

**O'Connor, J. (concurring)**

... I emphasize that under the holding of the Court, and under my view of the appropriate Establishment Clause analysis, the question of the constitutionality of the Section 702 exemption as applied to for-profit activities of religious organizations remains open.

**Case Questions**

1. What is the relevance of the three-part test set out in *Lemon v. Kurtzman* to a claim under Title VII?

2. What, according to the Supreme Court, was the rationale for the enactment of the Section 702(a) exemption for religious organizations? How does that purpose relate to the three-part test from *Lemon v. Kurtzman*?
3. Does the Section 702(a) exemption apply to all activities of religious organizations, even to commercial activities? Does the exemption allow religious organizations to discriminate on the basis of race or gender? Explain your answers.

&lt;&lt;

**Reasonable Accommodation**

Even when religion is not a BFOQ and the employer is not within the Section 702 exemption, the prohibition against discrimination on the basis of religion is not absolute. Section 701(j) defines religion as:

includ[ing] 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 religious observance or practice without undue hardship on the conduct of the employer's business.

An employer must make reasonable attempts to accommodate an employee's religious beliefs or practices, but if such attempts are not successful or involve undue hardship, the employer may discharge the employee. The following case explores the extent to which an employer is required to accommodate an employee's beliefs.

**CASE 8.2****TRANS WORLD AIRLINES V. HARDISON**

432 U.S. 63 (1977)

**White, J.**

Petitioner Trans World Airlines (TWA) operates a large maintenance and overhaul base in Kansas City, Mo. On June 5, 1967, respondent Larry G. Hardison was hired by TWA to work as a clerk in the Stores Department at its Kansas City base. Because of its essential role in the Kansas City operation, the Stores Department must operate 24 hours per day, 365 days per year, and whenever an employee's job in that department is not filled, an employee must be shifted from another department, or a supervisor must cover the job, even if the work in other areas may suffer.

Hardison, like other employees at the Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement which TWA maintains with petitioner International Association of Machinists and Aerospace Workers (IAM).

The seniority system is implemented by the union steward through a system of bidding by employees for particular shift assignments as they become available. The most senior employees have first choice for job and shift assignments, and the most junior employees are required to work when the union steward is unable to find enough people willing to work at a particular time or in a particular job to fill TWA's needs.

In the spring of 1968 Hardison began to study the religion known as the Worldwide Church of God. One of the tenets of that religion is that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. The religion also proscribes work on certain specified religious holidays.

When Hardison informed Everett Kussman, the manager of the Stores Department, of his religious conviction

regarding observance of the Sabbath, Kussman agreed that the union steward should seek a job swap for Hardison or a change of days off; that Hardison would have his religious holidays off whenever possible if Hardison agreed to work the traditional holidays when asked; and that Kussman would try to find Hardison another job that would be more compatible with his religious beliefs. The problem was temporarily solved when Hardison transferred to the 11 P.M.–7 A.M. shift. Working this shift permitted Hardison to observe his Sabbath.

The problem soon reappeared when Hardison bid for and received a transfer from Building 1, where he had been employed, to Building 2, where he would work the day shift. The two buildings had entirely separate seniority lists; and while in Building 1 Hardison had sufficient seniority to observe the Sabbath regularly, he was second from the bottom on the Building 2 seniority list.

In Building 2 Hardison was asked to work Saturdays when a fellow employee went on vacation. TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargaining contract, and Hardison had insufficient seniority to bid for a shift having Saturdays off.

A proposal that Hardison work only four days a week was rejected by the company. Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave 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.

When an accommodation was not reached, Hardison refused to report for work on Saturdays. . . . [Hardison was fired by TWA.]

The Court of Appeals found that TWA had committed an unlawful employment practice under Section 703(a)(1) of the Act. . . .

In 1967 the EEOC amended its guidelines to require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." The Commission did not suggest what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue."

This question—the extent of the required accommodation—remained unsettled. . . . Congress [then]

included the following definition of religion in its 1972 amendments to Title VII:

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. [Section 701(j)] . . .

The Court of Appeals held that TWA had not made reasonable efforts to accommodate Hardison's religious needs. . . .

We disagree. . . .

. . . As the record shows, Hardison himself testified that Kussman was willing, but the union was not, to work out a shift or job trade with another employee.

. . . it appears to us that the [seniority] system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. As will become apparent, the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off. . . .

We are also convinced, contrary to the Court of Appeals, that TWA cannot be faulted for having failed itself to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison. . . .

Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective-bargaining agreement.

Title VII does not contemplate such unequal treatment. . . . we conclude that Title VII does not require an employer to go that far.

. . . [T]he Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or as higher wages.

To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. . . .

As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in

employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

**Reversed.**

### Case Questions

1. Did Hardison's religious beliefs present a scheduling problem when he was hired? Is the employer required
2. Did the union's refusal to grant Hardison a variance from the seniority requirements of the collective bargaining agreement violate the union's duty to accommodate Hardison's beliefs under Title VII? Explain.
3. Why was TWA unwilling to pay some other employee overtime to work for Hardison on Saturdays? Was TWA required to do so under Title VII? Explain.

«

### The Duty of Reasonable Accommodation

As the *Hardison* case illustrates, the prohibition of religious discrimination under Title VII is not absolute. An employee may not be protected under Title VII if the employer is unable to make reasonable accommodation to the employee's religious beliefs or practices without undue hardship to the employer's business. The determination of what accommodation is reasonable, and whether it would impose an undue hardship on the employer, is to be based on each individual case and the facts of each situation. The EEOC Guidelines indicate that the following factors will be considered in determining what a reasonable accommodation is and whether it results in undue hardship:

- The size of the employer's work force and the number of employees requiring accommodation
- The nature of the job or jobs that present a conflict
- The cost of the accommodation
- The administrative requirements of the accommodation
- Whether the employees affected are under a collective bargaining agreement
- What alternatives are available and have been considered by the employer.

The employee seeking accommodation must first inform the employer of the conflict with his or her religious beliefs or practices and must request accommodation. The employee is also required to act reasonably in considering the alternative means of accommodation available.<sup>13</sup>

## » CASE 8.3

### WEBB V. CITY OF PHILADELPHIA

562 F.3d 256 (3d Cir. 2009)

**Facts:** Kimberlie Webb, a practicing Muslim, was a police officer for the City of Philadelphia. She requested permission to wear a traditional headscarf (known as a *khimar* or

*hijab*) with her uniform while on duty. The commanding officer denied the request because of Philadelphia Police Department Directive 78, which defines the approved

<sup>13</sup> *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977).