

COVERING TURBANS AND BEARDS: TITLE VII'S ROLE IN LEGITIMIZING RELIGIOUS DISCRIMINATION AGAINST SIKHS

KIRAN PREET DHILLON*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 protects employees from being discriminated against by employers on the basis of race, color, religion, sex, and national origin.¹ Religion is treated differently from the other statuses covered by Title VII because it is afforded extra protection via the religious accommodation provision under § 701(j) of Title VII. Section 701(j), adopted as an amendment in 1972, creates an affirmative duty for employers to reasonably accommodate religious employees unless doing so would cause their business undue hardship.² This amendment was introduced as a way to protect religious minorities from having to choose between their jobs and practicing their religion.³ Despite Congress's intention to provide extra protection to employees who belong to minority religions, the Supreme Court has greatly weakened § 701(j)'s protections by tipping the balance of what constitutes a reasonable accommodation and an undue hardship in favor of employers.⁴

* J.D. Candidate, University of Southern California Law School, 2012; B.A., Occidental College, 2009. I would like to thank Professor Stephen Rich for his guidance on this Note and the staff and board of the *Southern California Interdisciplinary Law Journal* for all their hard work. I would also like to thank my husband, Jagmeet Singh, for his unwavering support.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243-66 (codified as scattered sections of 42 U.S.C.).

2. "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (2006).

3. 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, 584 (2000) [hereinafter Kaminer, *Proposals for an Amendment*] ("The amendment was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians." (quoting Senator Randolph's statement: "[T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days." 118 CONG. REC. 705 (1972))).

4. See *infra* Part II.B.

The detriment of this imbalance to religious employees, caused by employer-friendly interpretations of § 701(j), is further compounded by the grooming codes doctrine, which defers heavily to employers and their decisions regarding the substance of their grooming policies.⁵ Employees whose religious identities are tied to their appearance are especially harmed by the grooming codes doctrine because grooming and dress policies are often based on mainstream cultural norms, which do not encompass, and often clash with, the grooming and dress requirements of many minority religions.⁶ In race and sex discrimination cases involving grooming codes, courts justify their deference to employers' policies by distinguishing between mutable and immutable traits, with only immutable traits receiving protection under Title VII.⁷ Given that § 701(j) removed the distinction between mutable and immutable traits as relating to religion, both religious conduct (mutable trait) and status (immutable trait) should be protected under Title VII.⁸ However, while "courts do not explicitly rely on the mutable/immutable distinction when deciding . . . religion cases," many courts have continued to do so indirectly.⁹ Thus, religious minorities for whom certain mutable traits, such as keeping a beard, are closely tied to the practice of their religion are marginalized because they do not receive the protection they are entitled to under Title VII.

While it is important to allow employers the freedom to run their businesses as they see fit, the extent of the deference given to employers under the grooming codes doctrine becomes problematic when it is combined with the employer-friendly standards of the religious accommodation doctrine because it permits employers to force religious employees to choose between their jobs and their religious beliefs. Thus, by facilitating the approval of employer grooming policies that force religious minorities to make this choice, Title VII legitimizes the very discrimination that § 701(j) was meant to prevent.

5. See *infra* Part III.B.

6. For example, the religious requirements that Sikh men wear a turban and not shave their beards; that Muslim women wear a hijab; that Orthodox Jewish men wear a yarmulke; and that Pentecostal women wear skirts, rather than pants.

7. Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 454 (2010) [hereinafter Kaminer, *Religious Conduct and the Immutability Requirement*]. See also *infra* Part III.B.

8. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 7, at 455.

9. *Id.* at 455–56.

Sikhs, a religious minority in the United States, are a prime example of this phenomenon because their religion prohibits them from shaving their beards and cutting their hair, and requires that they wear turbans¹⁰—practices which often conflict with employers’ grooming policies.¹¹ By deferring to employers’ choices to enforce certain grooming codes against Sikhs, courts force members of this religious minority to make a very difficult choice: retain their jobs or stay true to their religious beliefs. If Sikhs want to retain their jobs, they must compromise their religious beliefs and “cover”¹² by assimilating and adhering to American cultural norms in order to comply with their employers’ grooming policies. If they want to stay true to their religious beliefs, they must compromise their ability to acquire and retain employment. This means that true religious accommodation under Title VII is a false construct because the groups that most need accommodation, such as religious minorities like Sikhs, do not receive it. That is, grooming policies already accommodate the majority because they reflect mainstream cultural norms. In contrast, when religious minorities seek exemptions to grooming policies under the religious accommodation doctrine, they often are not provided with an exemption because the employer-friendly nature of the religious accommodation and grooming codes doctrines makes it easy for courts to find that an accommodation is unreasonable or will cause an undue hardship to the employer. Thus, by approving of employers’ refusal to exempt religious minorities from their grooming policies, Title VII case law legitimizes mainstream cultural norms of the majority and the discrimination these norms perpetuate against religious minorities such as Sikhs.

Part II of this Note discusses the religious accommodation doctrine, including the legislative history behind § 701(j), and analyzes how the Supreme Court’s interpretations of § 701(j) have rendered its protections very weak. Part II also discusses the trivialization of religion, a trend in American culture toward treating religious beliefs as arbitrary, irrational, and unimportant. Finally, Part II discusses how the case law on the religious accommodation doctrine reflects this trend and plays a role in legitimizing the discrimination that religious minorities experience in the workplace. Part III discusses the grooming codes doctrine in the context of race and sex discrimination cases, as well as how courts justify their deference to employers’ grooming code policies based on distinctions between mutable and immutable traits. Part III also discusses how this deference to employers’

10. See *infra* Part IV.

11. *Id.*

12. See *infra* Part III.A for further discussion of this concept.

policies subtly perpetuates and legitimizes discrimination against minorities and women by forcing these groups to “cover,” or assimilate to dominant norms. Part IV presents and analyzes the unique case of Sikhs, against whom covering is enforced and legitimized by the employer-friendly standards of Title VII’s religious accommodation and grooming codes doctrines.

II. THE RELIGIOUS ACCOMMODATION DOCTRINE

A. THE CHRISTIAN NORM AND THE TRIVIALIZATION OF RELIGION

The U.S. Census Bureau reports that in 2008 about 75 percent of Americans identified as Christian.¹³ Given that the majority of Americans are, and throughout the country’s history have been, Christian, Christianity has become the religious norm in the United States.¹⁴ Yale Law School Professor Stephen L. Carter explains:

[There is] a long tradition of treating America as essentially Christian in far more than a demographic sense. For millions of Americans, both historically and in the present day, the vision of a self-conscious Christian nationhood is not only attractive, but imperative—and an easy way to decide who is truly American and who is not. The image of America as a Christian nation is more firmly ingrained in both our politics and our practices than the adjustment of a few words will ever cure The legal scholars of the nineteenth century proudly and loudly proclaimed that “Christianity is part of the common law.” . . . Thousands, perhaps tens of thousands, of laws currently on the books were enacted in direct response to the efforts of Christian churches.¹⁵

Even the language used to discuss religion is based on Christian norms—“[a]ny authoritative book is a ‘bible,’ and Hanukah has become the

13. The U.S. Census Bureau reports that 173,402,000 individuals, out of a total adult population of 228,182,000, identified as Christian in 2008, equaling 75.9% of the U.S. population that year. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 at 61 (2011), available at <http://www.census.gov/prod/2011pubs/11statab/pop.pdf>.

14. In fact, in 1992, Governor Kirk Fordice of Mississippi referred to the United States as a “Christian nation.” STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 86 (1993). Governor Robert Bentley of Alabama made similar remarks on January 17, 2011, when he said: “Anybody here today who has not accepted Jesus Christ as their savior, I’m telling you, you’re not my brother and you’re not my sister, and I want to be your brother.” Russell Goldman, *New Alabama Gov. Criticized for Christian-Only Message*, ABC NEWS (Jan. 19, 2011), <http://abcnews.go.com/US/alabama-gov-robert-bentley-criticized-christian-message/story?id=12648307>.

15. CARTER, *supra* note 14, at 86 (footnotes omitted).

‘Jewish Christmas’ because it happens to fall in December.”¹⁶ A look at the institutional level further illustrates the prevalence of the Christian norm in the workplace:

The federal government and all its agencies, all 50 state governments, public school systems, and other taxpayer-funded entities manifest Christianity’s cultural hegemony in the organization of the workweek based on the Christian holy days. Congress, public schools, the state and federal courts, government agencies at all levels, and other public entities adjourn for the Christmas and Easter holiday seasons, but not for Eid, Diwali, or any other non-Christian religious holiday.¹⁷

The fact that religious practices associated with Christianity, such as the observance of Christmas and Easter, are already accommodated at the institutional level makes it even harder for religious minorities to gain accommodation of their own religious practices. Given that under the religious accommodation doctrine, most courts “requir[e] little more than ‘neutral’ treatment of religious employees,”¹⁸ employees who practice minority religions are marginalized because their accommodation requests are not viewed by employers and judges against a secular background, but instead are viewed against a background in which neutrality equals Christianity. Thus, the more a religion differs from Christianity, the more likely it is that employers and judges will view accommodations of that religion as unreasonable and likely to cause the employer undue hardship.

It is important to note, however, that even though Christianity is the religious norm in America, this does not necessarily mean that those who are devoutly Christian are taken seriously.¹⁹ In fact, contemporary American culture tends to treat religion as a passing belief, “rather than as the fundaments upon which the devout build their lives.”²⁰ Carter explains:

[O]ne sees a trend in our political and legal cultures toward treating religious beliefs as arbitrary and unimportant, a trend supported by a rhetoric that implies that there is something wrong with religious devotion. More

16. Khyati Y. Joshi, *The Racialization of Hinduism, Islam, and Sikhism in the United States*, 39 EQUITY & EXCELLENCE EDUC. 211, 216 (2006).

17. *Id.*

18. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 7, at 456. *See also infra* note 74 and accompanying text.

19. Although Christians benefit from the fact that they practice a mainstream religion, they also can become victims of this rhetoric if their religious devotion is displayed too overtly: “Even within the acceptable mainline [of Christianity], 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.” CARTER, *supra* note 14, at 29.

20. *Id.* at 14.

and more, our culture seems to take the position that believing deeply in the tenets of one's faith represents a kind of mystical irrationality, something that thoughtful, public-spirited American citizens would do better to avoid.²¹

Carter provides a number of examples to support this theory,²² including a case in which the Supreme Court ruled against a group of Native Americans who sued the Forest Service because it planned to "allow logging and road building in a national forest area traditionally used by the tribes for sacred rituals."²³ The Court stated that although the logging "could have devastating effects on traditional Indian religious practices," the fact remained that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."²⁴ In another example, a professor at the University of California, Berkeley who was criticized for scheduling an exam on Yom Kippur, "when most Jewish students would be absent," showed a similar apathy towards his Jewish students' religious beliefs when he stated, "[t]hat's how I'm going to operate. If the students don't like it, they can drop the class."²⁵ Carter argues that these cases are sending the message that "[i]f the government decides to destroy your sacred lands, just make some other lands sacred," and "[i]f you can't take your exam because of a Holy Day, get a new Holy Day."²⁶ Thus, this rhetoric in American society has "created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them."²⁷ The effect of this attitude toward religion is especially significant in the employment context, where despite the alleged protections of § 701(j), it can force religious employees to choose between their livelihood and their beliefs: first, when they face employers who are reluctant to accommodate them, and then again when judges rule in favor of employers because they "doubt the validity or importance of religion."²⁸

21. *Id.* at 6–7.

22. *See id.* at 11–17.

23. *Id.* at 11.

24. *Id.* (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451–52 (1988)).

25. *Id.* at 13.

26. *Id.* at 14–15.

27. *Id.* at 3.

28. Kaminer, *Proposals for an Amendment*, *supra* note 3, at 577. These doubts in judges' minds "ste[m] in part, from the fact that religion is a belief system that cannot be logically or rationally proven, a fact that troubles some courts in our modern rationalist society." *Id.* at 577–78.

The effects of this skepticism and of the “consistent message of modern American society . . . that whenever the demands of one’s religion conflict with what one has to do to get ahead, one is expected to ignore the religious demands and act[,] well[,] *rationaly*,”²⁹ can be seen in the Supreme Court’s decisions regarding religious accommodation under Title VII. These cases, and the ways in which their trivialization of religion legitimizes discrimination against religious employees, will be discussed *infra* Part C.

B. HISTORICAL BACKGROUND OF § 701(J)

Section 703(a) of Title VII of the Civil Rights Act of 1964 states:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.³⁰

When originally passed, the statute treated discrimination based on race, color, religion, sex, and national origin equally—that is, it “prohibited discrimination, but contained no language specifically requiring accommodation of religious employees.”³¹ In 1966, the U.S. Equal Employment Opportunity Commission (“EEOC”) addressed the issue of reasonable accommodation and stated in its interpretive regulations that religious employees should be accommodated “where such accommodation can be made without serious inconvenience to the conduct of the business.”³² The following year, the EEOC changed the regulation to “require accommodation except in cases where ‘undue hardship,’ as opposed to ‘serious inconvenience,’ would occur.”³³

However, “most courts chose not to follow the EEOC Guidelines,”³⁴ leading to a lack of consensus regarding the protections afforded to religious employees under Title VII. For example, in *Dewey v. Reynolds Metal*

29. CARTER, *supra* note 14, at 13.

30. 42 U.S.C. § 2000e-2(a) (2006).

31. Kaminer, *Proposals for an Amendment*, *supra* note 3, at 580.

32. *Id.* at 581 (citing 29 C.F.R. § 1605.1 (1967) (codifying the 1966 Guidelines)).

33. *Id.* (citing 29 C.F.R. § 1605.1 (1968) (codifying the 1967 Guidelines)).

34. *Id.* at 582. *See, e.g.*, *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 328 (6th Cir. 1970), *aff’d by an equally divided court per curiam*, 402 U.S. 689 (1971).

Co., “the Sixth Circuit interpreted religious discrimination in employment to require merely treating employees the same without regard to religion.”³⁵ Furthermore, the court “held that an employer had no duty under Title VII to accommodate an employee’s religious prohibition against working on Sundays.”³⁶ In response, Congress amended Title VII in 1972 by enacting § 701(j), which states, “[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 to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”³⁷

Section 701(j) amended Title VII’s religion provision, which until that time had protected only religious status, by imposing an affirmative duty on employers to accommodate employees’ religious conduct and practices.³⁸ Thus, Title VII now protects both religious status and religious conduct.³⁹ By imposing an affirmative duty on employers to accommodate religious employees, Congress differentiated between protecting employees’ religious practices under Title VII and protecting employees in the other enumerated status groups of race, color, sex, and national origin. For example, employees who sue for discrimination based on race, color, sex, or national origin do so because their employer did not treat them the same as employees outside of their enumerated status group.⁴⁰ Employees who sue because of religion-based discrimination under § 701(j), on the other hand, do not seek the same treatment as other employees; rather, they “want to be treated differently—or ‘accommodated’—so that they can meet both their religious and work obligations.”⁴¹

35. Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 741 (1996) (citing *Dewey*, 429 F.2d 324).

36. *Id.*

37. 42 U.S.C. § 2000e(j) (2006).

38. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 102(7), § 2000e(j), 86 Stat. 103 (1972).

39. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 7, at 458.

40. Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 516 (2010). There are also cases in which employees bring suit under Title VII because their employer allegedly treated them differently from other employees who do not belong to their religion. For example, a Muslim employee might allege that she was fired because her supervisor dislikes Muslims. However, these cases are beyond the scope of this Note, which focuses on the religious accommodation provision of Title VII pursuant to § 701(j).

41. *Id.* at 516-17.

Although the recorded legislative history behind § 701(j) is sparse, it does indicate that Congress “intended to require employers to affirmatively accommodate religious employees and provide them with a benefit not provided to non-religious employees.”⁴² The amendment was introduced by Senator Jennings Randolph, a Democrat from West Virginia who felt that the “purpose of the Civil Rights Act of 1964 was to protect religious belief as well as religious conduct.”⁴³ However, just as Title VII had not clarified the type of protection religious employees had, here again, Congress failed to clearly define “undue hardship.” Nonetheless, as one commentator notes:

[B]ased on . . . two examples posed to the Senator, it does appear that the legislature intended to equate “undue hardship” with what commonly would be referred to as a significant or meaningful expense. This legislative intent is also evident by the fact that Senator Randolph assumed that § 701(j) would mandate accommodation in most cases and that only “in perhaps a very, very small percentage of cases” would accommodation not be possible. Furthermore, the very language of the statute—which requires accommodation short of “undue hardship”—seems to anticipate a meaningful level of accommodation.⁴⁴

C. RELIGIOUS ACCOMMODATION DOCTRINE CASE LAW

Although § 701(j) was meant to protect the rights of religious employees in the workplace,⁴⁵ the development of the religious accommodation doctrine⁴⁶ has thus far benefited employers more than employees. An *Oklahoma Law Review* note explains:

42. Kaminer, *Proposals for an Amendment*, *supra* note 3, at 584.

43. *Id.* (citing 118 CONG. REC. 705 (1972) (statement of Sen. Jennings Randolph)).

44. *Id.* at 585 (citing 118 CONG. REC. 705 (1972) (statement of Sen. Jennings Randolph)). Kaminer explains the two examples:

Senator Domenick asked, “A young man I just talked to from Virginia, works 15 days on and then is off [fifteen] days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary [five]- or [six]- day week?” According to Senator Randolph, this type of re-scheduling would not constitute “undue hardship.” However, Senator Randolph did agree that there would be “undue hardship” in the following scenario posed by Senator Williams. “There are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one of the two days of the employment; this would be an undue hardship, and the employer’s situation is protected under the amendment.”

Id. at 585, n.61 (internal citations omitted).

45. Blair, *supra* note 40, at 519 (“The legislative history of Title VII shows that the drafters of the bill had the needs of the religious employee at the forefront of their efforts.”).

46. The religious accommodation doctrine stems from two United States Supreme Court cases: *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) and *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). Both are discussed *infra* Part II.C.1–2.

The greatest hurdle for employees bringing Title VII actions is the judiciary's narrow reading of the reasonable accommodation requirement and its correspondingly broad reading of what constitutes an undue hardship. Generally, employees prevail in Title VII religious discrimination cases only when employers have made absolutely no attempt to reasonably accommodate employees, and employers can make no legitimate showing of undue hardship. As a practical matter, almost any type of employer accommodation is sufficient to uphold the employer's duty to reasonably accommodate under Title VII.⁴⁷

The Supreme Court precedent has shaped the § 701(j) case law so that "courts view what must be done to accommodate the needs of religious employees through the lens of the employer," rather than the employee.⁴⁸ Thus, the employer-friendly nature of the religious accommodation doctrine actually legitimizes employers' non-accommodation of, and discrimination against, religious employees, rather than providing employees with meaningful protection.

1. The Undue Hardship Standard

*Trans World Airlines, Inc. v. Hardison*⁴⁹ is the seminal Supreme Court case on the meaning of "undue hardship" under § 701(j). *Hardison*, which dealt with "the extent of [an] employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit[ed] him from working on Saturdays,"⁵⁰ interpreted "undue hardship" to mean "de minimis,"⁵¹ which significantly reduced the burden on employers to make an effort to accommodate religious employees.

The Stores Department for Trans World Airlines ("TWA") operated twenty-four hours per day, 365 days per year.⁵² On June 5, 1967, TWA hired the plaintiff, Larry G. Hardison, to work as a clerk in the Stores Department.⁵³ Hardison was subject to a seniority system that was in TWA's collective-bargaining agreement.⁵⁴ Under this system, the level of seniority determined the jobs and shifts employees could choose.⁵⁵

47. Huma T. Yunus, Note, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 OKLA. L. REV. 657, 662-63 (2004) (internal citation omitted).

48. Blair, *supra* note 40, at 518.

49. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

50. *Id.* at 66.

51. *See id.* at 84.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

In the spring of 1968, Hardison began adhering to the practices of the Worldwide Church of God, a religion that required observing the Sabbath “by refraining from performing any work from sunset on Friday until sunset on Saturday.”⁵⁶ Hardison spoke with the department manager, who agreed to let him have his “religious holidays off whenever possible if [Hardison] agreed to work the traditional holidays when asked.”⁵⁷ This solution worked for a while because Hardison had “sufficient seniority to observe the Sabbath regularly.”⁵⁸ However, when Hardison transferred to another building, he was placed at the bottom of that building’s seniority list, which meant that he now had “insufficient seniority to bid for a shift having Saturdays off.”⁵⁹ After the transfer, Hardison was asked to cover the Saturday shift of a fellow employee who had gone on vacation.⁶⁰ In trying to reach an accommodation, Hardison proposed that he work only four days a week.⁶¹ Nevertheless, TWA rejected this proposal because Hardison’s “job was essential and on weekends he was the only available person on his shift to perform it.”⁶² Furthermore, TWA argued:

[L]eav[ing] the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison’s position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.⁶³

An accommodation was not reached and Hardison was fired for insubordination as he refused to work the Saturday shifts.⁶⁴

The district court found for TWA, holding that “TWA had satisfied its ‘reasonable accommodations’ obligation, and any further accommodation would have worked an undue hardship on the company.”⁶⁵ The Eighth Circuit reversed, finding that moving a supervisor or other employee who was on duty elsewhere to cover Hardison’s shifts or paying premium overtime wages to an employee to pick up his shifts did not constitute undue hardship for TWA.⁶⁶ The Supreme Court, however, reversed the Eighth Circuit,

56. *Id.*

57. *Id.* at 68.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 68–69.

64. *Id.* at 69.

65. *Id.* at 70.

66. *Id.* at 70, 76.

stating that “[b]oth of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages. To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.”⁶⁷ Thus, the standard for undue hardship⁶⁸ was reduced to “de minimis” for religious accommodation cases, rendering the protections of § 701(j) essentially meaningless for religious employees.

In finding that TWA had made reasonable efforts to accommodate Hardison’s religion and that the above alternatives would have posed an undue hardship on TWA,⁶⁹ the Supreme Court relied on the findings made by the district court.⁷⁰ In particular, the Supreme Court stated that the district court had found that the costs of paying overtime to have another employee cover Hardison’s shift or not replacing him at all “would have created an undue burden on the conduct of TWA’s business.”⁷¹ However, as Justice Marshall pointed out in his dissent:

[T]he [district] court did not explain its understanding of the phrase “undue burden,” and may have believed that such a burden exists whenever any cost is incurred by the employer, no matter how slight. Thus the District Court’s assertion falls far short of a factual “finding” that the costs of these accommodations would be more than de minimis.⁷²

Justice Marshall further noted that the record did not have evidence of how much efficiency TWA would have lost from using a supervisor or other employee to cover Hardison’s Saturday shifts, and that the stipulations about overtime cost were “far from staggering” at \$150 total for the three months before Hardison could have transferred back to the other department.⁷³ The Supreme Court’s ready acceptance of the district court’s “findings” is representative of a trend in the religious accommodation doctrine case law in which courts, when determining whether an accommodation would cause an employer an undue hardship, accept the employer’s speculations about the costs associated with accommodation, rather than requiring the employer to make a real, concrete showing in support of those

67. *Id.* at 84.

68. See Bilal Zaheer, Note, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 514–19 (2007) (providing criticisms of this undue hardship standard because it does not fall in line with the plain meaning of the word and goes against the congressional intent behind § 701(j)).

69. *Hardison*, 432 U.S. at 77.

70. *Id.* at 77–78, 84 n.15.

71. *Id.* at 84 n.15.

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

73. *Id.*

costs.⁷⁴ Courts' readiness to accept this type of speculation by employers reflects the society-wide trivialization of religion—even speculative costs to employers are seen as outweighing an employee's religious beliefs.

The Supreme Court also focused on TWA's obligation to follow the collective-bargaining agreement and stay within the bounds of the seniority system.⁷⁵ In particular, the Court stated that "the [seniority] system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees," and that "the seniority system represent[ed] a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."⁷⁶ The Court's reasoning here is interesting because it fails to acknowledge the fact that § 701(j) was meant to accommodate the needs of religious employees, not the preferences of secular employees.⁷⁷ The Court further stated that accommodating Hardison and other religious employees who sought days off for religious observance would have been "at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends."⁷⁸ The Court took issue with the fact that accommodation meant that certain privileges, such as Saturdays off, would be "allocated according to religious beliefs."⁷⁹ By treating religious reasons for wanting Saturdays off, and strong, nonreligious reasons for wanting Saturdays off as equally important, the court trivializes religious beliefs by treating them as nothing more than preferences, rather than "the fundamentals upon which the devout build their lives."⁸⁰ The Court's language and its decision to set

74. Thomas D. Brierton, "Reasonable Accommodation" Under Title VII: Is It Reasonable to the Religious Employee?, 42 CATH. LAW. 165, 182 (2002) ("The courts have weakened reasonable accommodation rights in the workplace through a number of mechanisms. Since employers need only provide a reasonable accommodation to the extent of a de minimis cost, the courts have allowed employers to meet the threshold by presenting evidence of potential workplace disruption and imposition on co-worker rights. Both of these defenses permit the court to speculate as to the consequences of allowing the reasonable accommodation."). See also Sarah Abigail Wolkinson, Comment, *A Critical Historical and Legal Reappraisal of Bhatia v. Chevron U.S.A., Inc.: Judicial Emasculation of the Duty of Accommodation*, 12 U. PA. J. BUS. L. 1185, 1193 (2010) ("By establishing the weak evidentiary standard of de minimis for proving undue hardship, the Supreme Court set the stage for parallel decisions at the appellate and district court levels in which courts have essentially refused to accommodate religious employees on the basis of speculative considerations.").

75. *Hardison*, 432 U.S. at 79.

76. *Id.* at 78.

77. See 42 U.S.C. § 2000e(j) (2006).

78. *Hardison*, 432 U.S. at 81.

79. *Id.* at 85. The Court also stated, "to 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." *Id.* at 81.

80. CARTER, *supra* note 14, at 14.

such a low burden for employers under the undue hardship standard implies that religious employees should act “rationally” and base their lives around their work obligations, rather than around their beliefs. Furthermore, “[t]he de minimis standard sends the implicit message that religious beliefs and practices are of minimal value to the workplace” and allows courts to “interpret ‘reasonable’ from the perspective of the reasonable employer, instead of asking what would be reasonable to the religious employee under the same circumstances.”⁸¹

In his dissent, Justice Marshall contends that the majority has “deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices.”⁸² He elaborated further:

An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today’s result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.⁸³

Most importantly, in response to the Court’s point that the seniority system was a significant accommodation because it was neutral, thereby allowing all employees an equal opportunity to request days off regardless of their religious obligations, Justice Marshall pointed out:

[I]f 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.” The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee.⁸⁴

The majority’s reasoning appears to be that by refusing to grant religious employees an exception to the seniority system rules so that they may adhere to the requirements of their religion, all employees, both religious and nonreligious, are treated more fairly. However, as Justice Marshall explains, treating both groups the same in this manner renders § 701(j) meaningless because the only way § 701(j) provides protection to religious minorities is by treating the two groups differently—that is, by providing reli-

81. Brierton, *supra* note 74, at 192.

82. *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

83. *Id.* at 87.

84. *Id.*

gious minorities with an exception, or accommodation, to the neutral rules that apply to all employees. Rather than providing religious minorities with the protections to which they are entitled under § 701(j), the Court's reasoning reaffirms the status quo and marginalizes employees whose religious beliefs conflict with their employers' "neutral rule[s] of general applicability."⁸⁵

2. The Reasonable Accommodation Standard

In *Ansonia Board of Education v. Philbrook*,⁸⁶ the Supreme Court addressed the issue of reasonable accommodation under § 701(j), looking specifically at the issue of whether "an employer must accept the employee's preferred accommodation absent proof of undue hardship."⁸⁷ The Court held that employers are not required to implement any particular accommodation,⁸⁸ thereby further weakening religious employees' rights under § 701(j) of Title VII.

The plaintiff, Ronald Philbrook, had been employed by the Ansonia Board of Education as a high school teacher.⁸⁹ In 1968, six years after starting his employment with the school board, Philbrook joined the Worldwide Church of God, which "require[d] members to refrain from secular employment during designated holy days."⁹⁰ The school board's collective bargaining agreement with the Ansonia Federation of Teachers allowed for three days of annual leave for observances of religious holidays.⁹¹ The agreement also allowed teachers to use up to three days of accumulated leave for "necessary personal business."⁹² However, if the three days allowed for religious leave had already been used, the employee was not allowed to use the personal leave for religious reasons.⁹³ Teachers were allowed to take one of the personal days without prior approval, but needed the principal's advance approval for the other two days.⁹⁴

From 1968 up until the 1976 school year, Philbrook used the three days granted for the observance of holy days in his contract, but had to take unauthorized leave to observe the remaining holy days; the school board

85. *Id.*

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

87. *Id.* at 66.

88. *Id.* at 68.

89. *Id.* at 62.

90. *Id.*

91. *Id.* at 63–64.

92. *Id.* at 64.

93. *Id.*

94. *Id.*

reduced his pay accordingly.⁹⁵ In 1976, he started scheduling required hospital visits on his religious holidays rather than taking unauthorized leave for religious reasons and “also worked on several holy days.”⁹⁶ However, Philbrook was not satisfied with this arrangement and asked the school board to either allow him to use personal leave for religious observance (which would give him three additional days of paid leave) or “pay the cost of a substitute and receive full pay for additional days off for religious observances.”⁹⁷ The school board rejected both options.⁹⁸

The Second Circuit held that “where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer’s conduct of his business.”⁹⁹ The Supreme Court expressly overruled this, holding:

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. . . . [W]here 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.¹⁰⁰

The Court further stated that under the Second Circuit’s approach, “the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict.”¹⁰¹ In his dissent, Justice Marshall countered:

If the employer has offered a reasonable accommodation that *fully* resolves the conflict between the employee’s work and religious requirements, I agree that no further consideration of the employee’s proposals would normally be warranted. But if the accommodation offered by the employer does not completely resolve the employee’s conflict, I would hold that the employer remains under an obligation to consider whatever *reasonable* proposals the employee may submit.¹⁰²

95. *Id.*

96. *Id.*

97. *Id.* at 64–65.

98. *Id.* at 65.

99. *Id.* at 66 (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d. Cir. 1985)).

100. *Id.* at 68. The Court remanded on the issue of whether the school board’s leave policy was a reasonable accommodation, stating, “[w]e think that there are insufficient factual findings as to the manner in which the collective-bargaining agreements have been interpreted in order for us to make that judgment initially.” *Id.* at 70.

101. *Id.* at 69.

102. *Id.* at 72–73 (Marshall, J., dissenting).

Even though an employee is in the better position to know which, out of multiple reasonable accommodations, is best to resolve his or her religious conflict, the Court essentially gave employers the right to choose which accommodation to enact. Thus, the Court tipped the balance in favor of employers, once again reflecting the trivialization of religion by giving business interests precedence over religious beliefs. Furthermore, while Philbrook was asked to compromise his pay and not his religious beliefs, some lower courts have extended the reasoning of this case to require religious employees to compromise their beliefs,¹⁰³ trivializing religion even further.

The Supreme Court's decisions in *Hardison* and *Ansonia* trivialize religious employees' beliefs by treating those beliefs as choices and implying that the reasonable, rational employee should be willing to compromise those beliefs if they conflict with job duties. By interpreting "undue hardship" to mean anything more than a de minimis burden on the employer, the Supreme Court set a low standard for employers and went against the legislative intent behind § 701(j), which was to provide a more meaningful level of protection to religious employees.¹⁰⁴ The negative effect of this low standard is further compounded by the Court's decision in *Ansonia*, which gives deference to the employer, rather than the employee, in the final choice of accommodation. This deference to employers "take[s] the focus off helping the employee resolve the conflict," and instead puts it on "how to minimize the burden on the employer in resolving the conflict."¹⁰⁵

Consequently, although on its face, § 701(j) of Title VII may appear to provide extra protection to religious employees through its requirement that employers accommodate employees' religious practices, these protections are in fact very weak given the low, employer-friendly standards for choosing a reasonable accommodation and establishing an undue hardship. Thus, Title VII legitimizes discrimination against religious employees through

103. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 7, at 464. Kaminer points to a number of cases to support this point, including: *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285, 1286 (8th Cir. 1977) (pointing out the employee's "failure to try to accommodate his own religious beliefs," and that the employee did not "consider any sort of a compromise insofar as his religion was concerned"); *Johnson v. Halls Merchandising, Inc.*, 1989 WL 23201 (W.D. Mo. Jan. 17, 1989) ("plaintiff did not make any effort to . . . accommodate her beliefs to the legitimate and reasonable interests of her employer"); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008) (Title VII "requires accommodation by the employer, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice"). *Id.* at 467–68.

104. See *supra* notes 42–44 and accompanying text.

105. Blair, *supra* note 40, at 538.

the religious accommodation doctrine, which, rather than providing religious employees with any real protection, actually serves as a vehicle for employers to justify their non-accommodation of religious employees.

III. THE GROOMING CODES DOCTRINE

A. THE PERPETUATION OF DISCRIMINATION THROUGH GROOMING CODES' ENFORCED COVERING

The nature of discrimination in America has changed since the enactment of Title VII in the 1960s: it has moved from overt displays of discrimination to subtle manifestations of it. New York University Law School professor Kenji Yoshino describes this change and how it affects the protection of minorities' civil rights:

Discrimination was once aimed at entire groups, resulting in the exclusion of all racial minorities, women, gays, religious minorities and people with disabilities. A battery of civil rights laws—like the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990—sought to combat these forms of discrimination. The triumph of American civil rights is that such categorical exclusions by the state or employers are now relatively rare. Now a subtler form of discrimination has risen to take its place. This discrimination does not aim at groups as a whole. Rather, it aims at the subset of the group that refuses to cover, that is, to assimilate to dominant norms. And for the most part, existing civil rights laws do not protect individuals against such covering demands.¹⁰⁶

The “dominant norms” Yoshino refers to are based on “white, male, ostensibly straight, Protestant, and able-bodied” standards.¹⁰⁷ Yoshino uses “covering” to refer to the process by which individuals downplay certain identity traits to conform to dominant cultural norms.¹⁰⁸ The concept of covering was first developed by Sociologist Erving Goffman, who referred to certain identity, such as racial and religious identities, as “stigmas.”¹⁰⁹

106. Kenji Yoshino, *The Pressure to Cover*, N.Y. Times Magazine, Jan. 15, 2006, at 32 [hereinafter Yoshino, *Pressure to Cover*].

107. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 22 (2006).

108. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) [hereinafter Yoshino, *Covering*].

109. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 4 (1963). Goffman describes three different types of stigmas: “various physical deformities,” “blemishes of individual character,” and the “stigma of race, nation, and religion.” *Id.* Goffman explains:

In all of these various instances of stigma . . . the same sociological features are found: an individual who might have been received easily in ordinary social intercourse possesses a trait that can obtrude itself upon attention and turn those of us

Covering, which is a form of assimilation often seen in the workplace,¹¹⁰ is about the “obstrusiveness” of an individual’s stigma. That is, covering requires “that the individual modulate her conduct to make her difference easy for those around her to disattend her known stigmatized trait.”¹¹¹ For example, a gay couple might cover by “avoiding public displays of same-sex affection.”¹¹² Yoshino explains that while it is acceptable, and even expected, to see straight couples holding hands or kissing in public, “it is generally unacceptable for gay couples to engage in such forms of expression,” because gay couples who do so “are perceived to be flaunting their sexuality in an indecent way.”¹¹³

Yoshino argues that “racial minorities and women cover, and are asked to cover, all the time.”¹¹⁴ He points to examples provided by Business Consultant and Researcher John T. Molloy, who in his book *New Dress for Success*, advises minorities to cover if they want to be successful in their careers:

Molloy advises African-Americans to avoid “Afro hairstyles” and to wear “conservative pinstripe suits, preferably with vests, accompanied by all the establishment symbols, including the Ivy League tie.” He urges Latinos to “avoid pencil-line mustaches,” “any hair tonic that tends to give a greasy or shiny look to the hair,” “any articles of clothing that have Hispanic associations” and “anything that is very sharp or precise.”¹¹⁵

And while Molloy’s advice may be unsettling, Yoshino writes, Molloy is simply pointing out the fact that prejudice against minorities still

whom he meets away from him, breaking the claim that his other attributes have on us. He possesses a stigma, an undesired differentness from what we had anticipated.

Id. at 4–5.

110. Yoshino, *Covering*, *supra* note 108.

111. *Id.* at 837.

112. *Id.* at 843.

113. *Id.*

114. *Id.* at 779. Yoshino explains:

The African-American woman who stops wearing cornrows to succeed at work may be covering. The native Hawaiian broadcaster who mutes his accent to retain his broadcasting job may be covering. The Latino venireperson who denies knowledge of Spanish to remain on a jury may be covering. Women also cover. The woman who seeks to downplay her status as a mother or her pregnancy for fear of being penalized as an inauthentic worker may be covering. The female scholar who eschews feminist topics may be covering. The woman who strives to be as aggressive or tearless as the stereotypical man may be covering. In all these instances, the individual is not attempting to change or hide her identity. Nonetheless, she is assimilating by making a disfavored trait easy for others to disattend.

Id. at 779–80.

115. Yoshino, *Pressure to Cover*, *supra* note 106.

exists in today's society and that it would be foolish to believe that this prejudice does not permeate the workplace and affect employers' perceptions of minority employees:

Molloy is equally frank about why covering is required. The "model of success," he says, is "white, Anglo-Saxon and Protestant." Those who do not possess these traits "will elicit a negative response to some degree, regardless of whether that response is conscious or subconscious." Indeed, Molloy says racial minorities must go "somewhat overboard" to compensate for immutable differences from the white mainstream. After conducting research on African-American corporate grooming, Molloy reports that "blacks had not only to dress more conservatively but also more expensively than their white counterparts if they wanted to have an equal impact."¹¹⁶

Molloy, who titled this research report "Dress White," also found that African Americans had to "put their clothing together well, and to choose clothing that was finely tailored, because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites."¹¹⁷

While Molloy's advice is optional and no one has to follow it, minority employees often find that even if they do not want to cover, they may be forced to do so by their employers. One way in which the subtle discrimination of covering is perpetuated in the workplace is through employers' grooming and dress codes.¹¹⁸ Employers often have grooming and dress codes for their employees because these policies can "serve important business-related concerns," such as ensuring safety, boosting employee morale, and increasing productivity.¹¹⁹ However, grooming codes can be problematic when they try to force employees to cover and assimilate to the dominant cultural norms the codes reflect, leading to the marginalization of minorities who do not, cannot, or refuse to cover and conform to those norms.

116. *Id.*

117. JOHN T. MOLLOY, JOHN T. MOLLOY'S NEW DRESS FOR SUCCESS 233 (1988).

118. See Mark R. Bandsuch, S.J., *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 287 (2009) ("Extreme acts of employment discrimination have diminished, only to be replaced by more subtle forms of prejudice, such as the implementation of employee dress codes. Make-up requests, hair restrictions, and clothing requirements represent a small sampling of this 'second generation' of 'trait discrimination,' usually established under the guise of professionalism or maintenance of corporate image.").

119. Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 169 (2007).

The discrimination that accompanies “enforced covering”¹²⁰ is legitimized by courts when they allow employers to enforce their grooming policies against minorities without requiring employers to provide strong, legitimate reasons for doing so.¹²¹ One way in which courts justify their deference to employers’ grooming policies is by distinguishing between mutable and immutable characteristics—that is, “between being a member of a legally protected group and behavior associated with that group.”¹²² Thus, courts find that employers cannot refuse to hire a woman “for having two X chromosomes,”¹²³ but can fire her for wearing pantsuits in violation of her employer’s dress code.¹²⁴ Similarly, “African-Americans cannot be fired for their skin color, but they could be fired for wearing cornrows.”¹²⁵ Yoshino argues that “[t]his distinction between being and doing reflects a bias towards assimilation,” given that “courts will not protect mutable traits, because individuals can alter them to fade into the mainstream.”¹²⁶ And if these individuals choose not to alter them, as we will see from the cases discussed *infra* Part III.B, “they must suffer the consequences.”¹²⁷

B. GROOMING CODES CASE LAW

Although the focus of this note is on religion-based discrimination, the grooming codes doctrine does not apply solely to religious discrimination cases. In fact, the doctrine developed through sex and race discrimination cases. Thus, this section focuses on sex and race discrimination cases and how they set the precedent of courts deferring to employers’ grooming policies and making protection contingent on the immutable nature of the trait in question.

1. Sex and Grooming Codes

In the 1975 case *Willingham v. Macon Telegraph Publishing Co.*,¹²⁸ Alan Willingham brought suit under Title VII against Macon Telegraph for

120. Yoshino, *Covering*, *supra* note 108, at 875 (“[M] any of the forms of discrimination from which racial minorities remain unprotected today take the form of enforced covering.”).

121. Yoshino, *Pressure to Cover*, *supra* note 106 (“What’s frustrating about the employment discrimination jurisprudence is that courts often don’t force employers to answer the critical question of why they are requiring employees to cover.”).

122. *Id.*

123. *Id.*

124. *See infra* Part III.B.1.

125. Yoshino, *Pressure to Cover*, *supra* note 106. *See also infra* Part III.B.2.

126. Yoshino, *Pressure to Cover*, *supra* note 106.

127. *Id.*

128. *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975).

refusing to hire him because of the length of his hair, which did not comply with the company's grooming policy.¹²⁹ Willingham argued that Macon Telegraph discriminated "amongst employees based upon their sex, in that female employees [could] wear their hair any length they [chose], while males [had to] limit theirs to the length deemed acceptable by Macon Telegraph."¹³⁰

The Fifth Circuit outlined the framework for a Title VII sex discrimination case as a three-step inquiry: "(1) has there been some form of discrimination, i.e., different treatment of similarly situated individuals; (2) was the discrimination based on sex; and (3) if there has been sexual discrimination, is it within the purview of the bona fide occupational qualification (BFOQ) exception and thus lawful?"¹³¹ In ruling against Willingham, the court found that Macon Telegraph's decision to not hire men with long hair was "based not upon sex, but rather upon grooming standards, and thus [was] outside the proscription" of Title VII.¹³² The court explained that in order to provide equal employment opportunity, employers are prohibited from "discriminating against employees on the basis of immutable characteristics, such as race and national origin."¹³³ Therefore, employers are not allowed to have different hiring policies for men and women if "the distinction is based on some fundamental right."¹³⁴ However, the court also stated that "a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity."¹³⁵ Thus, the court explained that because "[h]air length is not immutable," it is not protected,¹³⁶ and the employer's choice of how to run his or her business takes precedence. The court concluded that if an "employee objects to [a] grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."¹³⁷

In the 1979 case *Lanigan v. Bartlett & Co. Grain*,¹³⁸ Data La Von Lanigan, a secretary in the executive office at Bartlett & Co. Grain, was

129. *Id.* at 1086–87.

130. *Id.* at 1088.

131. *Id.*

132. *Id.*

133. *Id.* at 1091.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979).

fired for failing to comply with the company's dress code prohibiting women from wearing pantsuits in the executive offices.¹³⁹ Lanigan brought suit under Title VII, alleging that this policy discriminated against women.¹⁴⁰ She conceded that, under the precedent of *Willingham* and other "haircut cases,"¹⁴¹ she would lose her claim because those cases were "unanimous in holding that nothing in Title VII prohibits an employer from making decisions based on factors such as grooming and dress."¹⁴² However, Lanigan argued that her case was distinguishable from the haircut cases, because in her case, by prohibiting women from wearing pants, the company was "perpetuat[ing] the stereotype that men are more capable than women of making business decisions."¹⁴³ Lanigan argued that this made her case a "sex-plus" case.¹⁴⁴ Sex-plus cases "rest[] on the theory that disparate treatment of a male or female subclass violates Title VII since the employer has added a factor for one sex that is not added to the other sex as a condition of employment."¹⁴⁵ In this case, the subclass was women wearing pants, who were "subject to discharge while women wearing skirts and men wearing pants [were] not subject to discharge."¹⁴⁶

The court stated that in the interest of trying to reconcile the haircut cases and the sex-plus cases, the sex-plus analysis is limited to employment policies which "discriminate on the basis of (1) immutable characteristics, (2) characteristics which are changeable but which involve fundamental rights (such as having children or getting married), and (3) characteristics which are changeable but which significantly affect employment opportunities afforded to one sex."¹⁴⁷ Based on these criteria, the court ruled against Lanigan, finding:

Plaintiff does not contend that she is unable to wear clothes other than pantsuits or that she is in any way physically unable to comply with the dress

139. *Id.* at 1389–90.

140. *Id.* at 1389.

141. The court specifically cites to a number of these other "haircut cases." *Id.* at 1390. *See, e.g.,* Knott v. Missouri Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975); Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

142. *Lanigan*, 466 F. Supp. at 1390.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1391.

code. In other words, plaintiff's affection for pantsuits is not an "immutable characteristic." Plaintiff does not contend that she has a "fundamental right" to wear pantsuits to work. Plaintiff does contend that the dress code significantly affects employment opportunities because it perpetuates "a sexist, chauvinistic attitude in employment."¹⁴⁸

However, the court dismissed Lanigan's argument as "simply a matter of opinion,"¹⁴⁹ stating:

The decision to project a certain image as one aspect of company policy is the employer's prerogative which employees may accept or reject. If they choose to reject the policy, they are subject to such sanctions as deemed appropriate by the company. An employer is simply not required to account for personal preferences with respect to dress and grooming standards.¹⁵⁰

Thus, the precedence of deference to employers' grooming policies was once again affirmed, as was employers' ability to discriminate on the basis of mutable characteristics.

2. Race and Grooming Codes

Rogers v. American Airlines is often cited when analyzing the adverse effect of grooming codes on minorities.¹⁵¹ This 1981 case was based on American Airlines's grooming policy, which prohibited "employees in certain employment categories from wearing an all-braided hairstyle."¹⁵² The plaintiff, Renee Rogers, was an African American woman who worked at American Airlines and brought a discrimination suit against the company for not allowing her to wear her hair in cornrows.¹⁵³ In support of her argument, she asserted that cornrows have "special significance for black women" because they have historically been "a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."¹⁵⁴

In ruling against Rogers, the court stated that "the grooming policy applies equally to members of all races, and plaintiff does not allege that an all-braided hair style is worn exclusively or even predominantly by black people."¹⁵⁵ Although a grooming policy that prohibited an "Afro/bush" hairstyle might violate Title VII, the policy at issue in this case, which pro-

148. *Id.*

149. *Id.* at 1392.

150. *Id.*

151. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

152. *Id.* at 231.

153. *Id.*

154. *Id.* at 231-32.

155. *Id.* at 232.

hibited an “all-braided hair style,” was a “different matter.”¹⁵⁶ The court pointed out that banning an “Afro/bush” hairstyle would be “banning a natural hairstyle” and “would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.”¹⁵⁷ An all-braided hairstyle, on the other hand, “is not the product of natural hair growth but of artifice,” an “easily changed characteristic.”¹⁵⁸ Thus, even if this hairstyle is “socioculturally associated with a particular race or nationality, [it] is not an impermissible basis for distinctions in the application of employment practices by an employer.”¹⁵⁹

The assimilation bias that stems from distinguishing between mutable and immutable traits in granting Title VII protection that was seen in the sex grooming codes cases is also prevalent in *Rogers*.¹⁶⁰ The court states that “this type of regulation has at most a negligible effect on employment opportunity” because it “does not regulate on the basis of any immutable characteristic of the employees involved.”¹⁶¹ The court downplayed the negative effect of this regulation on the employment opportunities of African American women by implying that Rogers could, if she chose, change her hairstyle and retain her job. As Yoshino points out:

In the dialogue between American [Airlines] and Rogers, cornrows become a symbol of resistance to assimilation, and therefore a symbol of insubordination. The individual wearing them is “seen as having the stereotypical characteristics commonly associated with black will and willpower—undisciplined, insubordinate, unwilling to melt.” Rogers’s hair must thus be understood not as a simple attribute but rather as a site of racial contest.¹⁶²

In addition to reflecting assimilation bias, the court’s approval of American Airlines’s grooming policy also demonstrates the deference given to employers in establishing and enforcing their grooming policies. Although the court did not discuss the issue of whether American Airlines’s policy could be justified as a bona fide business qualification, it implied

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. For example, in *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), the implication was that if Willingham really wanted the job, he should assimilate to the dominant culture and cut his hair, while in *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979), the implication was that if Lanigan wanted to keep her job, she should conform to gender norms and wear a skirt suit rather than a pantsuit.

161. *Rogers*, 527 F. Supp. at 231.

162. Yoshino, *Covering*, *supra* note 108, at 896.

that if that issue had been reached, the policy would have been upheld.¹⁶³ The court essentially “gave more importance to American Airline’s [sic] business interests than the adverse effects of the policy on African American women.”¹⁶⁴ As Yoshino points out, when reading this case, “one can hear American Airlines and the court asking Rogers: ‘Why is this so important to you?’ To which it seems Rogers could fairly have responded: ‘Why is this so important to you?’”¹⁶⁵ Thus, by “[f]ocusing on the ease of compliance with the employer’s policy, the court failed to acknowledge the impact and message that compliance sends to affected employees”—that certain appearances and racial groups are preferred over others,¹⁶⁶ and that it is legitimate to make Rogers’s livelihood contingent upon her ability to cover and conform to cultural norms.

IV. THE CASE FOR SIKHS: THE INTERSECTION OF THE RELIGIOUS ACCOMMODATION AND GROOMING CODES DOCTRINES

A. WHO ARE SIKHS?

Sikhism is the fifth-largest organized religion in the world, with a following of approximately twenty-five million people worldwide, and at least 500,000 people in the United States.¹⁶⁷ The Sikh religion was founded in Punjab, India; thus, most Sikhs in America are of Indian origin.¹⁶⁸

A major tenet of the Sikh religion is the prescription against cutting one’s hair,¹⁶⁹ including beards. Because Sikhs’ uncut hair can grow very long, they wear turbans to protect it.¹⁷⁰ Given their unique appearance,

163. “[P]laintiff does not dispute defendant’s assertion that the policy was adopted in order to help American project a conservative and business-like image, a consideration recognized as a bona fide business purpose.” *Rogers*, 527 F. Supp. at 233.

164. Mahajan, *supra* note 119, at 184.

165. Yoshino, *Covering*, *supra* note 108, at 896.

166. Mahajan, *supra* note 119, at 184.

167. Muninder K. Ahluwalia & Laura Pellettiere, *Sikh Men Post-9/11: Misidentification, Discrimination, and Coping*, 1 ASIAN AM. J. PSYCHOL. 303, 304 (2010).

168. Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to This Article of Faith*, 9 RUTGERS J.L. & RELIGION 10, *8 (2008).

169. *See id.* at *12–14.

170. *Id.* “Although some Sikh women wear turbans to cover their hair, many choose not to. Generally, in the United States, female converts to Sikhism often wear turbans, while South Asian Sikh women tend to opt for a thin chiffon scarf, or *chhuni*, to cover their hair.” *Id.* at *15. In addition to keeping unshorn hair tidy, there are a number of different theories on why the turban is a key article of faith for Sikhs, including: it signifies equality, as it is “not reserved for the aristocracy or social elite, as it had been before” in India; it allows Sikhs to be easily identifiable, making “every member of the faith an ambassador of Sikh-

Sikhs have faced discrimination since they first immigrated to America in the early twentieth century.¹⁷¹ Unfortunately, however, the discrimination against Sikhs has escalated since the terrorist attacks of September 11, 2001 (“9/11”), and is especially egregious because Sikhs are often mistaken for terrorists, given the media’s frequent depiction of terrorists as bearded and turbaned men.¹⁷² This has led to an incredible number of hate crimes and verbal and physical attacks against Sikhs, including murder.¹⁷³ The U.S. Department of Justice states that since 9/11, over 800 incidents “in-

ism”; and, it is “an indication of the wearer’s commitment to Sikhism, general discipline, and willpower to wear the turban in the face of persecution.” *Id.* at *13–14.

171. See JOAN M. JENSON, *PASSAGE FROM INDIA: ASIAN INDIAN IMMIGRANTS IN NORTH AMERICA* 44–45 (1988) (“Perhaps the most important physical characteristic that helped exclusionists focus hostility on Indians was the turban. . . . Some Indians, in fact, found that they could discard their turbans and pass as southern Italians or Portuguese. But for Sikhs and other men trying to maintain their religious and cultural identity, the turban was an essential symbol. They would not abandon it. Much of the animosity thus came to be focused on the turban and on a cluster of complaints about cultural patterns that exclusionists associated with the turban.”); Jasmine K. Singh, “*Everything I’m Not Made Me Everything I Am*”: *The Racialization of Sikhs in the United States*, 14 *UCLA ASIAN PAC. AM. L.J.* 54, 64–65 (2008) (Sikhs’ “growing prominence came to be resented and others termed their immigration the ‘Hindoo Invasion’ or the ‘Tide of Turbans.’”).

172. Following 9/11, “the media has consistently and repeatedly displayed images of suspected terrorists—people with ‘Islamic-sounding’ names, those who ‘appear’ Muslim, and men who wear turbans.” Ahluwalia & Pelletiere, *supra* note 167, at 303.

173. *Id.* at 304. See also Gohil & Sidhu, *supra* note 168, at *23–24 (“On September 15, 2001, Balbir Singh Sodhi, a turbaned Sikh who owned a gas station in Mesa, Arizona, went to Costco to purchase an American flag and donated \$75 to a fund established for the families of victims of the 9/11 attacks. Upon returning to his gas station, Sodhi began attending to his landscaping outside of the gas station when Frank Roque drove by and fired five shots. Sodhi died at the scene. With his death, Sodhi became ‘the first murder victim of the 9/11-related hate crime backlash in America.’ After shooting Sodhi, Roque visited a nearby sports bar where he announced, ‘They’re investigating the murder of a turban-head down the street.’ On the day charges were filed against Roque, Maricopa County Attorney Rick Romney noted, ‘Sodhi was apparently killed for no other reason than because he was dark-skinned, bearded, and wore a turban.’ At trial, Roque’s co-worker at Boeing testified that Roque said he wanted to shoot some ‘ragheads.’”). Similarly, on March 4, 2011, two elderly Sikh men who lived in Elk Grove, California, were shot while out on a walk. Robert Lewis, *Attack on Two Sikh Men Seen as Possible Hate Crime*, *SACRAMENTO BEE*, March 6, 2011, at A1, available at <http://www.sacbee.com/2011/03/06/3453199/attack-on-two-sikh-men-seen-as.html>. While the police are still investigating the case, it seems likely that this was a hate crime. See *id.* Police say they do not know why someone would have shot the two men, who are described as “frail from heart attacks and advancing years.” *Id.* Elk Grove’s police chief stated: “We have no evidence to indicate there was a hate or bias motivation for this crime; however, the obvious Sikh appearance of the men, including the traditional Dastar [turban] headwear and lack of any other apparent motive, increasingly raise that possibility.” *Id.* Children are also subject to such attacks. For example, in 2008, a high school student set fire to a Sikh boy’s *patka*, which is the equivalent of a turban for young Sikh boys, while at the school. *Sikh Boy’s Turban Set on Fire at School*, *THE SIKH COALITION* (May 12, 2008), <http://www.sikhcoalition.org/advisories/NJTurbanFire.htm>.

volving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin” have been investigated by the Civil Rights Division of the U.S. Department of Justice, the Federal Bureau of Investigation, and the United States Attorney’s offices.¹⁷⁴

In addition to having to deal with harassment,¹⁷⁵ violence,¹⁷⁶ denial of entry into public places,¹⁷⁷ and profiling,¹⁷⁸ Sikhs also face discrimination in the workplace.¹⁷⁹ While the overt discrimination Sikhs face can be physically and emotionally damaging,¹⁸⁰ Sikhs are harmed more by the subtle

174. *Initiative to Combat Post-9/11 Discriminatory Backlash*, U.S. DEP’T JUST., <http://www.justice.gov/crt/legalinfo/discrimupdate.php> (last visited Oct. 4, 2011). And even though over ten years have now passed since 9/11, Sikhs continue to be victims of hate crimes. For example, on February 28, 2012, a Sikh family living in Sterling, Virginia, “received a letter containing death threats addressed to ‘Turban Family.’” *Sikh American Family Receives Death Threat*, SALDEF (March 2, 2012), <http://www.saldef.org/news/sikh-american-family-received-death-threat/#more-6872>. The letter states: “Our People in the neighborhood have been closely watching your activities and figured out you are a close associate of a secret Taliban movement on the US Soil. We ask you to leave the country as soon as possible otherwise one of our people is going to shoot you dead. Don’t attempt to relocate somewhere else in America as people are closely monitoring your day to day activities.” *Id.*

175. See Gohil & Sidhu, *supra* note 168, at *20–22 (outlining incidents of harassment faced by Sikhs post-9/11, including being called names such as “bin Laden,” “terrorist,” “raghead,” and “towelhead”; being told to return to “turbanland”; and being physically attacked).

176. *Id.* at *23 (“A database created on 9/11 by the Sikh civil rights organization, the Sikh Coalition, contains twenty-two reported cases of bias incidents against Sikhs on that day alone. In the first week following 9/11, 645 bias crimes were directed at those perceived to be Middle Eastern. In the first eight weeks after 9/11, over 1000 bias incidents were reported, including nearly nineteen murders, assaults, harassment, and acts of vandalism.”).

177. See *id.* at *27–28 (outlining incidents of Sikhs being denied entry into public places).

178. See *id.* at *35–36 (outlining incidents of Sikhs being racially profiled).

179. See *id.* at *28–35 (outlining incidents of Sikhs facing employment discrimination). The EEOC’s statistics for charge receipts filed under Title VII for religion-based discrimination show that the number increased from 1939 receipts in 2000 to 3790 in 2010. *Religion Based Charges: FY 1997–FY 2010*, U.S. EQUAL OPPORTUNITY EMP’T COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Oct. 6, 2011).

180. A case brought by the EEOC in September 2010 on behalf of Frank Mahoney-Burroughs, a Sikh, is illustrative of the type of overt discrimination many Sikhs face. Mahoney-Burroughs worked at an AutoZone store in Everett, Massachusetts, where he was treated just like all the other employees until he converted to Sikhism and started wearing a turban. Whitney Jones, *EEOC Charges Auto Store With Harassing Sikh Employee*, HUFFPOST RELIGION, May 25, 2011, http://www.huffingtonpost.com/2010/09/29/eeoc-charges-auto-store-w_n_744633.html. It was then that he was asked by his manager “if he was a terrorist and had joined Al-Qaeda and whether he intended to blow up the store.” *Press Release: EEOC Sues AutoZone for Discriminating Against Sikh Employee*, U.S. EQUAL OP-

discrimination they experience when their unwillingness to comply with an employer's grooming codes leads to an adverse employment action against them. A case recently brought by the EEOC on behalf of Gurpreet S. Kherha, a Sikh, is illustrative of this point. The case was brought against Tri-County Lexus, a dealership in Little Falls, New Jersey, for not hiring Kherha for a sales position because he refused to shave his beard.¹⁸¹ Kherha, who had "substantial sales and other business experience," applied for a sales associate position with Tri-County Lexus in February 2008.¹⁸² He had a successful interview with Tri-County's recruiter and participated in a multi-day training for the position, at which he was "publicly praised for his performance on training tasks given to the applicants."¹⁸³ However, Tri-County had a grooming policy that "prohibit[ed] men from wearing beards and having hair longer than collar length."¹⁸⁴ This policy "[did] not provide for any reasonable accommodation,"¹⁸⁵ as required by Title VII. When the recruiter asked Kherha if he would shave his beard so as to be in compliance with the grooming policy, Kherha informed the recruiter that "he could not do so because this would violate his religious beliefs."¹⁸⁶ Despite his qualifications, Kherha did not get the job because of his unwillingness to shave his beard.¹⁸⁷

OPPORTUNITY EMP'T COMM'N (Sept. 28, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/9-28-10c.cfm>. Furthermore, AutoZone "refused to let Mahoney-Burroughs wear a turban and kara," a religious bracelet worn by Sikhs. *Id.* AutoZone eventually fired Mahoney-Burroughs "because of his religion and in retaliation for complaining about discrimination." *Id.* Mahoney-Burroughs's experience also highlights how Sikhs' religious beliefs are trivialized, as he explained that the AutoZone staff "made [him] feel as though [he] had no right to practice [his] faith." Whitney Jones, *EEOC Charges Auto Store with Harassing Sikh Employee*, HUFFPOST RELIGION, May 25, 2011, http://www.huffingtonpost.com/2010/09/29/eeoc-charges-auto-store-w_n_744633.html.

181. *Press Release: EEOC Sues Tri-County Lexus for Religious Discrimination*, U.S. EQUAL OPPORTUNITY EMP'T COMM'N (Sept. 28, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/9-28-10h.cfm>.

182. Complaint and Jury Trial ¶ 8(a) EEOC v. United Galaxy, Inc (Sept. 28, 2010), *available at* https://salsa.wiredforchange.com/o/1607/images/EEOCvUnitedGalaxyComplaint_20100928.pdf.

183. *Id.* ¶ 8(c).

184. *Id.* ¶ 8(e).

185. *Id.*

186. *Id.* ¶ 8(f).

187. *Id.* ¶ 8(f). "At least four other individuals who participated in the training session with Kherha, none of whom wore beards for religious reasons, were hired at the same time by Defendant." *Id.*

Although no one at Tri-County Lexus maliciously or intentionally discriminated against Kherha, he was still denied employment because of his adherence to his religious beliefs; or in other words, because he refused to cover and assimilate to dominant cultural norms by shaving. In fact, many Sikhs have turned to their faith to help them deal with the harassment and discrimination they have face post-9/11.¹⁸⁸ Unfortunately, as demonstrated in Part IV.B, Sikhs who refuse to cover are marginalized by the employer-friendly standards of the reasonable accommodation and grooming codes doctrines because these doctrines make it extremely difficult for Sikhs¹⁸⁹ to prevail on their Title VII claims given that courts impute their own beliefs about the importance and mutability of religion into the analysis.

B. RELIGIOUS ACCOMMODATION AND GROOMING CODES CASE LAW ON SIKHS

1. *EEOC v. Sambo's of Georgia*¹⁹⁰

EEOC v. Sambo's of Georgia, a 1981 Georgia district court case, is representative of the ways in which the low standard for establishing undue hardship, as set forth by *Hardison*,¹⁹¹ legitimizes the discrimination Sikhs face when their religious beliefs prevent them from complying with an employer's grooming code.

This case was brought by the EEOC on behalf of Mohan Singh Tucker, a Sikh who had applied for, and was denied, a job as a manager at Sambo's Restaurants, Inc.¹⁹² In January 1979, in response to a newspaper advertisement, Tucker applied for a restaurant manager position at Sambo's Restaurants.¹⁹³ When Tucker gave his application to the regional recruiter, she told him that if he was accepted as a restaurant manager trainee, he would have to shave his beard per the company's grooming standards.¹⁹⁴

188. Ahluwalia & Pelletiere, *supra* note 167, at 310. The authors found that participants "relied on religion to help them overcome the obstacles they encounter through teachings, prayers, and principles of Sikhism." *Id.*

189. There are a number of other minority religions whose followers are also marginalized by the employer-friendly standards of these two doctrines, including Muslim and Jewish employees who may also be required to keep a beard. Wolkinson, *supra* note 74, at 1187–88. However, "[u]nlike Judaism and Islam that may recognize different levels of practice and observance, the rejection of the physical principles of Sikhism, which include the wearing of a turban and unshorn hair, signifies a repudiation of the faith." *Id.* at 1188.

190. *EEOC v. Sambo's of Ga., Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981).

191. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). See discussion *supra* Part II.C.

192. *Sambo's*, 530 F. Supp. at 87–88.

193. *Id.* at 88.

194. *Id.*

When Tucker told her that his religion forbade shaving facial hair, the recruiter told Tucker “that no exception from the grooming standards could be made on the basis of his religion, and that his application would be denied for that reason.”¹⁹⁵

The EEOC argued that Sambo’s had failed to reasonably accommodate Tucker’s religious practices.¹⁹⁶ The court disagreed, holding:

[T]he defendants could not have accommodated Mr. Tucker’s practices without “undue hardship,” as that term has been defined by the United States Supreme Court. Under the decision of the Supreme Court in *TWA v. Hardison* . . . undue hardship is present when the employer cannot make an accommodation without incurring a more than de minimis cost.¹⁹⁷

The court specifically pointed out that in *Hardison*, “undue hardship [was] found where [the] employer would have incurred a cost of \$150.00 in premium wages for a period of three months to arrange substitutes for [an] employee who could not work on Saturday because of his religion.”¹⁹⁸ Although in *Hardison*, the court implied that in addition to the \$150 cost, there was also the cost of unraveling the seniority system,¹⁹⁹ this court seized on the \$150 figure and used it as a benchmark to determine the meaning of “de minimis cost,” thereby valuing \$150 more than Tucker’s religious beliefs. The court further supported its holding that accommodating Tucker by relaxing Sambo’s grooming standards would have imposed an undue hardship on Sambo’s by finding the following facts: relaxing the grooming standards would (1) “adversely affect Sambo’s public image and the operation of the affected restaurant or restaurants as a consequence of offending certain customers and diminishing the ‘clean cut’ image of the restaurant and its personnel”²⁰⁰; (2) “impose on Sambo’s a risk of noncompliance with sanitation regulations that is avoided under the current policy”²⁰¹; and (3) “make more difficult the enforcement of grooming standards as to other restaurant employees and the maintenance of employee morale and efficiency.”²⁰²

To support its finding that accommodating Tucker would cause Sambo’s undue hardship because it would hurt the restaurant’s public image,

195. *Id.*

196. *Id.* at 90.

197. *Id.* at 90–91.

198. *Id.* at 91.

199. *See supra* notes 75–79 and accompanying text.

200. *Sambo’s*, 530 F. Supp. at 90.

201. *Id.*

202. *Id.*

the court pointed out that Sambo's required that its restaurant managers "not wear beards, long mustaches, or headwear because the wearing of a beard, a long mustache, or headwear does not comply with the public image that Sambo's has built up over the years."²⁰³ The court further stated that these grooming standards were common in the restaurant industry and were "based on management's perception and experience that a significant segment of the consuming public (in the market aimed at and served by Sambo's) prefer [sic] restaurants whose managers and employees are clean-shaven" and that this perception is "based on years of experience in the restaurant business."²⁰⁴ The court explained that customers' adverse reaction to beards can be attributed to the following factors: customers' "simple aversion to, or discomfort in dealing with, bearded people"²⁰⁵; the "concern that beards are unsanitary or conducive to unsanitary conditions"²⁰⁶; and, the "concern that a restaurant operated by a bearded manager might be lax in maintaining its standards as to cleanliness and hygiene in other regards."²⁰⁷ Finally, the court concluded that requiring "clean-shavenness" is typical among restaurants geared toward families and "is essential to attracting and holding customers in that market."²⁰⁸

By according customer preference more importance than Tucker's religious beliefs, the court trivializes Sikhism and legitimizes Sambo's discrimination against Tucker. The court's analysis is tainted by assimilation bias: it gives significant weight to the norms of the restaurant industry, which reflect the broader cultural norms of society, and makes Tucker's employment contingent on his willingness to cover and conform to those norms. The court's deference to Sambo's decision to enforce its grooming policy against Tucker is reminiscent of the reasoning in the grooming codes cases discussed above,²⁰⁹ in which the courts directly stated that employees who did not conform to their employers' grooming codes had two choices: either change their appearance and adhere to the policy, or look elsewhere for employment. The difference, however, is that in those cases, the courts explicitly justified their reasoning by distinguishing between mutable and

203. *Id.* at 89.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* The EEOC had argued that customer preference was an insufficient justification. *Id.* at 91. The court disagreed, stating "it is not the law that customer preference is an insufficient justification as a matter of law" and stated that "clean-shavenness is a bona fide occupational qualification for a manager of a restaurant." *Id.*

209. *See supra* Part III.B.

immutable traits and holding that for the statuses of race and sex, Title VII only protects immutable traits.²¹⁰ In *Sambo's*, on the other hand, the court does not explicitly discuss whether Tucker's religion is a mutable characteristic. Nonetheless, the court's trivialization of Tucker's religious beliefs and emphasis on the importance of adhering to the norm of being clean-shaven imply that the court viewed Tucker's religion to be a mutable characteristic, and therefore not deserving of protection under Title VII. This is problematic because although there is much debate about the issue of religion's mutability and whether it is a conduct or a status,²¹¹ this distinction does not matter for the purposes of § 701(j) analysis because the statute erased the difference between the two so that both status and conduct are protected.²¹² Thus, the court's reasoning, which reflects assimilation bias through its trivialization of religion and implied treatment of religion as a mutable characteristic, legitimizes *Sambo's* discrimination policy against Tucker.

Furthermore, the employer-friendly standard of undue hardship allowed the court to give considerable weight to *Sambo's* speculative evidence regarding the negative effect of Tucker's beard on the restaurant's business. The court's finding that the restaurant's business would be negatively affected if the restaurant hired a manager with a beard is based solely on "management's perception and experience," rather than any concrete evidence, and is reminiscent of the majority's ready acceptance of the district court's unsubstantiated findings regarding undue hardship in *Harrison*.²¹³ Courts' reliance on speculative evidence in finding for employers on the undue hardship issue is problematic because it prevents Sikhs from succeeding on meritorious religious discrimination claims and weakens the protections of all religious minorities, when in fact, the religious accommodation doctrine was meant to strengthen those protections.

Regarding the finding that relaxing the grooming standards might cause *Sambo's* to violate sanitation regulations, the court stated that "[i]t is beyond question that sanitation is a legitimate concern in the food service industry."²¹⁴ As evidence, the court pointed to the Georgia Department of Human Resources's "Guidelines for Effective Hair Restraints," which were used by the officials who conducted food sanitation surveys and stated that

210. *See id.*

211. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 7, at 457. ("Some courts and commentators simply presume that religion—both belief and conduct—is a mutable characteristic.")

212. *Id.* at 455.

213. *See supra* notes 69–74 and accompanying text.

214. *Sambo's*, 530 F. Supp. at 89.

“[e]xcessive growth of facial hair shall be considered a violation of the food service rules and regulations and will be debited on official surveys.”²¹⁵ The court explained that rather than risk opening itself up to claims related to its sanitation policies by allowing employees to have facial hair, the decision by Sambo’s to remove “the risk of noncompliance in this regard by simply forbidding facial hair” was “reasonable and justifiable.”²¹⁶

The argument that Sikhs’ beards may cause their employers to violate sanitation policies is hard for Sikhs to overcome because it does have merit. The inquiry, however, should not end when the employer simply states that a Sikh employee’s beard could cause the employer to violate sanitation regulations, as was done in *Sambo’s*. Employers should determine whether having a beard would actually violate the sanitation policies and whether an accommodation can be made, such as allowing the employees to cover their beards with hairnets. While it is “reasonable and justifiable”²¹⁷ that employers forbid facial hair in order to comply with sanitation policies, this should not be a sufficient justification for employers failing to affirmatively make an effort to accommodate a religious employee who is mandated to keep a beard. If an effort is made to try to find an accommodation and a reasonable one cannot be made without causing undue hardship, the employer is not required to do anything further.²¹⁸ At the very least, however, courts should adhere to the spirit of the legislative intent behind § 701(j)²¹⁹ and hold employers to their obligation to try to find an accommodation before making religious employees’ employment prospects contingent on their willingness to cover.

The *Sambo’s* court did not provide much factual support for its finding that relaxing the grooming policy for Tucker would make it difficult for the restaurant to enforce its policy with other employees and maintain employee morale and efficiency. It simply pointed out that Sambo’s used this grooming policy at all of its 1100 restaurants and that it had “consistently and uniformly, over the years, enforced its grooming policy.”²²⁰ The fact that the court did not provide any other evidence regarding this point once again illustrates how courts’ reliance on speculative evidence weakens pro-

215. *Id.* at 90.

216. *Id.*

217. *Id.*

218. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313–15 (4th Cir. 2008).

219. *See supra* notes 42–44 and accompanying text.

220. *Sambo’s*, 530 F. Supp. at 89.

tections for religious employees under § 701(j) and tips the balance greatly in favor of employers.

2. *Bhatia v. Chevron U.S.A., Inc.*²²¹

In the 1984 Ninth Circuit case, *Bhatia v. Chevron U.S.A., Inc.*, Manjit Singh Bhatia, a Sikh, brought suit against Chevron for failing to accommodate his religious practices.²²² In 1982, Chevron adopted a safety policy that “required all employees whose duties involved potential exposure to toxic gases to shave any facial hair that prevented them from achieving a gas-tight face seal when wearing a respirator.”²²³ The policy was designed to comply with California’s Occupational Safety and Health Administration’s standards (“Cal/OSHA”).²²⁴ Chevron enforced the policy against all machinists, even though “[n]ot all machinists perform[ed] tasks requiring the use of respirators.”²²⁵ However, because machinists’ assignment to particular tasks was unpredictable, “Chevron require[d] each machinist to be able to use a respirator safely” and “terminated three employees for refusing to shave.”²²⁶

Bhatia told Chevron that he would not be able to comply with the new safety policy because his religion forbade shaving facial hair.²²⁷ Chevron suspended Bhatia for six weeks without pay while it looked for a position that did not require the use of a respirator and to which Bhatia could transfer.²²⁸ Chevron was unable to find a position that did not require the use of a respirator and paid as much as the machinist job, so it offered Bhatia three lower-paying clerical positions.²²⁹ Bhatia turned down the jobs and asked to “resume work as a machinist, noting that in the years he had held

221. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984).

222. *Id.* at 1382–84.

223. *Id.* at 1383.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* Although *Bhatia* is a 1984 case, Sikhs still face the hurdle of trying to reach an accommodation with employers who require respirators. *See e.g.*, Mark Matthews, *Sikh Settles Discrimination Lawsuit with State Over Beard*, ABC 7 NEWS (Oct. 27, 2011), <http://abclocal.go.com/kgo/story?section=news/state&id=8408701> (Sikh man denied position as prison guard by California for refusing to shave his beard, citing inability to wear respirator as the justification); *Sikh American Paramedic Sues Hospital for Discrimination*, SALDEF (May 12, 2011), <http://www.saldef.org/blog/sikh-american-paramedic-files-workplace-discrimination-suit-against-espanola-hospital> (employer denied, without justification, Sikh employee’s offer to wear larger respirator that covered his facial hair).

229. *Bhatia*, 734 F.2d. at 1383.

the position, he had not been required to use a respirator.”²³⁰ Chevron “of-fered Bhatia a janitorial position that paid 17% less than a machinist’s wage,” which Bhatia also turned down.²³¹ “Chevron asked Bhatia to recon-sider, and promised to return him to a machinist position if respiratory equipment were [sic] developed that could be used safely with a beard. Bhatia initially refused to take the position unless Chevron could guarantee his return to a machinist position within six months.”²³² Chevron refused to make such a guarantee, so Bhatia accepted the transfer.²³³

Bhatia argued that Chevron’s actions were “insufficient to constitute reasonable accommodation because Chevron rejected the option of retain-ing him in a machinist position.”²³⁴ The Ninth Circuit disagreed, pointing to the following facts: although Bhatia had been suspended without pay for refusing to shave, the consequences for other employees who refused were much worse because they were terminated; Chevron had offered Bhatia four different positions; and Chevron had promised to allow Bhatia to re-turn as a machinist if a respirator that was safe for him to use became avail-able.²³⁵ Furthermore, the court held that “retaining Bhatia as a machinist unable to use a respirator safely would cause undue hardship” because the cost to Chevron would be more than *de minimis*.²³⁶ The court supported its holding by pointing out that if Chevron retained Bhatia, it risked violating the Cal/OSHA standards by possibly exposing Bhatia to toxic gases.²³⁷ On the other hand, the court stated, if Chevron “retained him as a machinist and directed his supervisors to assign Bhatia to only such duties as in-volved no exposure to toxic gas, the burden would be twofold”: (1) Chev-ron would have to revise how it assigned work to take into account whether assignments involved toxic gas exposure and (2) other workers would have to take Bhatia’s share of potentially hazardous assignments.²³⁸ The court concluded that “Title VII does not require Chevron to go so far.”²³⁹

Although the court did not cite *Ansonia*, the court’s analysis is reflec-tive of the precedent set by that case—namely, that once an employer of-

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 1383–84.

237. *Id.* at 1384.

238. *Id.*

239. *Id.*

fers an accommodation that is reasonable, the inquiry comes to an end.²⁴⁰ Here, the court pointed to the fact that Bhatia had been offered four different positions, implying that Bhatia was not justified in wanting to find an accommodation that fit his needs by allowing him to keep the job in which he had been working for years and adhere to the requirements of his religion.²⁴¹

Even though in many circumstances the accommodations that Chevron offered probably would have been sufficient because there simply would not have been any other way to accommodate a Sikh employee, Thomas D. Brierton, Associate Professor of Law at the University of the Pacific's Eberhardt School of Business, argues that "a close inspection of Cal/OSHA's investigation and review of Bhatia's situation reveals that Chevron's respiratory protection policy was overly broad and that Bhatia's ultimate removal as a machinist was not necessary."²⁴² For example, in a letter between Chevron and Art Carter, the chief of Cal/OSHA, Carter explained that after reviewing Chevron's policy, "there was confusion as to whether the company's policy was absolutely necessary under Cal/OSHA."²⁴³ In fact, "Chief Carter offered [Chevron] the Division's assistance in finding an alternative for those employees who had 'only a remote possibility of encountering an emergency situation . . . requiring respiratory protection.'"²⁴⁴ Furthermore, in a letter to a California assemblyman and Governor Edmund G. Brown, Jr., Carter wrote:

I personally believe that Chevron management, for reasons that relate more to a desire to keep strict control over management prerogatives relating to assignment of employees, is being very rigid in not being willing to recognize that Mr. Bhatia has a legitimate religious reason for not complying with their regulations concerning shaving facial hair. It does seem to me that he could be assigned permanently to the main machine shop, in which

240. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986). See also *Bhatia*, 734 F.2d at 1384.

241. *Bhatia*, 734 F.2d at 1383.

242. Wolkinson, *supra* note 74, at 1196.

243. *Id.* at 1196–97.

244. *Id.* at 1197. Wolkinson further explains:

The same day, Chief Carter responded to Assemblyman Thomas Hannigan about Bhatia's situation, where he explained that Cal/OSHA "[did] not have a regulation that routinely requires that every employee who may have some possibility of toxic fume exposure be clean shaven so as to get a good respirator fit.' In his letter to Assemblyman Hannigan, before completing his review of the situation, Chief Carter was sympathetic towards Bhatia and somewhat suspicious of Chevron's new policy, believing that it was overly expansive and unnecessary."

Id.

case he would not be exposed to either routine or emergency situations in which the wearing of a respirator requiring a close fit is required.²⁴⁵

In light of this letter, the Ninth Circuit's acceptance of Chevron's argument that accommodating Bhatia would be an undue hardship because it might cause the company to violate Cal/OSHA guidelines is especially problematic because Cal/OSHA itself did not think this was the case.²⁴⁶ Furthermore, the court "overly emphasized the probability of Bhatia being assigned a position that would expose him to toxic gas, thereby requiring his use of a respirator, when never in three years had Bhatia once been assigned a position that involved even the potential exposure to toxic gas."²⁴⁷ Regarding the argument that retaining Bhatia as a machinist would require Chevron to revamp its system of duty assignments, Chevron could have taken Bhatia out of that system and allowed him to continue working in a position that did not need use of a respirator²⁴⁸ given that Bhatia "was routinely assigned to work in the main machine shop location, which did not involve responding to any emergency situations or performing any routine work that required respirator use."²⁴⁹ Furthermore, "because of the plant's different zones, each had a specially assigned group of machinists to respond in emergency situations. Consequently, machinists in the main machine room did not need to respond to emergencies that required respirators."²⁵⁰

The low standard of establishing undue hardship and deference to employers' grooming policies allowed the court to rely on speculative evidence to support its finding of non-accommodation and legitimize Chevron's discrimination against Bhatia. The perpetuation of this discrimination through employers' grooming codes against religious minorities like Sikhs is further legitimized by the fact that "other courts often cite *Bhatia* [sic] as a precedent for an employer's right not to accommodate because of safety concerns, or because of the need to comply with a state or federal law or regulation, such as the Occupational Safety and Health Act."²⁵¹

245. *Id.* at 1198.

246. *Id.*

247. *Id.* at 1199.

248. *Id.*

249. *Id.* at 1197.

250. *Id.* at 1198.

251. *Id.* at 1196.

V. CONCLUSION

Section 701(j) of Title VII was meant to provide religious minorities, such as Sikhs, with meaningful protection so that they would not have to decide which was more important to them—their ability to hold employment and earn a livelihood, or their adherence to their religious beliefs. Despite the spirit of the amendment, however, the Supreme Court's interpretations of § 701(j) have rendered religious employees' right to religious accommodation very weak. Religious minorities whose religions have their own grooming and dress requirements are further marginalized by the deference given to employers' grooming codes under the employer-friendly grooming codes doctrine. The double impact of these two doctrines is particularly injurious to those religious minorities who deviate the most from American cultural norms. Courts' assimilation bias and their trivialization of religion, through the treatment of religion as a mutable characteristic, force these minorities to cover and assimilate. As Yoshino points out:

The demand to cover is anything but trivial. It is the symbolic heartland of inequality[—]what reassures one group of its superiority to another. When dominant groups ask subordinated groups to cover, they are asking them to be small in the world, to forgo prerogatives that the dominant group has and therefore to forgo equality. If courts make critical goods like employment dependent on covering, they are legitimizing second-class citizenship for the subordinated group. In doing so, they are failing to vindicate the promise of civil rights.²⁵²

Thus, these two doctrines facilitate the perpetuation and legitimization of the very discrimination that Title VII was meant to protect against.

252. Yoshino, *Pressure to Cover*, *supra* note106.

