Northwest Airlines, Inc.,* 51 Cal. App. 4th 345, 370 (1996) ("Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee.").
13. Cal. Gov. Code § 12926.1.
14. 42 U.S.C. § 2000e-1(a).
15. Those deemed "ministers" include those whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. *See Rayburn v. Gen. Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1169–70 (4th Cir. 1985) ("The 'ministerial exception' to Title VII . . . does not depend upon ordination but upon the function of the position . . . As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" [internal quotations and citations omitted]).
16. *See California Fair Employment and Housing Comm'n v. Gemini,* 122 Cal. App. 4th 1004, 1012, (2004) ("There are three elements to a prima facie case under section 12940, subdivision (1): the employee sincerely held a religious belief; the employer was aware of that belief; and the belief conflicted with an employment requirement. Once the employee establishes a prima facie case with sufficient evidence of the three elements, the burden shifts to the employer to establish that it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." [citations and internal quotations omitted]).
17. *Heller v. EBB Auto Co.,* 8 F.3d 1433, 1438 (9th Cir. 1993) ("We analyze Title VII religious discrimination claims under a two-part framework. First, the employee must establish a prima facie case by proving that (1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him with or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements. The prima facie case does not include a showing that the employee made any efforts to compromise his or her religious beliefs or practices before seeking an accommodation from the employer. Second, if the employee proves a prima facie case, the employer must establish that it initiated good faith efforts to accommodate the employee's religious practices." [citations omitted]).
18. Cal. Gov't. Code § 12940(1).
19. Cal. Gov't. Code § 12926(o).
20. Cal. Code Regs. tit. 2, § 7293.1.
21. 29 C.F.R. § 1605.1.
22. *Id.*
23. *See e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 714 (1981) ("Religious beliefs protected by Title VII need not be acceptable, logical, consistent, or comprehensible to others ...").
24. *Young v. Southwestern Sav. & Loan Ass'n,* 509 F.2d 140, 143 (5th Cir. 1975).
25. *Peterson v. Wilmur Communications, Inc.,* 205 F. Supp. 2d 1014 (E.D. Wis. 2002).
26. *Benz v. Rogers Memorial Hosp., Inc.,* 2006 WL 314407 (E.D. Wis. 2006).
27. *Slater v. King Soopers, Inc.,* 809 F. Supp. 809, 810 (D. Colo. 1992); *Bellamy v. Mason's Stores, Inc.,* 368 F. Supp. 1025, 1026 (E.D. Va. 1973); EEOC Dec. No. 79–6, 26 Fair Empl. Prac. Cas. (BNA) 1758, 1758–60 (Oct. 18, 1978).
28. *Augustine v. Anti-Defamation League of B'nai-B'rith,* 75 Wis. 2d 207, 215, 249 N.W.2d 547, 552 (1977).
29. *Friedman v. Southern Cal. Permanente Medical Group,* 102 Cal. App. 4th 39 (2002). *But see Anderson v. Orange County Transit Auth.,* EEOC Charge No. 345960598 (Aug. 20, 1996) (EEOC taking the position that veganism can be a religion).
30. *Brown v. Pena,* 441 F. Supp. 1382, 1385 (D.C. Fla. 1977) (granting summary judgment on religious discrimination claim because plaintiff's "'personal religious creed' concerning Kozy Kitten Cat Food can only be described as such a mere personal preference" that it is "beyond the parameters of the concept of religion as protected by the constitution or, by logical extension, by 43 U.S.C. § 2000e.").
31. 390 F.3d 126 (1st Cir. 2004).
32. *Id.* at 132 quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 714 (1981) (citation omitted).
33. *Baker v. Home Depot,* 445 F.3d 541, 564–47 (2d Cir. 2006) (rejecting defendant's contention that summary judgment should be granted because plaintiff could not establish that he held a sincere religious belief precluding him from working on the Sabbath because he did, in fact, work on the Sabbath for a while); *Vetter v. Farmland Industries, Inc.,* 884 F. Supp. 1287, 1306–08 (N.D. Iowa 1995) (motion for summary judgment denied where recent convert to Judaism wanted to live outside of his assigned sales territory—in violation of company policy—because the community did not have a significant Jewish population and employer rejected his request citing fact that employee previously lived in an area without a significant Jewish population thus belying employee's claim religious belief mandated move).
34. *EEOC v. IBP, Inc.,* 824 F. Supp. 147, 151 (C.D. Ill. 1993) (motion for summary judgment denied where employer claimed that employee, a Seventh Day Adventist, did not hold sincere religious belief requiring him to abstain from work on the Sabbath where before and after the time employee requested accommodation, he worked on the Sabbath).
35. *See EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico,* 279 F.3d 49, 56 (1st Cir. 2002) ("Credibility issues such as the sincerity of an employee's religious belief are quintessential fact questions. As such, they ordinarily should be reserved 'for the factfinder at trial, not for the court at summary judgment'"), *quoting Simas v. First Citizens' Fed. Credit Union,* 170 F.3d 37, 49 (1st Cir. 1999).
36. *See e.g., California Fair Employment and Housing Comm'n v. Gemini,* 122 Cal. App. 4th 1004, 1016 (2004) ("Gemini also contends that it was not required to accommodate Young's request until he explained his religious beliefs to his employer and provided enough information about his religious needs for Gemini to understand the significance of the convention and how his attendance was tied to his religious beliefs. We disagree. Notice to the employer does not require a complex explanation. The employee needs only to cite a religious connection." [citation omitted]).
37. *See e.g., id.* at 1017 (rejecting employer's argument that it did not engage in interactive process regarding employee's request for reasonable accommodation because employee failed to comply with employer policy arguably requiring that such requests must be made in writing—

"Even if Young could be faulted for the absence of 'documentation,' it does not follow that this somehow prevented Gemini from at least initiating an attempt to reach an accommodation.").

38. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).
39. *See Soldinger v. Northwest Airlines, Inc.*, 51 Cal. App. 4th 345, 371 (1996). Arguably, California law may actually impose a standard higher than Title VII for proving undue hardship as FEHA specifically defines undue hardship to mean "an action requiring significant difficulty or expense." *See* Cal. Gov't. Code § 12926(s). In drafting this definition, the California Legislature, however, likely meant for it and the definition for "reasonable accommodation" (Cal. Gov't. Code § 12926(n)) to apply only in the disability context.
40. *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir.1978) ("Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.").
41. *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 275 (5th Cir. 2000) (declining to embrace plaintiff's claim that employer's concerns regarding his religious accommodation were too speculative because they had yet to occur); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995) (finding that City did not have to accommodate employee's religious belief on basis of a concern that accommodation would negatively affect other employees); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) ("[I]t is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations ..."); *Bruff v. North Mississippi Health Services, Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) ("Title VII does not require an employer to actually incur accommodation costs before asserting that they are more than de minimis.").
42. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981) ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships. ... The magnitude as well as the fact of hardship must be determined by examination of the facts of each case."); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) (Any proffered hardship, however, must be actual; "[a]n employer ... cannot rely merely on speculation.") *quoting Smith v. Pyro Min. Co.*, 827 F.2d 1081, 1086 (6th Cir. 1987).
43. *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992).
44. *See Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir.1975) ("[A]n employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.").
45. Cal. Code Regs. tit.2, § 7293.3(b).
46. http://www.govtrack.us/congress/bill.xpd?tab=main&bill=h110-1431> (accessed May 1, 2007).
47. 859 F.2d 610 (9th Cir. 1988).
48. 509 F.2d 140 (5th Cir. 1975).
49. 313 F. Supp. 2d 1069, 1081 (2004).
50. *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).
51. *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1011 (D. Ariz. 2006).
52. *Baker v. Home Depot*, 445 F.3d 541 (2nd Cir. 2006).
53. 447 F.3d 642 (9th Cir. 2006).
54. *Id.* at 655.
55. 275 F.3d 156 (2d Cir. 2001).
56. *Id.* at 168.
57. 358 F.3d 599 (9th Cir. 2004).
58. *Id.* at 607.
59. *Id.*
60. *Id.*
61. 366 F.3d 736 (9th Cir. 2004).
62. 58 F.3d 1337 (8th Cir. 1995).
63. *Id.* at 1341.
64. 101 F.3d 1012 (4th Cir. 1996).

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MCLE Self-Assessment Test

MCLE CREDIT
Earn one hour of general MCLE credit by reading *"Saints and Sinners in the Workplace: A Survey of Religious Accommodation Cases"* and answering the questions that follow, choosing the one best answer to each question. Mail your answers and a $25 processing fee ($20 for Labor and Employment Law Section members) to:

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Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks. *Please include your bar number and e-mail.*

CERTIFICATION
The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of one hour.

Name ______________________ Bar Number ______________________ E-mail ______________________

1. Under California law, an employer must accommodate the religious beliefs and practices of its employees unless it would be significantly difficult and expensive to do so.
❑ True ❑ False

2. Under California law, an employer must not only accommodate the religious beliefs and practices of its employees, but also of its applicants and independent contractors.
❑ True ❑ False

3. Unless excused as an undue hardship, an employer must provide an employee with the reasonable accommodation of his or her choice.
❑ True ❑ False

4. The religious accommodation laws apply to public and private employers alike.
❑ True ❑ False

5. The religious accommodation laws do not protect atheists.
❑ True ❑ False

6. Purely political beliefs such as those espoused by the Ku Klux Klan will be protected by the religious accommodation laws, even if those beliefs are offensive to many, so long as those beliefs are sincerely held.
❑ True ❑ False

7. In order to rule on the merits of a religious accommodation case, the courts may have to determine whether the plaintiff's belief is truly "religious" in nature.
❑ True ❑ False

8. The courts have allowed employers to promulgate reasonable rules regulating how employees are required to provide notice of their need for religious accommodation (*e.g.*, employers may require employees to provide such notice in writing as opposed to orally)?
❑ True ❑ False

9. A proposed accommodation poses an "undue hardship" if it would impose more than a *de minimis* cost on the employer.
❑ True ❑ False

10. An employer must actually experience a hardship in order for the hardship to be recognized as too great to be reasonable.
❑ True ❑ False

11. It is a reasonable accommodation for an employer to allow an employee to cover her ears during that portion of a mandatory monthly staff meeting that covered a religious talk and a prayer, delivered by a Christian minister.
❑ True ❑ False

12. An employer may have to curtail its diversity policy requiring equal treatment for gays and lesbians in the workplace if the religious beliefs of other employees are offended by such a policy.
❑ True ❑ False

13. One appellate court has held that an employer can force those employees with non-religious objections to attend mandatory devotional services.
❑ True ❑ False

14. The Equal Employment Opportunity Commission has taken the position that one factor, among many, in determining whether a belief rises to the level of a "religious belief" is whether an established religious group espouses the plaintiff's beliefs.
❑ True ❑ False

15. The fact that the religious group to which the plaintiff professes to belong does not accept the plaintiff's particular belief is determinative in whether a court will find that the person's belief rises to the level of a "religious belief."
❑ True ❑ False

16. Excusing an employee from performing those duties that conflict with the employee's religious belief is not the type of accommodation that employers might be required to make.
❑ True ❑ False

17. The Ninth Circuit has held that it is an undue hardship to require an employer to allow an employee to demean and harass others even if such conduct is mandated by that employee's religion.
❑ True ❑ False

18. California courts have held that veganism is not a religion.
❑ True ❑ False

19. The EEOC has taken the position that veganism is a religion.
❑ True ❑ False

20. An employee will be unable to establish that she held a sincere religious belief precluding her from working on the Sabbath when she did, in fact, work on the Sabbath for a while.
❑ True ❑ False