



Statement of the U.S. Chamber of Commerce

ON: THE WORKPLACE RELIGIOUS FREEDOM ACT OF 2005

**TO: HOUSE SUBCOMMITTEE ON EMPLOYER-EMPLOYEE
RELATIONS OF THE COMMITTEE ON EDUCATION AND
THE WORKFORCE**

BY: CAMILLE A. OLSON

DATE: NOVEMBER 10, 2005

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

TESTIMONY OF CAMILLE A. OLSON

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Good morning Mr. Chairman and members of the Subcommittee. I am pleased to appear this morning to testify on H.R. 1445, the Workplace Religious Freedom Act of 2005 (“WRFA”). I am a partner with the national law firm of Seyfarth Shaw LLP, where I co-chair the Labor and Employment Group’s Complex Litigation Practice. In addition to my private law practice which has focused on employment discrimination issues for over twenty years, I have also regularly taught employment discrimination to law students at DePaul University and Loyola University in Chicago, Illinois.

I am testifying today on behalf of the United States Chamber of Commerce. The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, industry sector and geographical region. I serve on the Chamber’s Labor Relations Committee as well as its subcommittee focused on employment nondiscrimination issues.

Respect for the diverse religious beliefs in our society is important for employers and employees alike. Employers have experience with the law’s requirements that not only prohibit discrimination based on religious beliefs, but also require reasonable accommodation of religious practices and observances. However, accommodating certain religious practices or observances of individual employees is sometimes difficult in light of their impact on other employees as well as other legitimate business concerns.

The Chamber has serious concerns with the Workplace Religious Freedom Act. The legislation appears to go too far in terms of which accommodations must be deemed reasonable, especially in the case of dress codes and the scheduling of employees. We are also concerned that the bill would require employers to accept accommodations for individual employees that may create a hostile work environment for other employees. It also raises numerous questions of practicality and fairness. We urge the Subcommittee to carefully consider these issues and proceed cautiously.

Current Law

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against individuals based on their religious beliefs. In addition to protecting employee beliefs, Title VII also provides protection for the religious observances and practices of employees, requiring that employers not discriminate based on those observances or practices unless the employer cannot reasonably accommodate the observance or practice without undue hardship.

Employers frequently face religious accommodation issues. Often accommodations are easily agreed upon, for example, by permitting employees to swap shifts or permit limited time off during a shift to allow employees time to pray or engage in other religious practices. However, other religious accommodation requests can be very difficult for employers to accommodate in the workplace. Among other things, accommodation requests involve assessing whether or not an accommodation can be made, the scope of the accommodation, and the hardship created by accommodating the request (including the impact of the accommodation on an employer's business, customers, and other employees). Importantly, employers must consider the interaction of other laws as well, including, for example, their obligations under the National Labor Relations Act, in addition to their desire to keep the workplace free from harassment based on one's religious beliefs.

In the context of religious accommodation, Title VII has been criticized as a result of the Supreme Court's interpretation of Title VII's undue hardship exception.¹ Critics claim that the Court significantly weakened the law and that employers may deny requests to accommodate religious practices based on demonstration of a *de minimus* burden on the employer. It is important to note, however, that under the Supreme Court's interpretation of the accommodation obligations under Title VII, employer obligations are in fact quite substantial.

For example, courts have found employer adherence to "no-beard" in the workplace policies based on "professional appearance" as opposed to safety and health issues as violative of an employer's obligations to reasonably accommodate an employee's desire to maintain a bearded appearance in the workplace.² Similarly, employee requests for exceptions to employer work schedules have also been found to violate Title VII. Title VII's existing reasonable accommodation obligations have been determined to include an obligation to meet reasonable scheduling requests, including employee requests to not be scheduled on Easter Sunday to attend both morning and evening services,³ Jewish employees' requests for leave on Yom Kippur,⁴ and individualized employee requests for days off to attend religious services relating to family members.⁵ In addition, courts have recognized the ability of employees to engage in religious conduct that does not interfere with their official job duties or, in the case where the employee is a manager or supervisor, does not create an environment of religious favoritism such as a supervisor's spontaneous prayers and Bible references.⁶

¹ See *Trans World Airlines v. Hardison*, 432 U.S. 865 (1977).

² *Carter v. Bruce Oakley, Inc.*, 849 F.Supp. 673 (E.D. Ark. 1993).

³ *Pedersen v. Casey's General Stores, Inc.*, 978 F. Supp. 926 (D. Neb. 1997).

⁴ *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997).

⁵ *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).

⁶ *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), *cert denied*, 516 U.S. 1158 (1996).

Religious Practices

It is clear that the term “religious practices” has been broadly defined under Title VII. EEOC guidance defines the phrase as any “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”⁷ In practice, both the EEOC and federal courts have upheld this broad interpretation. For example, in 1996, the Orange County Transit Authority discharged an employee who refused to hand out coupons for free hamburgers because he was a vegan. An EEOC area office determined that the employer discriminated against the employee based on his religious beliefs.⁸

In another case, *Peterson v. Wilmur Communications*,⁹ a federal court held that an employee’s racist views qualified as religious beliefs. In this case, the employee was a member of the World Church of the Creator, an organization preaching “Creativity,” the central tenet of which is white supremacy. The Court noted: “*The White Man’s Bible*, one of Creativity’s two central texts, offers a vision of a white, supremacist utopian world of ‘[b]eautiful, [h]ealthy [white] people,’ free of disease, pollution, fear and hunger (citation omitted).”¹⁰ According to *The White Man’s Bible*, “This world can only be established through the degradation of all non-whites... the survival of white people must be ensured ‘at all costs’.”¹¹ In assessing whether the employee’s beliefs qualified as religious and therefore within the scope of Title VII, the court said the question is not whether the employee’s beliefs are moral or ethical in the subjective sense, but whether the belief system “espouse[s] notions of morality and ethics and suppl[ies] a means from distinguishing right from wrong.”¹² The court concluded that:

Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. The precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means from determining right from wrong.”¹³

Another example is *EEOC v. Red Robin Gourmet Burgers, Inc.*,¹⁴ involving a restaurant server and practicing Kemetecist who explained that Kemetecism was an ancient Egyptian

⁷ 29 C.F.R. §1605.1.

⁸ *Anderson v. Orange County Transit Authority*, No. 345960598 (Aug. 20, 1996).

⁹ 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

¹⁰ *Id.* at 1016.

¹¹ *Id.*

¹² *Id.* at 1023.

¹³ *Id.*

¹⁴ No. 04-1291, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005).

religion, which he practiced by obtaining religious tattoos encircling his wrists. He further claimed that covering his tattoos was a sin, and thus he could not comply with the restaurant's appearance policy prohibiting employees from having visible tattoos. Under Title VII the employer was required to accommodate the employee by allowing him to display the tattoos.¹⁵

These cases, although perhaps factually unusual, illustrate how broad the concept of religious practices is. The practical effect is that employers simply have no ability to question the legitimacy of employee claims that particular practices, no matter how unusual, are religious.

With the broad definition of religious practice in mind, we can turn to the current reasonable accommodation standard and how WRFA might impact that standard.

Changing the “Undue Hardship” Standard

The stated intent of proponents of WRFA is to change the standard used in determining whether an accommodation would impose an undue hardship. WRFA's principle provisions would prevent a proposed accommodation from being considered an undue hardship unless it required significant difficulty or expense for the employer. Precisely how this provision would be interpreted by the courts is unclear, but the provision clearly moves the line and employers would be legally obligated to accommodate more requests than they are today.

In assessing whether it is appropriate to change the standard, it is important to look at accommodation requests that courts have found to impose an undue burden under current law and assess how WRFA might impact similar cases in the future.

Recently, my firm litigated a case that considered the tension between an employer's dress code and an employee's religious beliefs. In this case, *Cloutier v. Costco Wholesale Corp.*,¹⁶ a conflict arose between the provisions in the employer's dress code that prohibited facial jewelry and the employee's religious beliefs as a member of the Church of Body Modification. For those not familiar with the church, it includes members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. It seeks to have its members grow as individuals through body modification and its teachings, and to be confident role models in learning, teaching, and displaying body modification.

The employer's dress code was established to cultivate a neat, clean, and professional image. The employee would not accept two offered accommodations, wearing a band-aid over the jewelry or wearing a plastic retainer in place of the jewelry, instead insisting that the only acceptable accommodation would be an exemption from the dress code.

Ultimately, the First Circuit ruled that forcing the employer to exempt the employee from the dress code would be an undue hardship. The court noted that the employer had the discretion

¹⁵ See, generally, Donna D. Page, *Veganism and Sincerely Held ‘Religious’ Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363 (Winter, 2005).

¹⁶ 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 2940 (2005).

to require the dress code and mandating the exemption would adversely affect the company's public image. If the burden were shifted and the employer were required to show that the exemption would have caused a significant difficulty or expense, it is certainly unclear whether the employer would have been able to insist on its dress code or its proffered accommodations.

Another case, *Swartzentruber v. Gunito Corp.*,¹⁷ illustrates how accommodating one person could contribute to creating a hostile work environment for others. In this case, the employee had a tattoo on his forearm of a hooded figure standing in front of a burning cross. The employee was a member of the Church of the American Knights of the Ku Klux Klan and stated that the tattoo depicted one of the Church's seven sacred symbols. After other employees complained about the tattoo, the employer asked the employee to keep the tattoo covered at work, except when necessary to wash. While this case was ultimately decided on other grounds, how would WRFA's new undue burden standard apply? Would the employer be required to permit the employee to keep his tattoo visible? Would that contribute to claims of a hostile work environment by other employees under Title VII's nondiscrimination provisions related to race?

A number of recent cases illustrate the growing tension between accommodating employee requests to adhere to their religious beliefs in the workplace, and an employer's desire to maintain a place of business that does not impose an employee's religious views on customers as well as meet the Company's obligation to maintain a work environment free from harassment for all employees. In these cases, courts held that:

- An employer properly discharged a telephone triage nurse who refused to stop making religious comments to patients calling a hotline;¹⁸
- A supervisor who continually lectured a homosexual subordinate about her sexual orientation describing it as a sin was properly terminated for violating the company's reasonable policy against harassment, including harassment based on sexual orientation;¹⁹
- A social worker who tried to drive out the demons in a client having a seizure instead of calling for medical help was properly fired for violating agency rules;²⁰ and
- An employer properly terminated an employee who refused to accept her employer's accommodation of permitting her to end her correspondence with employees by writing, "Have a Blessed Day," but refusing to allow the phrase to be inserted into all writings with customers and vendors.²¹

¹⁷ 99 F. Supp. 2d 976 (N.D. Ind. 2000).

¹⁸ *Morales v. McKesson Health Solutions, LLC*, 2005 U.S. App. LEXIS 4629 (10th Cir. Mar. 22, 2005), *cert. denied* 2005 U.S. LEXIS 7490 (Oct. 11, 2005).

¹⁹ *Bodett v. CoxCom Inc.*, 366 F.3d 736 (9th Cir. 2004).

²⁰ *Howard v. Family Independence Agency*, 2004 Mich. App. LEXIS 410 (Mich. Ct. App. 2004) (unpublished).

²¹ *Anderson v. U.S.F. Logistics Inc.*, 274 F.3d 470 (7th Cir. 2001).

As the above examples illustrate, one important reason that employers might deny a requested accommodation is that it may create a hostile work environment for other employees. To ensure that they are not fostering a workplace that could be a hostile work environment, it is common for employers to adopt neutral policies designed to prohibit intimidation and harassment of all kinds. Shifting the undue burden standard creates conflict with such a policy and leaves the employer in the difficult position of deciding which provisions of Title VII to violate and which to comply with.

Other Concerns

In addition to the concerns discussed above, WRFA raises numerous other serious concerns.

Essential Functions and Dress Codes and Scheduling

As part of its new framework, WRFA would require employers to determine essential functions of employment positions which, among other things, cannot include practices relating to clothing or taking time off. These provisions contain no exceptions. However, there are certainly instances where dress codes and scheduling are essential functions of a job. For example, if a dress code is required to protect the employee's safety, then it should be classified as an essential function. Courts have already grappled with this issue and found, under current law, that even though an employee's religion required an unshaven face, a tight fitting respirator mask requirement was appropriate for employees working around toxic gases.²² As another example, consider a dress code that, for safety purposes, requires an employee to wear pants while working around machines.²³ WRFA does not permit such concerns to be included as essential functions of a job.

Scheduling may also be an essential function of the job. On one extreme, consider an employer that is only open for business one or two days a week, for example, on weekends. The ability to work Saturdays and Sundays would then truly be an essential function of the job. Other establishments may have busy seasons during the year where they need all of their employees to be available. For example, the ability to be available for work preceding Christmas might well be an essential function of jobs in the retail sector.

ADA Model

WRFA, by adopting an "essential functions" test, appears to borrow from the Americans with Disabilities Act and the Rehabilitation Act of 1973. However, it is important to note one major difference that exists in accommodating religious practices that does not exist in accommodating individuals with disabilities. It is relatively straightforward for employers to

²² *Bhatia v. Chevron U.S.A., Inc.*, 734 F. 2d 1382 (9th Cir. 1984).

²³ *Killebrew v. Local 1683 AFSCME*, 651 F. Supp. 95 (W.D. Ky. 1986).

assess the types of physical demands that will be made of employees in particular positions. Therefore, an analysis of determining essential functions of a job for purposes of the ADA is more easily understood. However, given the very broad definition of religion, it will be very difficult, if not impossible, for employers to predict what fundamental parts of a job will conflict with an employee's religious practices. We urge the Committee to consider the practical difficulties that such a requirement will impose upon employers.

Preferential Treatment

The Supreme Court has made it clear that laws that have the primary effect of advancing particular religious practices violate the Constitution's Establishment Clause.²⁴ It is unclear just how far WRFA changes the test as to which accommodations would cause undue hardship. However, it appears to make it difficult for employers to deny requests for time off to attend to religious services. In addition to Constitutional concerns, to the extent that the bill would give employees of particular religions a preference over others in taking time off, serious questions of fairness and potential conflict with labor union seniority systems would be implicated.

Conclusion

In conclusion, the Chamber has serious concerns with the Workplace Religious Freedom Act. Mr. Chairman and members of the committee, thank you for the opportunity to share the Chamber's concerns with the Workplace Religious Freedom Act with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

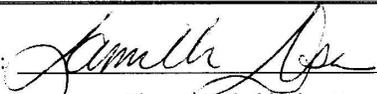
²⁴ *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

Committee on Education and the Workforce

Witness Disclosure Requirement – “Truth in Testimony”

Required by House Rule XI, Clause 2(g)

Your Name: Camille A. Olson		
1. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
2. Please list any federal grants or contracts (including subgrants or subcontracts) which <u>you have received</u> since October 1, 1998: None		
3. Will you be representing an entity other than a government entity?	Yes X	No
4. Other than yourself, please list what entity or entities you will be representing: The United States Chamber of Commerce		
5. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 4: I serve on the Chamber’s Labor Relations Committee, as well as its subcommittee focused on employment non-discrimination issues.		
6. Please list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 4 since October 1, 1998, including the source and amount of each grant or contract: None		
7. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 4 that you will not be representing? If so, please list:	Yes	No X

Signature:  Date: 11/8/05

Please attach this sheet to your written testimony.