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Is 'De Minimis' Cost Sufficient to Curtail Employees' Religious Freedom?

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Title VII of the Civil Rights Act of 1964 makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." As originally enacted by Congress, Title VII did not explicitly require an employer to accommodate an employee's religious practices. That changed when the Equal Employment Opportunity Act of 1972 amended Title VII to define religion as "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."

To establish a prima facie case of discrimination under Title VII, a plaintiff must plausibly allege two elements: the employer discriminated against the plaintiff because of the plaintiff's race, color, religion, sex or national origin. See, e.g., *Lowman v. NVI,* 821 F. App'x 29 (2d Cir. 2020). In a case involving alleged religious discrimination, a plaintiff may satisfy this burden by plausibly alleging that he or she actually requires an accommodation of his or her religious beliefs or practices and that the employer's desire to avoid the prospective accommodation was a motivating factor in an employment decision. See, e.g., *Equal Employment Opportunity Commission (EEOC) v. Abercrombie & Fitch Stores,* 575 U.S. 768 (2015). If the employee establishes a prima facie case, the burden then shifts to the employer to show it could not accommodate the employee's religious beliefs or prac-

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tices without undue hardship on the conduct of its business. See, e.g., *Knight v. State Department of Public Health,* 275 F.3d 156 (2d Cir. 2001).

In 1977, the U.S. Supreme Court held in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), that an employer suffers "undue hardship" if accommodating an employee's religion would result in "more than a de minimis cost" to the employer.

Now, in *Groff v. DeJoy*, No. 22-174, the court has been asked to reconsider the *Hardison* standard and to offer guidance on the meaning of "the conduct of the employer's business." The case has garnered a significant amount of attention, with more than 40 amicus briefs filed, including one by the co-author of this column (Sarah E. Child) on behalf of 13 members of the U.S. Senate and House of Representatives in support of the petitioner. Oral argument was held on April 18. With a decision expected next month, the court seems poised to at least clarify that the governing standard requires more than what *Hardison* holds.

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Background

Gerald Groff, a Sunday Sabbath observer whose religious beliefs dictate that Sunday is meant for worship and rest, began working for the U.S. Postal Service (USPS) in 2012. At that time, he was not required to work on Sundays. When his post office began delivering packages for Amazon on Sundays, he transferred to a post office in Holtwood, Pennsylvania, that had not yet implemented Sunday Amazon deliveries. The Holtwood post office was staffed with a postmaster, several full-time carriers, and a number of rural carrier associates (RCAs), including Groff.

In 2017, the Holtwood post office also began delivering Amazon packages on Sundays. Groff informed the Holtwood postmaster that he could not report to work on Sundays due to his religious beliefs, but pledged his willingness to work extra shifts, including on Saturdays and holidays, to avoid working Sundays. The postmaster refused to exempt Groff from Sunday delivery, believing that it would be showing favoritism to allow Groff to avoid Sundays.

The Holtwood postmaster offered to permit Groff to attend religious services on Sunday morning and report to work afterwards, but Groff's religious convictions required him to honor the Lord with the entire day. Later, the Holtwood postmaster sought out others to cover Groff's Sunday shifts, which the postmaster said was the only accommodation that would not "impact operations." The postmaster described the success of these shift-swapping efforts as "kind of arbitrary," as he and Groff's other supervisors were not always able to locate another RCA to volunteer for Groff's Sunday shifts. This ad hoc approach failed to consistently accommodate Groff throughout two years of peak and nonpeak seasons.

For a time, the USPS effectively accommodated Groff by skipping him on the Sunday schedule or

scheduling in advance an extra RCA on Sundays for which Groff was scheduled. The USPS ended this accommodation, however. From then on, when no volunteer replacement could be found for Sundays that Groff was scheduled, Groff honored his religious obligations and did not report for work.

The USPS argued that Groff's absences affected his coworkers. During the six-week peak season, other RCAs had to work more Sundays. On three occasions during peak season, the Holtwood postmaster delivered mail on Sundays when the assigned RCA unexpectedly became unavailable. Likewise, during nonpeak season, other RCAs were called to work on Sundays more often. And when management ceased its practice of scheduling an extra RCA in advance, other RCAs were required to deliver more mail than they otherwise would have on Sundays due to Groff's absences.

Given the court's expressed discomfort with the appropriateness of the "de minimis" standard, the court will likely clarify that religious employees are entitled to more protection under the statutory text, even if it does not directly overrule Hardison.

Groff received repeated discipline when he failed to report for Sunday delivery more than 24 times over two years. Knowing termination was the next form of discipline, Groff resigned in January 2019.

Groff sued the USPS for discriminating against him on the basis of his religion in violation of Title VII. The U.S. District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the USPS. The district court concluded that an employer need not wholly eliminate a conflict between an employee's job duties and religious obligations in order to offer a reasonable accommodation, and that the USPS had offered Groff a reasonable accommodation. It found in the alternative that the USPS provided evidence of "multiple instances" of undue hardship, including that granting Groff's requested exemption required the only other remaining RCA to work every Sunday without a break.

Groff appealed to the U.S. Court of Appeals for the Third Circuit.

The Third Circuit's Decision

Over one judge's dissent, the Third Circuit affirmed the district court's decision.

The Third Circuit first held that a legally sufficient accommodation under Title VII must eliminate the conflict between the employee's job duties and religious obligations. Thus, since Groff's employer was unsuccessful in finding someone to swap shifts with Groff on two dozen Sundays over a 60-week period, and Groff was disciplined when he failed to appear for work, the shift-swapping was not a reasonable accommodation under Title VII.

The Third Circuit next considered whether providing Groff an accommodation that eliminated the conflict would constitute an "undue hardship." Bound by the Supreme Court's definition of "undue hardship" in *Trans World Airlines v. Hardison,* the circuit court concluded that Groff's proposed accommodation of being exempted from

Sunday work would have caused "more than a de minimis cost" on the USPS because, in the circuit court's opinion, it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale.

In the Supreme Court

Groff cited two issues in his petition for certiorari. The first was whether the court should disapprove *Hardison*'s "more than a de minimis cost" test for refusing Title VII religious accommodations. The second was whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

On the first issue, Groff's counsel argued that the "more than a de minimis cost" standard, which the government did not defend, contravened the words Congress enacted and should be replaced by a textually consistent definition of "significant difficulty or expense." The latter is the definition of "undue hardship" that is set forth in other statutes, including the Americans with Disabilities Act.

The Solicitor General urged the court to clarify rather than overturn *Hardison.* While admitting that "more than a de minimis cost" was not a proper interpretation of "undue hardship," the Solicitor General argued that the Equal Employment Opportunity Commission and lower courts have nonetheless applied it to provide meaningful protection for religious observance in the workplace by interpreting it in light of the particular accommodations and the costs that the court confronted in *Hardison*. The Solicitor General explained that *Hardison* used "de minimis" interchangeably with "substantial cost," a phrase cited in a footnote in the decision, and cautioned the court against adopting a new formulation calling into doubt the well-developed body of case law applying the "de minimis" standard.

From oral argument, it was unclear whether the justices are inclined to completely overrule *Hardison,* but a majority appears ready to rule that a burden that is only a trifling—the legal definition of "de minimis"—is insufficient for an employer to deny a religious accommodation.

With respect to the second issue, several justices questioned when a burden on a co-worker rises to the level of disrupting the business. Justice Amy Coney Barrett asked whether poor morale is sufficient or if a co-worker must quit, while Justice Brett Kavanaugh observed that morale is critical to the success of a business. Both Groff's counsel and the Solicitor General agreed that morale alone was insufficient, and that the inquiry is fact-specific. This issue will likely be resolved based on the particular facts of Groff's case.

Conclusion

Given the court's expressed discomfort with the appropriateness of the "de minimis" standard, the court will likely clarify that religious employees are entitled to more protection under the statutory text, even if it does not directly overrule *Hardison.*