RELIGIOUS CONDUCT AND THE IMMUTABLE
REQUIREMENT: TITLE VII’S FAILURE TO PROTECT RELIGIOUS
EMPLOYEES IN THE WORKPLACE

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I. INTRODUCTION

The federal courts explicitly distinguish between mutable and immutable traits – or status and conduct – when deciding most Title VII cases. In doing so, the courts have routinely held that mutable traits are not entitled to protection under Title VII, and plaintiffs seldom win in these cases. For example, plaintiffs regularly lose in cases where an employer’s dress or grooming codes are challenged under Title VII’s prohibition on race or sex discrimination. Similarly, courts have held that “English-only” rules do not violate Title VII’s prohibition on national origin discrimination since they simply prohibit speaking a particular language and do not discriminate based on an employee’s national origin. Employees also regularly lose in sex discrimination cases involving transsexualism and sexual orientation because courts have held that these plaintiffs are not being discriminated against based on the immutable characteristic of sex, but rather based on a choice made by the employee.

4 See, e.g., Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084 (5th Cir. 1975); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979); see also Katherine T. Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality, 92 Mich. L. Rev. 2541 (1994); Engle, supra note 2, at 340–53. Two exceptions to this general rule involve cases where only women are required to wear uniforms, and cases where only women are required to wear sexually provocative clothes. See Farrell, supra note 2, at 493 n.46.
5 See, e.g., Garcia v. Gloor, 612 F.2d 264, 272 (5th Cir. 1980).
6 See, e.g., Holloway v. Arthur Anderson & Co., 566 F.2d 659, 663–64 (9th Cir. 1977).
7 See, e.g., DeSantiz v. Pac. Tel. & Tel. Co. 608 F.2d 327, 329–30 (9th Cir. 1979).
8 For a critique of these cases, see Farrell, supra note 2, at 495–97. While the federal courts have extended Title VII protection to some mutable characteristics in the “sex plus” cases, there are significant limitations on the reach of this protection. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding that employer’s policy of refusing to hire mothers – but not fathers – of young children may violate Title VII).
Commentators have criticized this mutable/immutable distinction, arguing that some mutable traits should also be entitled to Title VII protection and additionally, that some traits which courts have determined are mutable have immutable characteristics as well. Yet despite these critiques, courts continue to routinely hold that certain characteristics—such as dress, grooming and language—are mutable and therefore not entitled to Title VII protection against discrimination based on race, sex or national origin.

Religion is, however, treated uniquely under Title VII and courts do not explicitly rely on the mutable/immutable distinction when deciding the religion cases. Title VII, as originally passed, did treat religion the same as race, color, sex, or national origin and prohibited discrimination based on religious beliefs (or status) but did not specifically require accommodation of religious conduct. However, in 1972, Congress amended Title VII and enacted § 701(j) which specifically includes an affirmative duty of religious accommodation. As a result, Congress clearly indicated that religious conduct, as well as religious status (belief), is entitled to protection under Title VII. In other words, religious conduct is protected by Title VII, regardless of whether it is a mutable or immutable trait.


See generally Bayer, supra note 2; Engle, supra note 2; Farrell, supra note 2; Gonzalez, supra note 2.

Some commentators have argued that there was little policy rationale for including religion in Title VII. See, e.g., Russell S. Post, The Serpentine Wall and the Serpent’s Tongue: Rethinking the Religious Harassment Debate, 83 Va. L. Rev. 177, 180–81 (1997).


Yet, a careful reading of the case law illustrates that many courts have continued to rely indirectly on the mutable/immutable distinction when deciding the religion cases under Title VII. While § 701(j) collapsed the conduct/status distinction, religion is nonetheless often treated in a similar manner to the other protected traits, with courts requiring little more than “neutral” treatment of religious employees.\(^{16}\) Courts have done so, in large part, by assuming that religion is nothing more than a matter of personal preference or a lifestyle choice. This illustrates how deeply ingrained the mutable/immutable distinction is in judicial reasoning.

Part II of this article examines whether religion, and specifically religious conduct, should be considered a mutable or immutable trait. This Part concludes that there is a striking lack of consensus on whether religious conduct is mutable or immutable.

Part III focuses on the legislative history of § 701(j) which clearly illustrates that Congress intended for religious conduct, as well as for religious status (belief), to be protected under Title VII. This Part will also examine how, despite this legislative history, the Supreme Court has narrowly interpreted § 701(j).

Part IV examines how many lower courts have implicitly relied on the mutable/immutable distinction in a manner that has limited an employee’s right to religious accommodation in the workplace. First, this Part will examine how the courts have relied on the concept of “choice” to limit an employee’s right to religious accommodation in the workplace. Second, this Part will focus on the fact that judges are particularly skeptical of an employee’s request for religious accommodation in cases where the employee does not follow all or mainstream church dogma or changes his or her level of religious observance. Finally, this Part will examine cases where courts have determined that an accommodation is reasonable even if the religious conflict is not eliminated.

\(^{16}\) There are, of course, some religious accommodation cases where the religious plaintiff does win and courts do mandate accommodation of a religious belief or practice. See generally 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 (2000). Religion is therefore treated somewhat differently than the other protected categories under Title VII, since, as explained above, plaintiffs almost always lose in cases where an employers’ dress or grooming codes are challenged under Title VII’s prohibition on race or sex discrimination.
II. IS RELIGIOUS CONDUCT MUTABLE OR IMMUTABLE?

The mutable/immutable distinction is well-established under Title VII, and plaintiffs regularly lose in cases where an employer’s dress or grooming codes are challenged under Title VII’s prohibition on race or sex discrimination since dress and grooming are considered mutable characteristics that an employee can easily change. Religion is somewhat unique since there is a significant lack of consensus as to whether religion is a mutable or immutable trait.17

This lack of consensus as to whether religion is mutable, is clearly more of an issue regarding religious conduct than religious status (or belief). Since Title VII, at a minimum, mandates neutral treatment based on protected categories, religious status is clearly entitled to Title VII protection whether volitional or not. However, there is disagreement on the extent to which religious conduct should be protected in the workplace and the mutable/immutable distinction has been used to limit an employee’s right to affirmative accommodation of religious practices.

Some courts18 and commentators19 simply presume that religion – both belief and conduct – is a mutable characteristic. This presumption is often made with no discussion or justification. As will be explained in Part IV, courts often presume religion is mutable as a means of limiting an employee’s right to religious accommodation in the workplace. However, many commentators who opine that religion is mutable also believe that it is a fundamental right that is worthy of protection. As a result, some commentators have argued that because religious conduct is entitled to Title VII protection under § 701(j), this should be used as a model for mandating accommodation of other, non-religious mutable traits under Title VII.20

Other legal commentators do not agree that religious conduct is a mutable trait and simply a matter of “personal choice.” Professor Stephen Carter has articulated the flaw in presuming that religious conduct is mutable in his analysis of Justice O’Connor’s concurrence in Estate of Thornton v. Caldor, Inc., a decision striking down a Connecticut statute that provided employees with the absolute right not

18 See, e.g., Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980).
19 See Farrell, supra note 2, at 504 (“. . . religion is regarded as a mutable characteristic that is nevertheless protected . . .”); Jamar, supra note 15, at 727; Perea, supra note 10, at 895.
20 See generally Perea, supra note 10 (arguing for the inclusion of ethnic traits such as accents and language). But see Engle, supra note 2 (noting the limitations of § 701(j)).
to work on their Sabbath.\(^{21}\) Justice O'Connor determined that the statute unconstitutionally favored Sabbatarians because it gave them "the right to select the day of the week in which to refrain from labor."\(^{22}\) Professor Carter quoted Michael McConnell to note that it "would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God."\(^{23}\)

Similarly, another commentator has argued that the Workplace Religious Freedom Act, which has been introduced in Congress in an effort to strengthen an employee’s right to accommodation of religious conduct in the workplace, presumes that religion is immutable.\(^{24}\) Furthermore, many truly devout individuals do not believe that their religious conduct is simply a mutable characteristic.

While it is unclear if religion is a mutable or immutable trait, this should not be an issue for courts analyzing § 701(j) cases. As will be explained in the next Part, this is because § 701(j) specifically collapsed the conduct/status distinction and mandates accommodation of religious conduct as well as religious belief/status. Therefore even if courts presume that religion is mutable, this should not affect their analysis under 701(j).

III. OVERVIEW OF SECTION § 701(j)

The legislative history of § 701(j) illustrates that Congress intended that both religious conduct and religious status were to be protected and therefore courts should not analyze whether religion is a mutable or immutable characteristic. Title VII, as originally passed, did treat religion the same as race, color, sex, or national origin and prohibited discrimination based on religious beliefs or status but contained no language specifically requiring accommodation of religious conduct. In 1972, however, Congress amended the Civil Rights Act to include an affirmative duty of accommodation. Under § 701(j) of the Civil Rights Act of 1964, "[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee’s or prospective employee’s religious observance or practice


\(^{22}\) Estate of Thornton, 472 U.S. at 711.

\(^{23}\) CARTER, supra note 21, at 5–6 (quoting Michael McConnell, Religious Freedoms at a Crossroads, 59 U. CHI. L. REV. 115, 125 (1992)).

\(^{24}\) Sonne, supra note 17, at 1027.
without undue hardship on the conduct of the employer's business."\textsuperscript{25} This Part analyzes both the history leading to the enactment of § 701(j) and the two Supreme Court cases which have addressed an employer's obligation under this section.

\textbf{A. RELIGIOUS ACCOMMODATION PRIOR TO 1972}

When the EEOC first interpreted Title VII to address the issue of reasonable accommodation of religion in its 1966 Guidelines, it emphasized the concept of neutrality but also stated that accommodation of the reasonable religious needs of employees should be made “where such accommodation can be made without serious inconvenience to the conduct of the business.”\textsuperscript{26} The following year, however, in 1967, the Commission essentially reversed itself and amended its Guidelines to require affirmative accommodation except in cases where “undue hardship,” would result.\textsuperscript{27}

Most courts chose not to follow the 1967 EEOC Guidelines. Two decisions in particular led to the eventual enactment of § 701(j) in 1972. In 1971, in \textit{Dewey v. Reynolds Metal Co.},\textsuperscript{28} the Supreme Court affirmed the Sixth Circuit's determination that failure to accommodate a Sabbatarian – who refused to work on Sundays – was not religious discrimination. The same year, a district court in \textit{Riley v. Bendix Corp.}\textsuperscript{29} followed \textit{Dewey}'s reasoning in determining that failure to accommodate a member of the Seventh Day Adventist Church, who also refused to work on his Sabbath, was not religious discrimination. Both the \textit{Dewey} and \textit{Riley} courts emphasized the concept of neutrality and focused on the fact that the plaintiffs were not discriminated against based on their religious beliefs or status.

\textbf{B. CONGRESS ENACTS § 701(j)}

In 1972, in response to the refusal of the courts to follow the 1967 EEOC Guidelines, Congress enacted § 701(j), which tracks the language of the 1967 Guidelines and states, “\textit{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 religious observance or practice without undue hardship on the conduct of the employer’s business.”\textsuperscript{30}

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\textsuperscript{25} 42 U.S.C. § 2000e(j).
\textsuperscript{26} 29 C.F.R. § 1605.1 (1967).
\textsuperscript{27} 29 C.F.R. § 1605.1 (1968) (codifying the 1967 Guidelines).
\textsuperscript{28} 429 F.2d 324 (6th Cir. 1970), aff’d mem., 402 U.S. 689 (1971) (by an equally divided Supreme Court).
\textsuperscript{29} 330 F. Supp. 583 (M.D. Fla. 1971), rev’d, 464 F.2d. 1113 (5th Cir. 1972).
\textsuperscript{30} 42 U.S.C. 2000(e)(j).
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While a number of commentators, as well as the Supreme Court, have suggested that the legislative history of § 701(j) is not particularly helpful in interpreting the statute, it does provide some guidance. The amendment was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians, or specifically protecting religious conduct as well as religious belief or status. Included in the congressional record were copies of the decisions discussed above, *Dewey v. Reynolds Metal Company* and *Riley v. Bendix Corporation*. Congress, without a doubt, intended to require employers to affirmatively accommodate religious employees. In other words, regardless of whether religious conduct was mutable or immutable, it was entitled to legal protection.

**C. THE SUPREME COURT INTERPRETS § 701(j)**

The United States Supreme Court has twice interpreted § 701(j) and both times has narrowly defined an employer’s obligation to accommodate an employee’s religious conduct. For purposes of examining how the courts have used the concept of “choice” – or the presumption that religion is a mutable characteristic and therefore not worthy of protection – *Ansonia* is the more important case.

1. **Trans World Airlines v. Hardison**

In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court narrowly defined “undue hardship” under § 701(j) as any cost greater than de minimis. *Hardison* involved a Sabbatarian who was a member of the Worldwide Church of God and who was ultimately discharged by

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36 *Hardison*, 432 U.S. at 84. This case also addressed the deference that should be given to a seniority provision of a collective bargaining agreement prohibiting a religious employee from receiving time off for religious observance. This aspect of the case is beyond the scope of this article.
Trans World Airlines (“TWA”) for refusing to work on his Sabbath.\textsuperscript{37} TWA rejected Hardison’s proposal that he work a four-day week.\textsuperscript{38} Hardison refused to work on his Sabbath and was ultimately discharged on grounds of insubordination.\textsuperscript{39}

According to the Court, allowing Hardison to work a four-day week and replacing him on his Sabbath with either supervisory personnel or employees from other departments would lead to lost efficiency and therefore constitute more than a de minimis cost.\textsuperscript{40} Similarly, replacing Hardison with another employee not scheduled to work and then paying premium wages to this employee would require higher costs to TWA and thereby constitute more than a de minimis cost.\textsuperscript{41} Commentators,\textsuperscript{42} as well as the \textit{Hardison} dissent,\textsuperscript{43} have criticized the Court equating undue hardship with any cost greater than de minimis, and some lower courts in reality have required employers to incur more than a de minimis cost in accommodating religious employees.\textsuperscript{44}

In addressing the definition of “undue hardship,” the \textit{Hardison} Court did not discuss the concept of choice and whether religion is a mutable or immutable characteristic. Rather, regardless of whether religious conduct is mutable or immutable, the Court determined that an employer need not incur more than a de minimis cost in accommodating a religious employee.

2. The EEOC’s Response to \textit{Trans World Airlines v. Hardison}

In 1980, in an effort to respond to the Supreme Court’s decision in \textit{TWA v. Hardison}, the EEOC issued its “Guidelines on Discrimination Because of Religion,” which, not surprisingly, required a high level of

\textsuperscript{37} \textit{Id.} at 67–69.


\textsuperscript{39} \textit{Id.} at 69.

\textsuperscript{40} \textit{Id.} at 84.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{See} Corrado, \textit{supra} note 34, at 1433 (proposing an integrated framework for all Title VII religion cases and arguing that in cases where there is evidence of employer bias towards the religious employee there should be a higher burden of undue hardship); Engle, \textit{supra} note 2, at 364 (arguing that courts have relied on the neutrality principle in the religious accommodation cases); Kaminer, \textit{supra} note 16, at 629 (proposing an amendment to Title VII which would define undue hardship as a cost that is “meaningful or significant”); Jamie Darwin Prenkert & Julie Manning Magid, \textit{A Hobson’s Choice Model for Religious Accommodation}, 43 Am. Bus. L.J. 467, 467 (2006) (arguing that the problem with the religious accommodation cases is both the broad definition of religion and the de minimis standard).

\textsuperscript{43} \textit{Hardison}, 432 U.S. at 87 (Marshall, J., dissenting).

\textsuperscript{44} \textit{See} Kaminer, \textit{supra} note 16, at 618–19.
accommodation.\(^\text{45}\) The Commission broadly interpreted the definition of religious practices “to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious beliefs.”\(^\text{46}\) The Guidelines further state that “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.”\(^\text{47}\)

The Guidelines also tightened the undue hardship standard, determining that undue hardship would only be found in cases where an employer could demonstrate an actual hardship and would not be found in cases where there was merely an anticipated or hypothetical hardship.\(^\text{48}\) In addition, the EEOC suggested a number of possible accommodations, including the use of voluntary substitutes, the implementation of flexible work schedules, and, if such accommodations were not possible, then the use of a lateral transfer.\(^\text{49}\) The Commission specifically determined that in some cases an employer would be required to absorb an economic cost in accommodating a religious employee.\(^\text{50}\)

Additionally, the Commission determined that “when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.”\(^\text{51}\) In other words, an employee is entitled to his preferred accommodation so long as it does not cause undue hardship.

3. Ansonia Board of Education v. Philbrook

Six years after the EEOC issued its 1980 Guidelines, the Supreme Court again narrowly interpreted § 701(j) in Ansonia Board of Education v. Philbrook.\(^\text{52}\) This case is best known for holding that “where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations

\(^{46}\) 29 C.F.R. § 1605.1.
\(^{47}\) Id.
\(^{48}\) 29 C.F.R. § 1605.2(c)(1).
\(^{49}\) 29 C.F.R. § 1605(2)(d)(1).
\(^{50}\) 29 C.F.R. § 1605.2(e)(1).
\(^{51}\) 29 C.F.R. § 1605.2(c)(2)(ii).
Ronald Philbrook was a high school teacher and a member of the Worldwide Church of God, whose religious beliefs required that he be absent from school to celebrate approximately six religious holidays each year. Under the terms of the collective bargaining agreement in place, Philbrook was entitled to only three paid days off for religious reasons and was permitted to take the additional days off without pay. In holding for the Board of Education, the Supreme Court held that unpaid leave in general would be a reasonable accommodation since an employee would merely be giving up pay for a day that he did not work.

In a separate opinion, Justice Marshall stated that the case should be remanded for “factual findings on both the intended scope of the school board’s leave provision and the reasonableness and expected hardship of Philbrook’s proposals.” Justice Marshall was not convinced that Philbrook had been reasonably accommodated and explained that his conflict was not fully resolved since he would still be forced to give up pay in order to follow his religious beliefs. Furthermore, Justice Marshall argued that even if Philbrook had been reasonably accommodated, the Court’s holding that once an employer has reasonably accommodated a religious employee he need not look at the employee’s preferred accommodations conflicts with the analysis in Trans World Airlines, Inc. v. Hardison. As Marshall explained, “[i]n Hardison, the Court held that the employer’s chosen work schedule was a reasonable accommodation but nonetheless went on to consider and reject each of the alternative suggested accommodations.”

The Ansonia Court did not explicitly address whether religion, and specifically religious conduct, was a mutable or immutable characteristic. In interpreting § 701(j), the Ansonia Court held that a reasonable accommodation is an accommodation that “eliminates the conflict between [the employee’s] employment requirements and

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53 Id. at 68.
54 Id. at 63–64.
55 Id. at 70–71.
56 Id. at 75 (Marshall, J., concurring in part and dissenting in part).
57 Id. at 74.
religious practices.” In stating that the conflict must be eliminated, the Court seems to recognize that religious conduct is not something that an employee can simply change.

Despite this rhetoric, the Court also held that the accommodation at issue, which did not completely eliminate Ansonia’s religious conflict, was still reasonable. However, it should be noted that in Ansonia, the religious employee was not required to compromise on his religious beliefs. Rather, the compromise he was required to make was purely secular – lost pay. However, as will be explained in Part IV below, the reasoning of Ansonia has been extended by the lower courts, and some courts have determined that religious employees can be required to compromise their religious beliefs. While these courts do not explicitly state that religion is a mutable characteristic, once a court holds that an accommodation is reasonable even if it requires an employee to compromise on his religious beliefs, that court is in fact stating that religion is a mutable characteristic that an individual can choose to follow or dismiss at will.

Therefore, despite a Congressional determination that an employee’s religious beliefs should be accommodated in the workplace, the Supreme Court has narrowly interpreted an employer’s obligation under § 701(j) in a manner that is at odds with Congressional intent. In so doing, the Court has ignored both the EEOC guidelines and the legislative history of § 701(j). Since § 701(j) collapsed the conduct/status distinction, “choice” should not be an issue in these cases. However, as will be explained in the following Part, this issue of “choice” has continued to resurface.

IV. CASES WHERE THE LOWER COURTS HAVE RELIED ON THE CONCEPT OF CHOICE

Since § 701(j) collapsed the status/conduct distinction, courts do not directly state that religious conduct is a matter of personal choice and therefore not protected by Title VII. Rather, once a plaintiff has established a prima facie case of religious discrimination, the courts do need to consider whether the religious employee has been reasonably accommodated. The courts use a two-part procedure when analyzing claims under 701(j). First, a plaintiff must meet a three-part test to establish a prima facie case of religious discrimination. “The employee must establish that (1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed the employer of the belief and conflict and (3) the employer threatened him or subjected him to discriminatory treatment . . . .” See Lawson v. Washington, 296 F.3d 799, 804 (9th Cir. 2002); see also Opaku-Boateng v. State of California, 95 F.3d 1461, 1467 (9th Cir. 1996). Once a plaintiff has

59 Id. at 70.
60 The courts use a two-part procedure when analyzing claims under 701(j). First, a plaintiff must meet a three-part test to establish a prima facie case of religious discrimination. “The employee must establish that (1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed the employer of the belief and conflict and (3) the employer threatened him or subjected him to discriminatory treatment . . . .” See Lawson v. Washington, 296 F.3d 799, 804 (9th Cir. 2002); see also Opaku-Boateng v. State of California, 95 F.3d 1461, 1467 (9th Cir. 1996). Once a plaintiff has
In one of the most comprehensive law review articles published on § 701(j), Professor Engle opines that “courts seem to have successfully avoided the question of whether religion is immutable.”61 While the author agrees that courts do not explicitly rely on the issue of “choice” and the mutable/immutable distinction as they do in the other Title VII cases, courts do imply that religious conduct is a matter of personal choice and therefore mutable. There are three types of cases where this is most likely to arise.

First, courts have relied on the concept of “choice” in cases addressing whether an employee’s obligation to cooperate with his employer includes an obligation to compromise on his religious beliefs. When courts determine that an employee must compromise on his religious beliefs, these courts are implicitly stating that religion is simply a matter of choice or a mutable trait since it is not possible to compromise on an immutable trait.

Second, courts are more likely to focus on “choice” in cases where religious employees do not consistently follow a traditional religious dogma. This includes 1) cases where the employee does not follow all the rules of an established institutional religion; 2) cases where the employee is not a member of a mainstream institutional religion; and 3) cases where the employee changes his or her level of religious observance. Third, courts have relied on the concept of “choice” in cases addressing whether an accommodation can be reasonable if it does not eliminate the employee’s religious conflict.

These cases illustrate both the importance of the mutable/immutable distinction in judicial reasoning and also illustrate the courts’ skepticism of religion. This Part will examine these three categories of cases.

A. THE DUTY TO COOPERATE AND THE DUTY TO COMPROMISE

One way which courts have relied on the concept of choice is by using rhetoric implying employees have an obligation to compromise on their religious beliefs. While courts do not explicitly use the mutable/immutable distinction, this court-imposed requirement of employee compromise clearly implies that religion is a mutable characteristic that an individual can choose to follow or dismiss at will. Once a court has defined religion as a matter of personal choice, it is

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61 Engel, supra note 2, at 323.
much easier for the court to determine that accommodation of the religious employee should not be required. Often, this duty to compromise stems from an employee’s court-imposed obligation to cooperate with his employer.

1. When Cooperation Mandates Compromise

The courts agree that a religious employee has a duty to cooperate with his employer in securing an accommodation for his religious needs. While this obligation of cooperation requires an employee to work with his employer in securing an obligation, cooperation alone does not imply that religion is an alterable characteristic. The duty of employee cooperation was acknowledged in *Ansonia* when the Court stated that:

Senators Randolph, the sponsor of the amendment that became § 701(j), expressed his hope that accommodation would be made with “flexibility” and “a desire to achieve an adjustment.” Consistent with these goals, courts have noted that “bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer's business.”

Employees, therefore, regularly lose when they fail to make use of means provided by the employer which could have resolved their conflict. For example, *EEOC v. Autonation USA Corporation*, involved a plaintiff who was a devout Christian and a Sabbatarian. The employer suggested a number of possible accommodations so that the plaintiff would not need to work on his Sabbath, but the plaintiff resigned on the first day of discussions regarding possible accommodations without giving the employer an opportunity to implement or test the various accommodations. The Ninth Circuit determined that the plaintiff’s “resignation while discussions regarding potential accommodations were ongoing and in their early stages violated his correlative duty to make a good faith effort to satisfy his needs.”

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64 EEOC v. Autonation USA Corp., 52 F. App’x 327 (9th Cir. 2002).
65 Id. at 329; see also Hudson v. Western Airlines, Inc., 851 F.2d 261 (9th Cir. 1988) (plaintiff failed to make use of options offered under the collective bargaining agreement).
Courts also agree that employees can be required to make some secular compromises in having their religious observances accommodated, but there is not a clear consensus as to the secular cost employees can be required to bear. In *Ansonia*, the Court held that the accommodation at issue, time off without pay, was reasonable even though it did not completely eliminate Ansonia’s conflict. Similarly, in ruling that an employer did not discriminate against an employee who was also a minister by refusing to give him a busy Saturday off to officiate at a funeral, the Fifth Circuit implied that an employee does have an obligation to reschedule. The court stated that “[a]lthough plaintiff’s religion would have permitted a substitute minister to officiate at the funeral, he [plaintiff] made no effort to obtain one. Likewise, no effort was made to change the time of the funeral.”

In contrast, the Ninth Circuit implied that the duty to cooperate does not necessarily include a duty to reschedule since “[a]n inflexible duty to reschedule would impose too great a burden on employees who desire to attend religious ceremonies for which they might not be able to change the date or time, such as baptisms, confirmations, or weddings.”

The federal courts do not agree how far this duty of cooperation extends and some courts have used rhetoric implying that employees have a duty to compromise their religious beliefs. This compromise rhetoric clearly implies that religion is a mutable characteristic and simply a matter of personal choice.

For example, in *Chrysler v. Mann*, the Eighth Circuit held for the defendant-employer after determining that the plaintiff had failed “to consider any sort of a compromise insofar as his religion was concerned,” or to “try to accommodate his own religious beliefs.” While *Chrysler* has also been read as merely requiring an employee to cooperate with his employer, the language the court used does imply that an employee also has a duty to compromise his religious beliefs. In other words, religion is a mutable characteristic that employees can choose to follow or dismiss at will.

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66 Howard v. Havarti Furniture Corp., 615 F.2d 203 (5th Cir. 1980).
67 Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993).
68 561 F.2d 1282 (8th Cir. 1977).
69 *Id.* at 1286.
70 *Id.* at 1285.
71 See Redmond v. GAF Corp., 574 F.2d 897, 902 n.13 (7th Cir. 1978).
72 The *Redmond* Court did acknowledge that *Chrysler* could also be read as requiring an employee to compromise his religious beliefs since it stated “to the extent that the *Chrysler* court may be interpreted to say that it is incumbent on plaintiff to show first that he has made some effort to either ‘compromise’ or accommodate his own religious beliefs before he can seek an accommodation form his employer, we disagree.” *Id.* at 901–02.
More recently, in *Sturgill v. United Parcel Service,* the Eighth Circuit again explicitly stated that an employee may have an obligation to compromise on his religious beliefs. While the court stated that Title VII requires employers to make a serious effort to accommodate the religious employee, the court also stated that Title VII “requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must . . . compromise a religious observance or practice . . . .”

In *Johnson v. Halls Merchandising, Inc.*, a district court in the Eighth Circuit held that an employee may have an obligation to compromise her religious beliefs. The plaintiff in this case, for religious reasons, prefaced almost all of her sentences with the phrase “In the name of Jesus Christ of Nazareth.” The court could have found for the employer based solely on “undue hardship” since accommodating the religious employee would cause undue hardship to the employer who did not want to offend the religious beliefs of its customers. However, the *Johnson* court did not simply rely on “undue hardship” but also used rhetoric implying the employee had an obligation to compromise on his beliefs stating that the employee “did not make any effort . . . to accommodate her beliefs to the legitimate and reasonable interests of her employer . . . .” In other words, the employee’s religious conduct was mutable or a matter of personal choice.

In *Daniels v. City of Arlington, Texas,* the Fifth Circuit also used rhetoric implying that an employee had an obligation to compromise his religious beliefs. The plaintiff in this case was a police officer who during the course of his employment began to wear a small gold cross pin on his shirt as a symbol of his evangelical Christianity. This violated the police department’s policy which prohibited officers from wearing buttons, badges or medals on their uniform shirts. While the Fifth Circuit held for the employer and determined that permitting Daniels to wear the cross pin would be an “undue hardship,” the court also used rhetoric implying that religion is a mutable characteristic that an employee can choose to follow or dismiss at will. For example, the court specifically determined that the plaintiff’s religious conduct - his request to wear the pin - was “unreasonable.” Furthermore, in analyzing Daniels’ First Amendment complaint the court held that “Daniels undoubtedly has

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73 512 F.3d 1024 (8th Cir. 2008).
74 Id. at 1033.
76 Id. at 529.
77 Id.
78 246 F.3d 500 (5th Cir. 2001).
79 Id. at 506.
myriad alternative ways to manifest the tenets of his religion.”80 In other words, religion is mutable so choose a different means of expressing your religion. While the Daniels court stated that the plaintiff had a “duty of cooperation,”81 it clearly used rhetoric implying cooperation really means compromise.

Similarly, in Riviera v. Choice Courier Systems, Inc.,82 a federal district court failed to adequately distinguish between an employee’s duty to cooperate and an employee’s duty to compromise and accepted the defendant’s use of those terms interchangeably. The plaintiff, an evangelical Christian who wore the message “Jesus is Lord” on a badge on his vest, was hired as a courier and was fired when he refused to remove the badge. According to the supervisor, “[t]he fact he was persistent, and didn’t want to compromise in any way, he left me with no choice [but] to terminate him.”83 However, the court did find that the plaintiff had established a prima case of religious discrimination and refused to grant summary judgment for the employer based on the fact it was unclear what accommodation, if any, had been offered to the plaintiff.84

Other courts examining the issue have ruled that an employee’s duty to cooperate does not include compromising on his or her religious beliefs.85 The Fifth Circuit’s decision in Brener v. Diagnostic Center Hospital is often quoted for its holding that “bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.”86 However, the Brener court also stated that, “[o]f course, an employee is not required to modify his religious beliefs . . . only to attempt to satisfy them within procedures offered by the employer.”87 The Seventh Circuit agrees that an employee’s obligation is to work with the employer and not to compromise his religious beliefs.88

80 Id. at 505.
81 Id. at 506.
82 No. 01 Civ.2096(CBM), 2004 WL 1444852 (S.D.N.Y. June 25, 2004).
83 Id. at *2. (italics added). See infra Part IV.B.1. The supervisor also testified that he “‘tr[ied] to reach a point of compromise’ with plaintiff, and that he ‘asked him is there any way he can express himself in a more subtle [sic] way.’” Riviera, 2004 WL 1444852, at *2 (italics added).
84 Id. at *10.
85 See Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982); Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978); EEOC v. IBP, Inc., 824 F. Supp. 147 (C.D. Ill. 1993).
87 Brener, 671 F.2d at 146 n.3.
88 See Redmond, 574 F.2d at 897.
2. The Sabbatarian Cases

The duty of cooperation and the duty of compromise has also been an issue in cases where an employee had to refrain from work on his Sabbath. There are cases from both the Fourth and Sixth Circuits – which have been overruled or simply not followed in subsequent decisions – that required Sabbatarians to compromise these beliefs.\(^89\) While these cases are no longer good law, they illustrate how courts have implicitly determined that religion is simply a matter of personal choice. Professor Carter describes this attitude as “if you must observe your Sabbath, have the good sense to understand that it is just like any other day off from work.”\(^90\)

Discussing a Seventh Day Adventist who was a Sabbatarian, the Fourth Circuit stated in Jordan v. North Carolina National Bank that “[the plaintiff’s] pre-requirement on its face was so unlimited and absolute in scope—never to work on Saturday—that it speaks its own unreasonableness and [is] thus beyond accommodation.”\(^91\) However, as the dissent in the case correctly explained, plaintiff’s refusal to work on her Sabbath “is the beginning of the case, not the solution. It is the premise which invokes the Act and the regulation, for lacking one who has religious beliefs of the unbending nature of those held by plaintiff, neither Congress nor the Commission would have occasion to say that an employer has the duty to accommodate . . . .”\(^92\)

Before eventually overruling Jordan, a three-judge panel of the Fourth Circuit again reasoned that an employer was under no obligation to accommodate a Sabbatarian, since the request was simply too extreme and beyond accommodation.\(^93\) The Fourth Circuit emphasized that the employee had “refused to compromise in any way on the Sunday work issue.”\(^94\) In other words, religion was a mutable characteristic and a matter of personal choice on which an employee should compromise. Ithaca was, however, overturned by the Fourth Circuit sitting \textit{en banc}, which explained that the district court’s reasoning “turns the statute on


\(^{90}\) Carter, \textit{supra} note 23, at 7.

\(^{91}\) \textit{Jordan}, 565 F.2d at 76.

\(^{92}\) \textit{Id.} at 77 (Winter, J., dissenting).

\(^{93}\) \textit{Ithaca Industries, Inc.}, 829 F.2d at 522.

\(^{94}\) \textit{Id.} at 521–22.
its head. It improperly places the burden on the employee to be reasonable rather than on the employer to attempt accommodation."

The reasoning of the Jordan court was also relied upon in an unpublished Sixth Circuit decision, Settles v. Wickes Lumber Division, which held that "[a] ppellant’s ultimatum that he would never work on Saturdays may well constitute the type of blanket demand that cannot reasonably be accommodated." This ruling is particularly disturbing given that the court could have simply held for the employer on the grounds that accommodation would have caused undue hardship since employer was in mass retailing and he required all salesmen to work on Saturday, which was his busiest day. While the court did not explicitly state that religion was a mutable characteristic, the court implicitly relied on this reasoning because it took pains to emphasize that the employee should change his unreasonable conduct of being a Sabbatarian. Again, it is only mutable characteristics that can be changed. Subsequent Sixth Circuit decisions have not relied on the reasoning of the Jordan court and have instead required accommodation of Sabbatarians absent a showing of undue hardship.

B. WHEN RELIGIOUS EMPLOYEES DO NOT FOLLOW ALL OR MAINSTREAM CHURCH DOGMA OR CHANGE THEIR LEVEL OF RELIGIOUS OBSERVANCE

The courts are more likely to focus on "choice" in cases where religious employees do not consistently follow a majority institutional religion. There are three overlapping categories of cases where this occurs. First, the "choice" issue arises in cases where an employee does not follow a traditional institutional majority religion. Second, "choice" is an issue in cases where an employee follows some but not all church dogma. Third, this is an issue in cases where an employee becomes more observant over the course of his or her employment and requests additional accommodations. In all these cases, courts have used rhetoric implying that religion is simply a mutable characteristic that an employee can chose to follow or dismiss at will.

95 849 F.2d 116 (4th Cir. 1988). The Fourth Circuit also specifically overruled Jordan to the extent that it stands for the proposition that Sabbath work is beyond accommodation. Id. at 119 n.3.
97 Id.
1. Cases Where Religious Employees Do Not Follow a Mainstream Church Dogma

Courts tend to be skeptical of employees’ religious beliefs in cases where these beliefs do not stem from a majority religion. In these cases, courts are more likely to determine that the requested accommodation is really an issue of personal choice or a mutable characteristic. After the enactment of § 701(j), courts struggled for years with how to define “religious” and specifically which religious conduct should be protected by Title VII.99 Between 1972 and 1980, courts determined that religious observances that were mandated by an institutional religion were protected, while those that were not mandated by an institutional religion were a matter of personal choice and were not protected.100

In 1980, however, the EEOC issued its “Guidelines on Discrimination Because of Religion” (“Guidelines”).101 The Commission broadly interpreted the definition of religious practices “to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious beliefs.”102 The Guidelines further stated that “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.”103 Courts therefore no longer explicitly state that religious conduct is only protected if it is mandated by an institutional religion.

Yet despite these Guidelines, the courts tend to be skeptical of employees who do not follow mainstream institutional church dogma and seem very uncomfortable with how broadly religion has been defined.104 As a result of this skepticism, courts are more likely to rely on

100 Engle, supra note 2, at 357–406 (discussing how courts historically defined religion and the effect of the 1980 Guidelines on this definition).
102 Id. The Guidelines adopted the definition of religion from two Supreme Court cases involving conscientious objectors which had broadly interpreted religion and specifically determined that religion was defined to include beliefs that were sincerely held in an individual’s own “scheme of things.” See United States v. Seeger, 380 U.S. 163, 185 (1965); Welsh v. United States, 398 U.S. 333, 339 (1970). The Commission again emphasized this broad definition of religion in the EEOC Compliance Manual on Religious Discrimination, supra note 62, at 6–8.
103 29 C.F.R. § 1605.1.
104 See generally Sonne, supra note 17.
the mutable/immutable distinction and view the religious employee’s request for accommodation as little more than an issue of personal choice in cases involving minority religions or nontraditional beliefs. Courts in the First, Seventh and Eighth Circuits have all expressed skepticism of nontraditional beliefs or minority religions and implied that these beliefs and the conduct stemming from these beliefs is an issue of personal choice.

In Cloutier v. Costco Wholesale Corporation a federal district court granted summary judgment for the employer after expressing skepticism regarding the plaintiff’s request for religious accommodation. The plaintiff, a member of the Church of Body Modification, claimed that she had a religious need to wear and display facial piercings at all times, which violated Costco’s dress code. The court determined that Costco’s proposed accommodations – permitting the plaintiff to either cover her facial piercings with a band-aid or to wear a retainer – were reasonable and that any additional accommodation would have caused Costco “undue hardship.” The plaintiff had refused both of these accommodations stating that her religious beliefs required her to display the facial jewelry at all times.

In holding for Costco, the court did not explicitly question the sincerity of the plaintiff’s religious beliefs. In fact the court emphasized that at the summary judgment stage it is generally very difficult for a defendant to “challenge the contention that the plaintiff’s belief is religious, no matter now unconventional the asserted religious beliefs may be.”

Yet despite this holding, the court expressed great skepticism regarding the plaintiff’s religious beliefs, stating that even if it accepted that CBM was a bona fide religion, the plaintiff’s requirement that she display her facial piercings “represents the plaintiff’s personal interpretation of the stringency of her beliefs.” The court concluded that “[a]ll of these facts strongly suggest that while Cloutier may have a strong personal preference to display her facial piercings at all times – her preference does not constitute a strongly held religious belief.”

106 Id. at 193.
107 Id. at 199.
108 Id.
109 Id. at 196. Assuming the plaintiff did have a sincerely held religious belief that she needed to “display” facial jewelry at all times, a covered piercing would violate this belief.
110 Id.
In other words, while the district court explicitly stated that it was not questioning whether the plaintiff had a sincerely held religious belief, it nonetheless determined that the plaintiff’s religion was little more than a personal lifestyle choice which by definition is mutable.

In *Endres v. Indiana State Police*, the Seventh Circuit focused on the concept of “choice” in upholding a Baptist Police Officer’s termination for refusing to work at a casino. The officer believed that gambling was sinful and that he must therefore neither gamble nor help others to gamble. In ruling in the employer’s favor, the court held that it was unreasonable for a police department to “accommodate task-specific conscientious objection without undue hardship . . . and § 701(j) calls only for reasonable accommodation.”

However, throughout its opinion the court used the rhetoric of “choice.” According to the court, the plaintiff “contends that § 701(j) gives law enforcement personnel a right to choose which laws they will enforce.” The Seventh Circuit further explained that the plaintiff “wants to be an agent and to choose his assignments,” and that it is “difficult for any organization to accommodate employees who are choosy about [their] assignments.” Furthermore, the court determined that it is problematic if the “public knows that its protectors have a private agenda.” In other words the plaintiff’s request for religious accommodation was really a matter of personal choice that he could choose to follow or dismiss at will.

The dissent fundamentally disagreed with the majority’s reasoning and expressed specific concern with the opinion’s impact on “members of minority religions, whose doctrines are not well-understood or appreciated in our culture.”

In *Wilson v. U.S. West Communications*, the Eighth Circuit also focused on the concept of choice in holding for the employer in a case involving accommodation of a nontraditional religious practice. The plaintiff, Wilson, claimed that her religious beliefs required her to continually wear a graphic anti-abortion button with a color photograph

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112 349 F.3d 922 (7th Cir. 2003).
113 Id. at 924.
114 Id. at 925.
115 Id. (emphasis added).
116 Id. at 926 (emphasis added) (citation omitted).
117 Id.
118 *Endres v. Indiana State Police*, 349 F.3d 922, 927 (7th Cir. 2003) (emphasis added) (citation omitted).
119 Id. at 930.
120 58 F.3d 1337 (8th Cir. 1995). For a discussion of *Wilson*, see also *Corrado*, *supra* note 34, at 1420–23, 1435–37.
of an aborted fetus.\textsuperscript{121} Other employees were upset by the button and complained of harassment with some refusing to go to meetings that the plaintiff attended. As a result a forty percent decline in productivity occurred.\textsuperscript{122} The plaintiff refused to take off the button and was eventually fired.\textsuperscript{123}

The Eighth Circuit determined that the employer had reasonably accommodated Wilson by permitting her to wear the button, so long as she kept it covered.\textsuperscript{124} This accommodation eludes common sense, since wearing a covered button is an ineffective way of expressing an opinion.

The court also made it clear that Wilson should have \textit{chosen} another means of expressing her religious views. The court emphasized that it was only Wilson’s button, and not her views on abortion that were objectionable, and that many employees who opposed her button actually shared her views on abortion.\textsuperscript{125} The court noted that the employer did not object to other religious articles in Wilson’s cubicle or another employee’s anti-abortion button.\textsuperscript{126} The Eighth Circuit even emphasized that Wilson’s supervisors, who did not allow her to wear the button uncovered, were also Roman Catholics who opposed abortion and thus represented a “normal” comparison group of Roman Catholics.\textsuperscript{127} In other words, Wilson should have and could have, \textit{chosen} a different and more normal means of expressing her religious views. This reliance on choice presumes that religion is mutable.

In \textit{Johnson v. Halls Manufacturing},\textsuperscript{128} a federal district court ruled in favor of an employer who owned a retail business and refused to accommodate an employee’s request to begin almost every sentence with the phrase, “In the name of Jesus Christ of Nazareth.”\textsuperscript{129} Relying on the rhetoric of choice, the court held that the plaintiff “did not make any effort . . . to \textit{accommodate} her beliefs to the legitimate and reasonable interests of her employer.”\textsuperscript{130} Again, when dealing with a request for accommodation of a minority religious belief, the court relied on the concept of choice and clearly implied that the religious conduct in question was mutable.

\textsuperscript{121} Wilson, 58 F.3d at 1339.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 1340.
\textsuperscript{124} Id. at 1341–42.
\textsuperscript{125} Id. at 1341.
\textsuperscript{126} Id.
\textsuperscript{129} Id. at 528.
\textsuperscript{130} Id. at 529 (emphasis added).
Courts are also, understandably, unsympathetic to employees who claim that their white supremacist, racist and anti-Semitic beliefs are religious beliefs. These cases differ from the other cases discussed in this Part involving minority religions since they involve belief systems associated with hatred, physical violence and abuse. Some courts have directly held that the Ku Klux Klan\(^\text{131}\) or United Klans of America\(^\text{132}\) are not religious organizations but rather are political organizations. Another district court held that even if the Ku Klux Klan were a religion, an employee who was a member of the Klan was reasonably accommodated when he was required to cover up a tattoo on his arm of a hooded figure in front of a burning cross at all times except when washing his hands since his tattoo was “racist and violent.”\(^\text{133}\)

2. Cases Where Religious Employees Do Not Follow All Church Dogma

Courts are also skeptical of an employee’s request for religious accommodation if the employee does not follow all church dogma. In these cases the courts are more likely to find that the employee does not have a “sincerely held religious belief” and that the religious practice in question is simply a mutable characteristic or a matter of personal choice. It may seem understandable that courts are more skeptical of an employee who only follows some church dogma since it appears that the employee is “choosing” which practices to follow. However, this all or nothing approach ignores the reality that many truly religious individuals do not follow every tenet of their religion and may sincerely believe in some, but not all, of the tenets of their religion. For example, in *EEOC v. Union Independiente*,\(^\text{134}\) the First Circuit held that the district court had erroneously granted summary judgment in determining that the plaintiff, a member of the Seventh Day Adventist Church, had a sincerely held religious belief that prohibited him from joining a union. In reaching this conclusion the First Circuit relied on the fact that the plaintiff had engaged in some conduct contrary to his Church’s teachings – specifically, he was divorced, took an oath before a notary and had lied on an employment application.\(^\text{135}\) In other words, the court determined that because the employee did not consistently follow every rule of his religion, none of his religious beliefs were sincerely held. The First

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\(^{132}\) See *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973). *But see* *Peterson v. Wilmur Comm’ns, Inc.*, 205 F.Supp.2d 1014, 1021–24 (E.D. Wis. 2002) (finding that the World Church of the Creator, which preaches a belief system focused on white supremacy, is a religious organization).

\(^{133}\) *Swartzentruber v. Grunite Corp.*, 99 F.Supp.2d 976, 979 (N.D. Ind. 2000).

\(^{134}\) *EEOC v. Union Independiente de la Autoridad de Acueductos Y Alcantarillados*, 279 F.3d 49 (1st Cir. 2002).

\(^{135}\) *Id.* at 56–57.
Circuit clearly implied that the plaintiff was “choosing” which tenets of the religion to follow and therefore his religious conduct was mutable.

In *EEOC v. Ilona of Hungary,*\(^{136}\) the Seventh Circuit did determine that an employee had a sincerely held belief that she could not work on Yom Kippur (the most important Jewish high holiday) even though she was *not* an observant Jew. However, the court seemed very uncomfortable with its own holding and took pains to emphasize that the employee had a sincerely held religious belief to refrain from work on Yom Kippur since she had become more observant as a result of deaths in the family and the birth of her son.\(^{137}\) In other words, the court had a need to justify why the employee, who did not consistently follow all religious rules, should still have a particular religious belief accommodated.

Similarly, in *EEOC v. Chemisco, Inc.*,\(^{138}\) a federal district court denied an employer’s motion for summary judgment and held that the plaintiff, a member of the World Wide Church of God, could have a sincerely held religious belief that working on the Sabbath was a sin, even if she did not follow all church doctrine. The court took pains to emphasize the sincerity of the plaintiff’s belief, stating that the “record indicates that Ms. Brown has never worked on a Saturday at any job.”\(^{139}\) In other words, the plaintiff was not merely “choosing” which tenets to follow, which would imply mutability, but rather had a well-established, sincerely held religious belief that she could not work on her Sabbath.

3. When Religious Beliefs Change Over Time

Courts are also skeptical of an employee’s request for religious accommodation and rely on the concept of choice and the mutable/immutable distinction in cases where an employee’s religious beliefs change over time and the employee becomes more religious. Again, this to some extent is understandable. If an employee himself has changed his religious conduct, it may appear to be a mutable characteristic and a matter of choice. However, this again ignores the reality that many religious individual’s beliefs do evolve over time and an employee’s beliefs can both evolve and also be “sincerely held.” It also ignores the EEOC’s approach that sincerely held religious beliefs

\(^{136}\) 108 F.3d 1569 (7th Cir. 1996).

\(^{137}\) Id. at 1573 n.3; see also Cooper v. Oak Rubber Co., 15 F.3d 1375, 1378–79 (6th Cir. 1994) (emphasizing that employee’s faith and religious commitment had grown and she therefore had a sincerely held religious belief that she could not work on the Sabbath).

\(^{138}\) 216 F.Supp.2d 940, 950 (E.D. Mo. 2002).

\(^{139}\) Id. at 950.
can change over time. This has been an issue in the First, Second and Seventh Circuits.

In EEOC v. Union Independiente, the First Circuit based its holding, in part, on the fact that the employee had initially been willing to join a union. While the court did not explicitly rely on the mutable/immutable distinction, the court relied, in part, on the fact that the employee’s religious beliefs had changed over time. It is noteworthy that despite its holding the court did acknowledge that a sincerely held religious belief may change over time and the plaintiff’s refusal to join a union “might simply reflect an evolution in [his] views to more steadfast opposition to union membership.”

While there are courts that have recognized that an employee’s religious beliefs can both evolve over time and still be sincerely held and entitled to accommodation, this is not a decision that courts make lightly. For example, in EEOC v. Ilona of Hungary, the court determined that an employee did have a sincerely held religious belief that she should not work on Yom Kippur (a Jewish high holiday) despite the fact that this belief had developed over the course of her employment. As explained above, the court emphasized that the employee’s “religion had become increasingly important in recent years” as a result of deaths in her family and the birth of a child. Similarly, in Baker v. Home Depot, the Second Circuit refused to grant summary judgment for an employer in a case where the plaintiff had become a strict Sabbatarian over the course of his employment. Again, the court did not make this decision lightly but rather took pains to emphasize that the employee’s religious beliefs were sincerely held even though they had evolved over time.

140 “[A]lthough prior inconsistent conduct is relevant to the question of sincerity, an individual’s beliefs – or degree of adherence – may change over time, and therefore an employee’s newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.” EEOC COMPLIANCE MANUAL, supra note 62, at 13.
141 279 F.3d at 49. See generally supra Part IV.B.2 (discussing how district court’s granting of motion for summary judgment in favor of Seventh Day Adventist who claimed religious objections to joining a union was erroneous).
142 Union Independiente, 279 F.3d at 57 (reversing partial grant of summary judgment in favor of the EEOC).
143 Id. at 57 n.8. See also Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190, 199 (D. Mass. 2004) (court’s skepticism of plaintiff’s religious objections to joining a union was erroneous).
144 108 F.3d 1569 (7th Cir. 1996), See generally infra Part IV.B.2.
145 Ilona of Hungary, 108 F.3d at 1573 n.3.
146 445 F.3d 541 (2nd Cir. 2006).
147 Id. at 547.
As this Part has explained, courts are more likely to focus on “choice” in cases where the religious employee does not consistently follow a majority institutional religion. The next Part will focus on cases that have held that accommodations can be reasonable even if the religious conflict is not eliminated.

C. WHEN COURTS FIND THAT ACCOMMODATIONS ARE REASONABLE EVEN IF THE CONFLICT IS NOT ELIMINATED

There is some conflict among the circuits as to whether an accommodation can be reasonable if the employee’s conflict between his work and religious practice is not eliminated. In interpreting § 701(j), the Ansonia Court held that a reasonable accommodation is an accommodation that “eliminates the conflict between [the employee’s] employment requirements and religious practices.”148 Courts therefore usually find that accommodations which cannot possibly remove the employee’s conflict are not reasonable.149

However, the lower courts are split on whether an accommodation with the potential to eliminate the employee’s conflict, such as a voluntary shift swap, can be a reasonable accommodation even in cases where the accommodation in fact does not eliminate the conflict. It is striking that there are many courts that find an accommodation is reasonable even if it does not eliminate the religious employee’s conflict. In making this determination, these courts are essentially stating that it is reasonable to require a religious employee to alter or compromise on his religious conduct, which is only possible if religious conduct is mutable. Therefore, in holding that employees who have to alter their religious conduct have been “reasonably accommodated,” courts clearly imply that religious conduct is mutable.

149 See, e.g., Ilona of Hungary, 97 F.3d at 211 (holding that a Jewish employee who requested a day off from work for Yom Kippur – a Jewish High Holiday – was not reasonably accommodated when her employer permitted her to take off another day instead); Pedersen v. Casey’s Gen. Stores, 978 F. Supp. 926 (D. Neb. 1997) (referencing the jury’s finding that an employee who requested Easter off for religious observance was not reasonably accommodated when she was only given part of the day off); Graves v. Nordstrom, No. C-94-20457 RMW, 1994 WL 721589 (N.D. Cal. Dec. 20, 1994) (holding that a Sabbatarian who requested his Sabbath off was not reasonably accommodated when he was given a long break but required to work part of his Sabbath). But see Sturgill v. United Parcel Service, Inc., 512 F.3d 1024, 1032-33 (8th Cir. 2008) (declining to hold that a reasonable accommodation must eliminate any religion-work conflict and concluding “that the district court erred in instructing the jury that a reasonable accommodation must eliminate the religious conflict”).
The author recognizes that all religious conduct cannot be accommodated in the workplace since some accommodations would clearly cause an employer “undue hardship.” Reliance on the “undue hardship” analysis in no way implies religion is mutable but rather simply states that it is sometimes too costly for an employer to accommodate a religious employee in the workplace. However, in the cases discussed below, the lower courts do not rely on the undue hardship analysis but rather state that a “reasonable accommodation” may require an employee to modify his religious conduct.

1. Courts that Find Accommodations Are Reasonable Even If the Conflict Is Not Eliminated

Many courts that have addressed the issue have determined that accommodations that have the potential to eliminate a religious employee’s conflict can be reasonable even in cases where the conflict in fact has not been eliminated. This conclusion has been reached by the Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits and a number of district courts. In reaching this result, many of these decisions relied on the Supreme Court’s holdings in TWA v. Hardison and Ansonia v. Philbrook.

In Hardison, the Court determined that the employer had made “reasonable efforts to accommodate” a religious employee despite the fact the employee, a Sabbatarian, was ultimately required to work on his Sabbath. The Court determined that these reasonable efforts included the employer authorizing the union steward to help the employee obtain shift swaps with other employees and scheduling work shifts based on a seniority system. Relying on the reasoning of Hardison, the lower courts

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151 EEOC v. Universal Mfg. Corp., 914 F.2d 71, 73 (5th Cir. 1990); Eversley v. MBank Dallas, 843 F.2d 172, 176 (5th Cir. 1988); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46 (5th Cir. 1982).
153 See Mann v. Frank, 7 F.3d 1365, 1367–69 (8th Cir. 1993).
154 EEOC v. AutoNation USA Corp., 52 F. App’x 327, 328–29 (9th Cir. 2002).
155 Beadle v. Hillsborough County Sheriff’s Dep’t, 29 F.3d 589, 592–93 (11th Cir. 1994).
158 479 U.S. 60 (1986).
have determined that the use of a rotating shift system, particularly if combined with a system permitting voluntary shift swaps, can be a reasonable accommodation even if the religious conflict is not eliminated. ¹⁵⁹

However, some of the lower courts seem comfortable holding that an accommodation can be reasonable even if it does not eliminate the religious employee’s conflict and emphasize that accommodation was not possible because the religious employee failed to fully cooperate with his employer. Courts are particularly likely to rely on this lack of employee cooperation in cases where the employer permits the religious employee to engage in voluntary shift swaps and the religious employee fails to make full use of the shift swapping system. ¹⁶⁰ However, some courts have blamed the religious employee for failure to cooperate with the employer even in cases where there was no employee willing to swap shifts with the religious employee, ¹⁶¹ as well as in cases where additional cooperation might have limited the religious conflict but would not have fully eliminated it. ¹⁶²

The lower courts have also relied on the Supreme Court’s decision in Ansonia in holding that an accommodation can be reasonable even if it does not eliminate the religious employee’s conflict. The Ansonia Court

¹⁵⁹ See Beadle, 29 F.3d at 593 (finding employer’s neutral rotating shift system and its authorization of voluntary shift swaps was a reasonable accommodation); Miller v. Drennon, 966 F.2d 1443, at *3 (4th Cir. 1992) (unpublished table decision) (finding employer reasonably accommodated religious employee by permitting employee to engage in shift swaps and assisting in these swaps and also incurring $5000 in additional accommodation costs); Eversley v. MBank Dallas, 843 F.2d 172, 175 (5th Cir. 1988) (finding employer reasonably accommodated religious employee by permitting and assisting in shift swaps and offering another position with a pay cut); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 144-45 (5th Cir. 1982) (finding employer had reasonably accommodated a religious employee through the use of a rotating shift schedule combined with a system of voluntary shift swaps). But see Kenner v. Domtar Indus., No. 04-CV-4021, 2006 WL 662466, at *1 (W.D. Ark. Mar. 13, 2006) (determining that the existence of a shift swap system in a collective bargaining agreement is not a reasonable accommodation as a matter of law).

¹⁶⁰ See Brener, 671 F.2d at 144; Beadle, 29 F.3d at 589; Firestone, 2006 WL 2620314, at *1; Miller, 1992 WL 137578, at *3.

¹⁶¹ Brener, 671 F.2d at 145.

¹⁶² EEOC v. AutoNation USA Corp., 52 F. App’x 327, 329 (9th Cir. 2002). The employee, a Sabbatarian, resigned on the first day of discussions involving potential accommodations and therefore did not give the employer an opportunity to accommodate him. However, the Court held that an accommodation that would “reduce” – but not eliminate – the number of times the religious employee had to work on his Sabbath could be a reasonable accommodation. Id. at 329.
had determined that a religious employee who needed approximately six days off to celebrate his religious holidays was reasonably accommodated when he was given three days off with pay and was permitted to take the additional days off without pay.\(^{163}\) In holding for the employer, the Supreme Court said that unpaid leave in general would be a reasonable accommodation since an employee would merely be giving up pay for a day that he did not work.\(^{164}\)

Relying on the reasoning of Ansonia, the Fifth Circuit in EEOC v. Universal Manufacturing determined that “absolute accommodation” is not necessary.\(^{165}\) Similarly relying on Ansonia, the Fourth Circuit has held that an employer is “not required to provide absolute accommodation, only a ‘reasonable accommodation.’”\(^{166}\) Federal district courts have also determined that the accommodation does not need to be absolute or the best accommodation possible,\(^{167}\) and does not need to “totally eliminate the conflict.”\(^{168}\) In these cases the lower courts found that an accommodation could be reasonable even if it required an employee to violate his religious tenets.

However, these courts are misreading the holding of Ansonia. As explained in Part II, the compromise the employee was required to make in Ansonia involved lost pay for days not worked which was a secular compromise and the Ansonia Court did not state that an employee should be required to alter his religious beliefs or conduct. In interpreting § 701(j), the Ansonia Court explicitly stated that a reasonable accommodation is an accommodation that “eliminates the conflict between [the employee’s] employment requirements and religious practices.”\(^{169}\) However, these lower courts do not distinguish between compromises of a secular nature and compromises of one’s religious


\(^{164}\) Id. at 70–71.

\(^{165}\) EEOC v. Universal Mfg. Corp., 914 F.2d 71(5th Cir. 1990). However, in this case the religious employee had requested that two separate religious practices be accommodated and the employer only attempted to accommodate one of the practices. The court therefore determined that this “selective accommodation” was unreasonable. Id. at 73.

\(^{166}\) Miller v. Drennon, 966 F.2d 1443, at *3 (4th Cir. 1992) (unpublished table decision) (finding accommodation reasonable even though religious conflict was not eliminated).

\(^{167}\) Cloutier v. Costco Wholesale Corp., 311 F.Supp.2d 190, 198–200 (D. Mass. 2004) (finding accommodation reasonable even though it was unclear if employee’s religious conflict was eliminated).

\(^{168}\) EEOC v. Firestone Fibers & Textiles, Co., No. 3:04-CV-00467, 2006 WL 2620314, at *5 (W.D.N.C. Sept. 13, 2006) (finding accommodations, which included a seniority system and voluntary shift swapping, reasonable even though the religious conflict was not eliminated).

beliefs. Rather these courts essentially state that it is “reasonable” to expect a religious individual to alter his religious conduct, which implies religion is mutable since immutable traits by definition are not alterable.

2. Courts that Have Determined the Religious Conflict Must be Eliminated

There are some courts that have explicitly determined an accommodation is only reasonable if the employee’s religious conflict is eliminated. As explained above,170 these courts are in the minority. The EEOC has also taken the approach that a “reasonable accommodation must eliminate the conflict between work and religion unless such accommodation would impose an undue hardship.”171

For example, the Ninth Circuit has explicitly held that a reasonable accommodation is an accommodation that eliminates the conflict with the employee’s religious conduct.172 In reaching this conclusion, the Ninth Circuit has explicitly distinguished between compromises of a secular nature and compromises of a religious nature. The Ninth Circuit has explained that the religious conflict may be eliminated through an accommodation, such as transfer to a different position, which will place the religious employee in a “less attractive employment status.”173 Depending on the change in employment status, this type of accommodation might be reasonable. However, the Ninth Circuit has clearly stated that these cases are “distinct” from cases where the religious conflict is not eliminated.174 In making this distinction the Ninth Circuit has not explicitly relied on the mutable/immutable

170 See supra Part IV.C.1.
171 EEOC COMPLIANCE MANUAL, supra note 62, at 52 n.130. The EEOC Guidelines - as well as some of the cases discussed in this part - do not distinguish between accommodations that have the potential to eliminate the religion-work conflict, such as voluntary shift swaps, and accommodations that cannot possibly eliminate the conflict. Rather these decisions and the Guidelines simply state that a reasonable accommodation must eliminate the conflict.
172 Am. Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 776 (9th Cir. 1986) (finding district court failed to consider whether transferring postal clerks to another position preserved their employment status after determining that transfer would eliminate the religious conflict faced by the clerks); EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 620 (9th Cir. 1988) (holding employee who was atheist could not be required to attend devotional services at the Christian faith operated business where he worked and must have his religious objection to attending such services fully accommodated).
173 Am. Postal Workers, 781 F.2d at 776. The Court further explained, “Where an employer proposes an accommodation which effectively eliminates the religious conflict faced by a particular employee, however, the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee’s employment status.” Id.
174 Id.
distinction. However, the Ninth Circuit’s reasoning presumes that it is not *reasonable* to expect a religious employee to alter his beliefs or conduct. The Second\textsuperscript{175} and Seventh Circuits\textsuperscript{176} have also explicitly stated that a reasonable accommodation must “eliminate” the religious conflict.

There are also district courts that have held a reasonable accommodation is an accommodation that eliminates the religious conflict.\textsuperscript{177} Additionally, the Workplace Religious Freedom Act (WRFA) would amend § 701(j) to state that a reasonable accommodation is an accommodation that removes the conflict between the religious practice and the work requirement.\textsuperscript{178}

**D. SUMMARY OF CASES WHERE LOWER COURTS HAVE RELIED ON THE CONCEPT OF CHOICE**

Despite giving lip service to §701(j), there are three types of cases where courts are most likely to imply that religious conduct is a matter of personal choice or a mutable characteristic that is not entitled to accommodation. First, courts have relied on the concept of “choice” in cases addressing whether an employee’s obligation to cooperate with his employer includes an obligation to compromise on his religious beliefs. Second, courts are more likely to focus on “choice” in cases where religious employees do not consistently follow a traditional religious dogma. Third, courts have relied on the concept of “choice” in cases addressing whether an accommodation can be reasonable if it does not eliminate the employee’s religious conflict.

**V. CONCLUSION**

Section 701(j) collapsed the conduct/status distinction, and the federal courts therefore do not directly state that religious conduct is mutable and not entitled to Title VII protection. However, many courts continue to implicitly rely on the mutable/immutable distinction in a manner that limits an employee’s right to religious accommodation in the workplace. Courts do so, in large part, by describing religious conduct as a matter of personal choice that an employee can choose to follow or dismiss at will. Once courts have described religion as being so adaptable or mutable, it becomes much easier to limit an employee’s right to accommodation in the workplace.

\textsuperscript{175} Cosme v. Henderson, 287 F.3d 152, 159 (2d. Cir. 2002).

\textsuperscript{176} Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993) (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).


Courts often seem unaware of the fact that they are relying on the mutable/immutable distinction in the § 701(j) cases. Courts have implied that an employee’s obligation to cooperate with his employer includes an obligation to compromise on his religious conduct without recognizing that an employee can only compromise if religion is mutable.

Courts are particularly likely to rely on the concept of choice in cases where they are skeptical of the employee’s request for religious accommodation. This skepticism occurs in cases where an employee does not consistently follow a traditional religious dogma. Since religion is defined so broadly under § 701(j), courts often give lip service to the fact that an employee is engaging in “religious” conduct and then express skepticism about the employee’s religious beliefs and deny the employee’s right to accommodation in the workplace.

Similarly, many circuits have held an accommodation can be reasonable even if the religious conflict is not eliminated. In making this determination, these courts are essentially stating that it is reasonable to require a religious employee to alter or compromise his religious conduct, which is only possible if religious conduct is mutable. All of these cases, which ignore congressional intent in enacting 701(j), illustrate how deeply ingrained the mutable/immutable distinction is in judicial reasoning, and how difficult it is for courts to alter their thinking in the religion cases.