Prepared Testimony of Michael J. Gray on Behalf of the *HR Policy Association*

ON: **PROTECTING AMERICAN EMPLOYEES FROM WORKPLACE DISCRIMINATION**

TO: **HEALTH, EMPLOYMENT, LABOR AND PENSIONS SUBCOMMITTEE OF THE HOUSE OF REPRESENTATIVES**

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Prepared Testimony of Michael J. Gray,
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Good afternoon Chairman Andrews and distinguished members of the Subcommittee. Thank you for this opportunity to provide testimony on the Workplace Religious Freedom Act of 2007 (WRFA),[1] a proposed amendment to Title VII of the Civil Rights Act of 1964. I am testifying today on behalf of HR Policy Association, an organization comprised of the chief human resource officers of more than 250 of the largest corporations in the United States. These corporations collectively employ over 12 million workers in the United States and over 18 million worldwide. Among its primary missions, HR Policy Association seeks to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace.

I am a partner at Jones Day, an international law firm of over 2,300 lawyers with 30 offices located around the world. I lead the labor and employment practice in Chicago, where for the last 16 years I have had the privilege of counseling and representing employers of all sizes with issues affecting the workplace. I frequently speak to companies and bar associations and write about labor and employment issues. In fact, in 2006, I co-authored an article on religion in the workplace for the American Bar Association's Human Rights Journal.[2] In this article, Professor Samuel Estreicher of NYU Law School and I outlined issues facing employers related to employee requests for religious accommodation. Employers continue to need that direction, but WRFA would not assist in providing clarity; rather, the law risks adding another layer of confusion to an already complicated set of rules.

The United States has been called one of the most devout nations in the world.[3] Considering this fact, and with an ever-growing number of religions, employers face a daily challenge to craft solutions to manage effectively and fairly their workforce.[4] Employers do not take this obligation lightly. What our members seek, and what their employees need, are standards that will empower them to maintain a workplace free of religious discrimination or harassment -- a neutral work zone that treats one employee no more favorably than another.

As you well know, the historic Title VII of the Civil Rights Act of 1964, as well as parallel state equal employment laws, task employers with maintaining a workplace free of discrimination, including discrimination and harassment based on an employee's religious

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[1] H.R. 1431, 110th Congress (2007). As you may know, versions of H.R. 1431 have been introduced in Congress a number of times over the last 14 years. H.R. 4237, 106th Cong. (2000) (House Version); S. 1668, 106th Cong. (1999) (Senate Counterpart); H.R. 2948, 105th Cong. (1997); S. 92, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117 104th Cong. (1996); S. 2071 104th Cong. (1996); H.R. 5233 103d Cong. (1994).

[2] Samuel Estreicher & Michael J. Gray, *Religion in the U.S. Workplace*, 33 HUM. RTS. 17, at 17 (Summer 2006).

[3] THE PEW GLOBAL ATTITUDES PROJECT, THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, AMONG WEALTHY NATIONS . . . U.S. STANDS ALONE IN ITS EMBRACE OF RELIGION (Dec. 19, 2002).

[4] BARRY A. KOSMIN, EGON MAYER & ARIELA KEYSAR, THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK AMERICAN RELIGIOUS IDENTIFICATION SURVEY (2001).

beliefs. Since 1972, Title VII required companies to provide reasonable accommodation to employees based upon religion.[5] The law, as it has been interpreted by courts and the Equal Employment Opportunity Commission (EEOC), attempts to balance the desire to accommodate an employee's religious practices against the need to avoid undue impact on other employees or the business as a whole.

We remain concerned that WRFA will significantly disrupt this balance. In many cases, WRFA will create unnecessary confusion for even the most well-meaning employer as to its obligations of religious accommodation. In some cases, the WRFA will elevate the rights of employees seeking to avoid a company policy or practice based upon his or her religion over other employees and their beliefs. Indeed, the law goes too far in demanding that companies provide accommodation, including financial support, for one employee while risking unfairly burdening other employees in the process. And, WRFA risks these unintended consequences despite the fact that protections under the existing law provide ample encouragement to accommodate employee's religious beliefs in the workplace. Ultimately, WRFA leaves employers, and their employees, with more questions than answers and we urge this Subcommittee to evaluate the proposed legislation carefully and focus on the practical impact this amendment to Title VII would have on America's businesses and workforce.

Current Law Provides for Religious Accommodations in the Workplace

Title VII institutionalized the protection of religious freedoms as part of a broader scheme to protect employees from discrimination on the basis of race, gender, national origin and religion. Among the prohibitions, the law forbade discrimination against an employee based on his or her religious beliefs. In 1972, Congress responded to questions as to whether this prohibition included an obligation to accommodate an employee's religious needs by amending Title VII.[6] The amendment provided a heightened form of protection, making religion the only enumerated category under Title VII in which employers must take affirmative measure -- "reasonable accommodation" – to protect employees.[7]

The law provides no single template for handling religious accommodation requests. Rather, employers may choose among reasonable accommodations to balance the request for accommodation with the needs of other employees or the business as a whole.[8] Title VII excuses the employer from any obligation to accommodate if the employer would incur an "undue hardship" as a result of the accommodation.[9] According to the U.S. Supreme Court, to balance these competing concerns, "undue hardship" equates to anything more than a *de minimis* cost.[10]

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[5] Section 701(j) of Title VII as codified by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amended at 42 U.S.C. §2000e).

[6] *Id*.

[7] Congress later used a similar framework in crafting the Americans with Disabilities Act of 1990.

[8] *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

[9] Civil Rights Act of 1964, 29 U.S.C. § 2000e (2000).

[10] *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977).

The Supreme Court carefully crafted this standard to address concerns that any standard that made accommodation too costly may amount to reverse religious discrimination.[11] Indeed, any attempt at increasing the support employers give a particular religious group over another raises Constitutional concerns under the Establishment Clause.[12] Mindful that the Supreme Court sought to insulate Title VII rather than eviscerate it, courts applying the *de minimis* standard routinely find that employers will not be excused from providing accommodations because of minor cost or inconvenience.[13]

Under this framework, an employer's duty to accommodate an employee's religious practice or belief currently encompasses a wide scope of religious practices, particularly because courts have broadly defined the scope of the term "religion" under the law. Title VII defines religion as "all aspects of religious observance and practice, as well as belief."[14] According to interpretive guidelines issued by the EEOC, the definition includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[15] For purposes of determining whether a belief is "religious," according to the EEOC, it may not be important that the professed belief is not shared by the religious group to which the individual belongs.[16]

Under this expansive interpretation, the EEOC and federal courts have held that Title VII protects a wide range of religious beliefs and practices from guaranteeing the right to wear religious headdress at work during Ramadan pursuant to the Muslim faith[17] and permitting a day-off to observe the Jewish holy day of Yom Kippur,[18] to less mainstream protections for refusing to contribute to union dues because it violated tenets of the Seventh Day Adventists' convictions[19] and white supremacy preached by the sect of Creativity.[20] Courts though remain

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[11] *See id.*

[12] *See, e.g., H.R. 1445, The Workplace Religious Freedom Act of 2005: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 109th Cong. 34–38 (2005) (statement of Samuel A. Marcosson, Associate Dean and Professor of Law, Louis D. Brandeis School of Law, University of Louisville).

[13] *See, e.g., Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (holding that "a claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of actual imposition on co-workers or disruption of the work routine"); 29 C.F.R. § 1605.2 (2008) (stating that "a mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship").

[14] Civil Rights Act of 1964, 29 U.S.C. § 2000e (2000).

[15] 29 C.F.R. § 1605.1.

[16] *Id.*

[17] *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (finding employer liable for refusing to permit a Muslim employee to wear a headscarf during the holy month of Ramadan).

[18] *See, e.g., EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569 (7th Cir. 1997) (finding religious discrimination against a hair salon for failing to grant unpaid time off to two employees for Yom Kippur).

[19] *Tooley*, 648 F.2d at 1243.

[20] *Peterson v. Wilmur Commc'ns*, 205 F. Supp. 2d 1014, 1019–21 (E.D. Wis. 2002).

reluctant to inquire into whether a certain belief or practice is, in fact, "religious."[21] Most courts limit their analysis to whether the belief is "sincerely held" by the employee.[22] And other courts avoid even that admittedly "thorny issue" when circumstances permit.[23] In the workplace, however, employers may not simply dodge the issue. Instead, they must evaluate the particular facts and circumstances and decide whether to accommodate requests, which may be controversial. Accordingly, it is imperative that employers be permitted flexibility to carry out this important mission and not be burdened with impractical blanket restrictions like those mandated under WRFA.

The flexibility permitted under Title VII's current framework enables employers and employees to work together to find an appropriate accommodation that best suits the needs of both the individual and workplace. In fact, a review of recent cases and a 2001 survey conducted by the Tanenbaum Center indicates that this needed dialogue is in fact occurring. A majority of employers, for example, maintain personal days that employees may use for religious observance.[24] Most requests entail minor changes in routine such as requests for schedule changes and office holiday decorations, and employers routinely communicate with the requesting employees and other employees to reach compromises.[25] For requests that cause a greater disturbance, employers analyze the potential negative impact of the accommodation on other employees, on customers and on the workplace as a whole.[26] Some employers have established permanent committees to help guide them through this process, so-called affinity groups, which consist of employees sharing common religious beliefs.[27]

Where employers and employees cannot reach an agreement, the law already provides a competent mechanism to resolve disputes. Employees have ample access to the EEOC and the courts for redress. Approximately 2,500 religion-based charges were filed during each of the

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[21] The courts try to not to evaluate a religious organization as a whole, but rather the particular individual's beliefs. In doing so, a court may find that the individual's specific "religious" organization was political rather than religious and therefore not afforded protections. *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973) (finding that Klu Klux Klan is not a religion under Title VII, but a political organization). *But see Peterson*, 205 F. Supp. 2d at 1021 (holding that employee's racist views as a member of a white supremacist church qualified as religious beliefs despite fact that his church organization was very similar to the Klu Klux Klan).

[22] *See, e.g., U.S. v. Seeger*, 380 U.S. 163 (1965).

[23] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (court intentionally avoids deciding the "thorny issue" of whether insistence on facial jewelry is result of sincerely-held religious belief, "one to which the courts are ill-suited," but decides that facts do not support finding of religious discrimination.).

[24] Eighty percent of respondents to the Tanenbaum survey, for example, reported that their company provides personal days that can be used for religious holidays. TANENBAUM CENTER FOR INTERRELIGIOUS UNDERSTANDING, RELIGIOUS BIAS IN THE WORKPLACE (2001).

[25] *See id.*

[26] *H.R. 1445, The Workplace Religious Freedom Act of 2005: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 109th Cong. 38–44 (2005), (statement of Camille A. Olson on behalf of the U.S. Chamber of Commerce).

[27] Samuel Estreicher & Michael J. Gray, *Religion in the U.S. Workplace*, 33 HUM. RTS. 17, 20 (Summer 2006).

fiscal years between 2003 and 2006.[28] The percentage of religious discrimination charges filed at the EEOC, of which only a portion involve accommodation issues, has remained relatively static at approximately 3% of all cases filed at the EEOC.[29]

The body of recent Title VII case law indicates that courts, when faced with religious accommodation questions, weigh the rights of the individual against those of fellow employees and third parties. In some cases, there are the relatively clear-cut requests involving an individual's religious practice that has little, if any, impact on others. Challenges to professional appearance policies unrelated to safety and health issues, for example, almost invariably fall in favor of the individual seeking an accommodation.[30] Courts also often find that scheduling requests for religious holidays are "reasonable" and must be accommodated.[31]

In other cases, when faced with more difficult scenarios that require consideration of more significant impact on fellow employees or the overall business, courts demonstrate appropriate reluctance to create disturbances in the workplace and analyze the competing factors in reaching a decision. Recently, for example, courts have been confronted with situations in which one employee's desire to proselytize bordered on harassment of another, such as in the case where a supervisor repeatedly lectured a subordinate about the sinful nature of her sexual orientation[32] and a demand to wear facial jewelry in light of an employee's membership in the Church of Body Modification.[33] They also reviewed instances in which an employee's actions directly affected third parties and undermined an employer's goal of maintaining a neutral workplace, such as when an employee insisted on making religious comments to patients[34] and another who signed customer correspondence with "Have a Blessed Day."[35] In all of these cases, the courts used the flexibility of the current standard to evaluate the employee's right to perform religious acts within the overall objective of maintaining a discrimination-free workplace.

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[28] EEOC, Religion-Based Charges FY 1997 – FY 2006 (Jan. 31, 2007), http://www.eeoc.gov/stats/religion.html. The EEOC dismissed a majority of the charges on the basis that they lacked "reasonable cause," meaning it had no reasonable cause to believe that discrimination occurred based upon evidence obtained during its investigation. EEOC, Charge Statistics FY 1997 Through FY 2006 (Feb. 26, 2007), http://www.eeoc.gov/stats/charges.html.

[29] *Id.*

[30] *See, e.g. EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (finding employer liable for refusing to permit a Muslim employee to wear a headscarf during the holy month of Ramadan); *Potter v. District of Columbia*, 382 F. Supp. 2d 35 (D.D.C. 2005) (Muslim firefighters successfully challenged a department policy that required them to shave their beards).

[31] *See, e.g., EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569 (7th Cir. 1997); James F. Morgan, *In Defense of the Workplace Religious Freedom Act: Protecting the Unprotected Without Sanctifying the Workplace*, 56 LAB. L. J. 68, 70 (Spring 2005).

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

[33] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005).

[34] *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).

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

Nobody would assert that the current system is perfect. Indeed, as the First Circuit Court of Appeals noted in *Cloutier*, courts remain ill-suited for the difficult question of what is a religion.[36] Still, a review of the workplace and the cases interpreting it demonstrate that religious beliefs are being accommodated. Clarity seems to be coming, albeit slowly. If enacted, however, WRFA will unnecessarily overhaul the system with new definitions, untested standards, impractical rules and added layers of complexity.[37] For these reasons, HR Policy Association opposes the proposed legislation.

WRFA's Framework Does Not Work

WRFA incorporates terms and standards from an entirely different type of employment law, the American with Disabilities Act (ADA), which do not work in the context of religious accommodations.

First, accommodation under the ADA is designed to *enable* an employee to work, whereas religious accommodations *excuse* employees from performing their job duties.[38]

Second, the standards created to analyze accommodations for individuals with disabilities simply do not translate well to the analysis of accommodations for employees' religious expressions. It should come as no surprise that WRFA, as a proposed hybrid of Title VII and the ADA, will add to the confusion for employers and employees rather than clarity.

Third, WRFA fuels the confusion by borrowing terms of art from the ADA,[39] but then ascribing different meanings to those same words.[40] WRFA's adoption of the ADA's economic

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[36] *Cloutier*, 390 F.3d at 132.

[37] Proponents of WRFA argue it is akin to the 1997 "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace," which the federal government issued to "clarify and reinforce the right of religious expression in the federal workplace." Rather than dramatically changing current law like WRFA proposes, however, the 1997 guidelines set forth standards to ensure that federal law did not unduly restrict appropriate forms of religious expression in the workplace. HR Policy Association, *Analysis of S. 677 / H.R. 1445, The Workplace Religious Freedom Act, by Sen. Rick Santorum (R-PA) and Rep. Mark Souder (R-IN)* (Mar. 30, 2005), at 7–8.

[38] *Id*. at 12.

[39] Definitions under the ADA continue to be debated frequently. In 2006, the U.S. Equal Employment Opportunity Commission received over six times more charge receipts based on the ADA than on charge receipts based on religious discrimination (including religious accommodation and religious discrimination cases). EEOC, Charge Statistics FY 1997 Through FY 2006 (Feb. 26, 2007), http://www.eeoc.gov/stats/charges.html. Of those charge receipts, 520 ADA-based charge receipts were considered for litigation, EEOC, Americans With Disabilities Act of 1990 (ADA) Charges FY 1997 - FY 2006 (Feb. 26, 2007), http://www.eeoc.gov/stats/ada-charges.html, while only 99 religious discrimination charge receipts were considered. EEOC, Religion-Based Charges FY 1997 – FY 2006 (Jan. 31, 2007), http://www.eeoc.gov/stats/religion.html.

[40] For example, although both WRFA and the ADA define "undue hardship" as an accommodation requiring significant difficulty or expense, the factors that are to be considered under WRFA are much narrower. Under the ADA, the analysis of whether an "undue hardship" exists includes examining the accommodation's effect on a particular facility, the type of operations run by the business and the composition of the workforce. WRFA's version generally aggregates the employer's resources and does not even consider the business operations or workforce. 42 U.S.C. § 12111(10)(B) (2000); H.R. 1431, 110th Cong. § 2 (2007).

standard of "undue hardship" is a prime example.[41] WRFA's definition of "undue hardship" only permits an employer to deny an accommodation request if it can show it would incur "identifiable increased costs."[42] This standard provides an employer little guidance. Whereas accommodations under the ADA generally involve architectural alterations or equipment purchases with identifiable costs, accommodations for religious practices have consequences that often cannot be so easily quantified.[43] Permitting one employee, for example, to spray a swastika on a mirror as a religious "good luck" symbol certainly would offend fellow employees, inevitably leading to conflict, loss of morale and a general degeneration of the workplace, but at what quantifiable cost?[44] Similarly, acquiescing to a nurse's desire to counsel gay patients that their lifestyle was damned and their only salvation was through Christianity significantly affects third parties, but it hardly can be analogized to assisting an employee with a physical disability.[45] WRFA's "undue hardship" standard does not contemplate this inability to weigh such pertinent factors and employers will face inevitable confusion in trying to apply the standard.

WRFA's addition of the concept of "essential functions" to religious accommodations further complicates the analysis an employer will be required to perform. Under the ADA, the term guides employers who seek to limit employment to those that can perform fundamental tasks (as opposed to marginal ones), which in the context of disability law may be more readily identifiable.[46] WRFA presumes that practices relating to clothing, taking time off, "or other practices that may have a temporary or tangential impact on the ability to perform job functions" cannot be "essential."[47] Even though an employer may be obligated to modify a job requirement for religion there is no clarity for employers seeking to comply with WRFA on how to do so. This is particularly necessary given the highly subjective nature of religion beliefs and practices.[48]

WRFA's Negative Impact on the Workplace Too Great

In many cases, WRFA will have little, if any, positive impact because courts already use Title VII to enforce an employer's duty to reasonably accommodate an employee's religious practices. Just a few weeks ago, for example, the Eighth Circuit held that the United Parcel

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[41] Under the ADA, an employer's obligation to accommodate is measured by the cost of the accommodation, its effect on the relevant facility, the type of operations, and workforce composition. 42 U.S.C. § 12111(10)(B) (2000).

[42] H.R. 1431, 110th Cong. § 2 (2007).

[43] For example, a TTY system that will enable an employee with a hearing disability costs $300-$600.

[44] *Kaushal v. Hyatt Regency Woodfield*, 1999 U.S. Dist. LEXIS 9563 (N.D. Ill. June 21, 1999) (case dismissed because employee failed to provide notice of accommodation but court also reasoned that even if notice was provided employer would not have been obligated to accommodate under Title VII).

[45] *Knight v. Connecticut Dep't. of Publ. Health*, 275 F.3d 156 (2nd Cir. 2001).

[46] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989); HR Policy Association, *Analysis of S. 677 / H.R. 1445, The Workplace Religious Freedom Act, by Sen. Rick Santorum (R-PA) and Rep. Mark Souder (R-IN)* (Mar. 30, 2005), at 14.

[47] H.R. 1431, 110th Cong. § 2 (2007).

[48] See *supra* p. 3 for a discussion of the expansive interpretations of religion.

Service violated Title VII's religious protections by firing one of its drivers.[49] The driver refused to complete his route on a Friday during peak season after notifying UPS that working past sundown would violate his beliefs as a member of the Seventh Day Adventist Church.[50] Finding that UPS could have reasonably accommodated the plaintiff by splitting his delivery route amongst other drivers, the court upheld the jury finding that the resulting costs and inconveniences did not amount to an "undue hardship."[51]

This case, however, is just one recent example of the cases in which Title VII already reaches the result WRFA's proponents seek. For example,

- An employer could not enforce a "no-beard" workplace policy based on "professional appearance," as opposed to safety and health issues, because it would violate the employer's obligation to reasonably accommodate an employee's religiously motivated desire to maintain a beard.[52]
- An employer's obligation to reasonably accommodate included employee requests to not be scheduled on any Easter Sunday shift.[53]
- An employer's accommodation obligation included Jewish employees' requests for leave on Yom Kippur.[54]
- An employer's obligation to reasonably accommodate its employees included individualized employee requests for days off to attend religious services relating to family members.[55]
- A supervisor's spontaneous prayers and bible references did not create an undue hardship for the employer because it did not create an environment of religious favoritism. Although a fact-specific finding, the court generally held that employees may engage in religious conduct that does not interfere with their official job duties.[56]

Other unintended applications of WRFA, however, outweigh its usefulness. A case from the Ninth Circuit Court of Appeals decided several years ago serves as an example of which application of the Act may lead to a different outcome: one that places employees in conflict, compromises workplace safety and inhibits its efficiency. In that case, the plaintiff objected to a poster depicting a homosexual displayed as part of the employer's diversity campaign on the basis that if offended his religious beliefs.[57] He requested that his employer either permit him to post biblical verse decrying homosexuality or remove the poster, and brought suit under Title VII

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[49] *Todd Sturgill v. United Parcel Serv., Inc.*, No. 06-4042, 2008 U.S. App. LEXIS 806, at *8 (8th Cir. Jan. 15, 2008).

[50] *Id.* at *5-6.

[51] *Id.* at *8.

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

[53] *Pedersen v. Casey's Gen. Stores, Inc.*, 978 F. Supp. 926 (D. Neb. 1997).

[54] *EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569 (7th Cir. 1997).

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

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

[57] *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 601 (9th Cir. 2004).

when the employer refused.[58] The court found that either accommodation would place undue hardship on the employer.[59] It would have forced the employer to permit the posting of messages intended to demean other employees, effectively elevating the rights of the plaintiff over other employees. It also would have forced the employer to exclude sexual orientation from its diversity program, thereby compromising its effort to create a harassment-free, neutral work zone.[60] These costs to the employer were certainly not quantifiable and the request was unrelated to the "essential functions" of the plaintiff's job. Under WRFA, therefore, the employer may have been required to grant the employee's proposed accommodation leading to a different result.

Indeed, examples of other conflicts in the workplace that may have been decided differently under WRFA exist:

- An employer properly required an employee to cover a religious symbol where the employee was a member of the Church of the American Knights of the Ku Klux Klan and stated that his forearm tattoo of a hooded figure standing in front of a burning cross was a sacred symbol of the Church.[61]
- An employer properly discharged a telephone triage nurse who refused to stop making religious comments to patients calling a hotline.[62]
- 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.[63]
- 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.[64]

If enacted, WRFA's more rigid accommodation standards would leave many employers without flexibility to protect appropriate religious expression of the requesting party as well as the religious beliefs of other employees. The Act arguably may create an environment ripe for reverse religious discrimination which, even if constitutional, is hardly a desired result for any interested parties.

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[58] *Id.*

[59] *Id.* at 607.

[60] It may have also exposed the employer to harassment liability. Under Title VII, an employer is liable for harassing conduct of its employees that it should have known about but failed to take corrective action. *See* 42 U.S.C. §§ 2000e-2(a)(1) (1988); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

[61] *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000).

[62] *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).

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

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

Conclusion

Title VII currently requires the accommodation of an employee's genuinely held religious beliefs. At best, WRFA would further complicate the accommodation dialogue between employer and employee. At worst, WRFA may create an emotionally-charged work atmosphere where religious expression in the workplace would be exalted over the rights of other protected classes.

As you are well aware, the concepts of religious freedom and tolerance are cornerstones of American culture. Title VII was designed to uphold these fundamental tenets and remains crucial to maintaining the balance needed in such a tolerant society. The Supreme Court has said, "the First Amendment embraces two concepts – *freedom to believe and freedom to act*. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[65] The title of this Act, Workplace Religious Freedom Act, purports to protect religious freedoms. However, the more than 250 of the U.S.'s largest employers who comprise HR Policy Association believe that this law would not only hurt American businesses of all sizes, but fail to better protect religious freedoms. Accordingly, the HR Policy Association asks this Subcommittee to consider the proposed legislation within the greater context of providing all employees with a productive, non-hostile work environment.

[65] *Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).