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The Supreme Court Speaks: Religious Accommodation After *Groff v. DeJoy*

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Seyfarth Shaw LLP

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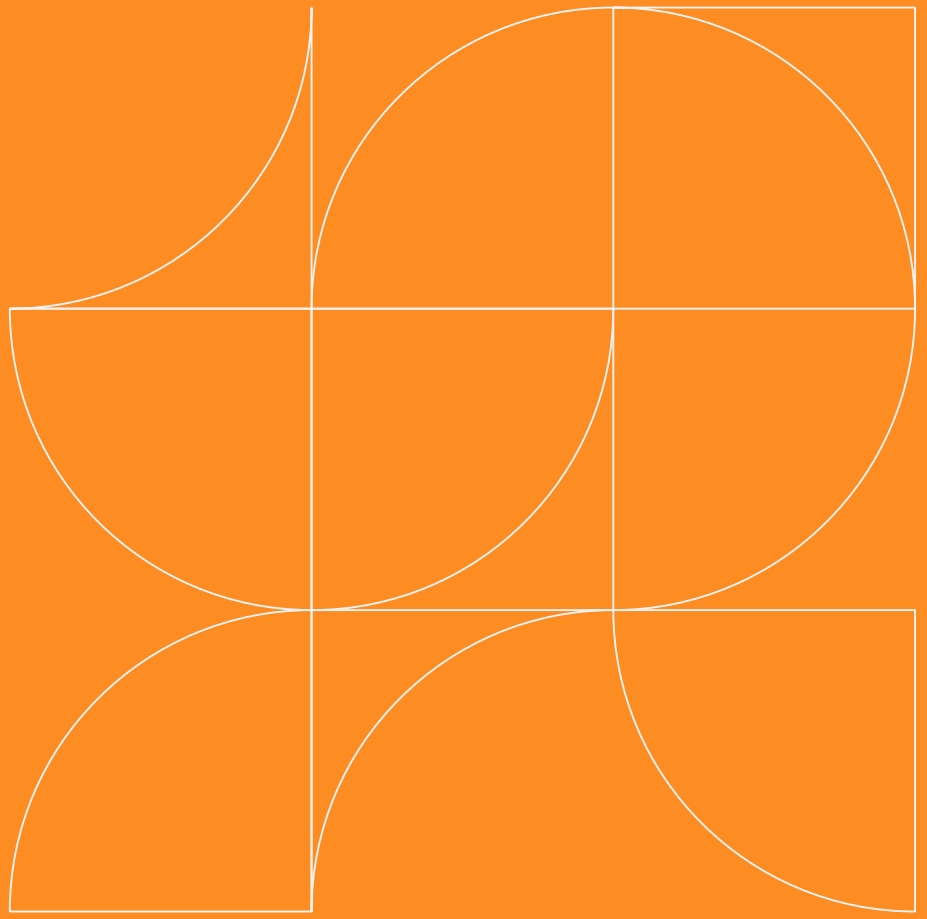
Religious Accommodation: Two-Minute Primer

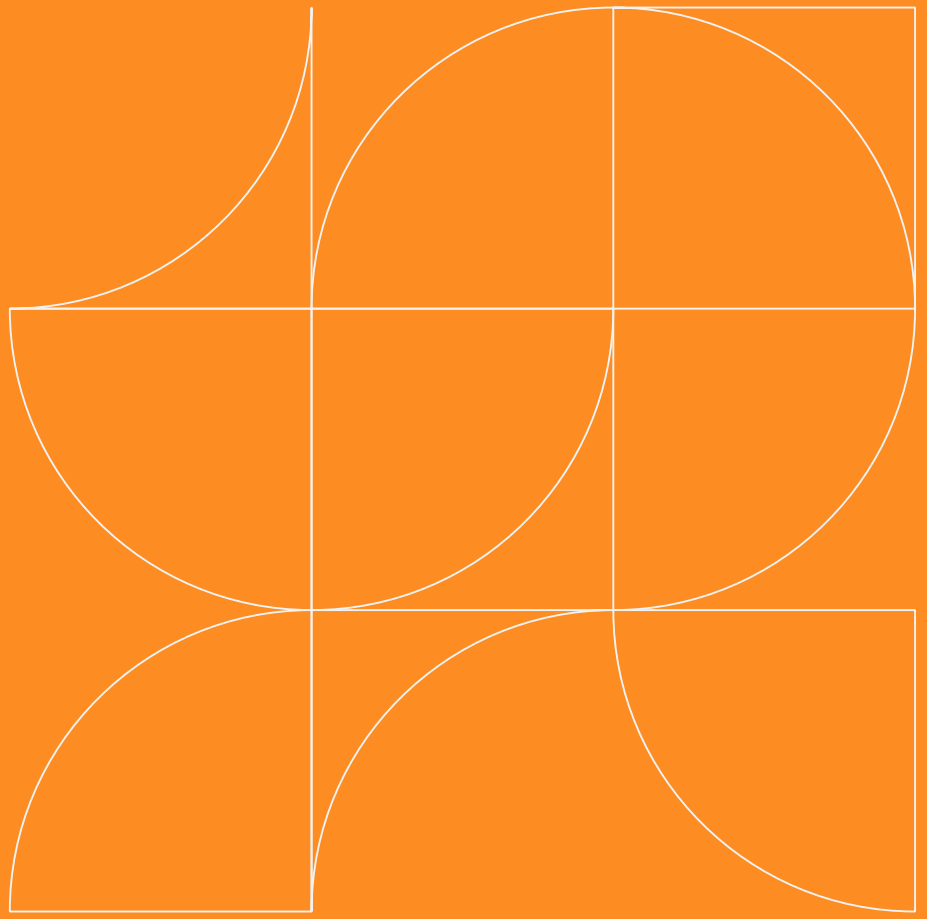


Law of Religious Accommodation (Under Title VII or State Analogs)

When an employee advises an employer of a **sincere religious belief** that conflicts with a job requirement, the employer must:

- engage in an interactive process with the employee to explore reasonable accommodations;
- either provide a **reasonable accommodation** or be able to show that it cannot do so without **undue hardship** to its business;
- avoid discriminating against the employee based on religion or retaliating against the employee for requesting an accommodation

TWA v. Hardison and the *De Minimis* Test



Trans World Airlines, Inc. v. Hardison

- Decided in 1977, *Hardison* concerned the proper interpretation and application of **Title VII**.
- Section 2000e-2(a)(1) of **Title VII** prohibits discrimination against any individual with respect to:
  - compensation, terms, conditions, or privileges of employment due to that individual's religious beliefs, **unless** an employer demonstrates that it is unable to accommodate an employee's religious belief without causing **undue hardship** to the employer's business.
  - **Title VII** does not define "undue hardship."
- *Hardison* held that an accommodation creates an undue hardship if it causes "**more than a *de minimis***" burden on the employer's business.
  - But in a little-noticed footnote, *Hardison* also referred to "substantial additional costs."
  - *Hardison* dealt with seniority rights under a CBA

~ 50 Years of Reliance on the *De Minimis* Standard

- Employers long relied on the *de minimis* standard
  - Different from the ADA's undue burden standard of "significant difficulty or expense"
- But we have long advised employers, even under the *de minimis* standard and *TWA v. Hardison*, that the employer has the burden to prove undue hardship. That is, the employer had to prove to the agency, judge or jury that the requested accommodation imposed an undue hardship.

One Example of Interpretation of the *De Minimis* Standard

Cloutier v. Costco, First Circuit 2004 (Massachusetts).

- Kimberly Cloutier alleged that her employer, Costco Wholesale Corp. (Costco), failed to offer her a reasonable accommodation after she alerted it to a conflict between the “no facial jewelry” provision of its dress code and her religious practice as a member of the Church of Body Modification.
- Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance.” Costco's dress code, included in the handbook distributed to all employees, furthers this interest.
- “It is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers, as Cloutier did in her cashier position. Even if Cloutier did not personally receive any complaints about her appearance, her facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism.”
- “We hold that Costco had no duty to accommodate Cloutier because it could not do so without undue hardship.”

Baker v. Home Depot, 445 F.3d 541 (2nd Cir. 2006)

- 2nd Circuit case (New York).
- Employee's religious beliefs prohibited working on Sunday. For nearly a year, his supervisors agreed to not schedule him to work on Sunday, until a new manager insisted that working on Sundays was mandatory.
- Manager offered him part-time employment to have Sundays off. Employee declined because it reduced his pay and disqualified him for benefits.
- Manager also offered him a later shift on Sundays, so employee could attend church in the mornings. Employee declined because he believed that Sunday work was prohibited entirely.
- Manager also allegedly offered to allow employee to switch shifts with coworkers, which the employee allegedly rejected.

Baker v. Home Depot, 445 F.3d 541 (2nd Cir. 2006)

- Home Depot terminated employee for not reporting to work on Sunday.
- District court ruled that Home Depot's offer to work in the afternoon or evenings on Sunday was a reasonable accommodation.
- 2nd Circuit vacated the judgment because the employer offered an accommodation for only one of the employee's two religious objections.
- Remanded the issue of whether Home Depot's offer of part-time employment or allowing the employee to exchanges shifts would have constituted a reasonable accommodation.

Mass. Bay Transp. Authority v. Mass. Com'n Against Discrimination, 879 N.E.2d 36 (Mass. 2008)

- Court held that under Massachusetts' statute, there is no obligation to undertake an interactive process if an employer can conclusively show that all conceivable accommodations would impose an undue hardship.
- But ruled that employer failed to show "undue hardship" because it did not even attempt a good-faith effort to accommodate employee's Sabbath observance.
- Emphasis on conduct of employer's business. Mass.'s statute offers four non-exhaustive examples of undue hardship:
  - the inability of an employer to provide services which are required by federal and state laws;
  - the accommodation would unduly compromise public health or safety;
  - the employee's presence is indispensable to the orderly transaction of business; and
  - the employee's presence is needed to alleviate an emergency situation.

War Stories

Real Life Scenarios under *De Minimis* Test

- Sabbath observance
  - Our experience in a Pittsburgh jury trial
- Prayer breaks
- Religious dress
  - Request to wear only white uniform for year after baptism in religion of Santeria

Foreshadowing of Issues with TWA v. Hardison

Justice Marshall

- Legendary civil rights icon Justice Thurgood Marshall, joined by Justice William Brennan, derided the *Hardison* opinion in a pointed dissent, stating that the decision "[dealt] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."

Justice Alito

- For example, in 2020 the U.S. Supreme Court denied a petition to reconsider *Hardison*. Justice Samuel Alito, joined by justices Clarence Thomas and Neil Gorsuch, agreed with the majority's denial because the case did not "present a good vehicle for revisiting *Hardison*," but reiterated that "review of the *Hardison* issue should be undertaken when a petition in an appropriate case comes before us."

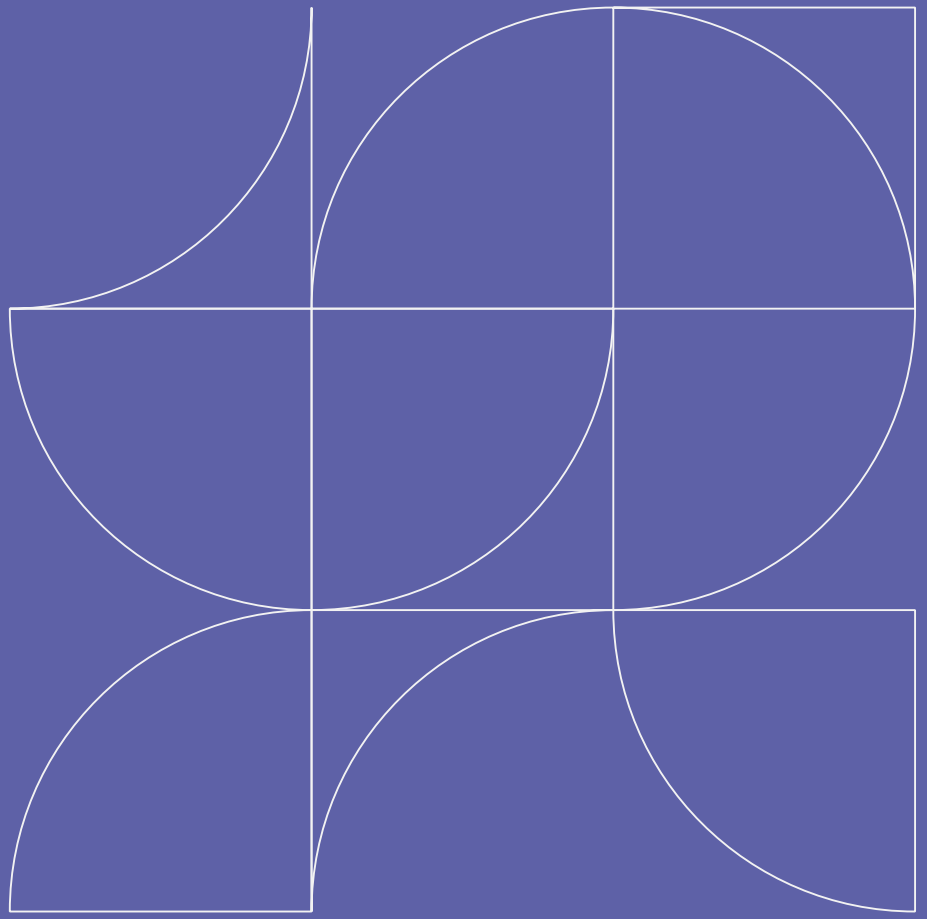
Justice Gorsuch

- A year later, Justice Gorsuch dissented against the majority's refusal to hear another religious discrimination case that would have put *Hardison* on the chopping block, noting that the *de minimis* cost test does not appear in the statute, that the *Hardison* opinion provides little supporting analysis, and finally stating "it is past time for the Court to correct it."

Dalberiste v. GLE Associates Inc., 814 Fed.Appx. 495 (11th Cir. 2020)

- 11th Circuit case (Florida).
- Employee did not disclose his Friday-to-Saturday Sabbath observance until after accepting the position. After disclosure, offer of employment was rescinded.
- District court, applying *Hardison*, ruling in favor of employer.
- Employee argued that employer could have shifted other technician's work schedules and duties to accommodate his religious observance.
- Employee conceded that an accommodation would cause more than a de minimis cost and moved for summary affirmance so that he could petition the U.S. Supreme Court to overturn *Hardison*.
- Petition for writ of cert. was denied.

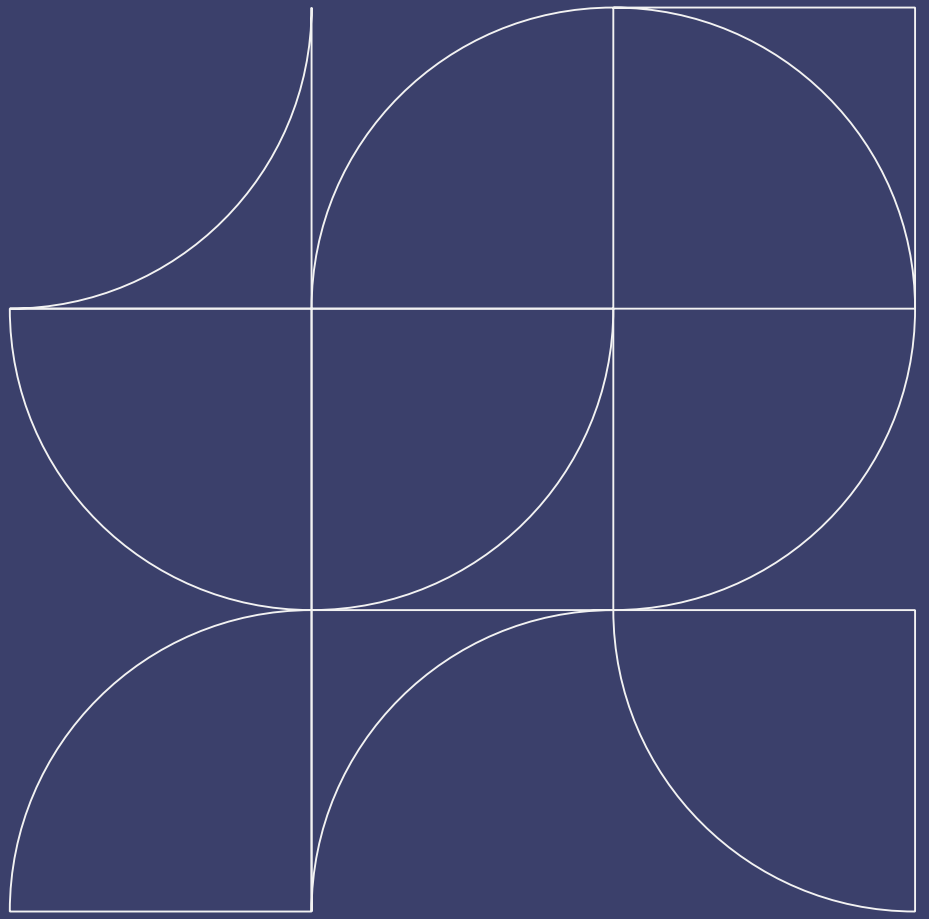
Background of *Groff v. DeJoy*



At Issue: Religious Accommodation

- Petitioner Gerald Groff was a carrier for the United States Postal Service (the “Postal Service”) whose religious beliefs prohibited him from working on **Sundays.**
- When Groff refused to work on Sunday the Postal Service disciplined him, prompting Groff to resign.
- Groff later sued the Postal Service for violating **Title VII** by failing to reasonably accommodate his religious beliefs.
- District Court ruled in favor of the Postal Service and the Third Circuit affirmed, relying on the seminal religious accommodation case: *TWA v. Hardison*.
- Supreme Court granted Groff’s petition to review the legal reasoning espoused in *TWA v. Hardison*.

Key Issues in *Groff v. DeJoy*



Two Issues Before the Court in *Groff v. DeJoy*:

I. Whether the Court should confirm or change the *de minimis* test for undue hardship under Title VII, as stated in *Hardison*; and

II. Whether an employer can show "undue hardship" under Title VII merely by showing that the requested accommodation burdens the employees' coworkers rather than the business itself.

Tea Leaves from Oral Argument

Oral Argument: April 18, 2023

- During oral argument, the Court sought to find **common ground** between both sides.
- Neither party defended the *de minimis* standard.
- Court also expressed skepticism about importing the ADA standard ("significant difficulty or expense") into Title VII.
- The justices debated how much to weigh an accommodation's effect on employee morale.

Groff's Argument

The Court Should Overrule…

- …and replace the "*de minimis*" standard with the Americans With Disabilities Act's "significant difficulty or expense" test.

&

Emphasis on Definition of "Undue Hardship"

- Groff contended that *Hardison*'s *de minimis* standard "violate[d] [Title VII's] promise that employees should not be forced to choose between their faith and their job," and "[made] a mockery of the English language," on the grounds that it cannot be squared with the term "undue hardship."

The Government's Argument

The Court Should Not Overrule…

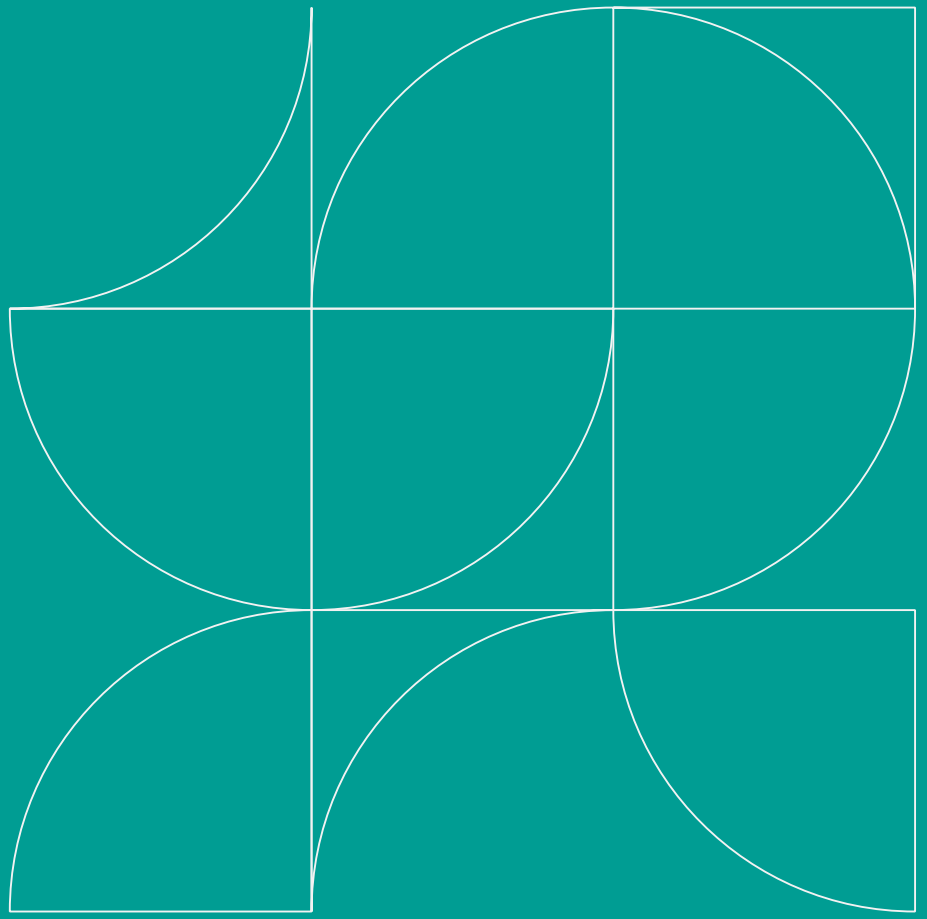
- …but instead clarify that "undue burden" affords **substantial protection for religious observance**.
- The Government emphasized that *Hardison* had referenced not only "*de minimis*" costs but also (in a little-noticed footnote) "substantial costs."

&

Emphasis on History

- Many lower courts over the decades had recognized that *Hardison* should be applied to afford **greater** protection to religious observance than the "*de minimis*" language might suggest if read in isolation.

Groff: Unanimous Opinion, by Justice Alito



Issue 1: The “Undue Hardship” Standard “Clarified”

New Standard

The employer must show that the burden of granting an accommodation would result in **“substantial increased costs in relation to the conduct of its particular business.”**

Reasoning

- The Court began with a reading of Title VII’s text and in particular the term “undue hardship.” The Court noted that the ordinary meaning of “hardship” is “something hard to bear,” and “something more severe than a mere burden.” The Court then noted that the modifier “undue” meant that the burden must rise to an “excessive” or “unjustifiable” level.
- The Court held that this was at odds with the ordinary meaning of de minimis, which means “very small or trifling.”
- *Hardison* (in addition to “de minimis”) also referred to undue hardship as entailing “substantial” “costs” or “expenditures.”

> What is most important is that ‘undue hardship’ in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer’s business in the commonsense manner that it would use in applying any such test.

Context Is Everything!

- The Court also held that courts must apply the test to take into account all relevant factors in the case at hand, including **the particular accommodations at issue** and their **practical impact in light of the nature, size, and operating cost of an employer**.

Overtime & Shift Swaps, Specifically

Overtime

- “Faced with an accommodation request like Groff’s, an employer must do more that conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options would also be necessary.”

Shift Swaps

- The Court specifically called out voluntary shift swapping as one option that is “necessary” to consider.

Issue 2: Whether The Burden on Coworkers Can Constitute "Undue Hardship"

Majority

- "Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business."
- A court "must analyze whether that further logical step is shown" – that is, not only that coworkers are impacted, but that the impact actually affects the conduct of the business.

Sotomayor's & Jackson's Concurrence

- "In addition, some hardships, such as the **labor costs of coordinating voluntary shift swaps, are not 'undue'** because they are too insubstantial.
- Nevertheless, if there is an undue hardship on 'the conduct of the employer's business,' then such hardship is sufficient, even if it consists of hardship on employees."

NOT Included

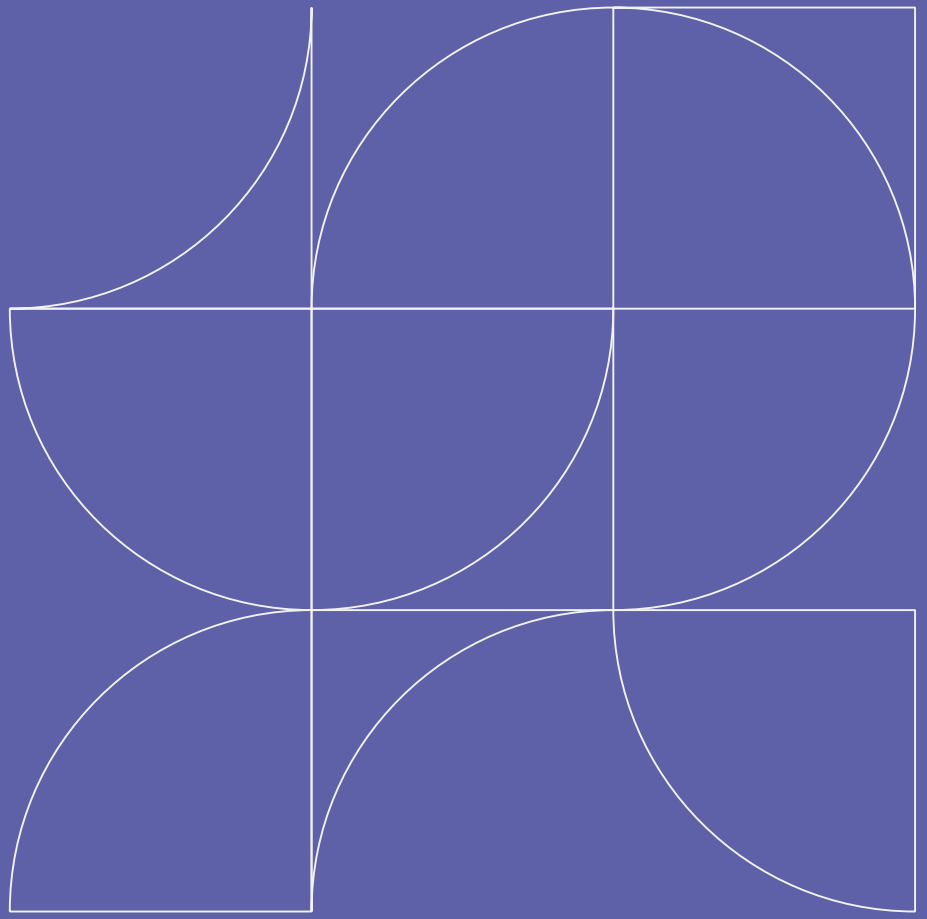
- Employee animosity towards:
  - a particular religion;
  - religion in general; or
  - the very notion of accommodating religious practice.

None of these factors are "undue hardships" to an employer's business.

Impact on Coworkers Now a Two-Part Test

1. **Does the requested accommodation negatively impact coworkers?**
2. **Does that negative coworker impact affect the conduct of the business?**

What Has Changed … and What Hasn’t



What *Hasn't* Changed

The Core Process for Considering Undue Hardship

- Employer always had the burden to prove "undue hardship" to agency, judge or jury
- Employer always had to look at the particular request in light of the employer's operations
- Employer always had to look critically at whether impact on coworkers was sufficient to show undue hardship
- We long recommended that employer *quantify* with legal counsel the nature of the undue hardship before denying an accommodation
- We have long recommended employers to look at shift swaps as a potential accommodation
- We have long recommended that employers – especially large employers – be wary of relying exclusively on overtime costs

What *Hasn't* Changed

EEOC Guidance

- "A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision. But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification the Court adopts today."

What *Hasn't* Changed

Health & Safety Can Be an Undue Hardship

- The *Groff* decision was notably silent as to whether health and safety impacts can be an undue hardship.
- Court left in place the longstanding body of law and EEOC guidance that says that health and safety impacts can be an undue hardship.
- Impacts on health and safety on coworkers, patients, clients, customers, the public will often be an undue hardship if quantifiable and provable.
- Examples:
  - hospital mandatory vaccination policies
  - breaks on manufacturing line
  - burning incense in room with combustibles

What *Has* Changed

SCOTUS Signaling a New Deference to Religious Rights

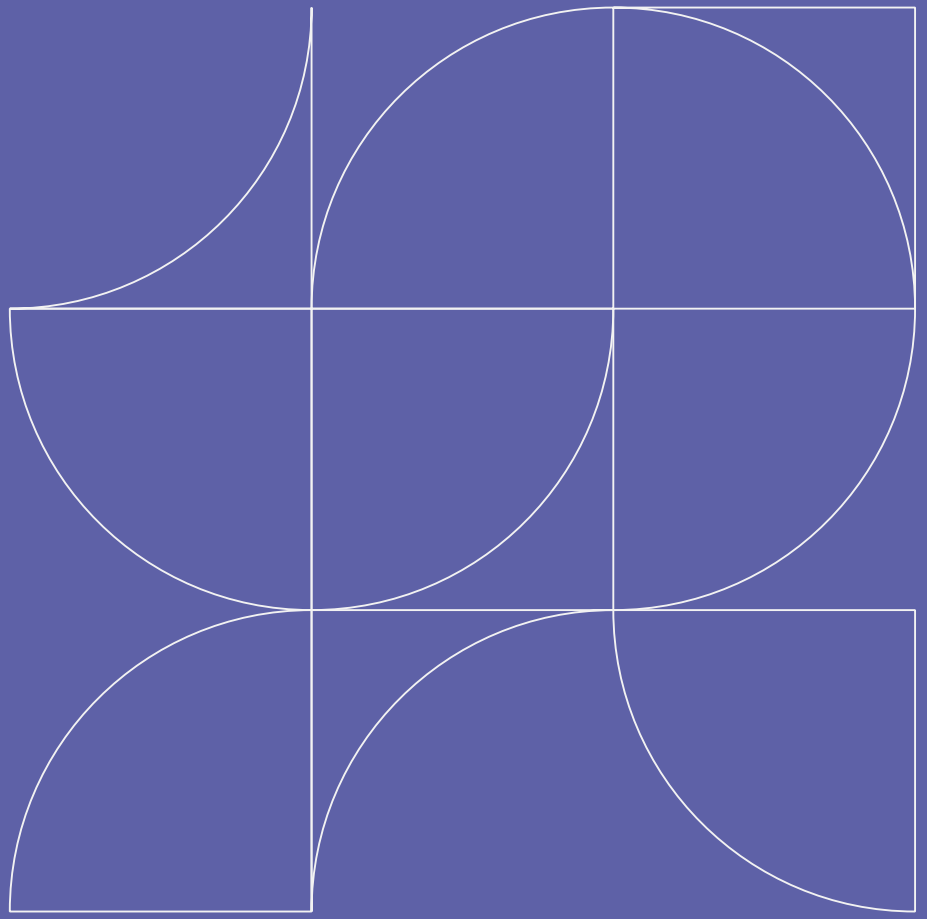
- Some courts had been leaning this way anyway – now the Supreme Court has weighed in
- *Groff* signals that the Supreme Court will be rigorous in scrutinizing undue hardship defenses and be deferential to religious requests for accommodation
- Harder to rely on coworker impacts – unless you can show effect on business operations
- Even more important to make a thoughtful, considered decision about undue hardship (ideally with advice of counsel with specific expertise in this area)

What *Has* Changed

Practical Effects

- Expect to see more accommodation requests and more litigation
- This will embolden the Plaintiffs' bar
- Increase in the trend towards religious requests for accommodation from vaccine requirements
- Increase in the trend towards religious requests for accommodation regarding LGBTQ+ trainings
- Increase in the trend towards religious requests for accommodation regarding religious speech that may be offensive towards protected categories

Effect on Pending Litigation



Does *Groff* Apply Retroactively?

We believe that *Groff* does apply retroactively.

Groff is essentially a question of statutory interpretation; it analyzed the meaning of "undue hardship" under Title VII.

In doing so, it looked to the plain meaning of that statutory term. The *Groff* court also clarified (but notably did not overturn) *Hardison*. *Groff*'s "substantial costs" standard comes from language within *Hardison*.

The Court is essentially saying that this is what "undue hardship" has meant all along; if some (largely unspecified) lower courts strayed from that meaning in interpreting "de minimis" as merely a trifling, they did so in error.

Notably, the *Groff* decision remanded the case to the lower courts to apply the "substantial costs" standard to the specific facts of that (pending) case. Groff, 2023 WL 4239256, at *12 ("Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance.").

Does *Groff* Apply Retroactively?

The conclusion that *Groff* is presumptively retroactive is also consistent with the legal framework regarding retroactivity.

The Supreme Court has held that, where it applies a civil rule retroactively to the parties before it, retroactive application is required in all pending cases. Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 97 (1993)

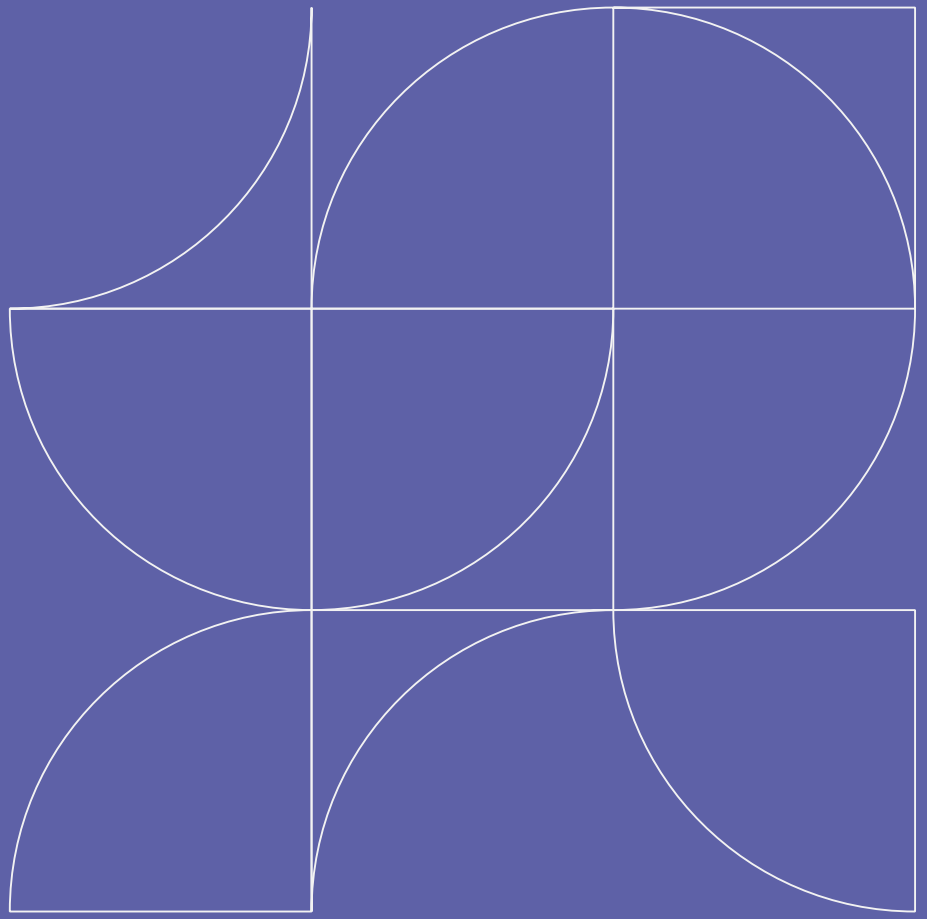
See also United States v. Sec. Indus. Bank, 459 U.S. 70, 79, 103 S. Ct. 407, 413, 74 L. Ed. 2d 235 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").

Does *Groff* Apply Retroactively?

In *DeVargas v. Mason & Hanger-Silas Mason Co.*, the Tenth Circuit stated the rule in reference to SCOTUS's interpretation of statutes: "Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases." DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1388 & n.11 (10th Cir. 1990).

What Next?

Practical Guidance



Training, Training, Training

Key Takeaways: Training

- Employers should **immediately** provide training for any employees who review religious accommodations on how to apply the new standard to requests for religious accommodation.
  - in-house counsel
  - Human Resources
  - managers
- We are happy to help provide this training to your teams.

Key Takeaways

Key Takeaways: New Standard

- Employers denying requests for religious accommodation need to be prepared to show that the cost to their business of accommodating a religious request would be **excessive** or **unjustifiable**, and if they are relying on the impact on other employees, they must also show how the accommodation's impact on other employees would substantially affect the conduct of the business.
- **Size and resources of the business matter.**

Key Takeaways

Questions to Ask re: Undue Hardship

- Questions to ask when considering whether a requested accommodation is an undue hardship, e.g.:
  - How large is the company?
  - What is the financial cost of the accommodation?
  - What health and safety risks are at play, if any?
  - What is the business impact of the accommodation?
  - What is the impact on coworkers that will affect the business?
  - What is the duration of the requested accommodation?
  - How many employees are seeking the requested accommodation?

Key Takeaways

Interactive Process

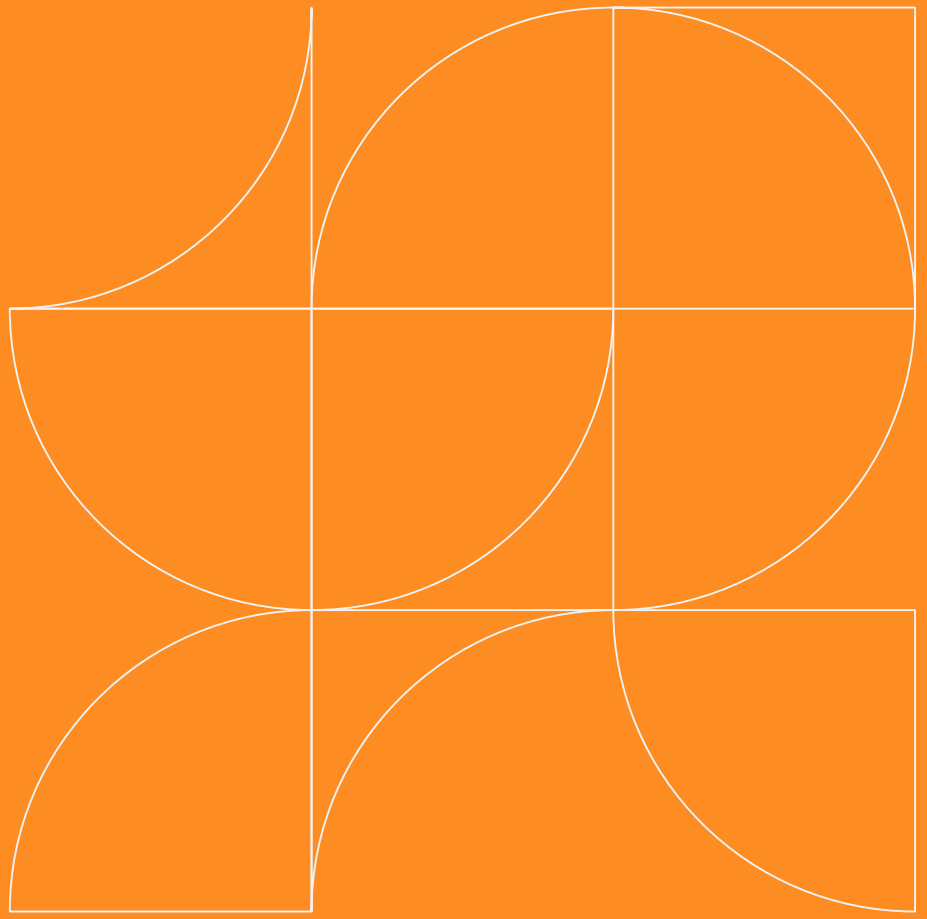
- We frequently provide clients with talking points to guide the interactive process:
  - I understand that you have previously requested a religious accommodation as to Sunday scheduling, so that you can attend church
  - The Company is committed to exploring reasonable accommodations for sincere religious beliefs if it can without undue hardship.
  - In order to evaluate your request, I will need some more information.
  - How would you describe your religious observance? Are you a member of an organized religion?
  - Can you tell us more about what you are asking for?
    - What is the nature of your religious practice on Sundays?
    - When do you attend church and where?
    - Are you requesting time off to attend church, or additional time beyond that? If you're asking for additional time off beyond church time, is that for religious reasons or other reasons?
    - Would you be open to swapping shifts with coworkers?
  - Is there anything else that you'd like to share with us about this today?
- We can also help you customize a Religious Accommodation Request Form.

Key Takeaways

(Likely) Examples of Undue Hardship

- Health and safety impacts
- Hiring a new employee to do the requestor’s job
- Paying an employee not to work
- Permitting an employee to be disrespectful or discriminatory to others in the workplace

Real-Life Scenarios Under the “Substantial Costs” Test



Practical Guidance

Real Life Examples under "Substantial Costs" Test

- How would we evaluate some of the most common religious accommodation requests under the new substantial costs test?
  - Sabbath observance
  - Prayer breaks
  - Religious dress
  - Health & safety issues
  - Requests for exemption from DEI/LGBTQ programming

Special Considerations for Unionized Workplaces

Collective Bargaining Agreements and Seniority Systems

- Employers with seniority systems should consider the facts and specific bidding system:
  - Is the bidding system not truly seniority based, such that Title VII protections do not attach?
  - Is the employee senior enough to bid another shift to accommodate the employee's religious needs?
  - Is it possible for the employee to trade shifts with another employee?
  - Is it possible for the employer to leave the shift short-staffed?
  - Is it possible for the employer to incentivize other employees to pick up the employee's shift (for unionized employers, without running afoul of the collective bargaining agreement or other labor laws)?
  - Is there any other way to get the shift covered without the employee?
- If the answer to any of these questions is "yes," then the employer cannot rely on de minimis costs and must show that there is undue hardship – "substantial increased costs" in conducting their business – under *Groff*'s higher bar.

Trends – Employees Seeking Religious Exemption from DEI & Discrimination Programs

DEI Trainings

- It is unclear whether an accommodation needs to be provided to an employee who objects on religious grounds to attending an otherwise mandatory anti-discrimination or LGBTQ+ inclusion training.
- A strong argument can be made that such programs are core to the business and its values, and that there would be practical costs to exempting the employee from such a training – including harm to coworkers, potential liability risks, etc.
- Employers should be sure to think that undue hardship defense through carefully and identify/quantify those harms up front in the context of their specific workplace.

Pay Attention to Your Jurisdiction

Jurisdictions May Vary

- We have been talking mostly about Title VII
- But be aware that states and localities may have specialized statutes or rules regarding religious accommodation
  - MA statute, for example, provides for a Sabbath day of rest
  - CA has unique state law standard re: undue hardship

thank you

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