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LEGAL ASPECTS OF SCHOOL BOARD AUTHORITY TO ACCOMMODATE RELIGIOUS OBSERVANCE BY EMPLOYEES

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LEGAL ASPECTS OF SCHOOL BOARD AUTHORITY TO ACCOMMODATE RELIGIOUS OBSERVANCE BY EMPLOYEES

by

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APPROVAL PAGE

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School boards and school administrators face a continuing problem today in making and implementing policy dealing with religious guarantees respecting reasonable accommodation for Sabbath observance and leaves of absence (both short and long term) for public school employees. The school boards have been placed in the same position as all employers in the American workplace by constitutional and legislative provisions.

Since the founding days of America, the various states were left virtually free to legislate in areas respecting religion, until the 1940 Cantwell v. Connecticut decision held that the Fourteenth Amendment embraced all the liberties of the First Amendment. Thus the states were left in the same position as the Federal government in neither advancing nor promoting the practice of religious observance. Judicial decisions over the past two decades have strengthened the legal concept requiring public and private employers to accommodate the religious practices of their employees.

With the passage of the Civil Rights Act of 1964 and in the intervening decades, Congress has gone further in legislative and administrative functions to spell out guidelines for accommodation of employees' religious beliefs and practices. An analysis of significant judicial decisions reveals

that the intent and implementation of these guidelines meet constitutional muster.

This study reviews (1) the origins of the Judeo-Christian Sabbath, (2) the Sabbatarian practices that emerged from the Protestant Reformation, and (3) an analysis of the states' statutes with regard to Sabbatarian practices permitted by the several states. It also presents an in-depth analysis of landmark and significant judicial decisions dealing with employers' accommodation of employees' religious beliefs and practices in the American workplace.

Based on an analysis of judicial decisions the following conclusions were drawn: (1) the employee is free to enjoy the guarantees of the First Amendment religious clauses and is not subject to religious discrimination in the American workplace; (2) the legislative and administrative guidelines of the Civil Rights Act of 1964 protect and preserve the intent and practice of religious freedom; (3) the employer may adopt policies dealing with work rules and religion if the rule is secular in nature, neither advancing nor prohibiting religion, and does not involve an excessive entanglement between policy and religion.

This study includes a list of recommendations for school boards and administrators so that policy and administrative practices assure each religious employee the right to be accommodated in practicing sincerely held beliefs.

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CHAPTER I

INTRODUCTION

During the last decade a number of religious discrimination suits have been filed against school boards for dismissing employees who were absent from school observing religious holidays or activities that did not occur on the Sunday Sabbath. Numerous journal articles and studies have discussed the suits brought about under the Civil Rights Act and the 1972 Amendment, the Equal Employment Commission (EEOC) and the courts without clearly defining the accommodations for religious observance by employees.

In August, 1977, a United States District Court (Eastern District-Wilmington, N.C.) sustained Pender County School Board's decision in a jury trial dismissing an auto mechanics teacher who insisted his dismissal occurred because he missed nine school days for religious holidays. In 1977, a California Appeals Court sustained a school board's decision dismissing a tenured teacher who was absent 31 days for religious reasons.

The 1964 Civil Rights Act prohibits an employer from failing to or refusing to hire an individual because of religion. The 1972 amendments to the Civil Rights Act insisted that "religion" encapsulated all aspects of religious observance, practice, and belief; that an employer must reasonably accommodate an employee's (even a prospective employee's)

religious observance or practice.[1]

The religious issue in employment is larger than education. In order to examine the legal ramifications in religion and employment practices for school boards, major cases litigated from the American industry, and business marketplace are to be considered.[2] The major focus of this study concerns constitutional questions that have applicability to school boards as employers in accommodating religious practices for employees.

School boards should be cognizant of the mandates of individual freedom under the First Amendment "respecting an establishment of religion or prohibiting the free exercise thereof..." as they consider the adoption of policy providing for religious accommodations for employees. Under the current United States Supreme Court analysis, the "establishment clause" requires that when government action touches on a religious sphere it must reflect a clearly secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must avoid excessive entanglement with religion.[3]

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[1]Joseph E. Bryson, "Church-State:Duty of the Employer to Make Religious Accommodation for Employment." In Contemporary Legal Issues in Education, (Topeka: NOLPE 1979), pp 152-153.

[2]Ibid.

[3]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

In 1972, Congress enacted section 701 (j) of the Equal Opportunity Act which under certain circumstances requires employers to modify neutral work policies when those policies conflict with an employee's religious belief or practice. This requirement,which is commonly referred to as the "reasonable accommodation" rule, can be utilized by employees so as to insure that they do not work on their Sabbath.[4] Under the reasonable accommodation rule, the employer is required to attempt to accommodate the employees' wishes if the employees do not want to work on their Sabbath. Moreover, the rule requires employers to accommodate the religious practice of their employees unless such accommodation results in undue hardship on the conduct of the employers' business.[5]

Undue hardship on the employer's part was addressed in the Hardison v. Trans World Airlines decision in 1974. Associate Supreme Court Justice Byron White, speaking for the majority (7-2 decision), said that requiring the employer to bear more than a de minimis cost in accommodating an employee's religious observance is an undue hardship. Noticing a considerable difference in judicial opinion between the District Court and Circuit Court of Appeals over de minimis cost, Justice White accepted the District Court's

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[4]42 U.S.C. 2000e (j) (1976).

[5]James L. Beard, "The Constitutionality of an Employer's duty to Accommodate Religious Beliefs and Practices," Kent Law Review 56 (1980): 635.

position that a seniority system had no intention of locking members of any religion into a pattern wherein their freedom to exercise their religion was limited.[6] Justice White added, "In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[7]

In 1983, a Colorado District Court denied a tenured Jewish teacher's claim that having only two paid personal leave days per year interfered with free exercise of his Jewish faith. The District Court, Judge Moore, held that permitting two personal leave days with pay did not constitute impermissible interference with the right to free exercise of religion, notwithstanding that for many Jews it is important to attend temple for two days on each holiday. Moreover, the court held that at the outset of the teacher's employment, the school board's policy had been even more stringent than it was at the time of litigation, and the acceptance of employment had not been a bar to acceptance of employment by the teacher. The court further held that, unlike an assembly line worker, the teacher is essential in the continuity of the educational process. Even though a substitute may be

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[6]Bryson, pp. 152-153.

[7]Trans World Airlines, Inc. v. Hardison, 432 U.S. 79 (1977).

available, "there is a diminution - however grave or slight- in the educational process when the regular teacher is absent".[8] The Colorado Court reasoned that two days of paid personal leave for teachers had tones of arbitrariness but was a creature of the give-and-take in negotiations that had a legitimate compelling public interest at base. The line was drawn in order to serve students for whose benefit the school system exists and the line was not constitutionally impermissible.[9]

On appeal, the Tenth Circuit Court, in affirming the District Court, held that the school district's policy of allowing only two days paid special leave did not constitute discrimination against the Jewish teacher on basis of religion merely because it required the teacher to occasionally take unpaid leave to accommodate his religious practices, and the school board's policy was not violative of the teacher's First Amendment right to free exercise of religion.[10]

Throughout the history of the United States, many Americans have regarded religious freedom as a fundamental right protected by the Constitution. The general intent of the

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[8]Pinsker v. Joint District No. 28J of Adams and Araphoe Counties, D. C. Colorado, 554 F. Supp.. pp. 1052 (1983).

[9]554, F. Supp. 1052 (1983).

[10]Pinsker v. Joint District No. 21 J 7 Adams and Araphoe Counties, 735 F2d 388 (1984).

religious clause has been that both religion and government can best achieve their respective purposes if each is free within its proper sphere from interference by the other.[11] The "establishment clause" prohibits government from forcing a citizen to believe in a religion.[12] The United States Supreme Court in Everson (1947) summarized the interrelation between the two clauses when it said:

> "The structure of our government has for the preservation of civil liberty rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority."[13]

For all its importance as the pivotal element in our church-state arrangements, the term "religion" was left undefined in our constitution and amendments. It is possible that here as elsewhere in the deliberations of the framers, ambiguity was the price for consensus, that the imprecision was intentional, and that the task of delimiting the term precisely was purposefully left to later generations. Central to a search for meaning in the religious clause is a recognition that it is a political charter and not a tenet of theological faith. If the meaning of religion is a political

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[11]Bruce Beezer, "Religion and Employment: How Extensive Is a Teacher's Religious Freedom?", Education Administration Quarterly 18 (Spring 1982): 96.

[12]Ibid.

[13]Everson v. Board of Education, 330 U.S. 1, (1947).

formula, it should be sought in the field of law rather than theology.[14] In this context, religious accommodation should be an operative principle for school boards and the ascertainment of it should be sought in legal aspects.

The Courts have attempted to define religion in a legal rather than a theological context ever since the Marbury v. Madison decision when the United States Supreme Court said: "It is emphatically the province and duty of the judicial department to say what the law is."[15]

Present-day school boards should examine the religious issue in employment in the same context without attempting to administer religious tests. The centrality and depth of the employee's religious belief is protected under the First Amendment. The 1964 Civil Rights Act, amended, and recent court decisions place the burden on the school board to deal with the "reasonable accommodation" - "undue hardship"[16] dichotomy and policies affecting employee religious practices.

The overall purpose of this study was to provide school boards with appropriate information regarding the legal aspects of policies in accommodating religious observance by its employees. To ensure that employees' First and Fourteenth

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[14]Edward R. Lilly, "The Meaning of Religion: A Constitutional Perspective" Viewpoints 120 (27 September 1982): 1.

[15]Marbury v. Madison, 5 U.S. 137 (1803).

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

Amendments guarantees[17] are protected, school boards need to have at their disposal, clear and definitive policies to accommodate religious practices and safeguard the educational process in the schools.

Statement of the Problem

It is obvious that school boards and educational decision makers face a dilemma today in making policy to accommodate religious observance by employees. The First Amendment, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..."[18] and the Fourteenth Amendment "nor shall any state deprive any person of life, liberty, or property, without due process of law"[19] require the school boards to accommodate religious observance by employees regardless of their Sabbath or religious practices.[20] While doing so, school boards have to juxtapose the rights of individuals to religious practice with the "reasonable accommodation" - "undue hardship" clause.[21] In issues not clearly answered by the courts, the

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[17]U.S. Constitution, amend. I, XIV.

[18]U.S. Constitution, amend. I.

[19]U.S. Constitution, amend. XIV, sec. 1.

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

[21]Ibid.

1964 Civil Rights Act, amended 1972, and the Equal Opportunity Employment Commission (EEOC) have gone further in the legislation and administrative branches to spell out guidelines for accommodations of religious practices by employees.[22] Thus, there is a need for examining the legal issues associated with the school boards' legal authority to make and administer policy that will accommodate the religious practices for all Sabbatarians.

Since the questions of "reasonable accommodation" and "undue hardship" continue to be widely debated in the courts and by school boards, there is a need to review the major legal issues for the purpose of determining when to grant privileges for religious observance as a part of the accommodation process.

Questions To Be Answered

One of the stated purposes of this study is the development of practical, legal guidelines for school boards to have at their disposal when making policy decisions concerning accommodation for religious observance by employees. School boards should guard against violations of First Amendment provisions: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." Below are listed several key questions which

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[22]Civil Rights Act of 1964, Title VII, sec 701 (j), 42 U.S.C., sec 2000 e (j).

research needs to answer in order for school boards to maintain the church-state separation.

1. What constitutes reasonable accommodation for religious holiday observance by employees?
2. When does religious accommodation (either short term or leaves of absence for religious observances) for an employee place an undue hardship on the school board?
3. What is the legal authority of the school board to establish policy concerning religious holiday observance by the employee?
4. What are the legal aspects in implementation of policy by the school administration?
5. Based on the results of recent court cases, what specific issues relating to religious holiday observance by employees are being litigated?
6. Based upon the established legal precedents, what are the legally acceptable criteria for policy making concerning employee religious accommodation?

Scope of the Study

This is a historical study of the legal aspects of school board's authority to accommodate the religious beliefs and practices of its employees. The research describes the church-state relations litigated under the Religion Clauses of the First Amendment applicable to the employer's

accommodation of employees' religious beliefs and practices, the reasons for litigation, the results of the major court cases, and the effects these court decisions have on school board in policy development for religious employees.

Even though this study includes numerous references to litigation requiring accommodation of religious beliefs and practices in the private sector, the courts have made the legislation applicable to the public employers, including school boards.

The major thrust of this research is directed toward the legal aspects of school boards' authority to accommodate religious beliefs and practices under existing legislation and litigation through the courts, establishing precedent and "case law" for school boards. In order to focus on religious beliefs and practices of employees, a review of the origins of the Judeo-Christian Sabbath is included in the review of literature.

This study includes a review of the statutes of the fifty states, District of Columbia, and Puerto Rico, major court cases from 1940 through 1985, and legislation related to reasonable accommodation and undue hardship arising from the First Amendment clause respecting free exercise and establishment of religion.

Methods, Procedures and Sources of Information

The basic research technique of this study was to

examine and analyze the available sources concerning the duty of school boards to provide for religious beliefs and practices by their employees.

In order to determine whether a need exists for such research, a search was made of Dissertation Abstracts for related topics. Journal articles related to the topic were located through use of such sources as Reader's Guide to Periodical Literature, Education Index, and the Index to Legal Periodicals.

General research summaries were found in the Encyclopedia of Educational Research, various books on school law, and in a review of related literature through computer research from the Educational Resources Information Center (ERIC).

Federal and state court cases related to the topic were located through the use of Corpus Juris Secundum, American Jurisprudence, the National Reporter System, and the American Digest System. Recent court cases were found by examining case summaries contained in 1983, 1984, and 1985 issues of the NOLPE School Law Reporter. All of the cases were reviewed and placed in catagories corresponding to the issues noted from the general literature review.

Definition of Terms

For the purpose of this study, the following selected terms are defined:

Undue hardship. The normal conduct of an employer's business is not required to suffer in allowing employees to practice the tenets of their religion which occur on an established work schedule. The claim of undue hardships cannot be supported by conceivable or hypothetical hardships; instead, a determination must be made by the facts of each case.[23] In the Pinsker decision (1983), the court reasoned that attendance of teachers is of greater concern to school boards than attendance of other employees to other employers.[24]

Reasonable accommodation. The language of the 1972 amendment to Title VII of the 1964 Civil Rights Act obligates an employer to provide "reasonable accommodation" for an employee's religious observance, practice or belief short of an undue hardship on the conduct of the employer's business.[25]

Religious observance. The term "religion" includes all aspects of religious observance and practices as well as beliefs and is not limited to either Sabbatarianism or a practice mandated or prohibited by a tenet of a person's religion.[26]

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[23]Tooley v. Martin-Marietta Corporation, 648 F2d 1239 (1981).

[24]Pinsker v. Joint District No. 28J of Adams and Araphoe Counties, 554 F. Supp. 1049 (1983).

[25]42 U.S.C. 2000e (j).

[26]Redmond v. GAF Corp., CA. Ill. 1978, 574 F2d 897 (1978).

Religion. The United States Constitution makes no distinction regarding the definition of religion in the pivotal element of church-state relations. It is possible that the imprecision was intentional by the framers in order to get a consensus, leaving precision in defining religion to later generations.[27] In religious discrimination suits filed under 42 U.S.C. 2000e, the courts have defined "religion" to include conduct which is religiously motivated in all forms and aspects of religion however eccentric.[28] A discernment must be made between beliefs of personal preference and the concept of "religion" as protected by the United States Constitution and the 1964 Civil Rights Act, amendments.[29]

Significance of Study

The First Amendment, adopted in 1791, provides the free exercise clause prohibiting any governmental regulation of religious beliefs.[30] The face of the First Amendment appears to apply to Congress to speak to the question of religion. Seventy-seven years later the states adopted the Fourteenth

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[27] Lilly, p 1

[28] Redmon v. GAF Corporation, 574 F2d 897 (1978).

[29] Brown v. Pena, D. C. Fla. 441 F. Supp. 1382 (1977), Affirmed, 589 F. 2d 1113 (1978).

[30] U.S. Const., amend. I.

Amendment which prohibits a state from invading the "the privileges of immunity of citizens" and from denying a person liberty without the due process of law.[31] The 1964 Civil Rights Act protects employees from religious discrimination under Title VII. Moreover, the 1964 Civil Rights Act, 1972 Amended Title VII insisted that employers must guarantee employees consideration in 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 religious observance or practice without undue hardship on the conduct of the employer's business.[32]

In an article published in Contemporary Legal Issues In Education in 1979, Bryson raised questions about the religious practices of the majority of Americans which, he contended, the marketplace has accommodated. A minority of religious people view these accommodations as arbitrary mandates that circumvent their religious dictates.[33]

Judicial interpretation and application of the employer's duty to accommodate for religion by the various courts has resulted in confusion. Not only is there irreconcilable

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[31]Joseph Beckham and Perry A. Zirkel, eds., Legal Issues in Public School Employment (Bloomington, Indiana: Phi Delta Kappa, 1983), p. 55.

[32]Civil Rights Act (1964) amend. (1972), Title VII, 42 U.S.C. 2000e (j).

[33]Bryson, pp. 152-153.

conflict among the district courts but also from panel to panel in the same circuit. While the factors considered relevant by the courts in the decision making are the same, their opinions lack uniformity. Consequently, the conflicting decisions stem from the lack of Congressional definitions and standards for key concepts in accommodating religious practices by employees. Judicial determinations fill in the gaps on an ad hoc basis resulting in diverse opinions.[34]

This study is significant in that it examines religion in employment practices from a legal perspective in order to assist school boards and educational decision makers to formulate better policies to prevent religious discrimination in accommodating religious observances and practices. A review of the Constitution, legislative, and judicial decisions was conducted to determine court decisions regarding accommodation for all Sabbatarians in their religious observances and practices.

Recent legislative actions and judicial decisions that address religious accommodation in employment were examined in light of Equal Employment Opportunities Commission (EEOC) Regulation 1605.1--

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[34]Sue Gordon, "Up Against the Accommodation Rule," University of Missouri (Kansas City) Law Review 45 (February 1976): 57.

> The 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 or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

and major court decisions arising from claims litigated on Constitutional issues and statutory provisions.

The study examined the school board's authority to make religious accommodation for all employees in consideration of the tripartite test which analyzes constitutional issues involving religion. Under this test, the policy must (1) reflect a clear secular purpose; (2) be neutral in its effect; and (3) not involve excessive governmental entanglements with religion.[35]

Design of the Study

The remainder of this study is divided into four major parts. Chapter II contains a review of literature related to the origins of the Judeo-Christian Sabbath.

The third chapter includes a narrative discussion and review of the statutes of the fifty states, the District of Columbia, and Puerto Rico which allow Sabbath observance by public school employees. An attempt is made to show the statutory provisions for Sunday observance either by explicit or implied legislation. Also included in this chapter

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[35]Lemon v. Kurtzman, 403 U.S. 602 (1971).

is a series of tables indicating statutory provisions for the Non-Sunday Sabbatarian, Good Friday and Easter Monday, Christmas, designation of special days by the governors or President of the United States, and acts of mercy and charity on Sunday.

Chapter IV includes a narrative discussion of the legal issues related to accommodation of religious observance by employees with major reference to accommodation of public employees. An attempt is made to show the applicability and relationship of religious accommodation afforded under the First and Fourteenth Amendments, Congressional enactments, and major court cases establishing precedent and "case law" for reasonable accommodation of employees short of undue hardship on the employer.

The fifth chapter contains a general listing and discussion of the judicial decisions which contain reference to the general topic of reasonable accommodation to employees. The first category of cases includes a listing of those cases relating to the broad constitutional issues of church and state focusing on the Free Exercise and Establishment Clauses of the First Amendment. Other categories of cases selected for review include those related to reasonable accommodation of religious practices of employees in business and industry with applicability to public school employees, and cases related specifically to accommodation

of religious practices of public school teachers and employees with applicability to school boards' employment policies.

Chapter VI contains a summary and conclusions of the information in the review of the literature and from the analysis of the selected court cases. The questions asked in the introductory section of this study are reviewed and answered in this chapter. Recommendations concerning legally acceptable criteria for policy development and implementation are included. Finally, recommendations are made to be used as a guide in developing and implementing legally sound policies ensuring Constitutional guarantees for "reasonable accommodation" of religious observance by employees.

CHAPTER II

REVIEW OF RELATED LITERATURE

Early History of The Judeo-Christian Sabbath

Mankind has measured periods of existence in various ways. Ancient peoples counted time by decades, nundines (the eighth day), the first day of the month, the ninth day before the middle of the month, and the middle of the month (ides). The seven-day week was not general at the dawn of history; it prevailed only in the near East, primarily among Jews, Egyptians, and Persians.[1] The early dating of the Sabbath suggests that the rest day could have originated as a lunar taboo day with the early Hebrews declaring periodic rest days of the lunar phase to be taboo and recommending abstinence and quiescence in order not to incur taboo.[2]

In Egypt the people rested securely in their belief in the regularity of life. The sun rose over the desert each day and set over the Nile while it periodically overflowed its banks in a predictable cycle of harvest and

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[1]Winton V. Solberg, Redeem The Time (Cambridge, Massachusetts: Harvard University Press, 1977), p. 7.

[2]N. A. Barak, History of The Sabbath (New York: Jonathan David, Inc., 1965), p. 14.

hunger.

The political hegemony of the priestly class denied to other classes self-determination and the questioning of their station in life. The unchanging of cycles was empowered by the gods and had to be appeased in the person of the Pharaoh.

In Mesopotamia, unpredictable storms, floods, and the tempest of war compounded the natural order; thus the people viewed the gods as arbitrary and capricious. In this context, the pagan sought to bring order out of chaos. The priest performed rites hoping to convince the various deities to allow the cycle of days and seasons to turn over once again.[3]

The Babylonians through their astronomical knowledge had established the invariability of siderial revolutions and were led to the idea of a Necessity, superior to the gods themselves. Since this Necessity commanded their movement and ruled their gods, it was bound to hold sway over mankind. Priests foretold the future according to the stars. By purifications and sacrifices, they professed to drive away evils and to secure more certainty of

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[3]Bruce A. Kimball, "The Origin of the Sabbath and Its Legacy to the Modern Sabbatical," Journal of Higher Education 49 (1978): 305.

promised blessing.[4] Babylonian theology never entirely broke with the primitive reverence with which Semitic tribes regarded all the mysterious forces surrounding man.[5]

Primitive cultures across the world adopted a "period of abstinence and quiescence." Native cultures of the South Seas, the Americas, Asia, and Africa observed periodic rest days arising from superstitions of certain days associated with the phases of the moon.[6]

Biblical scholars argue that the origin of the seventh-day Sabbath was not a divine revelation but that man's reason may have discovered the seven-day week. The appearance of a new moon would suggest a division of twenty-eight days, a full moon would lead to two weeks, and half of that would be a perfect septenary division of time.[7]

It is disputed whether the name "Sabbath" was used for the recurring seventh day in Assyria and Babylonia. A day of appeasing the gods was called by a name of "Shabattu".[8]

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[4]Franz Cumont, Astrology and Religion Among The Greeks and Romans (New York: Dover Publications, Inc., 1960), pp. 10-17.

[5]Ibid, pp. 10-17.

[6]Kimball, p. 306.

[7]Solberg, p. 10.

[8]John D. Davis, A Dictionary of the Bible (Philadelphia: The Westminister Press, 1929), pp.662-663.

There is little or no evidence of a particular day of the week or a day when labor was suspended.[9] There is debate whether the Hebrew idea of the Sabbath was derived from the Arabian rest day "sabbat" or from the ancient Hebrew word "seba", meaning seven.[10]

Tablets copied from the reign of Ashurbanipal, about 650 B.C., show that the seventh, fourteenth, nineteenth, twenty-first and twenty-eighth days of each month were regarded as inauspicious for certain specified acts. The unlucky days were not connected with the phasing of the moon as it does not quarter on the nineteenth day, and in months of thirty days, it would only occasionally quarter on the seventh day. These recurring seventh days were not days of national rest when the tablets were in force; a few specified acts were dangerous on those days.[11]

The Hebrews probably adopted the Babylonian rest day and connected it with the moon, stripping it of superstitions and making it subservient to religious ends.[12]

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[9]Ibid.

[10]Kimball, p. 307.

[11]Davis, pp. 662-663.

[12]S.R. Driver, The Book of Genesis, 10th ed. (London: Methuen and Company, 1916), p. 35.

The uniqueness of the Sabbath arose from its groundings in Hebraic religion. Israel came to regard human events as reality, not some secondary effect of cosmological battles among capricious deities. Through this insight, humanity realized greater stature because man was considered to have a direct hand in the course of events in the universe. This laid the foundation for human responsibility and a higher ethical code.[14]

The first occurrence of the name "Sabbath" in the Hebrew records is in Exodus 16:23. The Israelites had not reached Sinai or received the Decalogue, but in the wilderness of sin when manna began to be given, a double amount fell on the sixth day and Moses said:

> "This is that which the Lord hath said, Tomorrow is the rest of the holy sabbath unto the Lord: bake that which ye will bake today, and seethe that ye will seethe; and that which remaineth over, lay up for you to be kept until the morning.[15]

Though scholars largely declare the issue unresolvable, parallels between the Genesis creation account and the Exodus description of God's seventh day after creation raised new questions of the Sabbath's origins.[16] In Genesis 2:2-3,

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[13]Solberg, p. 8.

[14]Kimball, p. 306.

[15]Exodus 16:23 [All biblical references are from the King James Version.]

[16]Kimbal, p. 307.

we find:

> "and on the seventh day God ended his work which he had made; and he rested on the seventh day from all his work which he had made. And God blessed the seventh day, and sanctified it; because that in it he had rested from all his work which God created and made"[17]

Exodus 20:11 repeats the description of God's seventh day:

> "For in six days the Lord made heaven and earth, the sea and all that in them is, and rested the seventh day: wherefore the Lord blessed the Sabbath day, and hallowed it.[18]

The Genesis 2:2-3 account does not name the Sabbath or specify any law for its observance.[19] The sanctity of the seventh day is presented unhistorically. The Sabbath's closing the week determined the days of creation and not the days of creating the week.[20]

The Exodus 20:11 and 31:17 accounts ("It is a sign between me and the children of Israel forever: for in six days the Lord made heaven and earth, and on the seventh day he rested and was refreshed."[21]) describe God's seventh-day rest following creation or ordering of

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[17]Genesis 2:2-3

[18]Exodus 20:11

[19]Cumont, p. 8.

[20]Driver, p. 35.

[21]Exodus 20:11

the cosmos.[22]

The Old Testament describes the Sabbath after God made Israel a Covenant people and delivered them from Egyptian bondage. The Decalogue reduces to its significant essence a body of instruction for the chosen people in observing the Sabbath[23] as recorded in Exodus 20:8-11:

> "Remember the Sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: But the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: For in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the Sabbath day, and hallowed it."[24]

The form of God's Covenant given in the Decalogue rests upon a different foundation[25] as recorded in Deuteronomy 5:15:

> "and remember that thou was a servant in the land of Egypt, and that the Lord thy God brought thee out thence through a mighty hand and by a stretched out arm; therefore the Lord thy God commanded thee to keep the Sabbath day."[26]

References in the Old Testament such as Amos 8:5, ("when the new moon be gone that we may sell corn and the Sabbath, that we may set forth wheat, making the ephah small and the shekel great",[27]) appear to associate the

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[22]Kimball, p. 307.

[23]Driver, PP. 65-68.

[24]Exodus 20:8-11

[25]Solberg, pp. 8-9.

[26]Deuteronomy 5:15

[27]Amos 8:5

Sabbath's observance with the moon, thus suggesting a lunar day. Jewish scholars appear resistant to the theory of pagan origins of the Sabbath, although they find it appealing to attribute the Sabbath beginning to the early nomadic period of the Hebrews.[28]

Probably in that age the Sabbath was somewhat less sharply distinguished from the other days of the week, for the nomad shepherds had certain labors to perform each day, and the Israelites in Egypt were not their own masters and could not rest on the seventh day. However, when the Hebrew nation was organized at Sinai a different mode of life was adopted. The people formed their own laws, formed an independent community, and exchanged the life of the wilderness for a settled life of agriculture and trade, and as a natural result, resting on the Sabbath made a greater outward difference than it had done before.[29]

The recordings in Exodus make clear that the Sabbath was a covenant between God and the chosen people. It required that the people rest from labor and observe religious exercises on the seventh day of the week and keeping

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[28]Barack, pp. 2-14.

[29]Davis, pp. 662-663.

the covenant was so important that severe penalties would be imposed on those disobeying it:[30]

> "and the Lord spake unto Moses, saying, Speak thou also unto the children of Israel, saying, verily my sabbath ye shall keep: for it is a sign between me and you throughout your generations; that ye may know that I am the Lord that doth sanctify you. Ye shall keep the sabbath...; for it is holy unto you; everyone that defileth it shall surely be put to death for whosoever doeth any work therein, that soul shall be cut off from among his people. Six days may work be done; but in the seventh is the sabbath of rest, holy to the Lord: whosoever doeth any work in the sabbath day, he shall surely be put to death. Wherefore the children of Israel shall keep the sabbath, to observe the sabbath throughout their generations, for a perpetual covenant. It is a sign between me and the children of Israel for ever: for in six days the Lord made heaven and earth, on the seventh day he rested, and was refreshed.[31] "Six days shall work be done, but on the seventh day there shall be to you an holy day, a sabbath of rest to the Lord: whosoever doeth work therein shall be put to death."[32]

In the Jewish law, we find the oldest description of the Hebrew Sabbath in Exodus 23:10-13.[33] In that passage, Exodus 23:12 "For six days you shalt do thy work and on the seventh day thou shall rest; that thine ox and thine ass may rest, and the son of thy handmaid, and the stranger, may be refreshed." The passages in Exodus 34:21 and

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[30]Solberg, p. 9.

[31]Exodus 31:12-17.

[32]Exodus 35:2.

[33]Kimball, p. 309.

Deuteronomy 5:14-15 suggest to some that the Sabbath was a means to relieve the farmers and their animals from overwork. Moreover, since the covenant code was recorded several centuries after the settlement of the Hebrews in Palestine, it may reflect a more complex, settled society which may have needed a rest day. Scholars have noted the appearance of rest days in agrarian societies as well as a market day to facilitate commerce.[34] This thesis would seem to strengthen the argument that the Hebrew Sabbath emerged as an economic innovation in a developing society--a day to rest and allow a market day in an agarian society.[35]

Orthodox scholars dispute this utilitarian interpretation and the borrowing of the lunar and cultural origins. In the course of becoming a nation and establishing rule, the ancient Israelites linked an ethical code of justice to the worship of one God and the observance of a holy day of rest dedicated to that God which also required the observance of the ethical code. During the tenth and ninth centuries B.C., the Sabbath acquired its name and anchored the association of rest day to worship of God and the prohibition of work became subordinated to the idea of the

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[34]H. Webster, Rest Days: A Study in Early Laws and Morality (New York: Macmillan, 1968), p. 101.

[35]Kimball, p. 308.

Sabbath.[36] Table 1 (end of chapter) presents a time-line showing the Sabbath observance through the centuries.

The linking of the Sabbath to the biblical recordings of God's bringing the chosen people out of bondage attest to the association with the Hebrew covenant with God. In the ninth century B.C., the Sabbath evolved from a rest day or market day to a day of spiritual renewal of man--a day to rededicate oneself to the source of meaning. During the eighth and seventh centuries B.C., the Sabbath evolved as a holy feast day at the temple by the priests. It is very likely that the religious cult transformed the significance of the seventh day to a day of ritualization from the idea of rest and renewal.[37]

Jerusalem was captured and the Jews were deported to Babylon. During the sixth century B.C. exile, priests focused on the Sabbath as a means through which the people of Israel could maintain their religious heritage in a pagan foreign land. The priests recommended severe penalties for Sabbath breaking to ensure that the people would remember and practice their religious tradition,[38]

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[36]N. Andreasen, The Old Testament: A Traditional Historical Investigation (Missoula, Montana: Society of Biblical Literature, 1972), p. 139.

[37]Ibid, p. 309.

[38]Kimball, p. 309.

> "Ye shall keep the sabbath therefore: for it is holy unto you: every one that defileth it shall surely be put to death ; for whosoever doeth any work therein, that soul shall be cut off from among his people. Six days may work be done; but in the seventh is the sabbath of rest, holy to the Lord: Whosoever doeth any work in the sabbath day, he shall surely be put to death."[39]

The individual rationale for the modern Sabbath neglects the pluralism of meaning in the Sabbath tradition and in life itself. The Sabbath has for centuries provided rest and renewal for the individual and has provided a time to ask "Who are we? and Why are we here? and Does our work have meaning?"[40] A good summation of the Sabbath heritage is presented by the Jewish scholar, Abraham Herschel:[41]

> "The meaning of Sabbath is to celebrate time rather than space. Six days a week we live under tyranny of space; on the Sabbath we try to become attuned to holiness in time. It is a day on which we are called upon to share in what is eternal in time, to turn from the result of creation to the mystery of creation; from the world of creation to the creation of the world."[42]

The Israelites observed the Sabbath as a festival day with pleasure and delight; its observance honored Yahweh. In time, a narrow legalism evolved and many prohibitions of work surrounded the holy observance,[43] with restrictions

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[39]Exodus 31:14-15.

[40]Kimball, p. 313.

[41]Ibid.

[42]Abraham Herschel, The Sabbath (Cleveland: World Publishing, 1963) pp. 2,10

[43]Solberg, p. 9

becoming a "hedge about the Law" and a byword for extravagance and absurdity.[44]

Christian Influence on the Sabbath

Jesus Christ came out of Israel and with him came the New Covenant that perfected the bond between God and man. Jesus came to fulfill rather than to abrogate the Law, but he found that man's invention had replaced what was divine and spiritual in the Sabbath. He interpreted the Fourth Commandment in relation to his life and mission, sometimes keeping and sometimes breaking the Sabbath. He defended his disciples for working in cases of necessity and justified his own healing of the sick and lame on holy days. Jesus reminded his critics that in cases of conflict even they violated the rest day by holding to the law of circumcision over the Sabbath [45] ("and he said unto them, the Sabbath was made for man, and not man for the Sabbath: Therefore the Son of Man is Lord also of the Sabbath"[46]).

Christian exegetes have taken the whole Bible as a unified testimony. The Epistle to the Hebrews exemplied this approach[47] by saying that God spoke to us in many ways

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[44]Solberg, p. 9.

[45]Solberg, p. 10.

[46]Mark 2:27-28.

[47]Solberg, p. 10.

by the prophets" but in the last days he spoke through his son whom he appointed heir and by whom he made the worlds.[48]

Allegorists could find Christian content in the Jewish texts by use of symbols and imagery to find significance and freedom in making the Sabbath not a cessation of work on the seventh day but a day of spiritual rest from sin at all times. The allegory freed the church from pure literalism but opened the way for theological chaos.[49]

Other interpretations of the Sabbath include the typological exegesis which draws a parallel between the two Testaments, making the Old Testament types as models for New Testament antitypes. The Literalist interpretation became important to Protestant reformers seeking emancipation from Catholic interpretive tradition and making the Bible the standard for judging the church. Their seventeenth-century followers, fearing subjectivism, came to regard all parts of the Bible as true and divinely inspired providing fertile soil for modern-day Sabbatarianism.[50]

With the advent of the Christian era, the Lord's Day replaced the Sabbath as a positive entity of the Church. The Apostles and followers of Jesus found practical reasons for using another day as a periodically recurring day that would

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[48]Hebrews 1:1-2.

[49]Solberg, pp. 10-11.

[50]Ibid.

allow them to assemble for worship and would distinguish them from the Jews. The First Day celebration resulted; though analogous to the Jewish Sabbath, it did not use the Fourth Commandment as a justification for cessation of work and sanctification.[51]

Apostle Paul: The Transition

In the first century of the Christian era, Western Civilization was coterminous with the Roman Empire. Roman rule had established order and peace out of an evil political system by making the provinces cooperative units in a commonwealth instead of objects of plunder by a narrow circle of aristocratic families.[52] Within this secular domain, there was a widely spread religion that combined the splendor of antiquity and the tenacity of a national faith--the religion of the Jews. Alongside the stately public rituals of the cities were the private and independent religious brotherhoods which tried to provide a religious atmosphere more satisfying to the ordinary man than the antiquated and formal rites could provide.[53]

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[51]Ibid.

[52]C. H. Dodd, The Meaning Paul For Today (New York: Meridian Books, 1957), p. 21.

[53]Ibid, p. 22.

The Apostle Paul having been reared in a Gentile environment, but having been trained in the Jewish tradition, was peculiarly suited for the task of interpreting the gospels to the Gentiles.[54] Later Paul repudiated his former life within the Jewish community but continued to rest heavily on the basic beliefs and insights that Judaism had instilled into his life and thought.[55] Similarly, his resistance to compromise with paganism did not deter his using the vocabulary of the pagan religion and philosophy. Paul was the transition and indispensable apostle in the transfer of Christianity from Palestine to the larger Roman world.[56]

Paul's letters show that he had little interest in the involved methods of interpreting scripture that were commonly used by the rabbis of his day, although he used some of the more familiar allegories in his letters:[57]

> "Moreover brethren, I would not that ye should be ignorant, how that all our fathers were under the cloud, and all passed through the sea; and were all baptized unto Moses in the cloud and in the sea; And did all eat the same spiritual meat; And did all drink; for they drank of that spiritual Rock that followed them: and that Rock was Christ.[58]

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[54]James A. Hessey, Sunday: Its Origin, History and Present Obligation (London: Longmans, Green and Company, 1902) pp. 104-107.

[55]Ibid., p. 210.

[56]Ibid., p. 211.

[57]Ibid., p. 210.

[58]I Corinthians 10: 1-4.

Paul's writing was generally Pharisaic in attitude; however, he had little sympathy with the rigid legalism associated with the Pharisees.[59]

TABLE 2

Chronology of Apostle Paul's Life and Travels

Death, resurrection and ascension of Christ	A.D. 30
Conversion of Paul	A.D. 35?
First subsequent visit to Jerusalem	A.D. 37
Paul at Tarsus	A.D. 37-43
Visit to Jerusalem with gifts from Antioch	A.D. 44
First missionary journey	A.D. 46-48
Council at Jerusalem	A.D. 50
Second missionary journey	A.D. 51-53
1 and 2 Thessalonians	A.D. 52
Third missionary journey	A.D. 54-58
Galatians	A.D. 55
1 Corinthians	A.D. 56 or 57
2 Corinthians	A.D. 57
Romans	A.D. 57-58
Paul's arrest	A.D. 58
Imprisonment in Caesarea	A.D. 58-60
Accession of Festus	A.D. 60
Paul arrives in Rome	A.D. 61
Colossians, Philemon,	A.D. 61 or 62
Ephesians, Philippians	A.D. 62 or 63
Release from Roman imprisonment	A.D. 63
1 Timothy	A.D. 64 or 65
Titus	A.D. 65 or 66
Hebrews, if by Paul	A.D. 66 or 67
2 Timothy	A.D. 67
Death of Paul	A.D. 67[60]

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[59]Kee and Young, p. 210.

[60]J.W. Davis, A Dictionary of the Bible (Philadelphia: Westminister Press, 1929) p. 586.

In the early Jewish-Christian church, the Pharisees held strict observance of the Sabbath, applying the law to the most trivial acts, and forbidding many works of necessity and mercy. They denounced Jesus for his acts of healing and the disciples for tending the animals just as on ordinary days:[61]

> "And he was teaching in one of the synagogues on the Sabbath. And, behold, there was a woman which had a spirit of infirmity eighteen years, and was bowed together, and could in no wise lift up herself. And when Jesus saw her, he called her to him, and said unto her, Woman, thou art lossed from thine infirmity. And he laid his hands on her: And immediately she was made straight, and glorified God. And the ruler of the synagogue answered with indignation, because that Jesus had healed on the sabbath day. And said unto the people, There are six days in which men ought to work: in them therefore come and be healed, and not on the sabbath day. The Lord then answered him, and said, Thou hypocrite, doth not each one of you on the sabbath loose his ox or his ass from the stall, and lead him away to watering? And ought not this woman being a daughter of Abraham, whom Satan hath bound, lo, these eighteen years, be loosed from this bond on the sabbath day? And when he had said these things, all his adversaries were ashamed: And all the people rejoiced for all the glorious things that were done by him.[62]

The day for synagogue worship was the seventh day of the week, Saturday. The Apostolic Christian Church held worship on the first day of the week justifying it as the day Christ arose from the dead. Paul directed the Christians

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[61]Davis, p. 664.

[62]Luke 13: 10-17.

in Corinth to make contributions to the charities of the church on the first day, designated as the Lord's Day.[63]

Members of the early church made no distinction between days, including Jewish festivals and Sabbaths and possibly the first day. Some of the Jewish converts continued to keep the seventh day and the Jewish festivals as a matter of liberty so long as the convert did not hold the observance as necessary for salvation.[64]

Over the next several centuries, the Jewish Sabbath and the Christian Lord's Day occupied roughly equal significance in the belief of the faithful, while the Lord's Day, by degrees, shifted to the first day of the week.[65]

Emperor Constantine, in 321 A.D. in his Edict of Milan decreed that a weekly holiday (Sunday) be established for the Christians.[66] He decreed: "on the venerable day of the sun let the magistrates and people residing in the cities rest, and let all workshops be closed. In the country, however, persons engaged in...cultivation may freely and lawfully continue their pursuits..."[67] He reasoned that other

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[63]Davis, p. 664.

[64]Ibid., p. 457.

[65]Solberg, p. 12.

[66]Solberg, pp. 12-13

[67]Hessey, pp. 104-107.

days might be unsuitable for sowing and planting, and that neglecting the proper season would cause the loss of heaven's bounty.[68]

Biblical scholars have interpreted this declaration as an approximation of Sabbatarianism, while others see the church aided by civil authority and not as a divine ordinance. Still others considered Constantine practical in that he exempted the rural pagans in his decree; and while he encouraged Christians by giving them this day of observance, he gave it the civil name of Sunday, thus avoiding offense to the pagans.[69]

In the absence of reference to the Fourth Commandment, Constantine's deed was not Sabbatarian; it did not discourage the cheerfulness associated with the Christian permission to labor nor impose upon the urbans an unwelcome rest from labor on Sunday. The Christians had already stopped working and conducting legal matters on the day of observance. The decree provided Christians with civil authority for the religious ordinance they had been practicing since the time of the Apostles.[70]

For the followers of Christ, the Lord's Day stood alone as a festival in the Christian year until the Council of Nicaea in 325, even though confusion resulted over the Sabbath

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[68]Ibid., p. 58

[69]Ibid., pp. 59-66

[70]Solberg, p. 12

and the Lord's Day. After the Nicean Council, the church adopted a liturgical calendar to celebrate events in the life of Jesus, thereby putting Christian impress on the rhythm of nature.

Special reverence accorded to Saints' Days often obscured the divinely appointed Sunday. Christians occasionally apologized for the many holidays by analogy to the Jewish and Christian observances. As a result the Christians were in danger of forgetting that the Lord's Day was different from the Sabbath and that its apostolic beginnings placed it above ecclesiastical ordinances.[71]

Through the fourth and fifth centuries A.D., the ecclesiastical and civil authorities promulgated rules and edicts that imposed Judaism into the Christian practices. A strict rest was required on Sunday with attendance at worship becoming a requirement. The Fourth Council of Carthage proscribed the payments of debts and civil proceedings, and in 386 A.D. Emperor Theodosius forbade any transaction of business affairs on Sunday. Despite the strictness of the ecclesiastical and civil rules there was no ban on recreations and necessary duties if these affairs did not interfere with divine worship.[72]

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[71]Hessey, pp. 67-87.

[72]Ibid.

During the next millennium, Christian Sabbatarianism developed as an aspect of medieval religion. The Roman Catholic Church instituted many fasts and festivals which tended to lessen the Lord's Day to the status of the many other ceremonies that rested on ecclesiastical authority. Rome surrounded Sundays with numerous proscriptions. Because of these restrictions, the church devised ceremonies to insure the observance of the Lord's Day, declaring them successors of the old Jewish ceremonies by reference to the Fourth Commandment with a moral law binding all mankind rather than just the Jews.[73]

Roman Catholic legalism gave rise to a system that required a day of rest like that of the Jewish Sabbath and calling for sanctification of Sunday. Both civil and ecclesiastical authorities issued rules to further the ideal of sanctification by rest from servile labor and commercial activities.[74]

The first Sunday statutes date from the seventh century A.D. in England when West Saxon King Ina forbade work on Sunday. During the ninth century A.D. Edgar the Peaceable ordered the Lord's Day[75] "to commence at three o'clock on

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[73]Solberg, pp. 13-14

[74]J. L. Cate, "The English Mission of Eustace of Flay" (1200-1201), In Etudes d'Histoire Dedi'ees a la Memoire de Henri Pirene (Brussels: Nouvelle Societe d' Editions, 1937), pp. 67-89.

[75]Solberg, p. 14.

Saturday afternoon and to last until dawn on Monday."[76]

The term "Christian Sabbath" was first used in Europe[77] around 1201 A.D. when Abbot Eustace of Flay set out to crusade in England for a Judaic Sunday observance.[78]

The intervening centuries to the Protestant Reformation gave rise to efforts by the church to formulate a demanding theory of Christian Sabbatarianism. Both in Germany and England in the late thirteenth century A.D. came an effort to heighten prohibition of work on Sunday with strong admonitions of divine judgment for those transgressing the Sabbath observance. In the fourteenth century A.D., the Spanish Bishop of Avila declared it a moral sin to do any unnecessary labor on Sunday.[79]

Although the medieval church sought to strengthen a theory of Christian Sabbatarianism, it failed to get a general compliance with the ideal. Many laymen failed to observe Sundays and the many feast days. They remained absent from worship and spent the day with participation in pageants, carnival processions, folk dances, and consuming large amounts of ale at the parish celebrations.[80]

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[76]Benjamin Thorpe, ed., Ancient Laws and Institutes of England, 2 vols. (London: 1840) p. 1:105.

[77]Hessey, p. 90.

[78]Ibid.

[79]Ibid., pp. 91-92.

[80]Solberg, p. 14.

The Church overlooked these transgressions as long as the offenders did not question the precepts of the church.[81] Despite the dissatisfaction of sectarian groups with the prevailing practices in medieval Christianity, little was accomplished to challenge the ecclesiastical theory of the Catholic Church. The Christian Sabbath was one of the many non-scriptural elements in the late medieval religion that obscured the original meaning of the Lord's Day.[82]

Sabbatarian Doctrines of The Protestant Reformation

The Protestant Reformation unleased powerful forces that changed Christianity and the concept of a Sabbatarian doctrine. Continental Protestants rejected the Roman Catholic ecclesiastical traditions and papal authority, holding the Bible as the ultimate rule of Christian life. However, they differed over the interpretation and the relationship between the two Testaments. Their views led to different positions on the holy day.[83] Table 3 shows the doctrinal differences of the Sabbath observance emerging in the Reformation.

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[81] Ibid., p. 14.

[82] A. G. Dickens, Lollards and Protestants in The Diocese of York, 1509-1558 (London: Oxford University Press, 1959), pp. 9, 242-244.

[83] Solberg, pp. 16-20.

TABLE 3

Sabbath Observance: Doctrines of the Protestant Reformation

DOCTRINES	LUTHERANISM	REFORMED RELIGION	RADICAL REFORMERS	ENGLISH REFORMERS	PURITANS
Justification by faith.	x				
Antithesis between Law and Gospel.	x				
Fourth Commandment-a Jewish ceremonial law abrogated by the New Testament.	x				
Strict observance of Fourth Commandment on the Sabbath.					x
Abolition of Lord's Day; restoration of Jewish Sabbath.			x		
New Testament as normative.			x		
Old Testament as typolocical and allegorical.			x		
Mystical approach to Testaments.			x		
Church as mystical body of Christ.		x			
Inspiration of Holy Spirit.			x		
Basic unity of Old and New Testaments.		x			
Salvation lying in obedience to the Law.		x			
Precise adherence to Decalogue.		x			
Christians not bound to outward observance of Fourth Commandment.	x				
Restructuring of Sabbath for man's relief from mundane tasks.			x		
Christians Lord's Day for sake of bodily need.	x				
Sabbath to be observed on seventh day as prescribed by Fourth Commandment.			x		
Spirit acting upon the heart to make external religious discipline unnecessary.			x		
Political and ecclesiastical orders co-existing; Salvation to be obtained in the world by those finding their place in a providentially governed universe.	x	x			

TABLE 3 (continued)

DOCTRINES	LUTHERANISM	REFORMED RELIGION	RADICAL REFORMERS	ENGLISH REFORMERS	PURITANS
Everyday is a Sabbath-not only the seventh day (Anti-Sabbatarianism).				x	
Abrogation of holy days-(reap the harvest and advance the crafts).				x	
Sabbath precept of Jewish origins.				x	
Church-a community of the elect, not one imposed by the hierarchy.					x
Sabbath of the Decalogue identified with Christian Sabbath.					x
Duty to God over claims of mammon.					x
Fourth Commandment a part of moral law rather than ceremonial.					x
Sabbath binding on Christians.					x
The Lord's Day to be observed.					x
Acts of mercy can be performed on the Sabbath.					x

Martin Luther attacked the numerous saints' days in the Christian church and insisted the Sabbath perpetuated the Jewish ordinance of the Sabbath observance. He preached that the Lord's Day was a day to refrain from evil works, to rest and offer service to God by hearing and discussing his Word.[84] In 1544 during a sermon at Torgau, Luther accepted Sunday as the Sabbath as long as Christians insisted they were lords of the Sabbath and did not attach a special holiness to a particular day.[85]

John Calvin, a principal in the Reformed religion on the European continent, emphasized a basic unity in the Old Testament and New Testament which differed from Luther's antithesis of Law and Gospel.[86] Calvin, in his Institutes of The Christian Religion, 1536 and 1559 A.D., using exegetical methods similar to the Epistle to the Hebrews, attempted to Christianize the Old Testament and Judaize the New Testament on the significance of the Sabbath. This unity attempted to focus on one unified covenant allowing the believer to find his proper relation with God

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[84]Solberg, pp. 16-20.

[85]Theodore G. Tappert, trans. and ed. The Book of Concord: The Confessions of the Evangelical Lutheran Church (Philadelphia: Muhlenburg Press, 1959), pp. 375-379.

[86]Solberg, p. 16.

and the Universe through strict adherence to the Decalogue.[87]

The Fourth Commandment took on a spiritual meaning which encouraged Christians to desist from evil work and find rest in God by Calvin's portrayal of the Decalogue as a perfect code of morals. In dealing with the Sabbath, Calvin acknowledged it as a divine institution for a day of rest and arbitrarily substituted the first day for the seventh.[88]

The Radical Reformers, the left wing of the Protestant movement, and its subdivision of Anabaptist and Spirituals provided no stimulation for the growth of the modern Sabbatarianism as did the influence of Martin Luther and John Calvin in Lutheranism and Reformed religion.[89] Within the Radical Reformers, several sects interpreted the New Testament treatment of the Sabbath as normative and the Old Testament's Sabbath as typological and allegorical.[90]

Other motivating influences in the Radical Reformation had both positive and negative impulses on the Sabbath as

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[87]John T. McNeil, ed., John Calvin, Institutes of the Christian Religion, 2 vols., trans. Ford L. Battles, (Philadelphia: Westminister Press, 1960) pp. 1:394-401.

[88]Hessey, pp. 95-96.

[89]Solberg, p. 16.

[90]Ibid.

opposed to those in the Protestant mainstream. Opposing theories on the Sabbath held that the Decalogue was completely moral and the proscription of labor still in force; Jesus had come to fulfill the Law and the Sabbath should be observed on the seventh day with the rigor prescribed in the Old Testament.[91]

The second Radical theory subscribed to the New Covenant as replacing the Law with a ministry of Grace; the whole Mosiac Covenant had been fulfilled and passed. This aspect of the movement held that Christ did not institute or authorize a special day of rest or worship in place of or in succession to the Jewish Sabbath. The immediate influence of the Spirit on the heart relieved the believer of external religious discipline.[92]

The adoption of these ideals of the Radical Reformation by the Quakers and leftist Puritans gave them vitality and thus, an antilegalist approach of the Sabbath passed to America.[93]

England escaped much of the doctrinal conflict during the early Reformation while the assault on the theory and practice of the Sabbath consumed much of the mind of

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[91]George A. Williams, The Radical Reformation (Philadelphia: Westminister Press, 1962), pp. 848, 408-410

[92]Ibid.

[93]Solberg, pp. 18-19.

continental theologians.[94] In the 1530's Henry VIII broke with the Roman Catholic church and placed the English crown as head of a national church which refused to permit Lutheran and Reformed teaching of the Sabbath.

English reformers gave strong voice to anti-Sabbatarian theory. They contended that Sundays should be no holier than any other day, and that Christians changed the Sabbath from Saturday to distinguish themselves from Jews.[95]

During the early years of Henry VIII's reign, religious festivals, Sundays,and holy days totaled 217 days annually.[96] Despite the fact that many went unobserved, dissatisfaction arose,prompting Commons in 1532 to voice opposition to the excesses of the worshipers. In 1536, Henry VIII ordered the clergy to abrogate certain holy days during harvest time on the grounds that the idleness and frolic led to the decline of industrial crafts.[97]

Despite the break with the Catholic church, the Church of England was slow to emancipate itself from the Roman Catholic Sabbatarian beliefs. The Church of England embraced the Fourth Commandment apart from the other nine, holding

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[94]Ibid., p. 22.

[95]William A. Clebsch, England's Earliest Protestants, 1520-1535 (New Haven: Yale University Press, 1964) pp. 45, 121-122

[96]Solberg, p. 23.

[97]Ibid., p. 23.

the Fourth as ceremonial. It reasoned that rest from bodily labor on the seventh day was a Sabbath precept pertaining only to Jews and rest from sin was binding on all Christians. A person could work if necessary in order to enhance agriculture or industry and failure to do so out of principle of conscience offended God.[98]

The influence of John Calvin gained its hold on the Sabbath during the reign of Edward VI (1547-1553). The religious innovations of Protestantism during these years demonstrated the Anglican spirit of compromise; they concerned themselves less with what people thought than with how they acted. The Act of Uniformity (1552) required church worship on Sundays and holy days but stipulated no penalty for offenders.[99]

The Royal Injunctions of 1547 struck a compromise on the question of Sunday labor[100] as did those of Emperor Constantine in 321 A.D. Rest and worship were ordered for the followers but dispensation was granted for those who needed to attend the harvest.[101]

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[98]Ibid.

[99]Ibid.

[100]Ibid.

[101]Edward Cardwell, ed., Documentary Annals of the Reformed Church of England, 2 vols. (Oxford, 1844), pp. 1:15-16.

The accession of Elizabeth I to the throne brought no immediate change in the official policy toward the Sabbath observance. The Act of Uniformity and the Royal Injunction of 1559 required observance of Sundays and holy days by the public. The injunctions allowed labor after worship in times of harvest; moreover, they contained admonitions regarding absence from worship as superstitious in nature.

Church and state in cooperation sought to realize official policy by holding ecclesiastical court that sought to punish the Sabbath-offenders. Individuals unable to attend holy worship on the Sabbath might be turned over to the civil authorities who shared responsibility for maintaining the religious discipline.[102]

Dissatisfaction with the official attitude grew under the reign of Elizabeth and mid-way in the reign, a number of forces worked together to bring a change in the practice of Sabbath observance and a new theory of the Sabbath. The impact of the vernacular Bible, the influence of the new covenant of Puritan thought, a new attitude toward the economic action (work ethic), and the condemnation of Sunday recreation worked interrelatedly to produce the Puritan Sabbath.[103]

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[102]Solberg, pp. 31-32.

[103]Ibid., p. 32.

The Reformation made the Bible the supreme guide to life and righteousness. Out of this search came the Geneva Bible which was made available to the comman man. Over the next forty years, circulation grew to call for sixty editions.[104] The availability and wide usage of the Geneva Bible by the common man set before the reader, in comprehensible terms keyed to the Scriptures, a statement in the common tongue of the conception of man's inner life derived from Paul by way of Calvin. It enabled the reader to discover for himself in the text the essentials of the great doctrine of salvation by the election of divine grace.[105] The discipline of the Word figured prominently in the rise of English Sabbatarianism. The common man, anxious to find a rule for life, and believing the Scripture was the rule, affirmed the Reformed tenet that the Old and New Testaments constituted one unbroken covenant for the Sabbath.[106]

Many seized upon the Fourth Commandment as the source for observance of the Lord's Day. Learned Puritans believed the Scripture was self-illuminating, even to the uneducated and in searching the Book found the Fourth Commandment the

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[104] Ibid.

[105] A. K. Wikgren, "The English Versions of the Bible", in Peake's Commentary on the Bible, ed. Thomas Nelson and H. H. Rowley, (London: Thomas Nelson and Sons, 1962), pp.24-26.

[106] E. Tyrrell Green, The Thirty-Nine Articles and the Age of the Reformation, (London: 1896), p. 53.

only explicit spiritual basis for keeping the holy day. This equating of the Lord's Day with the Sabbath laid English Sabbatarianism on the ancient foundation[107] of the Mosaic Law as a basis for obedience.[108]

Early American Sabbatarianism

Puritans of New England

Basic in the belief of the Puritans was the doctrine of divine Providence which governed every aspect of the universe. After the Reformation, Protestants insisted that the Protestant rather than the Roman Catholic Church was the proper vehicle for advancing the kingdom of Christ, and Englishmen were eager to create the New Israel in their land. Unable to reform England, some Nonconformists decided to establish the pure church in the New World.[109]

American Puritans thought that New England was the spot for them to build a religious society based on God's word as contained in the Scriptures. New England was not precisely the land of promise, but Puritan immigrants held that Providence had postponed the New World opening until their own time, allowing God's people to escape from religious

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[107]Solberg, p. 34.

[108]Charles H. George and Katherine George, The Protestant Mind of The English Reformation, 1570-1640 (Princeton: University Press, 1961), pp. 232-233.

[109]Solberg, pp. 107-108.

oppression in England.[110]

New England Puritans deserve the major credit for kindling the Sabbath light in a new nation. They settled this region primarily to establish their theological doctrines and raise the Sabbath to a prominent position because they held it as the palladium of true religion. The Puritan movement, seen in relation to the goals of the Reformation, was an advanced expression of the Protestant movement to regenerate man spiritually and reorder society according to the Scriptures, and the theology of the Sabbath was a prime reason to justify their migration and understand their role in history.[111]

The Lord's Day observance by the Puritans was considered holy rather than festive. The Sabbath was a time for solemn rejoicing and a day of surcease from incessant toil, a memorial of the Resurrection, a foretaste of heaven.[112] The New England Puritans considered an establishment of a pure Sabbath essential in the fulfillment of their divine mission to build a truly reformed society. They identified with ancient Israel which was their model for the New Israel.[113]

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[110] Ibid.

[111] Solberg, p. 107.

[112] Ibid., p. 113.

[113] Ibid., p. 109.

The Puritan Sabbath fell into the tracks of a Hebrew custom, and the adherents found a sanction for their Sabbath observance in the Fourth Commandment. The Puritans came to New England to plant the Gospel in the Reformed tradition, believing in the basic unity and equal significance of the two Testaments.[114] They were "Old Testament Christians"[115] drawing on Hebrew writings to serve their needs; proper Sabbath observance was a means of bringing sinners to Christ and a rule for righteousness.[116]

The orthodoxy for the Puritans in New England was shaped by an early and typical settler, Edward Johnson, who said:

> "How much more shall Christ who created all power, call over this 900 League Ocean at his pleasure, such instruments as he thinks meete to make use of in this place, from whence you are now to depart, but further that you may not delay the voyage, for your full satisfaction, know this is the place where the Lord will create a New Heaven, and a New Earth in, New Churches, and a New Common-wealth together."[117]

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[114]Ibid., p. 113.

[115]Clifford K. Shipton, "The Hebraic Background of Puritanism", Publications of the American Jewish Historical Society 47 (March 1958): 141.

[116]Ibid., pp. 140-153.

[117]Franklin Jameson, ed., Johnson's Wonder-Working Providence, 1628-1651, (New York: Charles Scribner's Sons, 1910), pp. 23-25.

These thoughts, though shaped by religious orthodoxy, offer a statement on the relation of the Sabbath to the ideas that inspired the founding of Massachusetts and the colonies of New England.[118]

Chesapeake: Anglicans and Catholics

The new doctrine of the Sabbath which emerged in England at the beginning of the seventeenth century pervaded various strata of society as colonization of America began. The powerful Englishmen carried the theory to the original American settlements, and the growth of Sabbatarianism demonstrated the powerful force of Puritan ideology in shaping legal and religious thought in American culture.[119]

In the Chesapeake area, Virginia's religion was a child of the Church of England, and the early settlers there sought to make the church the centerpiece of their life. The presence of Catholics and Protestants in Maryland deterred the official establishment of religion and gave the church a lesser role than in Virginia. In both environments, geography and climate were suitable for a strong agarian life, thus precluding a compact, closely knit society like those in England and New England. However, as time passed, contrasting

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[118]Solberg, p. 110.

[119]Solberg, p. 85.

patterns of religious observance were created but later came to share a similar type of Sabbatarianism.[120]

Sabbatarianism in Virginia was the product of an interaction between the imported Puritan ideal and local religious, economic, and social conditions. Across the Potomac a different pattern of Sabbatarianism developed in the religious pluralism which conditioned the Lord's Day observance.[121] The Maryland colony had promised new possibilities for religious liberty under George Calvert, the first Lord Baltimore, who sincerely desired to found a colony based on the principle of religious tolerance.[122] Calvert, a Catholic, envisioned Maryland as a "land of sanctuary" for different faiths, because this was the only way he could obtain permission from a Protestant king to establish a safe haven for fellow Catholics.[123]

Both Maryland and Virginia forbade normal labor and certain activities on Sunday. These laws were enforced with a measure of uniformity.

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[120]Solberg, p. 85.

[121]Solberg, p. 93.

[122]William T. Russell, Maryland, the Land of Sanctuary: A History of Religious Tolerance in Maryland from the First Settlement Until the American Revolution (Baltimore: J. H. First Co., 1907).

[123]Ibid.

The setting of the Lord's Day represented an isle of rest in an ocean of endeavor made necessary by establishing entrepreneurs.[124]

Baptists of Rhode Island

The consolidation of the Puritan theory of the Sabbath in New England was the background for legal foundations for Lord's Day observance in Massachusetts. The colony had emphasized the importance of public worship with the passage of laws requiring Sabbath observance and fines for failure to attend worship. In this environment, Ezekiel Holliman was brought before the court for not attending public worship assemblies and departing from orthodoxy.[125] Holliman fled to Rhode Island where he and Roger Williams baptized each other and founded the first Baptist Church in America.[126]

As Rhode Island took shape, Roger Williams, its founder, intended the area to be "a shelter for persons distressed of conscience".[127] The civil community in Rhode Island began as a simple democracy where religious refugees were admitted

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[124]Solberg, p. 99.

[125]Ibid, p. 160.

[126]Massachusetts Bay Recorder, 1:140,221

[127]John R. Barlett, ed., Records of the Colony of Rhode Island and Providence Plantations, 10 vols. (Providence, 1856-1865), 1:22

with allowance for exercise of religious conscience; however, social pressure if not law put a premium on attending religious services. Nevertheless, forced worship was not permitted, the inhabitants enjoyed freedom in observance on the First Day. Roger Williams, though observant of the Sabbath, refused to travel on the First Day, but on occasions dealt in trading with Indians on Sunday. Williams encountered criticism because he made no attempt to convert the Indians; he saw no value in securing external observance out of respect for him rather than of conviction. The leaders of Rhode Island leaned toward inward religion and a lessening of the institutions of the Sabbath. Roger Williams succeeded in establishing a civil government silence on religion; this was construed as making liberty of conscience an inviolable right.

Settlements in Rhode Island, in 1647, formed a legal code without drawing upon the Old Testament. The code provided for the death penalty for a number of crimes and did not mention religion but concluded that, apart from the transgressions therein forbidden, "all men may walk as their consciences persuade them, every one in the name of his God."[128]

Mindful of the First Day observance by the inhabitants, the General Assembly reacted to complaints of disturbances by enacting laws prohibiting disturbances on the First Day and

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[128]Rhode Island Colonial Records, 1:190

not mentioning "Sunday", "Sabbath", and "Lord's Day".[129] Such a law, unthinkable in Puritan New England, was enacted by Rhode Island to balance liberty of conscience with the claims of Sabbatarianism.[130]

Quakers of Pennsylvania

With the division of New Jersey came a group of Friends who wished to establish a Quaker Commonwealth in the new world. The Quaker leaders adopted the Concessions and Agreements of 1677 to provide a government for their province. This government was willing to legislate to promote morality, especially in sexual matters, but not regarding the Sabbath.[131] Twenty years later, the Assembly legislated the Colony's first Sabbath legislation which declared:

> "it hath been the practice of all societies of Christian professors to set apart one day in the week for the worship and service of God, and it hath been and is the ancient law of England (according to the practice of the primitive Christians) to set apart the the first day of the week to that end."[132]

The statute prohibited unnecessary servile labor and

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[129] Ibid, pp. 279-280.

[130] Solberg, p. 193.

[131] Ibid, p. 249.

[132] Ibid.

travel on the Lord's Day or First Day except for religious worship or necessity.[133]

William Penn after arriving at Chester in 1682 called the Quaker assembly and council into session and from that meeting came the Proprietors Frame of Government and the Great Law. Penn's influence brought about two articles guaranteeing liberty of conscience to all Monotheists and forbidding service labor on the Lord's Day. These articles allowed the believers to dispose themselves to read the Scriptures of truth at home, or attend religious worship as might suit their respective beliefs.[134]

Quaker Sabbatarianism received acceptance as the provience of Pennsylvania grew with the arrival of the English, Scottish, Irish, Welsh, Dutch and German immigrants. Quaker meetings were established in various places and Friends gained positions of control in the government. Sunday was regarded as different from the rest of the week, and Sabbath observance laws were enforced. At the outset of the 1700's a new Sabbath law was enacted to amend the liberty of conscience. This law restricted the protection to Trinitarian Christians, dropped the clause enjoining observance of the Sabbath, rehearsed the value of the weekly rest, and

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[133]Ibid.

[134]Votes and Proceedings of the House of Representatives of the Province of Pennsylvania, 1682-1776, 8 vols. (Philadelphia, 1752-1756), pp. 108, 116.

increased the penalty for worldly work on the Lord's Day.[135]

Orthodox protestants took a "higher" doctrinal ground on the Sabbath than the Quakers; however, the Quakers and Protestants were in agreement with the Sabbath laws of 1705.[136]

The Seventh-Day Baptists brought the doctrine from England into Pennsylvania and it spread southward into Virginia and the Carolina back country. They were the first group in Pennsylvania to claim the right to worship according to their own conscience under the charters granting liberty of conscience to all men. This assertion, creating civil strife, was a precursor of the church-state problems the United States would face in later years.[137]

The emergence of a unique and divergent attitude toward Sabbath observance is a landmark in the transition from the medieval to the early modern age in England. The influences of the Protestant Reformation laid open a fertile ground for the framers of the Constitution in the search for a legal meaning of religion and the observance by Sabbatarians. Perhaps the imprecision of the religious provisions of the First Amendment "Congress shall make no law respecting the

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[135] The Laws of the Province of Pennsylvania (Philadelphia, 1714), pp. 32, 35-37, 77.

[136] Solberg, p. 263.

[137] Ibid.

establishment of religion, or prohibiting the free exercise thereof..."[138] was intentional; precision was left to be determined in the field of law rather than theology.

To ensure that school employees may observe their Sabbath, school boards and administrators should be cognizant, in developing policies protecting these guarantees, of the imprecise nature of religion and the guarantees afforded citizens under the First Amendment and the 1964 Civil Rights Act, amended in 1972:

> "The term religion includes all aspects of religion observance and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance of practice without undue hardship on the conduct of the employer's business".[139]

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[138]U.S. Constitution, amend. I.

[139]Civil Rights Act (1964) amend. (1972), Title VII, 42 U.S.C. 2000e(j).

TABLE 1

Historical Origins and Development of the Judeo-Christian Sabbath Observance

1300 B.C.	Canaanites enacted cultic drama to worship pagan deities with hope the fertility rites would continue the earth's fertility for the coming year.
1200 B.C.	Moses established Hebrew nation at Mount Sinai.
1220 B.C.	The early dating of the Sabbath plus the nomadic existence of the ancient Hebrews suggest that the rest day could have originated as a lunar taboo day.
1200 B.C.	Agrarian society of the tribal federation suggests an economic origin to the early Hebrew Sabbath.
1200 B.C.	Ancient passages relied on oral histories to describe the Hebrews' escape from Pharoah's slavery in Egypt and wandering in the desert of Sinai. Hebrews practiced some form of Sabbath in the days of Judges and possibly before the settlement of Palestine.
900-800	The Sabbath acquired its name anchoring the association of the rest day to the worship of Yahweh. Prohibition of work became subordinated to the concept of Sabbath. Whether or not the Sabbath began as lunar day, a rest day, or a market day, it became dedicated as a day of the Lord and thus a signal of Hebrew promise to maintain Yahweh's covenant and its ethical code.
900-800	Hebraic sensitivity to holy times traced to founding of their culture.
800 B.C.	The Sabbath transcended the rest day to become a day of spiritual renewal.
800-700	The Sabbath evolved into a holy feast day celebrated by the priestly class at the temple.

TABLE 1 (continued)

650 B.C.	During the reign of Ashurbanipal, the seventh, fourteenth, nineteenth, twenty-first and twenty-eighth days of the month were regarded as inauspicious for certain acts.
587 B.C.	Priests focused on the Sabbath as a Hebrew institution in a pagan land with recommendation for severe penalties for Sabbath-breaking to ensure that the Israelites would remember and practice their religious traditions.
500 B.C.	The Hebrew priests probably added Genesis 2:1-3, and Exodus 20:11 and 31:17 to the original Biblical passages to suggest inactivity and rest of the creator God following the creation of the world.
0-100 A.D.	Followers of Jesus adopted the Lord's Day as a positive institution of the church. Apostles and followers of Jesus used the First Day as a recurring day distinct from the Jewish ceremony of the Sabbath. The Jewish Sabbath and the Christians' Lord's Day coexisted.
300 A.D.	Council at Eliberis and Sardica announced penalities for absence from church on Sundays.
313 A.D.	Edict of Milan: Emperor Constantine secured a rest day for Christians by decree giving it a civil name--Sunday. Thus, State authority for observing religious days was established.
321 A.D.	Emperor Constantine's decree established a weekly holiday: "on the venerable day of the sun, let the magistrates and people...rest and... workshops be closed. This was interpreted as an approximation of Sabbatarianism or state aiding a church custom and not a divine ordinance.
325 A.D.	Council of Nicaea: The Christian church developed a liturgical calendar celebrating historical events in the life of Jesus and observing a rhythm of nature with Christian impress on the day.
386 A.D.	Emperor Theodosius the Great forbade the transaction of business on Sunday.

TABLE 1 (continued)

436 A.D.	Fourth Council of Carthage discouraged Lord's Day attendance at games and circuses. Civil officials proscribed payment of debts and legal proceedings.
499 A.D.	The Lord's Day had not yet been transformed into a Jewish Sabbath dependent upon the Fourth Commandment.
500 A.D.	Ecclesiastical and civil authority began to circumscribe the liberty of the Lord's Day. Strict rest on Sunday and attendance at public worship became required.
500 A.D.	and the following millennium: (1) Christian Sabbatarianism developed as an aspect of medieval religion. (2) The Roman Catholic Church established fasts and festivals which lowered the Lord's Day to ecclestiastical rather than divine authority. (3) Roman leaders declared the new Christian ceremonies to be successors of the old Jewish ceremonies. (4) The Church justified Lord's Day by reference to the Old Testament Sabbath. The Fourth Commandment became a moral law binding all mankind rather than a ceremonial law binding only Jews. (5) Roman Catholic legalism required a rest like that of the Jewish Sabbath and sanctification of Sunday. (6) Bishops enjoined rest from servile labor, commercial activities, prohibited travel and recreation on the Lord's Day.
743 A.D.	West Saxon King Ina forbade all work on the Lord's Day. Archbishops of York incorporated prohibition into constitutional form.
943 A.D.	Edgar the Peaceable ordered the Lord's Day begin at three o'clock on Saturday afternoon, extending until dawn on Monday.
1100 A.D.	The term "Christian Sabbath" was used.
1201 A.D.	Abbot Eustace of Flay crusaded in England for a strict and Judaic Sunday observance.
1526 A.D.	Martin Luther translated the New Testament, thus freeing believers from the legalism and moralism of the Jewish Sabbath.

TABLE 1 (continued)

1528 A.D.	Oswald Glart and Andrew Fisher proprogated Sabbath observance in the Jewish tradition fifty years later. Judizing Sabbatarians emerged to give impetus in England and America to Seventh-Day Baptist and Seven-Day Adventist churches.
1530 A.D.	The Augsburg Confession criticized Rome for exercising human authority in instituting new ceremonies and placing new "legalism" in requiring the Sabbath observance as a condition of salvation. The issue was Christian liberty versus bondage to Law.
1530's A.D.	Henry VIII of England broke with the papacy establishing the crown as head of the church.
1536 A.D.	Henry VIII directed the clergy to abrogate certain holy days during harvest time leading to superstitions, idleness, riot and decay of industrial crafts.
1544 A.D.	Martin Luther, in a sermon at Torgau, accepted Sunday as the Sabbath on conditions that Christians were lords of the Sabbath and did not attribute special holiness to a particular day.
1547 A. D.	The Royal Injunctions required worship on Sunday with special dispensation granted for harvest time and labor.
1552 A.D.	Act of Uniformity ordered Christians (Protestants) to attend the parish church on Sundays with no penalty for offenders.
1552 A.D.	Parliament in "Holy Days and Fasting Act" reduced festal days.
1554 A.D.	The Royal Injunctions directed the people to observe holy fasting.
1560 A.D.	Scotts Confession of Faith condemned the keeping of holy days but contained no trace of Sabbatarianism.
1561 A.D.	Scotts Book of Discipline stressed idea of the Fourth Commandment requiring worship and observance of Sunday with free time for religious services.

*Dates approximate, conclusion and inference general, not absolute.

CHAPTER III

STATE STATUTORY PROVISIONS FOR RELIGIOUS OBSERVANCE BY PUBLIC SCHOOL EMPLOYEES

Though the United Stated States Constitution remains neutral in respect to the establishment of a particular religion, the several states remain free in their statutes to accommodate religious practices by public school employees, often favoring one religion by remaining silent on others.

The special days for religious observance have been spelled out in the statutes to accommodate the majority groups by making Sunday the day of religious observance or the day of cessation of servile labor. Minority groups, primarily non-Sunday Sabbatarians, are accommodated by statutory provisions in ten states. The other states remain silent on the seventh-day Sabbatarian.

The statutory text providing religious accommodation in the fifty states, the District of Columbia and Puerto Rico is included in the appendix.

Sunday As A Legal Holiday

Twenty-seven states, the District of Columbia and Puerto Rico, have statutes granting school and public employees

Sunday as a legal holiday. Civil proceedings are declared "non dies juris" while the statutes in some states speak to closing of certain types of businesses on Sunday, the Sabbath. Tables 4 through 10 outline the state statutes that accommodate religious observances in some sort of statutory provision. Table 4 outlines the statutory provision for the enumerated and inferred Sunday observances by public employees.

Sabbath Provisions Enumerated

Table 4 lists those states having provision for a Sabbath. The states of Minnesota, Mississippi, Missouri, Oklahoma, Vermont and Washington treat the Sabbath as Sunday in their statutes. Table 5 also indicates that ten states provide accommodation for the non-Sunday Sabbatarian. Four states are shown with the statutory language for the Sunday Sabbatarian. Vermont and Washington are included as just recently repealing their Sabbath provisions.

Minnesota. Minnesota statutes prohibit "certain acts" that cause "serious interruptions on the repose and religious liberty of the community and doing of such acts on that day shall constitute Sabbath-breaking"[1] though the Sabbath is considered the first day of the week; and the time for the Sabbath is "included all the time from midnight to midnight."[2]

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[1]Minnesota, Revised Statutes, chapter 624, sec. 624.01.

[2]Ibid.

TABLE 4

States with Statutes Enumerating Sunday As A Legal Public Holiday and States Inferring Sunday By Transfer To A Weekday

States	Sunday as a holiday	Sunday inferred as a holiday
Alabama	x	
Alaska	x	
Arizona		x
Arkansas		x
California	x	
Colorado		x
Connecticutt		x
Delaware		x
Florida	x	
Georgia	x*	
Hawaii		x
Idaho	x	
Illinois		x
Indiana	x	
Iowa		x
Kansas		x
Kentucky		x
Louisana	x	
Maine	x	
Maryland	x	
Massachusetts	x	
Michigan		x
Minnesota		x
Mississippi	x	
Missouri		x
Montana	x	
Nebraska		x
Nevada		x
New Hampshire	x	
New Jersey	x	
New Mexico		x
New York	x	
North Carolina		x
North Dakota	x	
Ohio		x

TABLE 4 (continued)

States	Sunday as a holiday	Sunday inferred as a holiday
Oklahoma	x	
Oregon	x	
Pennsylvania	x	
Rhode Island	x	
South Carolina	x	
South Dakota	x	
Tennessee		x
Texas		x
Utah	x	
Vermont		x
Virginia		x
Washington	x	
West Virginia		x
Wisconsin	x	
Wyoming		x
District of Columbia		x
Puerto Rico	x	

* Georgia declares Sunday as religious holiday, Sect. 1-4-2

Mississippi. Mississippi statute, section 97-23-63, cited the Sabbath as the first day of the week with exceptions for acts of mercy, charity, and churches or religious societies' transacting business on the first day of the week.[3]

Missouri. Missouri has no Sabbath statute, but infers Sunday as a holiday; however, the statutes of Missouri assume a neutral position for those persons wishing to oberve the tenets of their faith on the days of the week other than the first. A "No Penalty" statute disallows discrimination in employment "because of his or her refusal to work on his or her normal day of worship."[4]

Oklahoma. Oklahoma statutes declare Sunday as a legal holiday but spell out in other statutes a definition of Sabbath-breaking. Normal labor is among those "acts forbidden to be done of the first day of the week, the doing of any of which is Sabbath-breaking: ..."[5]

Vermont. Vermont has recently (1983) repealed all its statutes speaking to "Sabbath Breaking", "A Common Day of Rest", and a section related to an alternate day of rest for persons who observe a Sabbath other than Sunday.

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[3]Mississippi, Code Annotated, sec. 97-23-63

[4]Missouri, Annotated Statutes, chap. 578, sec. 578.115

[5]Oklahoma, Statutes Annotated, chap. 21, sec. 908

Washington. Washington, in 1976, repealed all statutes related to Sabbath Breaking but retained Sunday as a legal holiday by statutory language.

Statutory Provisions for Religious Observance by Non-Sunday Sabbatarians

Ten states currently have statutes providing for religious observance by non-Sunday Sabbatarians.

Connecticut. Connecticut statutes provide an exemption from the Sunday law for those persons observing Saturday as their Sabbath:

> "No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, or who conscientiously believes that the Sabbath begins at sundown on Friday night and ends at sundown on Saturday night and actually refrains from secular business and labor during said period, and who has filed written notice of such belief with the prosecuting attorney of the court having jurisdiction, shall be liable to prosecution for performing secular business and labor on Sunday, provided he shall not disturb any other person who is attending public worship."[6]

Kansas. Kansas, in 1976, repealed a series of statutes regarding legal holidays and enumerated in section 35-107 the legal public holidays. Kansas' reference to the Saturday is in section 69-101 and exempts persons

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[6]Connecticut, Revised Statutes, chap. 946, sec. 53-303

> whose religious faith and practices is to keep the seventh day of the week, commonly called Sunday, as a day set apart by divine command as the Sabbath or rest from labor and dedicated to the worship of God, shall be subject...to serve as a juryman in a justice's court on that day..."[7]

Kentucky. Kentucky statutes allow working on Sunday only for acts of necessity, charity, and certain business. Exceptions are made for certain businesses and labor (public service or public utility). Those exceptions for Sunday work are for "(2) persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty...if they observe as a Sabbath one (1) day in each seven (7)."[8]

Maine. Maine infers Sunday as a legal holiday by moving the day from Sunday to the following Monday. Also defined is the Lord's Day which

> "includes the time between 12 o'clock on Saturday night and 12 o'clock on Sunday night."[9]

Allowance is made for Saturday as a holy day:

> "No person conscientiously believing that the 7th day of the week ought to be observed as the Sabbath, and actually refraining from secular business and labor on that day, is liable to said penalties for doing such business or labor on the first day of the week, if he does not disturb other persons."[10]

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[7]Kansas, General Statutes Annotated, chap. 69, sec. 69-101

[8]Kentucky, Revised Statutes, chap. 2, section 436.160

[9]Maine, Revised Statutes, chap. 17, section 3201

[10]Ibid., sec. 3209

TABLE 5

States With Statutes Enumerating Religious Observance For Non-Sunday Sabbatarians and Sabbath as Sunday

States	Non-Sunday Sabbatarians	Sabbath as Sunday
Connecticutt	x	
Kansas	x	
Kentucky	x	
Maine	x	
Maryland	x	
Michigan	x	
Minnesota		x
Mississippi		x
New York	x	x
Oklahoma		x
Rhode Island	x	
Virginia	x	
West Virginia	x	

Maryland. Maryland statutes proscribe work on sunday and disallow the employers to command children or servants to do any manner of work on the Lord's Day, commonly called Sunday. Exceptions to the Lord's Day observance is granted to persons who observe the seventh day as the Sabbath[11] and to those persons conscientiously believing

> "that the Sabbath begins at sundown on Friday night and ends at sundown on Saturday night and who actually refrains from secular business and labor during such period...[12]

Michigan. Michigan is explicitly clear in defining the seventh day as a Sabbath and the period of time included:

> "Sec. 1. Whenever in the statutes of this state, rights, privileges, immunities or exemptions are given or duties and responsibilities are imposed on persons who conscientiously believe the seventh day of the week ought to be observed as the sabbath, said sabbath or seventh day shall mean the worship and belief of such persons to include the period from sunset on Friday evening to sunset on Saturday evenings"[13]

New York. New York's General Business Law sets apart the first day of the week as the Sabbath for rest and religious uses.[14] Two court decisions arising out of New York on Sabbath statutes have spoken to Sunday: "The public policy of the state is to set aside Sunday as a day of

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[11]Maryland, Annotated Code, art. 27, sec. 492 (2)

[12]Ibid. (3)

[13]Michigan, Public Acts, Title 18, sec. 18.856 (1)

[14]New York, General Business Law, art. 2, sec. 2.

repose"[15] and "The Sabbath is a political and civil institution and subject to regulation by the civil government."[16] Sabbath Breaking, sec. 3, defines a violation of the prohibition in sec. 2 as Sabbath breaking[17] and is a misdemeanor.[18]

New York statutes allow religious observance for the Saturday Sabbatarian by a

> "defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons observing the first day of the week as holy time."[19]

Public school employees in programs financed by the Elementary and Secondary Education Act (ESEA) in districts having fewer than six hundred pupils may teach any day of the week. Moreover, "No students or teachers shall be required to attend classes if they observe any such day as a Sabbath or a holy day in accordance with the requirements

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[15]DePaul v. Berkowits, 54 Misc. 2d 156, 281 N.Y. 2d 449 (1967).

[16]People V. Polar Vent of America, Inc. 151 N.E. 2d 621 (1957).

[17]New York, General Business Law, art. 2, sec. 3.

[18]Ibid., sec. 4

[19]Ibid., sec. 6

of their religion."[20]

Rhode Island. Rhode Island sets Sunday as a legal public holiday and further prohibits work or recreation on Sunday[21] with imposition of fines for offenders. Provisions are made for:

> "Every professor of the Sabbatarian faith or of the Jewish religion, and such others as shall be owned or acknowledged by any church or society of said respective professions as members of or as belonging to such church or society, shall be permitted to labor in their respective professions or vocations on the first day of the week,..."[22]

Virginia. Virginia statutes allow broad Sabbatarian practices for all faiths and believers and for certain conditions of employment. With the presence of penalties for Sabbath work, persons observing Saturday as Sabbath are exempt if they conscientiously believe "that the seventh day of the week ought to be observed as a Sabbath and actually refrain from all secular business and labor on that day."[23] A broad practice of Sabbatarianism is accommodated by having at least one day of rest in each week,

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[20]New York, Education Law, sec. 3603

[21]Rhode Island, General Law, chap. 40, sec. 11-40-1

[22]Ibid., sec. 11-40-4

[23]Virginia, Code 1975, Crimes and Offenses Generally, Section 18.2-343

except in an emergency.[24] Non-managerial employees are entitled to Sunday[25] or Saturday as a day of rest.[26]

The Virginia statutes enforce the Sabbatarian practice by including a non-discrimination clause protecting employees who exercise the "one day in seven" for rest or worship: "No employer shall, in any manner, discharge, discipline or penalize such employee for exercising his right under this section(s)."[27]

West Virginia. West Virginia infers Sunday as a legal holiday and imposes penalties for violations; however, penalties

> "shall not be incurred by any person who conscientiously believes that Saturday ought to be observed as a Sabbath, and actually refrains from all secular business or labor on that day, provided he does not compel an...employee, not of his belief to do secular work or business on Sunday."[28]

Statutory Provisions for Easter Observance

North Carolina is the only state among the fifty, the District of Columbia, and Puerto Rico to enumerate Easter

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[24]Virginia, Code 1975, Sec. 40.1-28.1

[25]Ibid., 40.1-28.2

[26]Ibid., 40.1-28.3

[27]Ibid., 40.1-28.2

[28]West Virginia, Code of 1955, sec. 61-10-27

Monday as a legal holiday. Thirteen states provide statutory provisions for observance of Good Friday. Table 6 deals with the states and this designation, and lists the states with statutory language beyond designation of "Good Friday".

California. "Good Friday from 12 noon until 3 P.M."[29]

Indiana: "the movable feast day of Good Friday"[30]

North Dakota. "the Friday next preceding Easter Monday".[31]

South Dakota. South Dakota does not designate Good Friday as a legal holiday generally; however, in another section dealing with Legal Discontinuance of School, the language mandates that "school shall be legally discontinued only in the event the enumerated day occurs on a regularly scheduled school day"[32]; among those days is Good Friday.

Wisconsin. "After noon on Good Friday, in lieu of the period specified in Section 895.20"-(11:00 A.M. to 3:00 P.M.)[33]

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[29]California, Annotated Codes, sec. 6700

[30]Indiana, Statutes Annotated, chap. 9, sec. 1-1-9-1

[31]North Dakota, Revised Code, Education, sec. 15-38-04.1

[32]South Dakota, Session Laws, Education, sec. 13-26-3

[33]Wisconsin, Codes, sec. 16.30,859.20

TABLE 6

States with Statutes Enumerating
Good Friday and Easter Monday
As Legal Public Holidays

States	Good Friday Enumerated	Easter Monday
California	X	
Delaware	X	
Florida	X	
Hawaii	X	
Illinois	X	
Indiana	X	
Louisiana	X	
Maryland	X	
North Carolina		X
North Dakota	X	
Pennsylvania	X	
South Dakota	X	
Tennessee	X	
Wisconsin	X	

Christmas Observance as a Legal Holiday

Each of the fifty states, the District of Columbia, and Puerto Rico enumerate Christmas Day as a legal holiday for public employees and school employees.

The states of Arkansas, Georgia, and Wisconsin are the only states among the fifty, the District of Columbia, and Puerto Rico allowing December 24, Christmas Eve, as a legal holiday for public employees. South Carolina sets December 26 as a legal holiday and allows the governor of the State to proclaim December 24 as a legal holiday.[34] Wisconsin sets the afternoon of December 24 as a holiday for state employees.[35]

Massachusetts statutes provide permissive authority to "Establishment of Guidelines for Celebration of Christmas and Other Festivals":

> "The School committee may set appropriate guidelines for the celebration of Christmas and other festivals observed as holidays for the purpose of furthering the educational, cultural and social experience and development of children".[36]

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[34]South Carolina, Codes, sec. 53-5-10

[35]Wisconsin, Codes, sec. 16-30

[36]Massachusetts, Annotated Law, chap. 71, sec. 31A

The states of Florida and Mississippi go further in observing Christmas as a holiday in the schools. Florida statutes, in addition to setting December 25 as a legal holiday, sets

> "That period of the school year beginning on or before December 24 and continuing for a period of time to be fixed by the school board which shall include January 1, shall be set apart as a vacation period, and that time shall not be considered a part of the school month".[37]

Mississippi statutes provide permissive language for the county superintendent and board of trustee in municipal school districts to close for the Christmas holidays, not exceeding two weeks.[38]

Special Days Designation and National Thanksgiving Day

Twenty-seven states, District of Columbia, and Puerto Rico, provide statutory authority for the Governor or the President of the United States to proclaim a special day not specifically enumerated as a legal holiday for a public fast, thanksgiving, or other religious observance. Table 8 lists those states allowing special days observance. The states of Alabama, California, Connecticut, Illinois, Kentucky, and South Carolina use this special day provision in observing the National Holiday of Thanksgiving on the fourth Thursday of November. Other states shown in Table 7

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[37]Florida, Statutes Annotated, sec. 683.01

[38]Mississippi, Code Annotated, sec. 3-3-7

set apart, as a legal holiday, a statutory provision for the National Thanksgiving holiday and the sixteen states enumerating a special day proclamation and Thanksgiving Day as the fourth Thursday in November.

Jewish Religious Days as Legal Holidays

North Carolina is the only state among the fifty states the District of Columbia, and Puerto Rico to include a Jewish holy day, Yom Kippur, as a legal holiday.[39]

Though the statutes governing schools in North Carolina allow no provision for religious holidays other than Sunday for school employees, the North Carolina Administrative Codes in teacher substitutes regulations provide:

> "Observance of Bona Fide Religious Holidays. Absence from school for bona fide religious holidays may be allowed for a maximum of two days within any one school year with prior approval... The teacher must agree to make up the amount of time for which his or her absence has been excused. The superintendent, in consultation with the teacher, shall designate such religious holidays, provided that such days are not already scheduled as vacation or other holidays in the school year... Any such absence shall be with full pay."[40]

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[39]North carolina, General Statutes, chap. 103, sec. 103-4 (11a)

[40]North Carolina, Administrative Code, 16 2F..0108 (J)

TABLE 7

States with Statutes Enumerating December 24, 25, 26 as Holidays Christmas Vacations and Observances

States	December 24th, 25th, 26th Holidays		Special Observances
Alabama		x	
Alaska		x	
Arizona		x	
Arkansas	x	x	
California		x	
Colorado		x	
Connecticutt		x	
Delaware		x	
Florida		x	x
Georgia	x	x	
Hawaii		x	
Idaho		x	
Illinois		x	
Indiana		x	
Iowa		x	
Kansas		x	
Kentucky		x	
Louisana		x	
Maine		x	
Maryland		x	
Massachusetts		x	x
Michigan		x	
Minnesota		x	
Mississippi		x	x
Missouri		x	
Montana		x	
Nebraska		x	
Nevada		x	
New Hampshire		x	
New Jersey		x	
New Mexico		x	
New York		x	
North Carolina		x	
North Dakota		x	
Ohio		x	

TABLE 7 (continued)

States	24th	25th	26th	Holidays	Special Observances
Oklahoma		x			
Oregon		x			
Pennsylvania		x			
Rhode Island		x			
South Carolina	x[a]	x	x		
South Dakota		x			
Tennessee		x			
Texas		x			
Utah		x			
Vermont		x			
Virginia		x			
Washington		x			
West Virginia		x			
Wisconsin	x[b]	x			
Wyoming		x			
District of Columbia		x			
Puerto Rico		x			

[a]The Governor has authority to proclaim December 24 as a holiday.

[b]Wisconsin allows the afternoon of December 24.

TABLE 8

States with Statutes Allowing Designation of Special Days by the Governor or the President of the United States for Thanksgiving, Fasting, or Religious Observance and the Annually Proclaimed National Thanksgiving Day as a Legal Holiday

States	Special Days Observance	National Thanksgiving Day
Alabama	x	
Alaska		x
Arizona		x
Arkansas		x
California	x	
Colorado		x
Connecticutt	x	
Delaware		x
Florida		x
Georgia	x	x
Hawaii	x	x
Idaho	x	x
Illinois	x	
Indiana		x
Iowa		x
Kansas		x
Kentucky	x	
Louisana		x
Maine		x
Maryland	x	x
Massachusetts		x
Michigan	x	x
Minnesota		x
Mississippi		x
Missouri		x
Montana		x
Nebraska		x
Nevada	x	x
New Hampshire		x
New Jersey	x	x
New Mexico		x
New York	x	x
North Carolina		x

TABLE 8 (continued)

States	Special Days Observance	National Thanksgiving Day
North Dakota	x	x
Ohio	x	x
Oklahoma	x	x
Oregon	x	x
Pennsylvania	x	x
Rhode Island	x	
South Carolina		x
South Dakota	x	x
Tennessee	x	x
Texas		x
Utah	x	x
Vermont		x
Virginia		x
Washington	x	x
West Virginia	x	x
Wisconsin		x
Wyoming	x	x
District of Columbia	x	
Puerto Rico	x	x

Those states enumerated in Table 4 accommodate the non-Sunday Sabbatarians by seventh-day statutory provisions. However, Rhode Island has a similar provision but goes a step beyond by providing: "Every professor of the Sabbatarian faith or of the Jewish religion" to accommodate the non-Sunday Sabbatarian. This statute also speaks specifically to allowing "labor in their respective professions or vocations on the first day of the week"[41] but exceptions are disallowed for operating shops, etc. The fullness in the Sabbatarian doctrines of Rhode Island is strengthened by

> "in case of any dispute shall arise respecting the persons entitled to the benefit of this section, a certificate from a regular pastor or priest of any of the aforesaid churches or societies or from any three (3) standing members of such church or society, declaring the person... to be a member of or owned by or belonging to such church or society, shall be received as conclusive evidence of the fact".[42]

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[41]Rhode Island, General Law, chap. 40, sec. 11-40-4

[42]Ibid.

TABLE 9

STATES WITH STATUTES SPECIFYING
JEWISH RELIGIOUS HOLIDAYS

States	Yom Kippur	Jewish Sabbath
North Carolina	x	
Rhode Island		x

Acts of Mercy, Charity, or Acts of Necessity on sunday

The Sabbath observance has its foundation in the Fourth Commandment. Jesus added another dimension to the commandment by abating the proscription of labor for Christians when he defended his disciples for working in cases of necessity and justified his own healing of the sick and lame on holy days.[43] Jesus said, "the Sabbath was made for man, and not man for the Sabbath".[44]

Seven states currently incorporate this Christian concept in their statutes where Sunday work is proscribed but excepting acts of mercy, charity, or acts of necessity on Sunday (See Table 10).

This chapter indicates that each of the fifty states, the District of Columbia, and Puerto Rico have some statutory provision for religious observance for public school employees on their Sabbath and other religious observances.

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[43] Solberg, p. 10

[44] Mark 2: 27-28.

TABLE 10

States with Statutes Allowing Acts of Mercy, Charity, or Acts of Necessity on Sunday

Kentucky
Mississippi
New Hampshire
New York
Oklahoma
Rhode Island
South Carolina

CHAPTER IV

LEGAL ASPECTS OF SCHOOL BOARD AUTHORITY TO ACCOMMODATE RELIGIOUS OBSERVANCE BY EMPLOYEES: A NARRATIVE

Questions of religion in the workplace have frequented the court room of the United States. It is not unusual for employee's religious observance to come into sharp conflict with the work rules of the employer. During the past two decades, the pace of legal activity has increased over issues raised under the First Amendment guarantees of religious freedoms and the free exercise thereof by employees in the public and private sectors of the American workplace. The courts have addressed, often without clarity, the meaning of the free exercise and establishment clause of the First Amendment of the United States Constitution.

In the 1960's, Congress attempted to address employees' and even prospective employees' religious guarantees from discrimination by employers in legislating the 1964 Civil Rights Act. Responding to the lack of clarity in the Supreme Court's decision regarding religious observance and the employer's accommodation, the United States Congress, in the 1960's and 1970's amended the original 1964 legislation.

Along with the amendments, Congress authorized the

creation of the Equal Employment Opportunities Commission (EEOC) in 1972 to administer laws that assure equal protection under the First Amendment of the United States Constitution. The legislative and administrative procedures changed the concept of religious discrimination from the negative on the employer's part to a positive aspect by requiring employers to make affirmative accommodation for religious observance short of an undue hardship on the conduct of business.

The courts have continued to consider the free exercise and establishment clauses guaranteeing religious freedom in the private and public sector. Many of the judicial decisions draw upon the church-state separation issues under the First Amendment guarantees of free exercise. The Civil Rights Act of 1964, amended, has attempted to spell out, by legislative means, the duty of employers, private and public, to make reasonable accommodation for employees' religious beliefs and practices when they come into conflict with workrules of the employers.

To focus upon school board authority to accommodate religious practices of employees, a review of the First Amendment guarantees and court decisions addressing those guarantees is necessary. In reviewing the legislation requiring reasonable accommodation for employees and constitutionality of that legislation, it is necessary to consider criteria to be applied to rules established

by public and private employers.

The Supreme Court has established a three-part test for legislation, policies,and rules adopted by employers to judge the constitutionality of such action. School boards, in providing policies for employees' religious accommodations, can adopt the three-part test to determine whether the policies are secular in nature, do not violate free exercise guarantees or establishment prohibitions, or create excessive entanglement with government and religion.

First Amendment

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion..."[1] The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives. The first draft introduced by Madison read:[2]

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[3]

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[1]U.S. Constitution, amend. I.

[2]McGowan v. Maryland 366 U.S. 420, 434 (1961).

[3]I. Annuals of Congress, 434.

Madison is credited with adding the word "national" to meet approval of states which had an established church. Madison reasoned that the language in the first draft meant that Congress should not establish a religion, nor enforce the observance of religion by law nor compel citizens to worship God in any manner contrary to conscience. Madison further reasoned that the citizens feared one sect might obtain a pre-eminence, or a colition of several might join to establish a national religion and compel others to conform.[4]

On September 9, 1789, the Senate passed a version of the amendment to read in part:

> "Congress shall make no law establishing articles of faith, or a mode of worship..."[5]

Sentiment among the members of the Congress was that the "real object of the amendment was...to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[6] The First Amendment, in its final form, not only barred a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion.[7]

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[4]McGowan v. Maryland 366 U.S. 420 (1961)

[5]Records of the United States Senate 1A-C2 (U.S. National Archives)

[6]McGowan v. Maryland 366 U.S. 420 (1961)

[7]Ibid.

Thus, the Courts have given the Amendment a "broad interpretation...in light of its history and the evil it was designed forever to suppress..."[8]

A most extensive discussion dealing with the "Establishment" Clause is found in the Everson decision:[9]

> "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activity or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the Words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'"[10]

The neutrality of the free exercise and establishment clauses of the First Amendment has been addressed by the United States Supreme Court and in inferior courts a number of times since the adoption of the United States Constitution.

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[8]Everson v. Board of Education at the Township of Ewing, 330 U.S. 1, 14-15 (1947)

[9]McGowan v. Maryland 366 U.S. 420 (1961)

[10]Everson v. Board of Education 330, U.S. 1 (1947)

In 1870, the Ohio Superior Court Judge Alphonso Taft, father of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of:

> "Absolute equality before the law, of all religious opinions and sects...The government is neutral, and, while protecting all, it prefers none, and it disparages none"[11]

Judge Taft's views, expressed in dissent, prevailed on appeal. The Ohio Supreme Court held that:

> "The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legimate province of government".[12]

In a 1925 case dealing with religious issues arising from First Amendment questions, Justice Sanford contended in Gitlow v. New York that:

> "For present purposes we may and do assume that freedom of speech and of the press- which are protected by the First Amendment from abridgment by Congress- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States".[13]

The interrelationship of the establishment and free exercise clauses was touched upon by Justice Roberts for the court

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[11]Minor v. Board of Education of Cincinnati, 23 Ohio St. 211, 253 (1872).

[12]Ibid.

[13]Gitlow v. New York, 268 U.S. 652, 66 (1925).

in Cantwell v. Connecticut where he said that their "inhibition of legislation" had:

> A double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. To adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the 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."[14]

Moreover, in a landmark note, the court intervened in the concepts of due process and liberty of the Fourteenth Amendment with the liberties guaranteed by the First Amendment. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...".[15] Justice Roberts reasoned, "The Fourteenth Amendment has rendered the Legislatures of the states as incompetent as Congress to enact such laws...".[16]

The United States Supreme Court in Schempp, speaking to the concept of neutrality of the First Amendment, did not accept a state's requiring a religious exercise with the consent of the majority of those affected by using the state action to deny the rights of free exercise to anyone. The

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[14]Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[15]U.S. Constitution, amend. I

[16]Cantwell v. Connecticut, 310 U.S. 266 (1940).

court reasoned that the free exercise clause never meant that a majority could use the machinery of the state to practice its beliefs.[17] In West Virginia v. Barnette, Justice Jackson addressing the question of religion within the Bill of Rights contended:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from its Vicessitudes of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to...freedom of worship... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections".[18]

Justice Douglas in Zorach v. Clauson[19] delivered the opinion of the Court on "released time" for students to attend religious instruction. Drawing upon the intent of the First Amendment which has impact upon the accommodation of employees to attend religious observances, he cited Everson[20] and McCollum[21] in reasoning that "released time" in the Zorach[22] case did not establish a religion. He

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[17]Abington School District v. Schempp, 374 U.S. 664, 668 (1970)

[18]West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943)

[19]Zorach v. Clauson, 343 U.S. 306 (1952)

[20]Everson v. Board of Education 333 U.S. 1 (1947)

[21]McCollum v. Board of Education 333 U.S. 203 (1948)

[22]Zorach v. Clauson, 343 U.S. 306 (1952)

further reasoned that:

> "There is much talk of the separation of church and state in the history of the Bill of Rights and in the decisions clustering around the First Amendment. There cannot be the slightest doubt that the First Amendment reflects the philosophy that church and state should be separated and so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups."[23]

He further reasoned that policemen who assisted parishioners to their places of worship,or prayer in the legislative halls, the proclamations making Thanksgiving Day a holiday or "so help me God" in the courtroom oaths would be flouting the First Amendment. He further contended:

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[23]Ibid at 312

> "we are a religious people whose institutions presuppose a Supreme Being. We guaranteed the freedom to worship as one chooses. We make room for as wise a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the constitution a requirement that the government shows a callous indifference to religion groups. That would be preferring those who believe in no religion over those who do believe...But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence...it can close its doors or suspend its operation as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."[24]

In 1961, Chief Justice Earl Warren, speaking for a unanimous court on the First Amendment questions in McGowan v. Maryland, said:

> "But, the First Amendment in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this court has given the amendment a broad interpretation...in the light of its history and the evils it was designed forever to repress."[25]

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[24]Ibid.at 314

[25]McGowan v. Maryland, 366 U.S. at 441-442

In 1962, the United States Supreme Court, without the citation of a single case and over the sole dissent of Justice Stewart reaffirmed earlier discussions regarding the First Amendment establishment and free exercise clauses by saying:

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment clause, unlike the Free Exercise clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When their power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[26]

In 1963, Mr. Justice Clark speaking for the court in Schempp reasoned that:

> "The Establishment clause advances a wholesome 'neutrality' stemming from a recognition of the teaching of history that powerful sects might bring about a fusion of government and religious factors or a concert or dependency of one upon the other to the end that official support of the state or federal government would be placed behind the tenets of one or all orthodoxies. And a further reason for neutrality is in the Free Exercise clause which is cognizant of the value of religious teaching and observance and, more particularly, the right of each person to freely follow his conscience in religion matters,

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[26]Engle v. Vitale 370 U.S. 424 (1962)

> free of any compulsion from the state. The Free Exercise clause guarantees."[27]

The Schempp Court reinterpreted that the Supreme Court in the preceding twenty years had held that the establishment clause withheld all legislative power respecting religious belief or the expression thereof and provided a test for enactments:

> "What are the purpose and the primary effect of enactment" If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution".[28]

The Supreme Court reasoned that the free exercise clause withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. "Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."[29] The test of enactment on the "free exercise" clause is a showing that the coercive effect of the enactment as it operates against a citizen in the practice of religion. The distinction between the two clauses is that a violation of the free exercise clause is predicated on coercion while the establishment clause violation need not be so attended.[30]

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[27]Abington v. Schempp 374 U.S. at 222 (1970)

[28]Ibid at 222

[29]Ibid at 223

[30]Ibid at 223

Justice Black, expressing the opinion in the Lemon Court on the religious clauses of the First Amendment described it as opaque at best when compared with other portions of the First Amendment. He reasoned that the authors of the First Amendment did not simply prohibit the establishment of a state church or a state religion. Instead they commanded that there be "no law respecting an establishment of religion:. A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the clause. Drawing on the Walz court, Justice Black, stated that lines must be drawn with reference to three evils against which the establishment clause was intended to protect: "Sponsorship, financial support, and actual involvement of the sovereign in religion activity."[31]

In respect to enactment in the religious area, the court gleaned three tests for First Amendment muster:

> "First, the statute must have a secular legislation purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'".[32]

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[31]Walz v. Tax Commission, 397 U.S. 664, 668 (1970)

[32]Lemon v. Kurtzman, 403 U.S. 602 (1971)

Two years later, the Supreme Court again spoke on the issues arising from relationships between religion and education. The court reasoned that the well defined three-part test had emerged for its discussions and to pass muster under the establishment clause the law in question, first, must reflect a clearly secular legislative purpose,[33] second, must have a primary effect that neither advances nor inhibits religion[34] [35], and third, must avoid excessive government entanglement with religion.[36]

Civil Rights Act of 1964

Title VII of the 1964 Civil Rights Act declares that it is an unlawful employment practice for an employer to discriminate against any employee, or prospective employee on the basis of his religion.[37] This prohibition reflects a recognition that freedom of religion has long been considered a fundamental right.[38] The major issue in the religious discrimination cases has been the validity of the Equal Employment Opportunities Commission (EEOC) guidelines that

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[33]Epperson v. Arkansas 393 U.S. 97 (1968)

[34]McGowan v. Maryland 366 U.S. 420 (1961)

[35]Abington v. Schempp 374 U.S. 203 (1963)

[36]Walz v. Tax Commission 397 U.S. 664 (1970)

[37]Title VII, sec. 703, 42 U.S.C., sec. 2000C-2

[38]Zorach v. Clauson 343 U.S. 306 at 313-314 (1952)

require employers to make reasonable accommodation for employees'religious observance and that place the burden of proving undue hardship, if such accommodations are not made, upon the employers.[39]

Prior to the 1972 Amendments

The act, as originally passed, did not define the term "religion" and consequently, it was susceptible to inconsistent judicial interpretation regarding what constitutes religious discrimination.[40] The 1966 EEOC guidelines favored employers because they did not require employers to show undue hardship to justify work rules that interfered with some employees' religious observances; instead, an employer could escape liability by showing serious inconvenience.[41] The EEOC changed its guidelines in 1967 and required employers to make reasonable accommodation for employees' religious beliefs unless undue hardship for an employer's business could be demonstrated.[42]

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[39]Cummins v. Parker Seal Co. 516 F2d 544 (6th Cir. 1975).

[40]Robert Belton, "Title VII of the Civil Rights Act of 1964: A decade of Private Enforcement and Judicial Developments", St. Louis University Law Journal 20 (1976): 286.

[41]29 C.F.R. sec. 1605.1 (1967)

[42]29 C.F.R. sec. 1605 (1968)

A landmark case addressing religious discrimination in employment practices prior to the 1972 Amendments was Reynolds Metals Co. v. Dewey.[43] In Dewey, the district court held that the discharge of an employee because he refused to work on Sunday, his Sabbath, constituted a violation of the act.[44] The Court of Appeals for the Sixth Circuit reversed the earlier decision, noting that the employee had been discharged in accordance with the 1966 Guidelines and no violation could be established.[45] The Supreme Court affirmed the Sixth Circuit's decision by an equally divided court.[46]

1972 Amendment to the Act

In 1972 Congress went a step further in attempting to define the term "religion" by amending Title VII to read:

> "The 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 or prospective employees' religious observances or practice without undue hardship on the conduct of the employers' business.[47]

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[43]Belton, p. 287.

[44]Reynolds Metals Co. v. Dewey 300 F Supp. 709 (1968).

[45]Dewey v. Reynolds Metal Co., 429 F2d 324 (6th cir. 1970).

[46]Dewey v. Reynolds Metal Co., 402 U.S. 689 (1971).

[47]Title VII section 701 (j), 42 U.S. C. section 2000e-(j).

The first significant decision addressing the validity of the EEOC guidelines after the 1972 Amendments was Riley v. Bendix Corp,[48] in which the court rejected the defendent's reliance upon the majority opinion in Dewey that questioned the constitutional validity of the EEOC guidelines requiring employers to make reasonable accommodation for employees' religious beliefs.

The Sixth Circuit Court, in Reid v. Memphis Publishing Co.,[49] distinguished the doubts it had expressed in Dewey about the constitutionality of the EEOC guidelines. Three years later the Sixth Circuit Court in Cummins v. Parker Seal Co. [50] gave its rationale that EEOC guidelines were not violative of the First Amendment regarding the establishment of religion. The Cummins court drew on the 1973 decision of Committee for Public Education and Religious Liberty v. Nyquist[51] in outlining three standards that a law must meet to survive a First Amendment establishment clause challenge: first, the law must reflect a clearly secular legislative purpose; second, it must have a primary effect that neither advances nor inhibits religion; and third, it must avoid

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[48]Riley v. Bendix Corp, 464 F2d 1113 (5th Cir. 1972).

[49]Reid v. Memphis Publishing Co. 468 F2d 346 (1972).

[50]Cummins v. Parker Seal Co., 516 F2d 544 (6th Cir. 1975).

[51]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

excessive government entanglement with religion.[52]

Case law has supported the basic validity of the 1972 Amendments and EEOC guidelines; however, there still remains no reliable definition, either judicial or legislative, of the critical terms of "reasonable accommodation" and "undue hardship". These standards are highly susceptible to a wide range of interpretations in the courts. Moreover, there remains the question whether the definition of "religion" in the 1972 Amendments[53] is sufficiently precise enough to avoid the issues that the courts face in dealing with the First Amendment freedom of religion issues.[54]

Several significant changes were brought about by the Amendments to Title VII that were enacted as the Equal Employment Opportunity Act of 1972. Employees now may file charges of discrimination with the EEOC and if necessary, go into federal district court. Moreover, the previous exemptions for educational institutions were deleted; thus, employers and applicants for employment in teaching, administration, and clerical positions in both private and public school systems are covered by this act.[55]

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[52]Ibid., pp. 772-73

[53]42 U.S.C., sec. 2000e (j)

[54]Belton, p. 289

[55]Title VII, sec. 702, 42 U.S.C. section 2000e-1

Congress expanded the definition of "employer" to include the entire field of public employment under Title VII provisions. Title VII defines an "employer" as a "person", and person including government, governmental agencies, and political subdivisions.[56]

Section 701(j) of the Equal Opportunity Act[57] requires employers to modify generally neutral work policies when those policies conflict with the employees'religious belief or practice. This requirement is commonly referred to as the "reasonable accommodation" rule and can be used by religious employees so as to ensure that they do not have to work on their Sabbath. Under this rule, the employer is required to attempt to accommodate employees' wishes if they do not wish to work on their Sabbath. Moreover, section 701(j) requires employers to accommodate the religious practices of their employees unless such accommodation results in undue hardship.[58]

The establishment clause of the First Amendment provides that "Congress shall make no law respecting the establishment of religion."[59]

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[56]Title VII, section 701(a), 42. U.S.C. section 2000e-(a), (b). (Supp. 10 1974).

[57]42 U.S.C. section 2000(j) (1976).

[58]James L. Beard, "The Constitutionality of an Employee's Duty to Accommodate Religious Beliefs and Practices," Kent Law Review 56 (1980): 635.

[59]U.S. Constitution, amend. I.

The United States Supreme Court in Nyquist made an analysis of the establishment clause which requires that when government action touches on a religious sphere it must reflect a clearly secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must avail excessive entanglement with religion.[60]

The ban on religious discrimination originated in Title VII of the Civil Rights Act of 1964. The ban on discrimination in employment provides that:

> "It shall be an unlawful employment practice for an employer - "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin."[61]

The original thrust of Title VII was a negative mandate for employers requring that they refrain from utilizing race, color, religion, sex, or national origin as a basis for granting or withholding employment opportunities. However, in 1966, the Equal Employment Opportunities Commission departed from the negative mandate in the area of religious discrimination.[62] The 1966 guidelines of the EEOC stipulated

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[60]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

[61]42 U.S.C. section 2000e(j).

[62]Beard p. 636.

that private employers not only must refrain from using religion as a decision-making factor, but have an affirmative duty "to accommodate religious needs of employees where such accommodations can be made without serious inconvenience to the employer's business."[63]

The 1967 Equal Employment Opportunities Commission guidelines placed a greater burden on private employers by compelling the employer "to make reasonable accommodations to the religious needs of employees or prospective employees where such accommodations can be made without undue hardship on the conduct of the employers business.[64] The guidelines went further in requiring the employers to prove that the accommodations would result in undue hardship.[65] In essence, these guidelines went beyond the affirmative obligation to equate the failure to accommodate with religious discrimination.[66]

Reasonable Accommodation in Public Employment

The 1972 Amendments to the 1964 Civil Rights act extended coverage of its Title VII to all government employees and created a potential conflict between the reasonable

[63]29 C.F.R. 1605.1(a) (2) (1966).

[64]Ibid 1605.1 (b) (1971).

[65]Ibid 1605.1 (c).

[66]Beard, p. 363.

accommodation requirement and the First Amendment. In Yott v. North American Rockwell Corporation,[67] a Federal District Court held the reasonable accommodation requirement to be in conflict with the Establishment clause of the First Amendment.

A new provision of the act, section 2000e-16, extended coverage to employees of the federal government. It provides, in pertinent part:

> "1. (a) All personnel actions affecting employees or applicants for employment in military departments...in the United States Postal Service and the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on ...religion,...[68]

This amendment made the government subject to nearly the same considerations as the private sector.[69]

In Engel v. Vitale, the Court held that the Establishment clause is violated by enactment of laws which establish an official religion. The Supreme Court, in Engel[70] referred to the writings of James Madison, author of the First Amendment, to illustrate the dangers of the "establishment" of religion.

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[67]Yott v. North American Rockwell Corporation, 428 F Supp. 763 (D.C. Col. 1977).

[68]42 U.S.C. sections 2000e-16.

[69]Roger B. Jacobs "Reasonable Accommodation in Public Employment," Labor Law Journal 29 (November 1978): 712.

[70]Engle v. Vitale, 370 U.S. 424 (1962).

> "Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to other establishment in all cases whatsoever".[71]

In Dewey v. Reynolds Metals Company,[72] the Sixth Circuit Court delineated the federal standard for reasonable accommodation. The court held that the accommodation requirement promulgated in EEOC Regulations was not embodied in the Civil Rights Act. The court commented that acceding to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sunday in place of Dewey. "This would constitute unequal administration of the collective bargaining agreement among the employees," the court stated. The court held that the employer did not question Dewey's right to freedom of religion and the right to practice his religous beliefs in it. The court held that no intentional discrimination had occurred. In rejecting Dewey's plea for a rehearsing en banc, the court further stated that the employee ought not to be forced to accommodate each of the varying religious beliefs and practice of his employees.[73]

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[71] II Writings of Madison 183, In Memorial and Remonstrance Against Religious Assessments, pp. 185-86.

[72] Dewey v. Reynolds Metals Company 429 F2d 324 (1970).

[73] Ibid.

The opinion in Dewey established the framework that later cases used in dealing with reasonable accommodation. Congress disagreed with the Dewey result and incorporated the EEOC regulations into the 1972 Civil Rights Act Amendment. The employer in Dewey was not excused from a duty of accommodation; the Court of Appeals only held that the employer had satisfied any obligation it might have had under the statute.[74]

The eighth Circuit Court in addressing accommodation of employees held that:

> "An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employees attitude to reach a reasonable accommodation, he may render an accommodation impossible."[75]

In 1977 the United States Supreme Court considering the 1972 Amendments to the 1964 Civil Rights Act in Trans World Airlines Inc. v. Hardison held that:

> "in absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to require an employee to discriminate against some employees in order to enable others to observe their Sabbath."[76]

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[74]Jacobs, p. 715.

[75]Chrysler Corp. v. Mann, 561 F2d 1282, 1285 (8th Cir. 1977).

[76]Trans World Airlines, Inc., v. Hardison, 432 U.S. 63 (1977).

The Court based its decision on three main points: (1) TWA made reasonable efforts to accommodate the religious needs of Hardison; (2) TWA was not required to violate collective bargaining agreements by violating its non discriminatory seniority system; and (3) alternative plans, which would have permitted Hardison to avoid Saturday work by working only four days per week, constituting an undue hardship on its employer.[77]

The Sixth Circuit Court discussed the Establishment clause and reasonable accommodation in the private sector in Parker Seal v. Cummins.[78] A question arose when Cummins refused to work on Saturday, his Sabbath. The employer contended that a "loner" would lead to objections and complaints among the supervisors and impeded developing a team. The Court held that complaints of employees did not constitute undue hardship and must yield to the individual's right to practice his religion.

The Sixth Circuit then considered the constitutional issues dealing on the three-part test established in Committee on Political Education v. Nyquist.[79] (1) The law must reflect a clearly secular legislative purpose; (2) Its primary effect must neither advance nor inhibit religion; and (3) It must

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[77]Ibid.

[78]Parker Seal v. Cummins 516 F2d 544 (1975).

[79]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

avoid excessive governmental entanglement with religion.[80] The Court of Appeals held that 42 USC 2000e(j) and 29 CFR 1605.1 met constitutional muster and the primary effect was to inhibit discrimination, not to advance religion.

The conflict between the establishment clause and reasonable accommodation was considered by the Yott court and found section 42 USC 2000e(j) unconstitutional because it conflicted with the First Amendment of the United States Constitution. District Judge Real in Yott ruled that section 2000(e) (j) "enjoins an employer to accommodate employment practices to the religious beliefs of his employee."[81] The Court suggested, since the First Amendment prohibition is expressed in terms of "no law," any limitation on the degree of accommodation is irrelevant.[82] "Clearly, then, the statute imposes on an employer the requirement that he adopt or bring into agreement his otherwise nondiscriminatory business conduct with the religious beliefs of his employee".[83]

The Yott court further considered a constitutional conflict when the employee seeks to be excused from union membership dues or the payment of union dues on a condition of employment because of his religious objection. Such a procedure

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[80]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[81]Yott v. North American Rockwell Corporation, 428 F Supp 763 (1977).

[82]Jacobs, p. 719.

[83]Yott v. North American Rockwell Corporation, 428 F Supp 763 (1977).

permits an employee a privilege not otherwise available to employees whose religious beliefs or lack thereof proclaim no such excuse. The Court held that:

> "Government simply cannot make the choice - termed reasonable or otherwise - that conduct which lacks either discriminatory interest or discriminatory application can be circumscribed because religious beliefs may oppose its implementations."[84]

When government is faced with such a decision it must declare its neutrality which may result in a sacrifice from the individual who sincerely adheres to his religious beliefs. "This self-imposed sacrifice has its rewards outside our temporal ken."[85] However well-intentioned governmental action may be in an attempt to alleviate the sacrifice, it cannot survive the clear command by the Supreme Court in Committee for Public Education v. Nyquist.[86]

Government may not decide that some action may be circumscribed because an employee's religious beliefs oppose its implementation. The First Amendment commands that public employers make no adjustments which give some employees preference solely upon religious beliefs. Such accommodations would likely be unreasonable and unconstitutional.[87]

The Supreme Court in Walz v. Tax Commission held that the First Amendment is not inflexible by deducing the general

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[84]Ibid.

[85]Jacobs, p. 723.

[86]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[87]Jacobs, p. 723.

principle that governments may not "establish" or interfere with religion. The Court further contended "short of those expressly proscribed Government acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference".[88]

As far as the constitution is concerned, working in the public sector is not a typical situation. The government's efforts to support or interfere with religious practices may be an impermissible "establishment of religion." Some legal observers suggest that accommodation by government should be based upon economic factors. Such approaches fail to deal with the constitutional issues and ignore the Civil Rights Act. Nevertheless, the act limits accommodations when an undue burden is manifested in accommodation and economic factors could constitute an undue burden.[89]

Reasonable Accommodation and the Establishment Clause

A direct constitutional challenge to the accommodation rule was suggested in Dewey where the Court of Appeals said:

> "To construe the act as authorizing the adoption of Regulations which could coerce or compel an employer to accede to or accommodate the religious beliefs of all his employees would raise grave constitutional question of violation of the Establishment clause of the First Amendment."[90]

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[88]Walz v. Tax Commission, 397 U.S. 664, 669 (1970).

[89]Jacobs, p. 725.

[90]Dewey v. Reynolds Metal Company, 429 F2d at 334 (1970).

In Nyquist the Court held that the crux of the Sabbath observers problem is routed in the recognition "that tension inevitably exists between the Free Exercise and the Establishment clauses..."[91] and that

> "the Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[92]

Although the criteria used to measure establishment and free exercise clause violations have been independently formulated, judicial efforts to resolve the tension between the clauses have focused on the examination of the purpose and effect of legislative enactments. To make judicial muster, legislation must survive the three-pronged test set out in Committee for Public Education v. Nyquist: (1) a clearly secular purpose; (2) the primary effect of the law neutral, neither advancing nor inhibiting religion,and (3) avoidance of excessive governmental entanglement with religion.[93]

The Free Exercise violation criteria, not as formally articulated, seem to emphasize legislative purpose and effect in view of the Court's observation that:

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[91]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788.

[92]Walz v. Tax Commission, 397 U.S. 664, 668-69 (1970).

[93]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788.

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burdens may be characterized as being only indirect".[94]

The 1970 Circuit Court decisions finding that reasonable accommodation undue hardship tests pass muster under the three-pronged establishment clauses[95] concluded that judicial trends have rejected the definition set out in Dewey. It acknowledged both the purpose and effect of Title VII legislation to be rooted in the impact-oriented definition of religious constitutional and definitial trends. They are interrelated in light of an analysis of the purpose of Title VII religion discrimination legislation and the effect on the Sabbath-observing employee.[96]

Senator Jenning Randolph of West Virginia, who sponsored the 1972 Amendment, 42 USC 2000e(j), expressed the Congressional intent saying:

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[94]Braunfield v. Brown, 366 U.S. 599, 607 (1961).

[95]Hardison v. TWA 527 F2d 333 (8th Cir. 1975); Cummins v. Parker Seal Co. 516 F2d 544 (6th Cir. 1975).

[96]Dewey v. Reynolds Metal Company, 429 F2d 324, 335 (1970).

> "I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the Courts have, in a sense, come down on both rules of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This Amendment is intended, in good purpose to resolve by legislation-and in a way I think was originally intended by the Civil Rights Act-that which the Courts apparently have not resolved.[97]

The Sixth Circuit Court in Cummins[98] and Dewey[99] contended that government, by requiring the employer to reasonably accommodate the Sabbath-observing employee, shows a favoritism toward religion that is counter to the establishment clause. In Cummins,[100] the Court contended that the accommodation requirement discriminates between Sabbath observers who receive favorable treatment on the one hand, and atheists and non-Sabbath observers who receive no similar consideration on the other.

The Tripartite Test

The Secular Purpose Requirement

The requirement of a secular purpose is the central

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[97]Congressional Record, 705-06 (1972).

[98]Cummins v. Parker Seal Co. 516 F2d 544 (1975).

[99]Dewey, 429 F2d 324, (1970).

[100]Cummins v. Parker Seal Co. 516 F2d 544 (1975).

question in establishment clause analysis. If the legislation cannot be justified in secular terms, then the legislation is inconsistent with the establishment clause. The Courts have not had much difficulty in finding a secular purpose in values laws and has attached an expansive meaning to the term secular. In McGowan v. Maryland,[101] the court declined to invalidate a Maryland Sunday closing law because it happened to coincide with the beliefs of one religion. Rather, the court in analyzing the law said that:

> "The present...effect of most of (these laws) is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance of the dominant Christian sects, does not bar the state from achieving its secular goals".[102]

In Lemon v. Kurtzman,[103] the court said that "the statutes themselves clearly state that they are interested to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislative meant anything else".[104]

The secular purpose requirement proved controlling in Epperson v. Arkansas,[105] which involved a law prohibiting the

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[101] McGowan v. Maryland 366 U.S. 420 (1961).

[102] Ibid., p. 445.

[103] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[104] Ibid., p. 613.

[105] Epperson v. Arkansas, 393 U.S. 97 (1968).

teaching of evolution in the public schools. The court found "no suggestion--(that) the Arkansas law (could) be justified by consideration of state policy other than the religious views of some of its citizens".[106] Moreover, the court found the absence of a secular purpose controlling:

> "The overriding fact is that (the law) selects from a body of knowledge a particular segment which is proscribed for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group".[107]

If the court is able to find any secular purpose, even if the law evolved from purposes that are nonsecular, it will probably rely upon the secular purpose and apply the two remaining prongs of the establishment clause analysis.[108]

The Secular Effect Requirement

The requirement that a law have a primary effect that neither assists nor inhibits religion is central to establishment clause analysis.[109] However, the primary effect analysis poses questions as to when the effect

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[106]Ibid., p. 107.

[107]Ibid., p. 103.

[108]Beard, p. 651.

[109]Committee for Public Education and Religion Liberty v. Nyquist, 413 U.S. 756, 738-843 (1973).

is primary and when it is incidential. Laws or ordinances that provide for general municipal services have the effect of aiding religious institutions; however, these laws or ordinances are not ruled invalid merely because the purely secular effect happens to be realized in a sectarian context. If such laws were invalidated because they fortuitously benefited religious activities,the state would be applying hostile treatment in violation of the First Amendment.[110]

When a specific state program has both religious and secular effects, the courts must determine which effect is dominant.[111]

In 1973, the court in Nyquist avoided an inquiry into which effect is "primary" and which is "secondary." Instead the court applied a metaphysical approach:

> "Our cases simply do not support the notion that a law found to have a 'primary' effect (that promotes) some legitimate (secular goal) is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion".[112]

The anti-establishment analysis focuses on whether the religious effects are indirect or incidental as opposed to whether the secular effect is primary.[113]

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[110]Beard., p. 651.

[111]Ibid.

[112]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756.

[113]Beard., p. 652.

In School District v. Schempp,[114] a distinction was made that even when a state program has a secular purpose and secular effects, the establishment clause will prohibit the program when the religious benefits are inseparable from the secular benefits. This analysis may not allow Bible readings in public schools because the secular benefit of promoting a broad educational program is inseparable from the sponsorship of religious activities.[115]

If the secular and religious effects are separable, the government program may still be unconstitutional because the benefited class is essentially religiously oriented. In Nyquist the narrowness of the benefited class was the key factor in funding the program in violation of the establishment clause. The court struck down a tax relief program where over eighty percent of the benefited class was religiously oriented.[116]

However, in Walz v. Commissioner,[117] the other end of the spectrum was laid open in that the court ruled that the state had not singled out religion for preferential treatment but instead had granted religious organizations the same

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[114]Abington v. Schempp, 374 U.S. 203 (1963).

[115]Beard, p. 652.

[116]Committee for Public Education and Religious Liberty v. Nyquist, 412 U.S. 756 (1973).

[117]Walz v. Tax Commission, 397 U.S. 664 (1970).

tax status as other non-profit, quasi-public organizations. The court reasoned that if religious organizations are granted benefits only as a part of a program that benefits a larger group of organizations, the effects are incidential rather than direct.

The Requirement of No Excessive Entanglement

The third prong of the anti-establishment analysis is that government avoid any excessive entanglement with sectarian activity from the intent to minimize government intrusion into the religious realm. The first analysis appeared in Walz v. Commissioner,[118] when the court upheld a law exempting religious organizations from property tax in avoiding excessive government entanglement in sectarian affairs.[119] Proponents of the requirement contend that the secular effect analysis is substantial, while the entanglement analysis focuses on procedural involvement of a government program in sectarian affairs.[120]

The Court in Engel v. Vitale[121] contended that whether

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[118]Ibid.

[119]Ibid.

[120]Beard, p. 654, citing Roehmer v. Maryland Board of Public Works, 426 U.S. 736 (1976).

[121]Engel v. Vitale, 370 U.S. 421, 431 (1962).

the anti-entanglement analysis is procedural or substantive, it is clear that the analysis reaffirms the principle that the First Amendment was intended to inhibit "a union of government and religion that tends to destroy government and degrades religion.[122]

The concept of administrative entanglement seems applicable in an analysis of religious employment discrimination because any suit brought under Title VII necessarily involves an inquiry into whether the alleged discrimination was based on religion. Entanglement of this sort is the proscription of excessive government surveillance and evaluation of religious institutions. For example, in evaluating tax exemptions for religious bodies, the Supreme Court emphasized that eliminating the exemption would lead to "tax evaluation of church property, tax liens, tax foreclosures, and direct confrontations and conflicts that follow in the train of those legal processes."[123]

The Court noted the difficulty in separating the secular and religious aspects of a teacher's style of instruction in invalidating state salary supplements to teachers in religious schools. The Court reasoned that the state would be required to ascertain that "subsidized teachers do not

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[122]Ibid.

[123]Walz v. Tax Commission, 397 U.S. 664 (1970).

inculcate religion".[124] To enforce such a statute, the state would have had to be involved in "comprehensive, discriminating, and continuing state surveillance" of the teacher's activities,[125] which would have resulted in "excessive and enduring entanglement between State and Church.[126]

The United States Supreme Court's Analysis of the Reasonable Accommodation Rule: Dewey, Cummins and Hardison

The employer's duty to accommodate an employee's religious practices and beliefs first appeared in the 1966 Equal Employment Opportunities Commission (EEOC) guidelines on religious discrimination; however, the scope of the employer's obligation remained unsettled. The United States Supreme Court, in three cases, confronted the issue of how far an employer must go before accommodation results in an undue hardship.[127]

In Dewey v. Reynolds Metals[128] and Cummins v. Parker Seal Company,[129] an equally divided court affirmed the appellate court decision without an opinion. In third case,

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[124]*Lemon* v. Kurtzman 403 U.S. 602, 619 (1971).

[125]Ibid.

[126]Ibid.

[127]Beard, p. 641.

[128]Dewey v. Reynolds 402 U.S. 689 (1971).

[129]Cummins v. Parker Seal Company, 429 U.S. 65 (1976).

Transworld Airlines v. Hardison,[130] the United States Supreme Court rendered its opinion on the scope of the employer's duty to accommodate religious observance by the employee.

In Dewey,[131] the employee, Dewey, was discharged because of a conflict between the employer's work policy and his Sabbath. Even though the employer offered to find a replacement to fill Dewey's position on his Sabbath, Dewey held that finding a replacement and working on his Sabbath were sins and urged the court to allow him to observe his Sabbath and retain his employment. Dewey's argument was rejected by the Sixth Circuit Court in holding:

> "The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union and his employer, which provisions were equally applicable to all employees...To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations."[132]

The courts reasoning was that "to require the employer to do more than permitting the religious adherent to find a replacement would cause the employer to distribute employment opportunities on an unequal basis" in violations of

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[130]Transworld Airlines v. Hardison, 432 U.S. 63 (1977).

[131]Dewey v. Reynolds Co., 429 F2d 324, 330-31 (1970).

[132]Ibid.

Title VII of the 1964 Civil Rights Act.[133]

In granting certiorari, the United States Supreme Court was unable to reach agreement on the meaning of the reasonable accommodation rule.[134]

In 1976, the United States Supreme Court affirmed the Sixth Circuit in Cummins v. Parker Seal Co.[135] Cummins, a Sabbatarian observer, claimed that his religious practices conflicted with otherwise mutual work policies. After the employer attempted to find a replacement, the plan proved unworkable causing Cummins' counterparts to work seventy-two hours a week while Cummins only worked forty hours a week. This unbalance resulted in numerous complaints and the employer dismissed Cummins. The Sixth Circuit Court held that the employer had not satisfied its obligation to accommodate the religious practices of the employee. The court stated that "if employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under the reasonable accommodation rule, such grumbling must yield to the single employee's right to practice his religion".[136] Moreover, the court held that

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[133]Ibid.

[134]Dewey v. Reynolds Metal Co., 402 U.S. 689 (1971).

[135]Dummins v. Parker Seal Co., 516 F2d 544 (1975).

[136]Ibid.

only if morale problems caused chaotic personnel problems could the Sabbath observer be discharged. After granting certiorari, the United States Supreme Court affirmed the Sixth Circuit Court's decision.[137] The central precedent case of Trans World Airlines v. Hardison[138] addressed "reasonable accommodation" and "undue hardship" under Title VII. Hardison, the Sabbath observer and employee of Trans World Airlines,voluntarily changed jobs in a maintenance shop that operated seven days a week. The new job provided less seniority under the collective bargaining agreement. Hardison, being unable to bid for shifts allowing him time off on Saturday, his Sabbath, took off on Saturdays after the company refused to allow him to work only four days a week. TWA rejected Hardison's proposal because it would impair critical functions in the airlines maintenance operations, hold that no accommodation was available and discharged Hardison for his refusal to work on Saturday.

Hardison instituted action under the 1967 EEOC guidelines and the 1972 Amendments to Title VII contending that reasonable accommodation was not made. The district court ruled in favor of the union and TWA holding that the seniority system could not be ignored and that TWA had satisfied

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[137]Cummins v. Parker Seal Co., 429 U.S. 65 (1976).

[138]Trans World v. Hardison,432 U.S. 63 (1977).

its obligation to accommodate Hardison's religious beliefs. The Sixth Circuit Court affirmed the judgment for the union but reversed as to TWA.

The Sixth Circuit Court reasoned that TWA could have fulfilled its obligation to accommodate Hardison's religious beliefs by:

> "(1) permitting Hardison to work a four-day week and replacing Hardison by a superior or another employee on duty elsewhere, even though this would cause shop functions to suffer, (2) filling Hardison's Saturday shift from another available personnel, although this would have required TWA to bear the cost of premium overtime pay; or (3) arranging a "swap" between Hardison and another employee for another shift for the Sabbath day, although this would have been a breach of the collective bargaining agreement".[139]

TWA and the International Association of Machinists and Aerospace Workers Union challenged the Sixth Circuit's decision on statutory and constitutional grounds. In a seven to two decision, the United States Supreme Court held that the defendants had satisfied their obligations to the employee and had met the statutory intent.[140]

The United States Supreme Court considered the arguments against Hardison's assertion that the express will of Congress required employers to accede to employees' religious

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[139]Trans World Airlines v. Hardison, 516 F2d 544 (1975).

[140]Trans World Airlines v. Hardison, 432 U.S. 76 (1977).

demands absent of finding an undue hardship. The court found for the employer and the union. Mr. Justice White speaking for the court acknowledged that "public policy favored industrial stability realized through collective bargaining and indicated that a seniority system represents an accommodation to both religious and secular needs of employees"[141] contending that "the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day he would prefer to have off.[142] Justice White concluded that in the absence of a discriminatory purpose the seniority system should not be set aside in order to accommodate an employee's religious practices and the Title VII statute "does not require employers to deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious practices of some other employees".[143] Moreover, the court held "that to require an employer to bear more than a de minimis cost in accommodating religious practices is equivalent to undue hardship."[144]

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[141] Ibid., p. 78.

[142] Ibid.

[143] Ibid.

[144] Ibid., p. 84.

Supreme Court Justices Marshall and Brennan in dissent, declared that the majority decision may well have struck a "fatal blow to efforts under Title VII to accommodate work requirements to religious practices".[145] Even though the Trans World decision limits the scope of an employee's duty to accommodate, it appears that the outcome was necessary by the establishment clause of the First Amendment.[146]

The Trans World decision rests upon two basic policies:

> "(1) that collective bargaining, and in particular a negotiated seniority system, should not be disturbed, absent a showing of discriminatory purpose, and (2) that regulating private conduct to the extent of mandating preferential treatment on the basis of a religion raises serious constitutional questions".[147]

If the court had construed the Title VII statute broadly so as to have required accommodation, then the court would have faced the question of whether or not accommodation of religious practices contravened the First Amendment. However, by narrowly construing the statute, the Court avoided this dilemma and followed the proposition that legislation should not be construed to impose this duty unless such interpretation is unavoidable.[148]

In Trans World, the court made the distinction from previous decisions that regulating private conduct to the

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[145]Cummins v. Parker Seal Co., 429 U.S. p. 86.

[146]Beard, p. 645.

[147]Ibid.

[148]Ibid.

extent of granting religious preferences to some employees was inconsistent with the purposes of Title VII. The court emphasized that the "unequivocal emphasis of both the language and the legislative history of Title VII is to eliminating discrimination in employment and such discrimination is proscribed when it is directed against majorities as well as minorities..."[149]

In holding that the seniority system barred accommodation of Hardison's religious beliefs, the court stated that "to...give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath".[150]

Justice Byron White in concluding for the majority opinion stated:

> "The paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language to the contrary, we will not construe the statute to require an employer to discriminate against some employees to enable others to observe their Sabbath."[151]

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[149]Trans World Airlines v. Hardison, 432 U.S. p. 81.

[150]Ibid.

[151]Ibid., p. 85.

The Court in Trans World implicitly recognized that a reasonable accommodation requirement is essentially sound for affirmative action regarding religious beliefs. As in an affirmative action program, the obligation to accommodate requires preferential treatment of a protected class without judicial determination of an illegal employment practice. The court was in an uncomfortable position of having to choose between the narrow construing of the reasonable accommodation rule or mandating religious preference. The court choose the narrow construction. If the reasonable accommodations rule had favored mandating religious preference, serious constitutional questions would have been raised.[152]

Test of Reasonableness: Tooley v. Martin-Marietta

In 1981, the Ninth Circuit Court in Tooley v. Martin-Marietta[153] applied the reasonableness[154] and tripartite' tests[155] involving the payment of funds equal to the union dues being donated to the employee's religious charity in lieu of the payment of union dues. The company and the union had refused to accommodate the employee's request and sought his

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[152]Beard, p 647.

[153]Tooley v. Martin-Marietta Corp., 648 F2d 1239 (1981).

[154]Trans World Airlines v. Hardison, 432 U.S. 63 (1971).

[155]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

dismissal. The District court ordered his reinstatement with the Ninth Circuit Court affirming the lower court's decision.

The claim of the employee, Tooley, was anchored on the provision of section 701(j), 42 U.S.C. 2000e (j), which prohibits discrimination in employment by union and employers on the basis of religion. The codes define religion to include all aspects of religious observance..."unless an employer demonstrates that he is unable to reasonably accommodate an employee's...religious observance or practice without undue hardship on the conduct of the employers business."[156]

Reasonableness

The steelworkers union argued that the substituted charity which exempted Tooley from union dues was unreasonable and resulted in impermissibly unequal treatment. Citing the Brown v. General Motors Corporation,[157] the Tooley Court held that disparate treatment of employees is not necessarily unreasonable.[158] The religious accommodation provision of section 701 (j) does not authorize preferential treatment of employees nor does it require an employer or

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[156]42 U.S.C. 2000e (j) section 701(j).

[157]Brown v. General Motors Corporation, 601 F2d 956 (1979).

[158]Tooley v. Martin-Marietta, 648 F2d 1239 (1981).

union to abrogate the contractual rights of some employees or to incur substantial costs of accommodation for the benefit of those to be accommodated.[159]

The Tooley court, using the reasoning in Hardison, found that the substituted charity accommodation did not allow preferential treatment and the plaintiff suffered the same economic loss as the union member; therefore, the accommodation was reasonable.[160]

Undue Hardship

The union contended that allowing the substitute charity was inconsistent with the "de minimis"[161] cost, contending that reference to using surplus funds in the union's reserve departed from the de minimis standard. Ninth Circuit Court Judge Farris, citing the 1978 Anderson[162] decision, acknowledged that in determining an "undue hardship" the particular factual context of each case must be considered. A claim of undue hardship must be beyond a conceivable or hypothetical hardship and be supported by proof of "actual imposition of co-workers or disruption of the work routine".[163]

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[159]Trans World Airlines v. Hardison, 432 U.S. at 84 (1977).

[160]Tooley v. Martin-Marietta, 638 p F2d 1239 (1981).

[161]Trans World Airlines v. Hardison, 432 U.S. 63 (1971).

[162]Anderson v. General Dynamics Convair Aerospace Division, 589 F2d 397, 400 (1978).

[163]Ibid., pp. 406-407.

Constitutionality of Section 701 (j) of Title VII

The Steelworkers union further argued that section 701 (j) appealed in the case violated the Establishment Clause. Relying on Nyquist,[164] Yoder,[165] Walz,[166] Zorach[167] and Lemon,[168] the Tooley court reasoned that government can accommodate the beliefs and practices of minority religious groups without contravening the prohibition of the establishment clause and in the face of religious differences, reflect neutrality.[169] Using Lemon and Nyquist[170] as a background, the court found section 701 (j) constitutional in its legislative purpose by prohibiting discrimination in employment and securing equal economic opportunities to members of minority religions.[171] The secular purpose of section 701 (j) is legitimate by "promoting equal employment

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[164]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[165]Wisconsin v. Yoder, 406 U.S. 205 (1972).

[166]Walz v. Tax Commission, 397 U.S. 664, 669 (1970).

[167]Zorach v. Clauson, 343 U.S. 306.

[168]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[169]Tooley v. Martin-Marietta, 648 F2d 1239 (1981).

[170]Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[171]U.S. Congress,House, H 763, 11 February 1980, Congressional Record, vol. 126.

opportunities for members of all religious faiths";[172] As to primary purpose, the union contended that the substitute charity had the primary effect of advancing the plaintiff's religion by securing alleged economic benefits. The court reflected the contention and made the discernment between ancillary and primary benefits in the substitute charity in that the plaintiff was allowed to work without violating his religious beliefs at a cost equivalent to that paid by his co-workers without similar beliefs. It neither increased nor decreased the advantages of membership in the Seventh-Day Adventist faith.[173] Concerning government entanglement, the Tooley Court reasoned that the substitute charity required only a minimal amount of supervision and administrative cost. After establishing the sincerity of the religious objector's belief, the only burden involves an agreement on a mutually acceptable charity. In the absence of an establishment burden on the union, the court found no excessive government involvement.[174]

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[172]Rankins v. Commission on Professional Competence, 24 ca. 3d 167, 177-78, 154 Cal. Rptr. 907, 913, 14. (1979).

[173]Tooley v. Martin-Marietta, 648 F2d 1239 (1981).

[174]Ibid.

Definitional Problems of Religion

While Title VII proscription against religious discrimination in employment states what the term "religion" includes,[175] it does so without precisely defining what is meant by religion.[176] Lack of statutory definition has allowed the courts to interpret the meaning of religion broadly. Finding the traditional concepts of religion too narrow, the United States Supreme Court in Welsh v. United States,[177] a case involving the exemption of conscientious objectors from the draft, defined "religious belief" by stating:

> "If an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him a duty of conscience to refrain from participating in any war at anytime, those beliefs certainly occupy in the life of that individual a place parallel to that filled by...God in traditionally religious persons".[178]

Welsh deals with a statute which is very different from the Civil Rights Act[179] but legislative history and recent case law suggest that Title VII contemplates a definition

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[175] 42 U.S.C., sec. 2000e(j)

[176] Sue Gordon, "Up Against the Accommodation Rule," University of Missouri-Kansas City Law Review 45 (February 1976): 59.

[177] Welsh v. United States, 398 U.S. 333 (1970).

[178] Ibid., p. 340.

[179] Universal Military and Selective Service Act, Statutes at Large 61, sec. 6 (j) (1967).

similar to the one in Welsh.[180] Title VII is broad enough to encompass atheistic beliefs in which the Fifth Circuit Court held that an atheist was the victim of religious discrimination.[181] However, Title VII's protection does not include all beliefs.[182] The courts are beginning to exclude certain ideological beliefs from the religious category. In Bellamy v. Mason Stores, Inc.,[183] a Title VII suit alleging religious discrimination in discharging Bellamy because he was a member of the Ku Klux Klan, the district court dismissed the case stating:

> "the proclaimed racist and anti-semitic ideology of the organization to which Bellamy belongs takes on, as advanced by that organization, a narrow, temporal and political character inconsistent with the meaning of "religion" as used in section 2000e".[184]

The beliefs of the complaining party must not only be religious, but also must be found to be sincere.[185] Since belief is subjective, the mere claim of sincerity by the employee is virtually impossible to disprove, and the plaintiff's simple assertion of sincerity may constitute

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[180]Gordon, p. 59.

[181]Young v. Southwestern Savings and Loan, 509 F2d 140 (1975).

[182]Gordon, p. 59.

[183]Young v. Southwestern Savings and Loan, 509 F2d 140 (1975).

[184]Ibid., p. 142.

[185]Ibid., p. 143.

a prima facie case of its truth.[186] Except for matters of church attendance, financial aid, historical tenets, or other facets of traditional religious beliefs, there are few objective criteria by which to determine whether all religious beliefs are sincere. The burden of proof increases as the religious belief becomes less traditional and almost impossible when religious beliefs approach the frontiers suggested in Welsh. The courts have not faced this problem, but merely noted in their decisions that the petitioners' beliefs are sincere.[187] In Welsh,[188] the court stated that the "task is to decide whether the beliefs professed by a (religious practitioner) are sincerely held and whether they are, in his own scheme of things, religious."[189]

The Welsh case suggests a two-pronged inquiry: "(1) whether the belief is sincerely held, and (2) whether the belief, judged by the claimant's own standard, is religious".[190] Inquiry by the courts should be carefully limited. An inquiry into sincerity involves the fact-finders' use of a reasonableness standard, because the more reasonable a belief appears, the more likely it will be accepted as

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[186]Edwards and Kaplan, "Religious Discrimination and the Role of Arbitration under Title VII," Michigan Law Review 69 (1971): 614.

[187]Gordon, p. 60

[188]Welsh v. United States, 398 U.S. 333 (1970).

[189]United States v. Seeger 380 U.S. 163, 185 (1965).

[190]Beard, p. 657.

sincerely held. The ultimate inquiry would really be an inquiry into the employee's subjective beliefs. But to the extent that the entanglement analysis insures religious liberty by prohibiting judicial involvement in religion, courts should play a limited role in analyzing asserted religious beliefs. Thus, the administrative entanglement principle does not bar adjudication of religious discrimination claims, but it does circumscribe the courts' role in religious cases of doctrine.[191]

Reasonable Accommodation in Public Education

In 1969, Clayborn Umberfield, a teacher in School District #11, Joint Counties of Archuleta and La Plata, Colorado, since 1965 had been a member of the World Wide Church of God, and had absented himself from his teaching duties to attend religious assemblies for the period of September 26 through October 3, after being denied leave. The school district charged Umberfield with breach of contract and neglect of his duties. On May 29, 1970, a hearing was held by a panel of three attorneys in compliance with the Colorado Teacher Tenure Act (1967 Perm. Supp.). Upon recommendation of the Teacher Tenure Panel, the school district dismissed Umberfield.

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[191] Ibid.

In August 1970 Umberfield filed a complaint with the Colorado Civil Rights Commission which alleged that the school district had violated the Colorado Antidiscrimination Act and ordered his reinstatement. The school district sought relief in district court seeking to have the Civil Rights Commission's decision overturned and order vacated. The district court ruled that since Umberfield did not seek judicial review of the school district's action, his dismissal was not subject to collateral attack in another forum or before another agency. The court ruled that the Civil Rights Commission's conclusion that the board's action was discrimination and unfair employment practice was not supported by evidentiary findings.

The Colorado Court of Appeals, in interpreting the Colorado Antidiscrimination statute,ruled that the statute vests the Civil Rights Commission with the power to conduct findings whether the statute has been violated; no other remedy is provided by the statute for the commission of such a practice.[192] Moreover, the court of appeals held that the review by the Teacher Tenure Panel and the Civil Rights Commission findings must stand judicial review before "discriminatory or unfair employment practice", as defined in the Colorado Antidiscrimination Act, has occurred,inasmuch as the

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[192]School District #11 v. Umberfield, Colorado, App. 512 P2d 1166 (1973).

issue is not one for an administrative panel to determine. A review by the tenure hearing panel does not involve determination of the school district's committing "a discriminatory or unfair employment practice" under the act by discharging Umberfield; he was entitled to initiate a complaint before the Civil Rights Commission, subject to judicial review. In noting the lower court's error ruling, the Court of Appeals agreed with the lower court's ruling that the commission's determination was not supported by findings.[193]

Though the issues in this case centered primarily around procedural points, it is worthy to note that the Civil Rights Commission's hearing officer supported his finding, though reversed by the commission, that the school district had not committed a "discriminatory or unfair labor practice" by stating:

> "There was evidence adduced and reason dictates that in a small school system, a regularly employed teacher is far superior to the substitute teachers, and that even though lesson plans are prepared in advance, there is no substitute for a teacher who has been with the class throughout the year, and that the students will not progress as well under the substitute teacher as under the regularly employed teacher".[194]

The Colorado Supreme Court granted certiorari and held that where a tenured teacher, who had a full adversary hearing

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[193]Ibid.

[194]Ibid., p. 1169.

before the teacher tenure panel which had power to determine his claims of religious discrimination, did not seek judicial review of adverse recommendation of the panel and his dismissal by the school district, but instead sought a new proceeding before the Civil Rights Commission, the doctrine of res judicata served as a bar to relitigation of issues raised or could have been raised by the teacher before the panel and on judicial review.[195] The Colorado Supreme Court modified and affirmed the Appeal Court's decision.

In 1977, Roberta Waldman, a Jewish teacher, sought relief from her school district for an unpaid leave of absence to celebrate Rosh Hashanah. The California Education Code[196] allowed the school district to adopt rules governing teacher absences falling in categories of personal necessity. Leaves for religious reasons are not included in paid leaves of absence in enumerating circumstances of personal necessity.

The California Superior Court, San Bernardino, held for the school district and reasoned that religion in the abstract is not a necessity.[197]

In addressing the question of religion, the court pointed out that a certain percentage of the American population are atheists or agnostics or fall into broad groups

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[195]Umberfield v. School District #11, Colorado, 522 P2d 730 (1974).

[196]Education Code, California, Section 13468.5.

[197]California Teacher's Association v. Board of Trustees, 138 Cal. Rptr., 817 (1977).

with vague Christian origins. Those persons falling into groups with no religious faith--atheists, agnostics and indifferents --lead happy, productive lives. They are not anti-religious, simply non-religious, and are not accorded a status under the Constitution. Because of accident of history, ours is a culture based on Christian practices. Thus business, industry, and government observe the five-day week, allowing a Christian to attend his religious observances on the two remaining days of the week.[198] Within this setting, a Christian who works in occupations of seven-day necessity (fire, police, transportion, medical services) and who wants Sunday off must make some accommodation to that effect with his employer. He has no constitutional right to a day of paid leave of absence to attend church on Sunday. If his religious beliefs require his appearance on Sunday to be a personal necessity, he must pursue other occupations.[199]

The issue was whether the plaintiff was entitled to a day of paid leave of absence to attend a religious observance. It is clear that it was not an abuse of discretion by the school board in denying her that privilege. Citing Cummins, the court held that the school board afforded her "reasonable accommodation"[200] within the scope of its discretion by not

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[198]Ibid.

[199]Ibid.

[200]Cummins v. Parker Seal Company, 516 F2d 544 (1975).

disciplining Waldman and denying a day's salary. The court, upon invitation declined to address the establishment clause of the federal and state Constitutions plus article 26, section 5 of the California Constitution which provides in substance that no school district shall pay any money for any religious purposes; it rendered a purely advisory opinion.[201]

In 1979, the Supreme Court of California reversed the lower court's decision in upholding the dismissal of Edward Byars, a member of the World Wide Church of God, for being absent from his duties attending holy day assemblies. Byars was employed by the Ducor Union School District in 1969 and joined the World Wide Church of God in 1971. In accommodating his Sabbath observance, the district excused Byars from Saturday activities and permitted his absence on two holy days in 1971.

In subsequent years, Byars was absent after being denied leave for religious reasons, notwithstanding his advance request and preparation of detailed lesson plans for the substitute. In 1973, Rankings, the district superintendent, issued Byars a letter of reprimand, stating the district's disapproval of the unexcused absences with warning that their continuance would justify his dismissal. By the same letter the district rehired Byars as a permanent employee.

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[201]California Teacher's Association v. Board of Trustees, 138 Cal. Rptr. 817 (1977).

The school district notified Byars in 1975 of its intent to dismiss him for "persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for..the public schools"[202], as noted in the California Education Code, basing the charges solely on the absences.[203] At Byars' request, a hearing was conducted by the California Commission on Professional Competence, at which time the district superintendent testified that "a substitute cannot equal a good teacher because the substitute takes time to become acquainted with the pupils' abilities and discipline problems and...to provide continuity of instruction."[204] The commission held that Byars' absences had no substantial detrimental effect on the educational program and that the district's denial of his request for religious leave and threats of dismissal for such absences interfered with his free exercise of religion.[205] The commission further contended that the district's practice violated the Fourteenth Amendment of the United States Constitution and Article I, Section 4, of the California Constitution, and that therefore he had not failed to obey a valid school law or

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[202]Education Code, California, Section 44932.

[203]Rankins v. Commission on Professional Competence of Ducor, 154 Cal. Rptr. 907.

[204]Ibid., p. 909.

[205]Ibid.

regulation.[206] The trial court ruled that Byars' discharge was proper on the record of the commission.

In overturning the lower court, the California Supreme Court held that Section 8 of the California Constitution forbids not only overt religious discrimination but also qualifications for employment that are discriminatory in effect despite the fact that the stated reason for the dismissal was not for Byars' religion but nonattendance at school in accordance with district rules.[207]

The court cited the fact that no published opinion seems to have construed Article I, Section 8 of the California Constitution prohibition of religious discrimination but pointed out that tasks whose requirement by the employer would constitute unlawful religious discrimination have most frequently been drawn under the federal Civil Rights Act of 1964, Section 703 (a)(1), which make it unlawful for any employer "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual... religion...."[208] The implementation of this provision was

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[206] Ibid.

[207] Ibid., p. 910

[208] 42 U.S. C. 20000 2(a)(1).

provided by the Equal Employment Opportunities Commission in 1967 with guidelines declaring "that the duty not to discriminate on religious grounds includes an obligation to make reasonable accommodation to employees'religious needs insofar as possible without undue hardship on the employer's business".[209]

These guidelines became a part of the 1972 Amendments of the 1964 Civil Rights Act, and five years later the United States Supreme Court in Trans World Airlines v. Hardison[210] upheld the statute as a "defensible construction of the pre-1972 statute".[211] The Rankins court in rendering its decision cited the earlier federal district court decision of Griggs, Yott, Dewey and Reid[212] giving approval of the guidelines requirement of reasonable accommodation without undue hardship as a proper application of the principle that discrimination may be established by showing the disproportionate impact of an employment practice not justified by "business necessity".[213]

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[209]29 C.F.R., 1605.1.

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

[211]Ibid., p. 76.

[212]Griggs v. Duke Power, 401 U.S. 424 (1971);Yott v. North American Rockwell Corp, 501 F2d 398 (1974); Dewey v. Reynolds Metal Co., 429 F2d 324 (1970); Reid v. Memphis Publishing Co, 521 F2d 512 (1975).

[213]Griggs v. Duke Power, 401 U.S. p. 431.

The Rankins court contended that the school district failed to make reasonable accommodation to Byars' desire to observe his church's holy day assemblies. Citing a comparison with Hardison,[214] the court held that accommodations in Rankins were not as extensive; thus the school district could adjust to Byars' absences without comparable burden. There were no shortages of fully qualified substitute teachers who could be called in to replace Byars at no additional cost to the district.[215]

Accordingly, the merits of the district's claim of undue hardship must stand on substantial evidence supporting a substantial detrimental effect on the educational program not the district; the California Supreme Court held that finding not thus supported. The Court held that there is evidence that instruction by a regular teacher is preferable to instruction by a substitute teacher; however, such evidence fails to show that Byars' absence for five to ten holy days imposed a hardship sufficiently severe to warrant dismissal from employment. In citing the California statute, the Court pointed out that each teacher is allowed at least ten (10) days of paid leave each year for illness or personal necessity and a district unwilling to pay for leave for

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

[215]Rankins v. Commission, p. 911.

religious purposes as a personal necessity must then accommodate those purposes by allowing a reasonable amount of unpaid leave. The unpaid leave required by Byars' religious observances would not be unreasonably burdensome.[216]

In citing Walz v. Tax Commission,[217] the Court held that the neutrality commanded by the establishment clause did not require the school district to extend its accommodation for Byars' religious observance to other employees who seek time for secular purposes. Without violating the establishment clause, governments may lighten the burden consequent on religious practices through laws that are secular in purpose, evenhanded in operation, and neutral in primary effect.[218]

The Rankins Court, in concluding, held that the effect of the accommodation is to lessen the discrepancy between the conditions imposed on Byars' religious observances and those enjoyed by adherents of majority religion as a result of the five-day week and the Christmas and Easter vacations or regular school calendars. The Court in interpreting Article I, Section 8 of the California Constitution held that it did not require full equality of treatment of all employees' religious practices under all circumstances; it does require

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[216]Ibid.

[217]Walz v. Tax Commission, 397 U.S. 664 (1970).

[218]Gillette v. United States, 401 U.S. 437 (1971).

whatever reduction of inequality of treatment is possible through reasonable steps that do not impose undue hardship as employers.[219]

In a case involving a teacher whose dismissal was sought by the school district because of his unauthorized absence from school for two periods on December 1, 1978, the plaintiff sought relief, charging his dismissal deprived him of both his First Amendment rights to free exercise of religion and due process rights under the Fourteenth Amendment. During the hearing process, it was noted in testimony that the plaintiff Niederhuber, a member of the World Wide Church of God,had submitted a written request to the school superintendent to take personal leave on October 2 and 11, 1978 to observe the religious holy days of Feast of Trumpets and Day of Atonement. The request was approved with one day with pay and one day without pay. Later, on October 4 he filed a second request for leave to enable him to observe the Feast of the Tabernacles which extended from October 16 to October 23, 1978, causing him to be absent six days. The request was denied with the explanation that granting it would "start a bad precedent"; however, upon inquiry Niederhuber was assured that his job would not be in jeopardy when he returned. Niederhuber absented himself for the requested period and was disallowed salary for the days missed.

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[219]Rankins v. Commission, p. 914.

On November 30, 1978, the plaintiff notified his supervisor that he must be excused from the last two periods on the following day for "very personal business". Niederhuber left school with the understanding that his classes would be covered via a customary practice of the school.

Following a memorandum from the supervisor to the superintendent regarding the plaintiff's absence from the last two periods on December 1, 1978, the superintendent at the next board meeting made his recommendation that Niederhuber be dismissed. The following day the plaintiff was informed by letter that his "services were no longer needed".

Niederhuber was represented before the board by a representative of the New Jersey Education Association who accused the board of committing a misdemeanor under New Jersey law and immediately following that, the board terminated the plaintiff without a written statement of the reasons.

The district court hearing the evidence reasoned from the plaintiff's contention that even if his two-period absence was a factor contributing to the board's decision to terminate his contract, the board would never have reached the same decision if it had not taken into account the religious absence in addition to Neiderhuber's two-period absence.[220] Citing Mt. Healthly v. Doyle,[221] the District

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[220]Niederhuber v. Camden, 495 F. Supp 273 (1980).

[221]Mt. Healthly v. Doyle, 429 U.S. 274 (1977).

Court reasoned that:

> "We find that plaintiff's eight days of religious absences was a 'motivating factor in the superintendent's recommendation that plaintiff be discharged and that the superintendent and Board of Education would not have reached that decision had they relied exclusively on his two-period absence".[222]

The Court was not convinced by the Board's insistence that the distinguishing factor was the plaintiff's request and refusal to divulge reasons for the two-period absence. Moreover, the court reasoned that the evidence, though circumstantial, links the superintendent's recommendation of dismissal to his religious absences, and the tie between the unauthorized religious absence and the unauthorized two-period absence is unmistakable.[223] Senior District Court Judge Cohen noted that the court found the plaintiff's dismissal was related to his religious absence; it did not discern any evidence of discriminatory intent. He further noted that even if the board did not deliberately discriminate against the plaintiff's religion, or even if the discharge was motivated by secular concerns, citing Wisconsin v. Yoder,[224] that

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[222]Niederhuber v. Camden, 495 F. Supp. 273 (1980)

[223]Ibid

[224]Wisconsin v. Yoder, 406 U.S. 205 (1972)

> "Government action, neutral on its face may, in its application nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion".[225]

Moreover, he stated:

> "The Civil Rights Act of 1964 proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity".[226]

Thus, the critical inquiry is the coercive effect of government action as it operates against an individual in the practice of his or her religion.[227]

The defendant board urged the court, should it find that the plaintiff's contract terminated for exercise of his religious beliefs, that it did so to protect the "efficient functioning of the educational process",[228] citing Title VII of the Civil Rights Act of 1964, amended 1974,[229] Jordan,[230] and Hardison,[231] and that so accommodating the plaintiff would constitute an undue

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[225]Ibid.

[226]Niederhuber v. Camden, 495 F. Supp. 273 (1980).

[227]Ibid., citing Abington v. Schempp 374 U.S. 203 (1963).

[228]Niederhuber v. Camden 495 F. Supp. 273 (1980).

[229]42 U.S.C. 2000e(j).

[230]Jordan v. North Carolina National Bank, 565 F2d 72 (1977).

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

burden.[232]

The District Court disagreed and found the cases to be distinguishable from the case at bar. In contrast, Niederhuber's religious demands were much less substantial a burden. Unlike the Trans World Airlines case, the difficulty in finding a replacement at comparable rate of pay was not compelling. There was no shortage of competent substitute teachers. The Court contended that hiring substitute teachers would not add cost to the Board since the plaintiff was willing to take his religious leave without pay and,in contrast to the facts in Trans World Airlines,excusing the plaintiff for religious purposes would not force the employer to violate any existing union agreements.[233]

In response to the Board's contention that substitute teachers would abate a "stable and structured learning environment"[234], the court cited the analysis employed by the Rankins[235] court and cited the purpose underlying the duty of accommodation for teachers:

> "It is simply to lessen the discrepancy between the conditions imposed...plaintiff's religious observances and those enjoyed, say, for observance by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations or regular school calendars".[236]

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[232]Niederhuber v. Camden, 495 F. Supp. 273 (1980).

[233]Ibid.

[234]Ibid.

[235]Rankins v. Commission on Professional Competence of Ducor, 154 Cal Rptr. 907 (1979).

[236]Ibid., p. 914

Moreover, the court recognized, as did the Rankins court, that the constitutional right to exercise one's religion does not require "full equality of treatment of all employees' religious practices under all circumstances."[237]

In concluding, the District Court found the Board failed to demonstrate sufficiently compelling reasons for the plaintiff's dismissal or that accommodating his religious conviction would result in undue hardship and found for the plaintiff.

Answering the defendent's contention of deprivation of procedural due process under the Fourteenth Amendment, the court found his dismissal violating the First Amendment and the procedural due process of the decision irrelevant.[238]

Though not a case involving accommodation for religious observance, the Hunterdon v. Hunterdon decision has implications to be considered by school boards in policy making and negotiations with teacher associations giving rise to granting paid leave for religious observance.

The Hunterdon Central High School Board of Education petitioned the New Jersey Public Employment Relations Commission to rule on the scope of negotiations determinations of granting public school teachers paid leave of absence for

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[237]Ibid.,p. 914

[238]Niederhuber v. Camden, 495 F. Supp 273 (1980).

religious purposes which otherwise would qualify as a term and condition of employment, and which would nevertheless be in violation of the establishment clause of the First Amendment of the United States constitution and outside the scope of collective negotiation and not arbitrable.

The action arose following the request of a teacher in the Hunterdon School District for permission to take December 8, 1978 as a "religious" leave day. The board's personnel director granted the request stipulating that the leave could be taken without pay or charged against the allowable number of leave days for personal reasons as provided in the negotiated contract with the Hunterdon Central High School Teachers' Association. The teacher claimed discrimination on religious grounds and after unsuccessfully gaining redress through the contractual grievance procedure and through the association availed himself of the arbitration provision in the contract and served notice upon the board for two demands for arbitration One demand alleged a unilateral change in the leave policy of loss of religious holidays, and the second complained of improper denial of religious holidays.[239]

Arbitration was stayed when the board filed its petition with the Public Employment Relations Commission. After

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[239]Hunterdon Central High School Board of Education v. Hunterdon Central High School Teacher's Association, N.J. Super. A.D. 416 A2d 980 (1980).

considering the petition, the Commission issued a Decision and Order in which it stated that "interpreting matters of constitutional law is not within our area of expertise" [240] but nevertheless held that:

> "granting of additional days off with pay, i.e., not charged to personal days, vacation, or any other leave available to all employees, specifically for the observance of religion does violate the constitutional prohibition against the establishment of religion. These are additional leave days that can only be granted for religious observance; and a benefit that non-religious employees can never enjoy. 'It aids all religions as against non-believers'. Accordingly, the commission finds that the demand for arbitration herein is outside the scope of collective negotiation and is neither negotiable nor arbitrable. The request for permanent restraints of arbitration is granted".[241]

On appeal to the Superior Court of New Jersey, Appellate Division, the teacher association disputed the jurisdiction of the Public Employment Relations Commission to rule on the scope issue on a constitutional basis, contending the commission usurped the function of the courts. The Superior Court, citing the New Jersey statute,[242] ruled that the commission had jurisdiction in the issue subject to review by the Superior Court. The Court held that in disputes between the

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[240] Ibid.

[241] Ibid.

[242] New Jersey Employer-Employee Relations Act., N.J.S.A. 34: 13A-1 Section 5.4(d).

board and the association, the parties had a contractual obligation to negotiate, but, preliminarily, the Commission had to make a scope determination because matters which can not legally be negotiated in the first place cannot be arbitrable.[243]

The school board argued that an administrative agency can make decisions within its area of competence and not exceed its jurisdiction merely because it applies relevant law, in this case the First Amendment to the United States Constitution. The court agreed holding that the commission's authority is broad enough to enable it to apply laws other than those which it administers and should be censured "so as to permit the fullest accomplishment of the legislative intent".[244] Further, in response, the court stated:

> "We discern no sound reason to deprive PERC of the power to declare a proposal non-negotiable on the ground that its acceptance would be constitutionally objectionable. It has been said that 'administrative agencies are competent to pass upon constitutional issues germane to proceedings before them; and that 'such action is necessary so as to better focus the issue for judicial review, if such action is later necessary.'"[245]

In ruling on the correctness of the commission's action, the Court held that the commission correctly concluded that

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[243]Hunterdon v. Hunterdon, p. 983.

[244]Plainfield Board of Education v. Plainfield Education Association, 366 A2d 703 (1976).

[245]Hunterdon v. Hunterdon p. 983.

the granting of paid leaves of absence for religious purposes would be violative of the establishment clause of the First Amendment of the Constitution which requires strict governmental neutrality with respect to religion.[246]

The Superior Court took the view that agreements by a board of education to grant paid leaves of absence for religious purposes would not meet the requirements of the tri-partite test which holds that the action have a secular purpose, a primary effect that neither advances nor inhibits religion,[247] and must not foster an excessive government entanglement with religion.[248] Here, the court concluded there would be no secular purpose and the sole purpose would be to permit certain teachers to be absent for religious reasons, even though the number of days might be limited. Moreover, the effect would enhance religion at the exclusion of those having no religious persuasion. Since teachers availing themselves of such leave of absence would be paid from tax money, the action would be so intertwined with religion as to foster excessive government entanglement with religion.[249]

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[246]Resnick v. East Brunswick Tp. Bd. of Ed., 389 A2d 944 (1978).

[247]Abington School District v. Schempp, 374 U.S.203 (1963).

[248]Walz v. Tax Commission, 397 U.S. 664 (1970).

[249]Hunterdon v. Hunterdon, p. 985.

The court affirmed the Public Employment Relations Commission's action and noted there was no issue of the boards duty to reasonably accommodate an employee's desire to observe or practice his religious beliefs by allowing unpaid leave without penalty or permitting such absences to be charged against allowable paid leave for reason of personal necessity.[250]

In 1981, the United States Court of Appeals, Fourth Circuit, heard a claim brought against the School Board of the City of Norton, Virginia by a teacher's aide, Ruby Edwards, alleging that the school board failed to accommodate her religious practices under provisions of Title VII of the Civil Rights Act of 1964.

When Edwards began work for the school board as a teacher's aide, her duties ranged from collecting lunch money to grading papers. Gradually, she assumed more responsibility and began providing instruction to educable students who were mentally retarded or slow learners. Because of the special and individualized nature of her work, no substitutes were available. During the 1969 school year she was absent for 29 and one-half days. In 1970 and 1971, Edwards missed 45 days.

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[250]Rankins v. Commission on Professional Competence of Ducor, 154 Cal. Rptr. 907 (1979).

In the fall of 1971, Edwards was informed that her absences for holy day observance by the World Wide Church of God would no longer be permitted. She was told that due to the increased teaching duties, the unavailability of substitutes aides required her daily presence. Despite the board's admonition, she was allowed to observe the holy days in 1971.

The board denied the request, in September of 1972, to attend a religious convocation in observance of the holy days. Nevertheless, Edwards followed her previous practice and abstained from her duties to observe the holy days. Following the board's dismissal, she filed a complaint with the Equal Employment Opportunities Commission and received a right to sue letter in April, 1977 and sought reinstatement and back pay from the date of discharge, alleging she had been unable to find employment except for several months in 1975.

The district court held that the school board failed to show that accommodation would create an undue hardship on the conduct of the school's operation. It concluded that the board had violated the provisions of the Civil Rights Act.[251] In proceeding to the Court of Appeals, the board did not appeal the lower court's ruling of violation of the provision.[252]

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[251] 42 U.S.C., 2000e-z (a) (1).

[252] Ibid.

The District Court limited Edwards' back pay and denied reinstatement based on two points: (1) Edwards was untenured and had no property interest at stake beyond the one year contract and (2) the school board would not have rehired Edwards for another year regardless of religious practices because of her excessive absences that were not related to her religion.[253]

The Fourth Circuit Court supported its conclusion that Edwards was required to prove a property interest in her job beyond the current year by citing Board of Regents v. Roth,[254] a noncontrolling case, but nevertheless one showing that the due process clause affords procedural prohibition to a person's property interest, but it does not create this interest.[255]

In contrast to procedural rights secured by the due process, Title VII creates a substantive right "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law".[256] To remedy an illegal discharge, Congress intended that the Civil Rights Act permits the courts to award back pay and reinstatement,

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[253]Edwards v. Norton, 658 F 2d 951, 953 (1981).

[254]Board of Regents v. Roth, 408 U.S. 562 (1972).

[255]Ibid., p. 577.

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

but it did not authorize restricting the back pay to an unpaid balance for the remaining period of an employee's contract.[257] Moreover, the court reasoned that Congress modeled the back pay provision of Title VII on the provision in the National Labor Relations Act which provides that back pay for "an unlawfully terminated employee begins with the date of discharge and continues until the employer makes a valid offer of reinstatement."[258]

The Appeals Court found that the District Court's concluding that Edwards had no property interest in the job beyond the current year by finding that, regardless of her religious absences, the school board would not have renewed her contract for 1973-74, was in error.

In viewing the record as a whole, the higher court concluded that the conflict between the school board and Edwards was her observance of her religious holy days for which it discharged Edwards. The higher court noted that the school board had not proved that it could not accommodate the religious absences. Moreover, the higher court noted that the judgment of the lower court could not suffice as a basis for the decision.

Citing Supreme Court Justice Frankfurter's opinion in

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[257]Edward v. Norton, 658 F2d 951 (1981).

[258]Polynesian Cultural Center, 222 NLRB 1192 (1976)

SEC v. Chenery,[259] "a reviewing court should not substitute its judgment for a decision which the agency alone is authorized to make".[260] The court reasoned that the principle of law applied,and the lower court exceeded the bounds of discretion when it limited back pay and denied reinstatement because it concluded the school board would not rehire Edwards.[261]

The higher court supported its findings by saying that Edwards' entitlement to back pay and reinstatement would not necessarily survive every change of circumstance. If,for example, the board abolished the position for either educational or financial reasons, Edwards'right to relief would cease at the time the change occurred.[262]

Title VII provisions allow back pay awards with reduction allowable for "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against....[263] Thus an improperly dismissed employee may not remain idle and recover lost wages from the date of discharge. After unlawfully discharged employees produce evidence in support of their claims for back pay, with contention that they were unable to find comparable work, the employer has

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[259]SEC v. Chenery Corp., 318 U.S. 80 (1943).

[260]Ibid.

[261]Edwards v. Norton, 658 F2d 951 (1981).

[262]Ibid.

[263]42 U.S.c., 2000c 5(g).

the burden of showing that reasonable efforts were exerted to mitigate the damages.[264]

The Appeals Court found that the lower court in limiting back pay found it unnecessary to consider mitigations of damages and made no finding of fact on the issue other than expressing the opinion that Edwards' efforts were insufficient.[265] Thus, the Appeals Court held that the lower court's opinion was a misapprehension of the law concerning the burden of proof on the issue of mitigation. In view of the finding, the Fourth Circuit Court vacated and remanded the decision.[266]

In 1982, the United States District Court, South Dakota, rendered its decision on a claim by an Industrial Arts teacher in the Watertown School District No. 14-4 of Codington County, South Dakota, that the teacher had established a prima facie case of religious discrimination after the school board refused to accommodate his religious practice by permitting his leave of absence and asserting that no substitute teachers were available. After being denied the religious leave in 1973 to observe the Feast of Tabernacles, which is observed annually in the fall by the World Wide Church of

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[264]Taylor v. Philips Industries, Inc. 593 F2d 783 (1979).

[265]Edward v. Norton, 483 F Supp. 620, 629.

[266]Edward v. Norton 658 F2d 951 (1981.

God, plaintiff Orley B. Wangsness prepared detailed lesson plans for his classes and absented himself from his teaching duties despite the board's denial of the leave and warning that he would be terminated should he attend the religious feast.

Following the termination of his contract, Wangsness filed a complaint with the Equal Employment Opportunities Commission which referred the complaint to the South Dakota Commission on Human Rights. On or about the same time, Wangsness filed a separate complaint with the South Dakota Division of Human Rights. The Equal Employment Opportunities Commission found probable cause to believe that the plaintiff had been discriminated against on account of his religion and concluded that the defendant school board did commit an act of religious discrimination against Wangsness by dismissing him.[267]

Nearly three years (1977) later, the EEOC issued a Notice of Right to sue. Thereupon, Wangsness commenced his action under 42 U.S.C., 2000e of the Civil Rights Act. The United States district Court, South Dakota,held that Wangsness had established a prima facie case of religious

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[267]Wangsness v. Watertown, 541 F Supp. 332 (1982).

discrimination under the provision of the Civil Rights Act[268] as enumerated in the Brown v. General Motors Corp.[269] decision which requires the following elements:

> (1) a bona fide belief that compliance with an employment requirement is contrary to plaintiff's religious faith;
> (2) plaintiff informed his or her employer about the conflict; and
> (3) plaintiff was discharged because of his or her refusal to comply with the employment requirement.[270]

The Court in determining that a prima facie case of religious discrimination had occurred, shifted the burden to the defendent school board to show it had made a good faith effort to accommodate the religious beliefs of Wangsness. The school board was unable to show that accommodation would result in an undue hardship. The Court applied the reasoning shown in Yott[271] after the employee had informed the employer of his religious beliefs and the conflict resulting from the work rules.[272] Moreover, the court cited the provisions of 42 U.S.C., 20003(j) which requires the employer to demonstrate the hardship on the conduct of business as explained by the United States Supreme Court in Hardison:[273]

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[268]42 U.S.C., 2000e-z(a)(i)(j).

[269]Brown v. General Motors Corp., 601 F2d 956 (1979).

[270]Ibid., p. 959.

[271]Yott v. North American Rockwell Corp., 602 F2d 904 (1979).

[272]Ibid., 907.

[273]Trans World Airlines, Inc., v. Hardison,432 U.S. 63 (1977).

> "The intent and effect of this definition was to make it an unlawful employment practice under section 2000e-2 (a)(1) for an employer not to make reasonable accommodation short of undue hardship for the religious practices of his employees and prospective employee".[274]

District Court Judge Donald J. Porter, after finding insufficient evidence of reasonable accommodation, examined the defendant's defense of undue hardship and reasoned that the school board failed to demonstrate an undue hardship. Despite the fact that the school board held that a qualified substitute was not available, the court found that the class had made more than satisfactory progress from the lesson plans left by Wangsness and under the substitute's supervision. The school board's claim of hardship was reasoned to spring from the "position that all substitute teachers perform a role more akin to that of a babysitter than an educator".[275] Judge Porter characterized the hardship asserted by the board to be more hypothetical which the Brown[276] court rejected:

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[274]Ibid.,p. 74.

[275]Wangsness v. Watertown, 541 F Supp 332 (1982).

[276]Brown v. General Motors, 601 F2d 956 (1979).

> "If an employer stands on weak ground when advancing hypothetical hardships in a factual vacuum, then surely his footing is even more precarious when the proposed accommodation has been tried and the postulated hardship did not arise."[277]

The defendant board, relying on the District Court's decision in Edwards,[278] sought to compensate Wangness only the amount equal to wages for the contractual year of his probationary status. Judge Porter cited the Fourth Circuit Court of Appeals ruling "that a district court does not have discretion to limit a back pay award under Title VII to the period of the claimant's current employment".[279] He noted the opinion in Norton[280] that "the due process clause secures procedural right whereas Title VII creates a substantive right".[281] Further relying on the Edwards[282] Court, Judge Porter held that "under the 'Labor Act',[283] the back pay period for an unlawfully limited employee commences with the date of discharge and continues until the employer makes a valid offer of reinstatement".[284]

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[277]Ibid., p. 960.

[278]Edwards v. Norton,483 F. Supp 620 (1980).

[279]Edwards v. Norton, 659 F2d 951 (1981).

[280]Ibid., p. 954.

[281]Ibid.

[282]Ibid., p. 951.

[283]29 U.S.C., 160(c).

[284]Edwards v. Norton, 658 F2d 951 (1981).

In the findings of the Court, Wangsness was entitled to back pay from the date of his unlawful discharge to the date of the judgment of the District Court, less interim wages.[285]

Because teachers are likely to have different religions and different degrees of devotion to their religions, a school district cannot be expected to establish or negotiate leave policies broad enough to suit every employee's religion needs perfectly.[286] In a case appealed to the Tenth Circuit Court by Gerald Pinsker, a Jewish School teacher, alleging that the school district's leave policy discriminated against him and other Jewish teachers on the basis of religion and unconstitutionally burdened his right to free exercise of religion. The Tenth Circuit Court affirmed the lower court's findings that the teacher did not have to violate his religious beliefs for the sake of continued employment or relinquish employment to obey a tenet of faith.[287]

The lower court reasoned from Rankin[288] in stating: "It is patently clear that no person may constitutionally be put in the dilemma of choosing between employment and religion",

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[285]Wangness v. Watertown, 541 F Supp. 341 (1982).

[286]Pinsker v. Joint District, 735 F2d 388 (1984).

[287]Ibid, 544 FSupp. 1049 (1983).

[288]Rankins v. Commission or Professional Competence, 593 p.2d 852 (1979).

and from Brown[289] and Tooley[290] in reminding employers who punish employees by placing the latter in a position in which they must ignore a tenet of faith to retain employment, is in violation of the Civil rights Act.[291]

Citing these standards, the court found that such was not the case with the plaintiff, Pinsker.[292] The claim arose because the school district's leave policy did not permit the plaintiff paid leave to attend all religious services he would like to attend on the holy days of Yom Kippur and Rosh Hashanah. Further, the plaintiff contended that the school calendar permits Christian teachers to observe their religious services without resorting to their two days of personal leave.

The defendant contended that the leave policy did not impair the teacher's religious freedom as he was free to take unpaid leave to attend religious services. The defendant further contended that the policy permits two personal leave days with pay for each teacher each year and these day may be used for any number of personal reasons, including attendance at religious services.

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[289]Brown v. General Motors, 601 F2d 956 (1979).

[290]Tooley v. Martin-Marietta corp., 648 F2d 1239 (1981).

[291]42 U.S.c., 2000e - 2(a) (i).

[292]Pinsker v. Joint District, 544 F Supp 1049 (1983).

The Appeals Court, in review, cited 42 U.S.C., 2000e (j)[293] which provides:

> "The 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 employees or prospective employees religious observance or practice without undue hardship on the conduct of the employer's business."

and using Hardison[294] in holding that the Supreme Court ruled that the intent and effect of this definition of "religion" is to make a violation of 42 U.S.C. 2000e-2(a)(1) "for an employer not to make reasonable accommodation short of undue hardship, for the religious practices of employees..."[295]

The Tenth Circuit Court held that Title VII requires reasonable accommodation and does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated, nor does Title VII require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever.[296]

Moreover, the circuit court held that the defendant's policy and practice jeopardized neither Pinsker's job nor his

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[293]Title VII, Civil Rights Act, 1964.

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

[295]Ibid.

[296]Pinsker v. Joint District, 735 F2d 388 (1984).

observation of religious holidays,and the policy, although it may require teachers to take occasional unpaid leave, was not an unreasonable accommodation of teachers' religious practices.[297]

A Connecticut teacher, alleging that the school board's leave policy of allowing three days paid leave for religious purposes and not allowing the three days of paid leave for personal business to be used for religious observance,conflicted with his religious beliefs which prohibited him from engaging in secular employment on church holy days, more than three of which occur during the school year.

For a period of time, Ronald Philbrook,an employee of the Ansonia school board and a member of the World Wide Church of God, refrained from his teaching duties more than the permitted three days for religious reasons, taking a loss of pay for the days in excess of the religious days provision. However, in 1976, Philbrook ceased taking the unauthorized leaves for religious reasons, contending that his family could not sustain the financial strain of the docked salary.[298]

With a "right-to-sue" letter from the Equal Employment Opportunities Commission (EEOC) the appellant filed his complaint in federal district court, alleging the school board's

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[297]Ibid.,p. 391.

[298]Philbrook v. Ansonia Board of Education, 757 F2d 476 (1985).

prohibition from using personal business leave for religious observance violated Title VII[299] and the First Amendment of the United States Constitution.

The Federal District Court held that the appellant had failed to prove religious discrimination and concluded that the school board's policy had not placed Philbrook in a position of violating his religion or losing his job.[300]

Upon review by the Second Circuit, the court held that the appellant had established a prima facie case of discrimination by his request to be allowed to use the personal business days for religious observance and the offer to pay the full cost of a substitute instead of being docked the larger pro rata salary deduction for observing religious days in excess of the three allotted by the bargained contract. Moreover, he had agreed to supervise the substitute and to make up days missed by performing other school-related work at other times. The school board had rejected the offers of accommodation by the appellant. Further, the appeals court held that discharge is not required to make a prima facie showing of religious discrimination,and where employer and employee propose a reasonable accommodation to the employee's religious need, Title VII requires the employer to

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[299]Title VII, 1964 Civil Rights Act, 42 U.S.C. 2000e(j).

[300]Philbrook v. Ansonia,757 F2d 476 (1985).

accept the proposal employees prefer unless it can demonstrate that such accommodation causes undue hardship on the employer's conduct of his business.[301]

In reversing and remanding the case to the lower court, the Appeals Court cited standards in determining prima facie case of religious discrimination as established in Brown, Anderson, and Redman:[302]

> (1) he or she has a bona fide religious belief that conflicts with an employment requirement;
> (2) he or she informed the employer of this belief;
> (3) he or she was disciplined for failure to comply with the conflicting employment requirement.[303]

The Appeals Court held that the record showed that plaintiff had satisfied this prima facie standard and went on to hold that the crucial issues to be determined were the meaning and relationship between the terms of "reasonable accommodation" and "undue hardship".[304]

Citing the central precedent case of Hardison,[305] the court reasoned that Philbrook's job was not as crucial as that of Hardison with Trans World Airlines since the cost

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[301] 42 U.S.C. 2000e(j).

[302] Brown v. General Motors, 601 F2d 956 (1979); Anderson v. General Dynamics Conair Aerospace Division, 589 F2d 397 (1978); Redman v. GAF Corp., 574 F2d 897 (1978).

[303] Ibid.

[304] Philbrook v. Ansonia, 757 F2d 476 (1985).

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

of Philbrook's substitute would not present additional cost to the school board, and further, accommodation for Philbrook would not disturb seniority rights enunciated in a collective bargaining agreement. Using Anderson,[306] the Court rejected "any hypothetical hardship", noting that "undue" means something greater than hardship. Undue hardship cannot be proved by assumption nor by opinions based in hypothetical facts.[307] Further citing Brown,[308] the court held that speculative costs to the employer could not discharge its burden of proving undue hardship.[309]

The school board argued that the court accept its long-standing accommodation of paid leave and unpaid leave for religious observance as a reasonable accommodation. Citing the Pinsker[310] decision, the board held that a policy allowing two days of paid leave for religious reasons and additional days of unpaid leave satisfied the duty to accommodate. However, the Second Circuit held that the Ansonia school board's policy was also "reasonable" but duty to accommodate could not be defined without reference to undue hardship. "Where the employer and employee each propose a reasonable

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[306]Anderson v. General Dynamics, 589 F2d 397 (1978).

[307]Ibid.

[308]Brown v. General Motors, 601 F2d 959 (1979).

[309]Ibid.

[310]Pinsker v. Joint District, 735 F2d 388 (1984).

accommodation,Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business".[311] On remand, the appeals court instructed the lower court to "determine whether accepting either of appellants proposed accommodations would cause undue hardship."[312] Noting the record, the court reasoned that it appeared that neither of the accommodations would lead to greater than "de minimis" costs to the school board.[313]

The Philbrook [314] court set aside the school board's claim that accommodating the appellant would constitute preferential treatment by citing Hardison.[315] "Appellant's proposal for use of personal business leave for religious observance is not one seeing preferential treatment."[316] Appellant has asked to be treated differently; he has not asked for privileged treatment. In exchange for additional days off, he is willing to make up for time off and pay for the substitute. Differential treatment cannot be equated with privileged

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[311] Philbrook v. Ansonia, 757 F2d 476 (1985).

[312] Ibid.

[313] Ibid.

[314] Ibid.

[315] Trans World Airlines v. Hardison, 432 U.S. 63.

[316] Philbrook v. Ansonia, 757 F2d 476 (1985).

treatment.[317] The court held that accepting the school board's argument" would preclude all forms of accommodation and defeat the very purpose behind section 2000e(j):[318]

> "The 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 or ... religious observance or practice without undue hardship on the conduct of the employer's business".[319]

Summary

Reasonable accommodation for an employee's religious observance has continued to be litigated since the passage of the 1964 Civil Rights Act, amended in business, industry,and public education. The United States Supreme Court has established a broad interpretation for religion and the employer's duty to accommodate for the employee's practice of such beliefs short of an undue hardship on the employers conduct of business. In light of the broad interruption, inferior courts continue to rely on the broad parameters set by the Supreme Court, but nevertheless, examine the individual case findings to render decisions, often times different, in maintaining a separation of church-state relations.

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[317] Ibid.

[318] Brown v. General Motors, 601 F2d 962 (1979).

[319] 42 U.S.C. 2000e(j).

CHAPTER V

ANALYSIS OF SIGNIFICANT DECISIONS

Introduction and Overview

In most of the more advanced nations there is a common civil calendar which takes into account the solar and lunar cycles with considerable accuracy. This calendar, the Gregorian, was worked out under the patronage of Pope Gregory XIII and adopted in 1582. England adopted the calendar 170 years later and the American colonies followed suit at the same time. This is the calendar used in civil and business affairs of all Christian nations and many other nations. Although Christmas was established as December 25th and many of the events of the Christian Church year fall on fixed calendar dates in relation to Christmas, neither the Christian Church calendar nor that of any other religious group coincides exactly with the civil calendar.[1]

The public school calendar varies from state to state. It is usually governed by some fundamental legislative requirement for the number of days school is to be in session

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[1]Donald E. Boles, et al., "Religion In the Public Schools: A Report by the Commission on Religion in the Public Schools". American Association of School Administrators, (Reston, Va 1964): pp. 38-39.

as well as by other statutes which require the schools to observe some special days, some by closing. In contrast to a calendar of working days in business and industry, the typical public school calendar is established not so much by enumerating the holidays, as it is by designing a schedule of days on which school shall be in session to meet the state requirements and to be compatible with the civil and, in some cases, church calendars.[2] The public school calendars in the fifty states, District of Columbia,and Puerto Rico conform to the five-day work week, thus, very seldom posing a problem for the Sunday Sabbatarian.

The courts have been called upon to decide conflicts between the employee's religious beliefs and practices and the employer's work schedules where accommodation was sought outside the established work schedule.

School boards now find themselves in a position of having to show that accommodating the beliefs and practices of majority and minority religious employees does not work an undue hardship on the conduct of their business.

As a review of the cases will indicate, the courts have been maintaining the wall of separation between church and state in providing reasonable accommodation of employees' religious beliefs and practices while requiring the school boards and other employers to accommodate those religious

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[2]Ibid., p. 41.

beliefs and practices short of an undue hardship. In recent decisions, the courts have applied a test for employers' policies on religious accommodation which has evolved from the United States Supreme Court decision ensuring (1) that the policies have a secular effect; (2) that the policies neither advance nor prohibit religion; and (3) that the policies do not involve excessive governmental entanglement.[3]

Organization of Cases Selected for Review

Cases chosen for review in this chapter were selected because they met one or more of the following criteria:

(1) The case is considered to have been a landmark case in the broad constitutional area of church-state relations with questions on the free exercise and establishment clauses of the First Amendment.

(2) The case helped to establish legal precedent or "case law" in reasonable accommodation and/or undue hardship in religious accommodation by business and industry.

(3) The case helped to establish legal precedent or "case law" for reasonable accommodation for public school employees and school boards.

The first series of court cases selected for review are those United States Supreme Court landmark decisions relating to the broad constitutional issues of church-state relations

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[3]Lemon v. Kurtzman, 403 U.S. 602, 612-13.

speaking to the free exercise and establishment clauses of the legal precedents for decisions in cases involving secular policies, prohibition or advancement of religion, and excessive entanglement between religion and government. Included in this category are the following cases:

(1) Cantwell v. Connecticut (1940)

(2) Everson v. Board of Education (1947)

(3) Zorach v. Clauson (1952)

(4) Engel v. Vitale (1962)

(5) Abington v. Schempp (1963)

(6) Epperson v. Arkansas (1968)

(7) Lemon v. Kurtzman (1971)

The second category of cases reviewed in this chapter consists of those United States Supreme Court decisions that have significantly contributed to the establishment of precedent or "case law" in reasonable accommodation by employers to employee religious needs and undue hardship on the employer by accommodating, and those United States District Court and Circuit Court of Appeals cases that were decided under the precedentual Supreme Court Cases. Cases selected for review in this category are the following:

(1) McGowan v. Maryland (1961);

(2) Trans World Airlines v. Hardison (1977);

(3) Dewey v. Reynolds (1970);

(4) Cummins v. Parker Seal (1975);

(5) Reid v. Memphis Publishing (1975);

(6) Jordan v. North Carolina National Bank (1977);

(7) Redmond v. GAF Corp. (1978);

(8) Brown v. General Motors (1979);

(9) Tooley v. Martin-Marittea (1981).

The third category includes selected cases from both state and federal courts relating to reasonable accommodation and undue hardship for public school employees and school boards.

Most of the decisions in the cases reported in this category were based on legal precedent established by the United States Supreme Court landmark cases cited in the first and second categories above or on "case law" established by the federal District and Circuit Court decisions in the cases cited above.

Even though the major thrust of this study concerns the school boards' authority to accommodate religious observances by employees, it is not possible to consider accommodation without reviewing cases in which religious discrimination is charged. Therefore, the following key court cases in the areas of accommodation and discrimination of employees are reviewed in this section of the study:

(1) Unberfield v. School District No. 11 (1974);

(2) California Teacher's Association v. Board of Trustees (1977);

(3) Rankins v. Commission on Professional Competence (1979);

(4) Niederhuber v. Camden (1980);

(5) Hunderdon v. Hunderdon (1980);

(6) Edwards v. Norton (1981);

(7) Wangsness v. Watertown (1982);

(8) Pinsker v. Joint District (1984);

(9) Philbrook v. Ansonia (1985).

United States Supreme Court Landmark Decisions Relating to First Amendment Religion Clauses of Free Exercise and Establishment

Cantwell v. Connecticut
310 U.S. 299 (1940)

Overview

This landmark decision ended speculation that the Fourteenth Amendment -- holding that

> "All persons...in the United States,...are citizens of the...State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall a state deprive any person of life, liberty..., without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"[4] --

did not bind the states to the establishment clause of the First Amendment with respect to religion. Many later decisions about the states' enactments of laws regarding religious activities have been based on the concept of liberty

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[4]U.S. Constitution, Amend. XIV.

embodied in the Fourteenth Amendment, which embraces all liberties guaranteed by the First Amendment. Thus the states are rendered as incompetent as Congress in enactment of laws regarding religion.

Facts

The United States Supreme Court received this case on appeal from and certiorari to the Supreme Court of Errors of Connecticut. The case involved the alleged violation of a Connecticut statute by Newton Cantwell and his two sons in conducting religious activities on the streets of New Haven. The provision of the statutes required a certificate from the state to solicit for religious causes. Cantwell's contention was that his activities were not within the statute but consisted only of distribution of materials under free exercise of religion guarantees.

Decision

The Supreme Court ruled that the statute as applied to Cantwell deprived them of their liberty without due process of law and in contravention of the Fourteenth Amendment. In setting aside the conviction of breaching the peace, the court ruled that the free exercise of religion and the freedom to communicate information and opinions be not abridged by state statutes.[5]

[5]Cantwell v. Connecticut, 310 U.S. 299 (1940).

Discussion

In holding the Connecticut statutes violative of freedom to act, the Supreme Court held that a state may regulate religious activities by general and nondiscriminatory legislation insofar as the time, the places, and manner of soliciting upon the streets with respect to safeguarding the peace, but in no way deny the right to disseminate religious views. The regulation in requiring an agent of the state to ascertain whether activities were of a religious nature blurs the line between discretionary and ministerial functions. The discretionary action by the state involves appraisal of facts, the exercise of judgment and a formation of opinion, and the right of survival and denies the liberty protected by the First and Fourteenth Amendments, whereas acts subsequent to ministerial authority are subject to judicial remedy and are not violative of guaranteed religious liberties.

Prior to 1940 the First Amendment prohibitions of religion were restraints on only the federal government. This landmark decision held that these limitations on religion were part of the due process clause of the Fourteenth Amendment to the Federal Constitution, and thus applicable to the states and their subdivisions. Since this landmark decision most of the litigation alleging violation of the First Amendment "free exercise" or "establishment" clause has involved state action rather than federal action. The interrelationship

of the establishment and free exercises clauses were touched upon by the court in this case. It said that their "inhibibition of legislation" had a double aspect. On the one hand it forestalls the compulsion of law on the acceptance of any religion or the practice thereof. On the other hand, it safeguards the free exercise of a chosen religion and the practice thereof. The court held that the First Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but the second cannot be.[6]

Everson v. Board of Education
330 U.S. 1 (1947)

Facts

This case on the religion clause of the First Amendment arose from litigation of a New Jersey statute authorizing local school boards to fund transportation of children to public and Catholic schools. (The statute had exclusionary language on private schools operating for profit and is not applicable in this case.) The United States Supreme Court heard this case on appeal after the New Jersey Court of Errors and Appeals reversed the New Jersey Supreme Court's ruling that the legislation was without power to authorize funds under the state constitution.[7]

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[6]Ibid., pp. 303-304.

[7]Everson v. Board of Education, 330 U.S. 1 (1947).

Decision

The Supreme Court affirmed the New Jersey Court of Errors and Appeals holding that public funds may be used to transport children to nonpublic schools.[8]

Discussion

In reaching this decision the court framed the due process argument in two phases. The first phase insists that the state cannot tax one to the benefit of another respecting religion. However, the New Jersey statute allowed tax funds to be used to transport children to public and parochial schools in the interest of satisfying a public need. The fact that the legislation's act coincided with the personal desires of a few is not to say that the legislation erroneously appraised the public need.

Insofar as the second phase of the due process argument differs with the first it is by alleging that public transportation to church school constitutes support of a religion by the state. The law would violate the First Amendment.

Second, the New Jersey statute was challenged as a law respecting an establishment of religion. The Court essentially rejected the establishment clause violation and drew on the scope of the free exercise provision by insisting that legislation enacted to promote the public welfare should not exclude

[8]Ibid.

the members of any faith from receiving the benefits of public welfare legislation.

The court insisted that cutting off church schools from this service would frustrate the general interest of the public welfare in much the same manner as if state-paid policemen could not protect children going to and from church schools or if publicly paid firemen could not extinguish a church fire. Mr. Justice Burger insisted that this was not the purpose of the First Amendment but rather, it required that the state be neutral in its relations with religious believers and non-believers; it did not require the state to be their adversary.

Finally, the Court reasoned that;

(1) The New Jersey statute was valid in its requiring compulsory school attendance; the parochial schools met that requirement;

(2) The state contributed no money to the schools

(3) The legislation did no more than provide a general program to help parents, regardless of their religion...;

(4) The First Amendment has erected a wall between Church and State; that wall must be kept high and impregnable;

(5) We cannot approve the slightest breach.[9]

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[9]Ibid., p. 18.

Zorach v. Clauson
343 U.S. 306 (1952)

Facts

The United States Supreme Court received this case on appeal from the Court of Appeals of New York. The case involved a challenge to a New York law allowing students to be released from the public schools to go to religious centers for religious instruction or devotional exercises. The parents challenging the law contended that the weight and influence of the school was put behind a program for religious instruction.[10]

Decision

The Supreme Court affirmed the New York Court's finding that there was neither supervision nor approval of religious teachers and no solicitation of pupils to be released. The religious instruction had to be outside the school building and grounds.[11]

Discussion

This decision differed from the McCollum[12] case where

[10]Zorach v. Clauson, 343 U.S. 306 (1952).

[11]Ibid.

[12]McCollum v. Board of Education 343 U.S. 203 (1948).

classrooms were used for religious instruction and the force of the public school was used to promote that instruction. In holding that release time was constitutional, the court reasoned that such a program has made a law respecting an establishment of religion within the meaning of the First Amendment; and as for interference with the "free exercise" of religion and an "establishment" of religion, the court held that separation must be complete and unequivocal. The Court held that the First Amendment does not say that in every respect there shall be a separation but stresses the fact that "there shall be no concert or union or dependency one on the other",[13] otherwise, the state and religion would be aliens to each other.[14]

Engel v. Vitale
370 U.S. 421 (1962)

Facts

The United States Supreme Court reviewed this case on certiorari to the Court of Appeals of New York. Prior to this case Bible-reading and prayer were common practices in the public schools, and most states courts found Bible-reading to be a nonsectarian activity and thus constitutionally

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[13]Zorach v. Clauson, p. 312.

[14]Ibid p. 312.

permissible. The New York State Board of Regents had prescribed the following prayer be said aloud by each class in the presence of a teacher at the beginning of each school day:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our Country."[15]

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the state constitution to which the New York Legislature had granted broad supervisory, executive, and legislative powers over the state's public schools.[16]

Decision

The Supreme Court invalidated the use of the prescribed prayer, holding that use of the prayer violated the First Amendment's prohibition against the enactment of any law "respecting an establishment of religion" which is made applicable to the states by the Fourteenth Amendment.[17]

Discussion

This landmark decision set the tone for later First Amendment cases with respect to the establishment and free

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[15]Engel v. Vitale, 370 U.S. 421, 422 (1962).

[16]Engel v. Vitale, 370 U.S. 421 (1962).

[17]Ibid.

exercise issues by the following:

(1) its insistence that prayer was religious in nature

(2) prayer in public schools was inconsistent with the establishment clause of the First Amendment

(3) no part of Government may compose official prayers for any group to recite as a part of a religious program carried on by government

(4) public schools are government institutions.[18]

In finding the New York law inconsistent with both the purpose of the establishment clause and the establishment clause itself, the court held that its finding was not to indicate a hostility toward religion or toward prayer but that the First Amendment tried to put an end to governmental control of religion so as not to destroy government or religion. Recognizing the brevity and general nature of the Regent prayer and its unseeming danger to religious freedoms, the Court cited the words of James Madison, the author of the First Amendment:

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[18]Ibid.

> "It is proper to take alarm at the first experiment on our liberties...who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christian, in exclusion of all other Sects? That the same authority which can force a citizen to contribute...for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[19]

Abington School District v. Schempp
374 U.S. 203 (1963)

Facts

Edward Schempp, on behalf of himself and his family, brought suit to enjoin enforcement of a Pennsylvania statute requiring the reading of Bible verses each day at the opening of school, contending that their rights under the Fourteenth Amendment had been and would continue to be violated unless the statute be declared unconstitutional as violative of the First Amendment prohibition on establishment and free exercise of religion. This case reached the United States Supreme Court on appeal from the District Court for the Eastern District of Pennsylvania. Along with a companion case from the Maryland Court of appeals in which the petitioner, Mrs. Madalyn Murray and her son, William J. Murray, III both professed atheists, objected to the daily reading of portions of the King James Version of the Bible as provided

[19] Memorial and Remonstrance Against Religion Assessments, II Writings of Madison 183 at 185-186

in a 1905 Maryland code. Both cases were granted certiorari.[20]

Decision

The United States Supreme Court found in both cases the statutes required religious exercises and were conducted in direct violation of the rights of the appellees and petitioners. The required exercises were not mitigated by the fact that individual students may absent themselves upon parental request.[21]

Discussion

The Court was once again called upon to consider the scope of the First Amendment respecting laws on establishment of religion or prohibiting the free exercise thereof. In so doing the court held that the place of religion is an exalted one, achieved through a long tradition of reliance on the home,the church, and the inviolable citadel of the heart and soul. In the relationship between man and religion, the state is committed to a position of neutrality.

The free exercise Clause withdraws from legislative power the exertion of any restraint on the free exercise of

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[20]Abington School District v. Schempp 374 U.S. 203 (1963).

[21]Ibid.

religion. Applying the establishment clause to these cases, the Court found that requiring Bible reading for those students was in violation of the Establishment Clause.

The distinction drawn between the two clauses by this landmark decision is twofold:

(1) a violation of the free exercise clause is predicated on coercion,

(2) the establishment clause violation need not be so attended.[22]

Epperson v. Arkansas
393 U.S. 97 (1968)

Facts

The United States Supreme Court heard this landmark case after a high school biology teacher, joined by a parent, litigated the state statute prohibiting the teaching of Darwin's theory of evolution in the public elementary and secondary schools in Arkansas. The teacher was scheduled to use a newly adopted biology textbook that included a chapter concerning the Darwinian theory of evolution. Violation of the state statute carried a misdemeanor punishment and teacher dismissal.

Susan Epperson, plaintiff, sought action in the Chancery

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[22]Ibid p. 223.

Court of Arkansas challenging the constitutionality of the anti-evolution statute which was an adaptation of the 1925 Tennessee "monkey law". The Arkansas Chancery Court ruled the statute violated the Fourteenth Amendment of the Constitution. On appeal, the Arkansas Supreme Court reversed the decision, maintaining that the statute was a legitimate exercise of state authority in governing the curriculum in the public schools of the state.[23]

Decision

On appeal, the Supreme Court reversed the Arkansas Supreme Court on First and Fourteenth Amendment grounds. Justice Abe Fortas, in speaking for the Court, maintained the following: :

(1) State and National government must be neutral in matters of religious theory, doctrine, and practice. Government may not be hostile to any religion, to the advocacy of non-religion, nor aid or foster one religion or religious theory against another.

(2) The Courts are reluctant to interfere with the daily operations of public school. However, where there is a violation of basic constitutional values, the court must intrude

(3) There is no doubt that the First Amendment does not permit the state to enact any law that favors the principles or prohibition of any religious sect or dogma;

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[23]Epperson v. Arkansas, 393 U.S. 97 (1968).

(4) The state may not use tax-supported property for religious purposes,thereby breaching the "wall of separation" which,according to Jefferson, the First Amendment was intended to erect between church and state.

(5) The state may not adopt programs or practices in its public schools or colleges which aid or support any religion. "This prohibition is absolute". It forbids the preference of one religion or prohibition which is deemed antagonistic to a particular dogma.

(6) The states may not impose upon the teachers in the schools any conditions it chooses, however restrictive they may be of constitutional guarantees.[24]

Discussion

The Epperson decision is an example of the Supreme Court's response to the state's law's imposition on the basic constitutional rights respecting religious freedom. Though this case speaks specifically to censorship of material in the public schools, the fundamental right given by the free exercise and establishment clauses are also applicable to school board policies regulating teachers' religious belief and practices. This landmark decision drew on antecedent decisions which are rooted in the fundamentals of freedom within the First Amendment's broad command.[25]

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[24]Ibid., p. 106.

[25]Ibid., p. 104.

Lemon v. Kurtzman
403 U.S. 602 (1971)

Facts

This landmark decision arises from two states' (Rhode Island and Pennsylvania) statutes allowing public funds to flow to private schools for secular instruction. The Pennsylvania statute authorized the State Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools, directly reimbursing those schools soley for teacher salaries, textbooks, and instructional material. The Rhode Island statute permitted a salary supplement to be paid to teachers in nonpublic schools for using only material in the public schools and agreeing not to teach courses in religion.

The Pennsylvania statute was litigated when appellant Lemon challenged the constitutionality of the statute claiming that he was paying a specific tax supported religion. A three-judge federal court held that the statute neither violated the establishment nor the free exercise clause of the First Amendment.

The Rhode Island statute was litigated when citizens, appellees of the state, brought suit to have the statute declared unconstitutional and its operation enjoined as violative of the establishment and free exercise clauses of the First Amendment.[26]

[26]Lemon v. Kurtzman, 403 U.S. 602 (1971).

Decision

The United States Supreme Court heard the Rhode Island suit affirming the District Court's ruling that the statute violated the establishment clause and holding that it fostered "excessive entanglement" between government and religion. In ruling on the Pennsylvania statute, the Court reversed the District Court holding that the statute violated neither the establishment nor the free exercise clause.[27]

Discussion

Chief Justice Warren Burger writing for the Court held the language of the religion clauses of the First Amendment opaque at best when compared with the other portions of the Amendment. Mr. Justice Burger insisted that the authors of the First Amendment simply did not prohibit the establishment of a state church but commanded that there shall be "no law respecting an establishment of religion".[28] Mr. Burger went further to emphasize that a given law may not establish a state religion but nevertheless respect that end in the sense of being a step that could lead to an establishment and hence offend the First Amendment provisions.

The Court held that in the absence of precisely stated constitutional prohibitions, lines must be drawn with reference

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[27]Ibid.

[28]Ibid., p. 612.

to three main evils against which the establishment clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activities. An analysis in this area must consider the cumulative criteria developed by the Court since Everson. The Court gleaned three tests to be applied to enactments in order for the laws to make constitutional muster:

(1) the statute must have a secular legislative purpose;

(2) its principal or primary effect must be one that neither advances nor inhibits religion;

(3) the statute must not foster an excessive government entanglement with religion.[29]

The Court conceded that the statute had secular legislative purposes, and it acknowledged that restriction had been placed on the program to insure that the funds were used only for secular purposes. Consequently, it did not decide whether the programs advanced religion. However, the court found the program unconstitutional on grounds that the relationship arising under the statute in each state involved excessive entanglement between government and religion.

Finally, the Court acknowledged the long-standing role of church-related schools over the past 200 years but insisted that a dangerous progression existed in these statutory provisions unlike tax exemptions. Not to demean the role of

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[29]Ibid., pp. 612-613.

the schools, the Court insisted that lines be drawn to square the aid to nonpublic schools with the dicates of the Religion Clauses.[30]

Cases Contributing Significantly to the Establishment of Case Law in Areas of Reasonable Accommodation for Religious Observance by Employees and Undue Hardship on the Employer's Conduct of Business

McGowan v. Maryland
366 U.S. 429 (1961)

Facts

This case was an appeal by employees of a large Maryland department store of a ruling by the state court of Maryland and the Court of Appeals of Maryland. The lower Court ruled that a Maryland statute prohibiting the sale of certain items was constitutional and did not violate the establishment clause of the First Amendment. The employees were convicted and fined by the state court for selling on Sunday certain items prohibited under the Maryland statute. The significance of this case rests with its interpretation of the seventh-day rest as being secular, a day of rest and being in the interest of the public welfare. The appellants were not granted standing to challenge the state statute on religious freedom since they alleged only economic injury to themselves.

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[30]Ibid p. 625.

However, since they suffered direct economic injury allegedly due to the imposition on them of the tenets of the Christian religion, they were granted standing to challenge the statute in respect to an establishment of religion.[31]

Decision

The United States Supreme Court reviewed the case from the Court of AAppeals of Maryland ruling that the case dealt only with the constitutionality of the Maryland statute regulating the sale of goods on Sunday. In affirming the lower court's ruling that the statute did not violate the equal protection or due process clause of the Fourteenth Amendment or constitute a law respecting an establishment of religion, within the meaning of the First Amendment, which is made applicable to the states by the Fourteenth Amendment, the Supreme Court held:

> "We do not hold that Sunday legislation may not be a violation of the Establishment Clause if it can be demonstrated that its purpose--evidenced either on the face of the legislation in conjunction with its legislative history or in its operative--is to use the states coercive power to aid religion".[32]

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[31]McGowan v. Maryland, 366 U.S. 420 (1961).

[32]Ibid p. 453.

Discussion

While Sunday closing laws had their genesis in religion, it becomes apparent that government concern apart from their original purpose,has focused on the purpose and effect of most of them to provide a uniform day of rest for all citizens. The fact that the day is Sunday, a day recognized by Christians with religious significance does not bar the state from enacting laws to provide a day of rest for all citizens; to construe otherwise would give a constitutional interpretation of hostility toward the public welfare rather than of church-state separation.[33]

Chief Justice Earl Warren, in delivering the Court's decision, noted that previous courts rejected the contention that Sunday closing laws interfered with religion liberty holding that the law's purpose was to provide a day of rest from a mere physical standpoint. Considering the legislative intent and operative effect of the statute, the Court insisted that a blanket prohibition against Sunday work was not present. In light of the other Maryland statutes, the Sunday closing laws coupled with the general proscription of other types of work, the court held that the intent was a day of rest rather than one respecting an establishment of religion.[34]

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[33]Ibid., p. 445.

[34]Ibid., pp. 448-452.

Dewey v. Reynolds Metal Company
429 F2d 324 (6th Cir. 1979)

Facts

In 1960 and 1965 Reynolds Metal Company and the union entered into an agreement which allowed the company to establish schedules for straight time and overtime from employees in order to meet production schedules. The agreement specified that an employee was to work the overtime or secure a qualified replacement. Kenneth Dewey, an employee of Reynolds since 1951, was a die repairman. He joined the Faith Reformed Church in 1961 after which he refused to work on Sunday, his Sabbath, or secure a qualified replacement consistent with the negotiated agreement between the union and Reynolds. Despite due notice of overtime requirements by the company and the collective bargaining agreement, Dewey refused to perform scheduled overtime work on Sunday and assumed the position that continued employment and following his religious belief without interference were absolute rights.

Dewey was dismissed by Reynolds and subsequently sought relief through the Equal Employment Opportunities Commission (EEOC).[35]

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[35]Dewey v. Reynolds Metal Company,429 F2d 324 (1979).

Decision

The District Court of Michigan entered judgement for the employee and Reynolds appealed. The Sixth Circuit Court reversed the District Court holding that even if regulations adopted by EEOC subsequent to employee's discharge permitted an employee, by a replacement, to observe Sunday as his Sabbath, this constituted a reasonable accommodation to the needs of an employee. In so doing, the employer had the right to dismiss an employee for refusal to make replacement arrangements for overtime work scheduled on Sunday.[36]

Discussion

The applicable statute is 42 U.S.C., section 2000e-2(a), of which the pertinent part provides:

> "(a) it shall be unlawful employment practice for an employer -
> (1) ...to discharge any individual or otherwise discriminate against any individual with respect to...terms...of employment, because of ... religion..."

The reason for Dewey's dismissal was not discrimination on account of religion but rather because he violated the provisions of the collective bargaining agreement between his employer and the union. The violation consisted of not only refusing to work overtime on Sunday but also of his refusal to arrange for a replacement which was an alternate

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[36]Ibid.

procedure. Dewey did arrange for replacements five times but later refused to do this, claiming it was a sin.[37]

The Sixth Circuit Court insisted that to accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sunday in place of Dewey, thereby relieving Dewey of his contractual obligation.

Upon denying petition for rehearing, Sixth Circuit Judge Weick contended that the court had adopted a broad construction of the Civil Rights Act and EEOC Regulation by:

(1) maintaining that the legislative history of the Act expressed a congressional intent to inhibit only discrimination against an individual because of his ...religion....

(2) maintaining the Act did not intend to coerce or compel one person to accede to or accommodate the religious beliefs of another.

(3) maintaining that the collective bargaining agreement was equally and uniformly applied to all employees and discriminated against none.

(4) maintaining that to coerce or compel an employee to accede to or accommodate the religious beliefs of all his employees would raise constitutional questions of violation of the establishment clause of the First Amendment; therefore, government in its relation with religious believers and

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[37]Ibid., p. 330.

non believers, must be neutral.[38]

Reid v. Memphis Publishing Company
468 F2d 346 (1972)
521 F2d 512 (1975)

Facts

McCann Reid was a Seventh Day Adventist who, according to the tenets of his religion, refused to work as a copyreader on Saturdays for the Memphis Publishing Company. As a result of Reid's refusal he was not hired by the company on the grounds that it was company policy to assign new copyreaders to Saturday work and give preference for weekday work to more senior copyreaders. Reid filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C., 2000e claiming that the company failed to hire him because of his religion (Seventh Day Adventist) which observed Saturday as Sabbath.[39]

Decision

The first time the Sixth Circuit Court heard prospective Reid's appeal it reversed the district court which had relied on Dewey[40], concluding that religious discrimination had not

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[38]Ibid., p 335 (citing Schempp, Engel, and Everson).

[39]Reed v. Memphis, 468 F2d 346 (1972).

[40]Dewey v. Reynolds, 429 F2d 324 (1979).

been established. The Court of Appeals distinguished the facts from the Dewey decision on the grounds that the 1967 EEOC Regulation[41] was in effect when Reid was denied employment, and the district court had not considered whether the employer had made an effort to reasonably accommodate the employee's religious beliefs and practices.[42]

On the second appeal, the Sixth Circuit reversed its decision holding that the accommodation was reasonable and the hardship undue. Discrimination as defined by the Civil Rights Act of 1964 was not supported by substantial evidence.[43]

Discussion

The Reid I - Reid II dichotomy would seem to focus on the narrow issue of whether the 1967 EEOC Regulation as applied to Sabbath observer was in concert with the legislative history of Title VII.[44] In finding of Reid II, the Appeals Court noted that the District Court offered the view that Reid should have been hired in order to determine whether it would work out, notwithstanding the District Court's finding

[41]29 C.F.R. 1605.1 (1975).

[42]Reed v.Memphis Publishing Co., 468 F2d 346 (1972).

[43]Reed v. Memphis Publishing Co., 521 F2d 512, 517 (1975).

[44]M.L. Wright, "Title VII--Sabbath Observer Discrimination, Reasonable Accommodation, Undue Hardship Standard, Establishment Clause: Reed v. Memphis Publish Co.," New York Law School Review 22 (1976):151.

that:

(1) employing Reid as a copyreader which required regular working on Saturday, his Sabbath, would work an undue hardship;

(2) assigning other senior copyreaders undoubtedly would violate their seniority, require overtime pay of the hiring of two copyreaders when only one was needed;

(3) the involuntary assignment of senior copyreaders to substitute for Reid would create serious morale problems.

In a dissenting opinion, circuit Judge Edwards noted that the Reid I decision upheld the applicability and constitutionality of the EEOC Regulation and remanded the case to the District Court to determine facts concerning "undue hardship". Noting the distinction between Dewey and Reid, he took cognizance that the employer had offered an accommodation to Dewey prior to dismissal whereas Memphis Publishing Company was unwilling to offer an accommodation in the form of being allowed off for religious purposes.[45]

Cummins v. Parker Seal
516 F2d 544 (1975)

Facts

Paul Cummins, an employee of the Parker Seal Company since 1958, was made shift supervisor in 1965. In 1970 he joined the World Wide Church of God which forbade work on its Sabbath (Friday sundown to Saturday sundown) and certain holy days. Shift supervisors were salaried and required to

[45]Reed v. Memphis, 521 F2d 512 (1975).

work the scheduled hours including Saturday. After Cummins joined the World Wide Church of God, he refused to work on Saturday, thereby causing other company supervisors to substitute for him on Saturdays. After complaints arose from fellow supervisors who were involuntarily assigned to substitute for him, Cummins was discharged

The appellant filed charges of religious discrimination with the United States Equal Employment Opportunities Commission (EEOC) and the Kentucky Commission on Human Rights (KCHR). The charges were dismissed by the Kentucky Commission on Human Rights. However, the EEOC issued a right-to-sue letter in September of 1972.[46]

Decision

The District Court reviewed the KCHR transcript as agreed upon by the parties, and found that a full and fair hearing was granted, holding that:

(1) Parker Seal's attempt to accommodate Cummins religious needs was causing an undue hardship;

(2) a reasonable accommodation was made to the appellant's religious beliefs, and no further accommodation could be made at the time of dismissal without creating an undue hardship on the employer's business;

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[46]Cummins v. Parker Seal, 516 F2d 544 (1975).

(3) the defendant was justified in discharging the plaintiff.

On appeal, the sixth Circuit reversed the District Court and remanded the case for further proceedings.[47]

Discussion

In finding for Cummings,the Appeals Court rejected the lower court's decision on the doctrine of res judicata, holding that a party is not foreclosed from pursuing his federal remedy under Title VII because he has first been party to a state proceeding.

The reasonable accommodation complaint by the appellant was on the provision of 42 U.S.C. 2000e as it existed before the 1972 Amendment. Section 2000-2,which has not been amended, states in relevant part:

> "(a) It shall be an unlawful employment practice for an employer - (1) ... to discharge any individual...because of such individual's ... religion..."

The EEOC Regulation, 29C.F.R. 1605.1 (1974), "Observation of the Sabbath and Other Religious Holidays", which was in force at the time of the appellant's discharge, provides:

(1) that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to make reasonable accommodation to the religious needs of employees and prospective employees where accommodation can

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[47] Ibid.

be made without undue hardship ;

(2) the employer has the burden of providing that an undue hardship renders the accommodation to the religious needs of the employee unreasonable;

(3) the Commission will review each case on an individual basis to seek an equitable application of the guidelines due to the pluralistic religious practice of the American people.[48]

The Appeals Court in finding that Title VII, Civil Rights Act of 1964, was constitutional, held that:

(1) Cummins did suffer discrimination by his discharge and that

(2) Parker Seal did not show that accommodation would have imposed an undue hardship on the conduct of business.[49]

In rejecting Parker Seal's contention that 42 U.S.C., 2000e (j) and the EEOC Regulation 1605.1 (1974) were laws "respecting an establishment" and violation of the Religious Clause of the First Amendment, the Sixth Circuit Court concluded that the legislation and regulation satisfied the three standards for any law to meet in order to survive an establishment clause challenge:

(1) The secular aspect of Regulation 1605 and 42 U.S.C. 2000e(j) was adequate. The reasonable accommodation rule was intended to prevent discrimination in employment, not to

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[48]29 C.F.R. 1605.1 (1974).

[49]Cummins v. Parker Seal, 516 F2d 544 (1975).

establish a religion.[50]

(2) Regulation 1605 and 2000e (j) did not advance nor prohibit religion. The reasonable accommodation rule restrains employers from enforcing uniform work rules thought facially neutral that discriminate against employees' holding certain religious convictions despite the fact that some religious institutions will derive incidental benefit from Regulation 1605 and 2000e(j).[51]

(3) Regulations 1605 and 2000e(j) do not raise the spectre of excessive government entanglement with religion. The reasonable accommodation rule will not subject religious institutionsto government surveillance that the Supreme Court finds impermissable. Secondly, EEOC and the courts will have to determine whether a reasonable accommodation has been made and whether an undue hardship results. These issues will be considered in a labor relations context and do not require government entanglement with religion.[52]

The First Amendment religion issues raised in this case were found invalid and supported by the McGowan[53] Court in holding that the statute's purpose and effect were not to aid religion but to set aside a uniform day of rest and recreation. Section 2000e(j) requires a reasonable accommodation of an

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[50]Ibid., p. 552.

[51]Ibid., p. 553.

[52]Ibid., p. 554.

[53]McGown v. Maryland,366 U.S. 420 (1961).

employee's religious practices short of an undue hardship on the employer's business. The Court juxtaposed the effect of 2000e(j) with Sunday closing laws in McGowan to hold that 2000e(j) had no tendency toward establishment of religion but only to insure a common day of rest in the public interest.[54]

Trans World Airlines v. Hardison
432 U.S. 63 (1977)

Facts

Hardison worked for Trans World Airlines for more than a year before he became deeply involved with the World Wide Church of God whose tenets hold that no work may be performed on Saturday (Friday sundown to Saturday sundown). His problem with the work schedule arose after being voluntarily transferred to another department where he had lower seniority and could not have Saturdays off. The union contract which governed shift and job assignment was not violated to accommodate Hardison's religious practices. TWA rejected Hardison's proposal to work a four-day week, and subsequently Hardison refused to work on Saturday. Hardison was dismissed, and he brought action for injunctive relief against TWA and the union claiming that his discharge was religious discrimination in violation of Title VII of the Civil Rights Act of 1964

[54]Cummins v. Parker Seal, 516 F2d 544 (1975).

which provides in pertinent parts:

> "It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual...to discriminate against any individual with respect to his compensation terms, conditions, or privileges or employment because of such individual...religion..."[55]
>
> "The 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 or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[56]

Hardison also claimed religious discrimination under the 1967 EEOC guidelines requiring an employer to make reasonable accommodation to an employee's religious needs short of undue hardship.[57]

Decision

The District Court ruled for the union, holding that the union was not required to ignore a seniority system as a part of its accommodation duty. Further, TWA was found to make reasonable accommodation.

The Eighth Circuit reversed the latter ruling holding that TWA had rejected reasonable accommodation by

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[55]Civil Rights Act of 1964, Title VII, 703(a)(1), 42 U.S.C., 2000e-2(a)(1) 1970).

[56]Civil Rights Act of 1964, Title VII, 701(j), 42 U.S.C., 2000e(j) (1975).

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

(1) by disallowing a four-day work week,

(2) by declining to make a shift change between Hardison and another employee, or

(3) by not filing the Saturday shift from a pool of available and competent employees.

The court found TWA and the union at fault for not considering the variance from the seniority system. The Supreme Court reversed the decision in a 7-2 decision holding that TWA had made reasonable accommodation.[58]

Discussion

Associate Justice Byron White delivered the 7-2 decision (Justice Brennan and Marshall dissenting) that to require TWA to bear more than de minimis costs in accommodating Hardison would constitute undue burden, and that, absent clear legislative intent, TWA need not deprive other employees of their rights under the union contract in order to accommodate his religious beliefs.

Justice White, in reviewing both legislative and judicial history, insisted the effort had been directed toward "eliminating discrimination in employment...with regard to... religion...." In reviewing the EEOC 1967 guidelines which required employees to make reasonable accommodation to the religious needs of employees, Justice White cited historical

[58]Ibid.

ambivalance. The 1971 Dewey[59] case focused on Reynolds Metals discharge of an employee who refused to work on Sunday. Reynolds Metals argued that EEOC lacked authority to adopt the 1967 guidelines, and that, furthermore,the guidelines were unconstitutional by virtue of advancing religion--a First Amendment violation. The Supreme Court split on a 4-4 vote with no written opinion.

In 1976 the Supreme Court heard Parker Seal Company v. Cummins[60] from the Sixth Circuit Court of Appeals in which it found for the employee and insisted the statute did not violate the First Amendment establishment clause.[61] Again the Supreme Court affirmed the lower Court's decision with a 4-4 split and no written opinion.[62]

A narrow reading of Hardison is a long line of case-by-case, fact-based determination of reasonable accommodation and undue hardship. Considered in a narrow reading, Hardison defends religious accommodation when anything more than de minimis cost to the employer as undue hardship under Title VII.[63] The Hardison court accepted the existence of employer's duty to accommodate, and that duty seemed to be directed toward

[59]Dewey v. Reynolds, 429 F2d 324 (1979).

[60]Parker Seal v. Cummins, 429 U.S. 65 (1976).

[61]Cummins v. Parker Seal, 516 F2d 544 (1975).

[62]Parker Seal v. Cummins, 429 U.S. 65 (1976).

[63]Penni Johnson, "Religious Accommodation in Employment—The Eleventh Commandment? Trans World Airlines v. Hardison," 432 U.S. 63 (1977), Arkansas Law Review 32 (Fall 1978): 589.

employer neutrality rather than conferring employee privilege.[64]

Jordan v. North Carolina National Bank
565 F2d 72 (1977)

Facts

Jordan brought suit against North Carolina National Bank charging religious discrimination in violation of the Civil Rights Act of 1964, Title VII, 42 U.S.C. section 2000e. Before voluntarily leaving employment with the bank in 1969 she had adopted the tenets of the Seventh-Day Adventist religion and in May 1970 sought reemployment with NCNB. She charged that failure to gain reemployment was the result of the bank's refusal to allow her to observe her Sabbath on Saturday.[65]

Decision

The District Court, Judge James B. McMillan presiding, held that North Carolina National Bank violated the Civil Rights Act of 1964 by refusing the plaintiff employment on her unwillingness, for religious reasons, to work on Saturday. The Court of Appeals ruled that the Civil Rights Act of 1964 was not violated when Jordan insisted upon a guarantee that

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

[65]Jordan v. North Carolina National Bank, 565 F2d 72 (1977).

she would not be called upon to work on Saturday, reasoning that such a guarantee would constitute "undue hardship on the conduct of the employer's business".[66]

Discussion

The Appeals Court held that Jordan's pre-requirement of never having to work on Saturday was so unlimited and absolute in scope that it speaks its own unreasonableness and is thus beyond accommodation. In reviewing the testimony given in the District Court, the Appeals Court found that, in fact, employment was never denied, only the absolute guarantee of never having to work on Saturday. Citing Hardison,[67] the Appeals Court held that the guarantee to Jordan would obligate the bank to provide it for all its employees and entail extra expense, thus constituting an "undue hardship." Jordan, in citing discrimination, alluded to another NCNB employee, Elizabeth Woods, also a Seventh-Day Adventist, who had secured a promise not to have to work on Saturday. However, the appellant showed that Woods had agreed to work on Saturday sometimes if employment was a possibility.[68]

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[66]Ibid.

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

[68]Jordan v. North Carolina National Bank, 565 F2d 72 (1977).

Redmond v. GAF Corporation
574 F2d 897 (1978)

Facts

Rodgers Redmond, an employee of GAF Corporation since 1952 became a member of the Jehovah's Witness in 1958. Redmond was appointed as a leader of a Bible study class by the elders of the church in 1959. In 1974 the class schedule was changed to Saturday by the ruling body. This change resulted in a conflict between the infrequent overtime scheduled on Saturday and Redmond's religion needs. After this change in his religious needs, he did not work the overtime schedule,and the record indicated that he had been excused from Saturday with GAF's cognizance of the conflict between work and religion.

Following Redmonds suspension for one day after his failure to return for annual inventory during his vacation, he was scheduled to work overtime on Saturday. Redmond refused to work the overtime on Saturday. After advising his superiors of his religious obligation and his earlier excused absence on the Saturday overtime, he was told that either he agreed to work or he would loose his job; subsequently, he was terminated.

Redmond brought charges alleging race discrimination, harrassment, and retaliation for filing discrimination and termination. He sought relief through the District Court of

the Northern District of Illinois alleging discrimination because of his inability to work on Saturday even though his religious practices prevented him from doing so.[69]

Decision

The District Court concluded that Redmond's discharge discriminated against him in exercise of his religion. On appeal by GAF, the Seventh Circuit Court affirmed the lower courts decision by holding:

(1) the employee's participation in the Bible class was a religious obligation with statutory protection offered to all aspects of religious observance and practices.

(2) the employer made no effort to accommodate the employee's religious need and did not demonstrate it would suffer undue hardship in accommodating the employee.[70]

Discussion

Title VII prohibits discrimination based on religion but the Act did not define the term until the 1972 Amendment added the following definition, "The term 'religion' includes all aspects of religion observance and practice as well as belief..."[71]

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[69]Redmond v. GAF Corporation, 574 F2d 897 (1978).

[70]Ibid.

[71]42 U.S.C., 2000e(j).

The statute makes it clear that congress attempted to protect subjective belief and practices in carrying out such beliefs and the legislation did not aid the courts in determining the breadth of the belief and practice other than to say they must be religious.[72] Despite the fact most cases litigated under Title VII dealt with Sabbararian practices, the statute embraced both categories.[73]

Once the plaintiff established his practice which prevented him from working Saturday overtime, it became religious under provision of section 2000e(j), and the burden shifted to the employer to demonstrate that reasonably accommodating the employee constituted undue hardship on the conduct of business.[74]

In its reasoning, the court held that the employee had established a prima facie case of religious discrimination, and the employer had made no effort to accommodate the plaintiff.

The record of this case shows that Redmond had advised GAF of his religious needs but that the only alternative presented was to work on Saturday or lose his job. There was no effort shown to accommodate the employee by transfer to another division or arranging for replacement on the Saturday shift. In this absence of fact the court reviewed

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[72]Redmond v. GAF Corporation, 574 F2d 897, 900 (1978).

[73]Ibid.

[74]Ibid., p. 901.

the following points to support its reasoning:

(1) GAF showed no inconvenience to its business;

(2) the District Court did not have the Hardison decision on accommodation and undue hardship,but the applicable standards were nevertheless applied;

(3) GAF would not have suffered the extra pay for overtime as all Saturday employees were on overtime rate;

(4) there was no showing of loss of efficiency since the work was unskilled and could be performed essentially by any employee;

(5) there was no union or collective bargaining contract which would prevent changing the plaintiff's schedule.[75]

Brown v. General Motors Corporation
601 F2d 956 (1979)

Facts

Brown began working on the General Motors assembly line in Kansas City in 1964. In 1966 Brown transferred to the daytime shift. Shortly after his transfer to the first shift he joined the Worldwide Church of God whose tenets proscribe secular work on the Sabbath (Friday sundown to Saturday sundown). In March of 1970 there was a reduction in the assembly line due to economic conditions which resulted in Brown's transfer to the second shift (4:00 PM to 12:30 AM) due to his low

[75]Ibid p. 904.

seniority. From May 25 until August 19 when he was terminated for refusing to work after sundown on each Friday, Brown sought relief by bringing claim that his discharge violated Title VII provision.[76]

Decision

The United States District Court, W.D. of Missouri entered judgement for the employer and the plaintiff appealed. The Eighth Circuit Court reversed the judgement.[77]

Discussion

In reversing the judgement, the Eighth Circuit Court relied on Hardison[78] in its findings:

(1) an employer is required to accommodate the religious observance of its employees unless such accommodation contravenes the provisions of a valid collective bargaining agreement or would cause the employer undue hardship. Since there was no collective bargaining agreement, the question of undue hardship was dismissed on grounds that no pay was received by Brown in his absence after sundown on Friday and the employer maintained extra men to cover for unscheduled employee absences.

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[76]Brown v. General Motors Corporation, 601 F2d 956 (1979).

[77]Ibid.

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

(2) In order to establish a prima facie cause of religious discrimination under Title VII provision, the employee must plead and prove that a) he has a bona fide belief that compliance with work requirement is contrary to his religious faith; b) inform his employer of the conflict; c) he was discharged because of his refusal to comply with the work requirement.

The facts of the case, undisputed by both parties, clearly established a prima facie case of religious discrimination.

The question as posed by Hardison was whether the proposed accommodation (allowing Brown Friday evening off) would cause an undue hardship resulting in more than de minimis cost to the employer. Holding that the theoretical argument of having to hire more men on Friday to maintain efficiency was erroneous, the court rejected this question.

(3) Section 2000e(j) does not require the employer to reasonably accommodate the purely personal preference of its employees. The cost resulting from accommodating Brown does not include those who wish Friday evening off for secular reasons. The record showed that only four other Sabbatarians were working this shift out of a work force of 1200 to 1600.

(4) Accommodating Brown would not discriminate against all employees who do not adhere to Brown's religion.

Citing Hardison, the court held that differential treatment resulting from accommodation violates section 2000e(a)(1)

if it: (1) compromises other employees' seniority rights secured by collective bargaining or (2) would confer a privilege whose cost was more than de minimis, solely on the basis of the recipient's religious belief. Neither was present in this case.[79]

Tooley v. Martin-Marietta Corporation
648 F2d 1239 (1981)

Facts

Herman O. Tooley and two of his fellow employees, members of the Seventh-Day Adventist religion and employees of the Martin-Marietta Corporation, brought suit under the Civil Rights Act of 1964, section 701(j) and 42 U.S.C.A., section 2000e(j), claiming religious discrimination in their dismissal for refusing to pay union dues under a collective bargaining agreement containing a "union shop". Following their consciences under the tenets of the Seventh-Day Adventist Church proscribing belonging to and paying dues to a union, they offered to pay an equal sum to a mutually acceptable charity. The union refused.

After exhausting their administrative remedies, the plaintiffs brought action alleging that the company and the

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[79]Brown v. General Motors Corporation, 601 F2d 956 (1979).

union's refusal to accommodate their request constituted religious discrimination under Title VII of the Civil Rights Act of 1964. They argued that the company and union were required to accommodate their request under section 701(j) of the act, 42 U.S.C. 2000e(j), unless an undue hardship resulted for the employer and union. The union contended that the substitute charity would cause an undue hardship and was unreasonable and such an accommodation violated the establishment clause. The District Court enjoined the union and the company from discharging the plaintiff.[80]

Decision

The judgement of the District Court affirmed.[81]

Discussion

Federal statutes and codes prohibit discrimination in employment by unions and employers on the basis of religion. The codes define religion to include all aspects of religious observance "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". The court held that the provision of section 701(j) applies to unions here as in the Yott

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[80]Tooley v. Martin-Marietta Corporation, 648 F2d 1239 (1981).

[81]Ibid.

decision.[82]

Reasonableness. The Steelworkers union argued that the substituted charity which exempted Tooley from union dues was unreasonable and resulted in impermissible unequal treatment. Citing the Brown v. General Motors Corporation[83], the Tooley Court held that desparate treatment of employees is not necessarily unreasonable. The religious accommodation provision of section 701(j) does not authorize preferential treatment of employees nor do they require an employer or union to abrogate the contractual rights of some employees or to incur substantial costs of accommodation for the benefit of those to be accommodated.[84]

The Tooley Court, using the reasoning in Hardison[85], found that the substituted charity accommodation did not allow preferential treatment and the plaintiff suffered the same economic loss as the union member; therefore, the accommodation was reasonable.[86]

Undue hardship. The union contended that allowing the substitute charity was inconsistent with the de minimis cost,

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[82]Yott v. North American Rockwell Corporation, 602 F2d 904 (1979).

[83]Brown v. General Motors Corporation, 601 F2d 956 (1979).

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

[85]Ibid.

[86]Tooley v. Martin-Marietta, 648 F2d 1239 (1981).

contending that reference to using surplus funds in the union's reserve departed from the de minimis standard. Ninth Circuit Court Judge Farris, citing the 1978 Anderson[87] decision, acknowledged that in determining an "undue hardship", the particular factual context of each case must be considered. A claim of undue hardship must be beyond a conceivable or hypothetical hardship and be supported by proof of "actual imposition on co-workers or disruption of the work routine.[88]

Constitutionality of section 701(j) of Title VII. The Steelworkers Union further argued that section 701(j) appealed in the case violated the establishment clause. Relying on Nyquist, Yoder, Walz, Zorach, and Lemon[89], the Tooley Court reasoned that government can accommodate the beliefs and practices of minority religious groups without contravening the prohibition of the establishment clause and, in the face of religious differences, reflect neutrality. Using Lemon and Nyquist as a background, the court found section 701(j) constitution in legislative purpose by prohibiting discrimination in employment and securing equal economic opportunities

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[87]Anderson v. General Dynamics 589 F2d 397 (1978)

[88]Ibid p. 400, 406-407

89Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756; Wisconsin v. Yoder, 406 U.S. 205; Walz v. Tax Commission, 397 U.S. 668; Zorach v. Clauson, 343 U.S. 306; Lemon v. Kurtzman 403 U.S. 602.

to members of minority religions.[90] The secular purpose of section 701(j) is legitimate by "promoting equal employment opportunities for members of all religious faiths".[91]

Section 701(j) was also found constitutional in its primary purpose. The union contended that the substitute charity had the primary effect of advancing the plaintiff's religion by securing alleged economic benefits. The court reflected the contention and made the discernment between ancillary and primary benefits in the substitute charity, in that the plaintiff was allowed to work without violating his religious beliefs at a cost equivalent to that paid by his coworkers without similar beliefs. It neither increased nor decreased the advantages of membership in the Seven-Day Adventist faith. Furthermore, the Tooley Court reasoned that the section was free of government entanglement in that the substitute charity required only a minimal amount of supervision and administration cost. After establishing the sincerity of the religious objector's belief, the only burden involves an agreement on a mutually acceptable charity. In the absence of an established undue burden on the union, the court found no excessive government involvement.[92]

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[90]126 Congressional Record #763 (1976).

[91]Rankins v. Commission on Professional Competence, 24 Col 3d 167, 177-78; 154 Col Rptr. 907, 913-14.

[92]Tooley v. Martin-Marietta Corporation, 648 F2d 1239, 1246 (1981).

Significant Decisions in Education Establishing Precedent for Religious Accommodation for Teachers

Umberfield v. School District No. 11
Colo., 522 P.2d 730 (1974)

Facts

Clayborn Umberfield, a teacher in School District No.11 since 1954,became a member of the World Wide Church of God whose tenets proscribed secular employment on the Sabbath (Saturday) and certain holy days. During the period of 1969-1970 he absented himself from his teaching duties to attend a religious assembly after being denied leave from his school district. Thereupon, the school district charged breach of contract and neglect and sought dismissal.[93]

Decision

Subsequent to the charges and dismissal proceedings, Umberfield sought relief before the Colorado Teacher Tenure Panel which recommended dismissal. Following dismissal by the school district, the teacher filed a complaint with the Colorado Civil Rights Commission, which held that discrimination had resulted from the teacher's dismissal and ordered

[93]Umberfield v. School District No. 11 Colo., 522 P2d 730 (1974).

reinstatement. The district court reversed the Civil Rights Commission. On appeal to the Colorado Court of Appeals, the court affirmed the district court's action. The Colorado Supreme Court granted certiorari, modifying and affirming the lower courts.[94]

Discussion

The district court, in upholding the finding of the Teacher Tenure Panel for dismissal and reversing the Civil Rights Commission, insisted that the teacher had a right to initiate proceedings before the Commission. In affirming the district court's decision, the Appeals Court held that the lower court erred in ruling that the teacher could seek relief from another administrative panel before judicial review. On certiorari, the Colorado Supreme Court affirmed and modified the judgement by addressing the following points:

(1) The doctrine of res judicata applies under the Colorado Teacher Tenure Act which sets the procedure for dismissal of tenured teachers. It provides a full adversary hearing consistent with Fourteenth Amendment guarantees.

(2) The Civil Rights Commission has a more limited function in the area of discrimination in employment. Its function is to make find of fact as to whether a statutory

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[94]Ibid.

employer has discriminated against an employee because of religion.

(3) Umberfield did not seek judicial review following the Teacher Tenure Panel's adverse recommendation and subsequent dismissal by the school district. By seeking new proceeding before the Civil Rights Commission, the court could be placed in an anamalous situation of affirming opposite results of two administrative bodies.

(4) The Teacher Tenure Panel had full power to determine all claims of religious discrimination.

(5) Therefore, the doctrine of res judicata bars the relitigation of issues the teacher raised or could have raised before the Teacher Tenure Panel and on judicial review.[95]

California Teacher's Association v. Board of Trustees
138 Cal. Rptr. 817 (1977)

Facts

Plaintiff Waldman, a teacher in the defendant school district and a member of the Jewish faith, sought relief after taking unpaid leave of absence to celebrate Rosh Hashana. The school district rules under California codes permitted the adopting of rules and regulations governing teacher absences in categories of personal necessity. Religious absences were not included as paid leave under personal

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[95]Ibid.

necessity.[96]

Decision

The Superior Court of San Bernardino County, California, entered judgement for the school district, holding that the California Education Code allowed the school district discretion in determining situations of personal necessity, further holding that religious observances were not of a personal necessity. Judgement affirmed by the Court of Appeals.[97]

Discussion

The California Court of Appeals, upon invitation, declined to discuss the establishment clause of the federal and state Constitutions plus the California Constitution[98], which provides in substance that no school district shall expend funds for any religious purposes. However, the court discussed the pluralism of the American population pointing to the accident of history that made the American culture one predominantly of Christian practice. The court compared the believers and nonbelievers, saying that both are accorded equal status under the constitution.

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[96]California Teacher's Association v. Board of Trustees, 138 Cal. Rptr. 817 (1977).

[97]Ibid.

[98]California Constitution, art. 26, sec. 5.

Business and industry observe a five-day week allowing a Christian to attend his religious observances on Sunday. However, those persons employed in an occupation of seventh-day necessity who want Sunday off must make some accommodation to that effect with his employer. He has no constitutional right to a paid day of absence to attend a religious observance. The central issue raised in this case was whether the plaintiff was entitled to a day of paid leave to attend a religious observance. In answering the question, the court declared that the school district had the discretion to deny the teacher a paid day for religious observance and denial of such was not an abuse of discretion. In citing Cummins,[99] the court found that reasonable accommodation within the scope of discretion was afforded by the teacher's not being disciplined and by denial of a day's salary.[100]

Rankins v. Commission on Professional Competence
154 Cal. Rptr. 907 (1979)

Facts

Thomas Byars was employed by the Ducor Union School District in 1969 and in 1971 he joined the World Wide Church of God whose tenets requires its members to refrain from work

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[99]Cummins v. Parker Seal Company, 516 F2d 544 (1975).

[100]California Teachers' Association v. Board of Trustees, 138 Cal. Rptr. 817 (1977).

on its Sabbath (sundown Friday to sundown Saturday) and on certain holy days. The school district had accommodated the teacher by excusing him from activities on Friday evenings and on two holy days in 1971-1972 and again in 1972-1973. Though the plaintiff's requests for leave were submitted well in advance, they were denied. Subsequently over the next four school years he was absent 31 days without permission. In March of 1973 the district sent him a letter of reprimand stating disapproval of his absences with warning of dismissal should the unexcused absences continue. By the same letter the school district rehired him for 1973-1974 and made him a permanent instead of a probationary employee.

In May, 1975, the district gave notification of intent to dismiss for persistent violation of or refusal to obey the school laws prescribed for employees, basing the charges on his absences.[101]

Decision

Byars sought and received a hearing before a commission on professional competence. The Commission of Professional Competence ruled that the teacher had not failed to obey a valid school law or regulation. The California Superior Court entered an order granting writ, and the Commission and teacher appeal. On appeal, the Supreme Court of California

[101]Rankins v. Commission on Professional Competence, 154 Cal. Rptr. 907 (1979).

reversed with directions.[102]

Discussion

Though the school district's rules were religiously neutral on their face, the court held that the effect was to exclude Byars for his employment because of his adherence to the precepts of his religion. Citing provisions of the California Constitution,[103] the court concluded that the teacher may not be disqualified from entering or pursuing his profession because of his religion, and; (2) the school district had not made an effort to reasonably accommodate the teacher's religious beliefs under the guidelines of the 1972 Amendment to 42 U.S.C. 2000e (j) as the Hardison [104] Court had held as "defensible construction of the pre-1972 statute".[105]

The Court reasoned that the California constitutional[106] provision implied prohibition of religious disqualification from employment, and its adoption in 1974 expressed a deep concern for religious freedom that underlies the First

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[102]Ibid.

[103]California Constitution, I, sec. 4.

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

[105]Ibid.

[106]California Constitution, art. 1, sec. 4.

Amendment and its historic protection for religious practices in the absence of a compelling state interest.[107]

Citing a comparison with the "reasonable accommodation short of undue hardship" in Hardison,[108] the court found that the school district did not demonstrate undue hardship by the availability of fully qualified substitute teachers who could replace Byars with no additional cost to the district.

The record revealed that the district, by statute, allowed each teacher 10 days of paid leave each year for illness or personal necessity. The court insisted that a district unwilling to pay for leave for religious purposes as a personal necessity must accommodate these purposes by allowing a reasonable amount of unpaid leave. The unpaid leave for Byars' religious observances would not be a burden on the conduct of the schools. The school district had contended that accommodating Byars would contravene the establishment clause of the First Amendment;[109] however, the court rejected this contention by insisting that the California constitutional[110] provision met the test prescribed by

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[107]Rankins v. Commission on Professional Competence, 154 Cal. Rptr. 907 (1979).

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

[109]Rankins v. Commission on Professional Competence, 154 Cal. Rptr. 907 (1970).

[110]California Constitution, Article 1, Sec. 4.

Lemon[111] and violated 42 U.S.C. 2000e (j) as upheld by Hardison.[112]

Niederhuber v. Camden County
495 F. Supp. 273 (1980)

Facts

Ronald Niederhuber, a member of the World Wide Church of God and nontenured teacher in the Camden County School District was dismissed by the school district for his unauthorized absence from school for two periods on December 1, 1978. Prior to his dismissal, the teacher had submitted a written request to take personal leave on October 2 and 11, 1978, to observe holy days of his church,and on October 4, 1978, he submitted a second request to be absent for religious purposes from October 16 to October 23, 1978, a period of six days. The first request was approved with one day with pay and one day without pay; the second request was denied. With the denial, the explanation was given that it would start a bad precedent. Nevertheless, the teacher absented himself for religious observance and was disallowed salary for the six day period. On November 30, 1978 the plaintiff requested that he be excused for the last

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[111]Lemon v. Kurtzman, 403 U.S. 602 (1971).

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

two periods of the next day for "very personal business". He left school with the understanding that his classes would be covered via the customary procedure.[113]

Decision

Upon dismissal the plaintiff charged that his First Amendment rights to free exercise of religion were denied and his due process rights under the Fourteenth Amendment were violated. The United States District Court, New Jersey, ordered reinstatement, compensatory damages, and attorney fees.[114] This was affirmed by the Appeals Court, 671 F2d 496.

Discussion

Following the dismissal by the school district, the plaintiff requested a public meeting and on January 9, 1979, he and his representative from the New Jersey Education Association charged that the dismissal was reached with a written statement of the reasons. The school district contended that the sole reason for dismissal was the unauthorized absence from school for the two periods on December 1, 1978. However, the plaintiff contended that his dismissal was unrelated to the two-period absence but rather based upon his unauthorized absent for the six-day period in October. The plaintiff further contended that

[113]Niederhuber v. Camden County, 495 F. Supp.273 (1980).

[114]Ibid.

even if the two period absence was a factor in his dismissal, the school district would not have reached the same decision if it had not considered this religious absence in addition to his two-period absence on December 1, 1978.[115]

The court in citing Mt. Healthy guidelines for analyzing the evidence in the case found the following:

(1) the plaintiff's six-day religious absence was a "motivating factor" in the dismissal;

(2) the superintendent and the school board would not have reached the same decision had they relied exclusively on the two-period absence.[116]

The court insisted that a mid-term dismissal was the most severe sanction that could be imposed upon the teacher and the alleged loss of efficient functioning of the educational process to be inconceivable and unsupported by credible evidence.[117]

Hunterdon v. Hunterdon
N.J. Super. A.D., 416 A.2d 980 (1980)

Facts

A teacher employed in the Hunterdon School District

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[115]Ibid.

[116]Mt. Healthy v. Doyle, 429 U.S. 274 (1977).

[117]Niederhuber v. Camden County, 495 F. Supp. 273 (1980).

submitted a written request for permission to take a "religious leave day." The board's personnel director granted the leave on the condition that the leave be taken either without pay or be charged against the allowable number of leave days for personal reasons, as provided in the collective agreement between the teacher's association and the school district. The teacher protested, claiming discrimination in that other teachers had been paid for religious absences. After the teacher unsuccessfully sought redress through the contractual grievance procedure, the teacher association agreed to arbitration and served two demands on the board for arbitration: (1) a unilateral change in temporary leave policy, and (2) improper denial of religious holidays.[118]

Decision

The New Jersey Public Employment Relations Commission ruled that granting additional days off with pay for religious observances violated the constitutional prohibition against the establishment of religion, and also that the demand for arbitration is outside the scope of collective negotiations and is neither negotiable nor arbitrable, accordingly granting permanent restraints on arbitration. Action of the Public Employment Relations Commission affirmed by the

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[118]Hunterdon v. Hunterdon, N.J. Super. A.D., 416 A2d 980 (1980).

Superior Court.[119]

Discussion

The Superior Court, New Jersey, held that the New Jersey statute defines the scope of collective negotiation and allows the PERC to make jurisdiction determinations. The court took the view that agreements made by a school board does not include provisions to grant paid leave for religious purposes. Such agreement would not meet the requirement set forth in the Lemon decision, which held that the action must have a secular purpose, neither advancing nor inhibiting religion, and be free of excessive government entanglement with religion.[120] Here, the court concluded there would be no secular purpose and the sole purpose would be to permit certain teachers to be absent for religious reasons, even though the days may be limited. Moreover, the effect would enhance religion at the exclusion of those having no religious persuasion. Since tax money would be used to pay the religious teachers, the action would be intertwining with religion.[121]

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[119]Hunterdon v.Hunterdon, N.J. Super. A.D., 416 A2d 980 (1980).

[120]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[121]Hunterdon v. Hunterdon, N.J. Super. A.D., 416 A2d 980 (1980).

Edwards v. Norton
658 F.2d 951 (1981)

Facts

Ruby Edwards, a teacher aide for the Norton school board beginning in 1967, was initially assigned to prepare teaching material, collect lunch money,and grade papers. Later her duties evolved to instructing mentally retarded students and slow learners. The plaintiff, a member of the World Wide Church of God whose doctrines prohibited secular work on certain holy days, was reemployed for 1968-1969 and the 1969-1970 school terms. During these school terms, the district accommodated Edwards' religious practices by allowing her to abstain from work and observe her church's holy days. In the fall of 1971, Edwards was advised that her observances for holy days would no longer be permitted with the explanation that her increased duties and unavailability of substitute aides required her daily presence. Her employment was reviewed for 1971-1972 and despite the admonition, she was allowed to observe the holy days. Subsequently, her 1972-1973 employment was granted, and in September, 1972, her request for religious leave was denied. Following her previous practice, she absented herself from work. The school district terminated her employment because of the unauthorized leave.

After her discharge, the plaintiff filed a complaint

with the Equal Employment Opportunities Commission charging discrimination under provisions of Title VII of the Civil Rights Act of 1964 and received a right-to-sue letter. Timely action was initiated in the United States District Court of Virginia.[122]

Decision

The United States District Court held that the school district failed to prove that accommodating Edwards' religious practices would create an undue hardship on the school's operation as provided under provision of 42 U.S.C. 2000e (2)(1) and limited back pay with denial of reinstatement. The Fourth Circuit Court of Appeals vacated the denial of reinstatement and amount of back pay.[123]

Discussion

The issue in appeals was whether the District Court remedy for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e 2 (a)(1) is legally adequate. The court limited the back pay to the balance of the amount due for the contract year of 1972-1973 and denied reinstatement.

In contrast to procedural rights of the due process clause, Title VII creates a substantive right. The Circuit

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[122]Edwards v. Norton, 658 F.2d 951 (1981).

[123]Ibid.

Court stated that the legislation was in part enacted to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law. Congress authorized reinstatement and back pay,but it did not authorize restricting the award of the unpaid balance of the salary for the remaining period of an employee's current contract.[124]

Wangsness v. Watertown School District No. 14-4
541 F. Supp. 332 (1982)

Facts

Plaintiff, Orley B. Wangsness, a member of the World Wide Church of God whose tenets require its members to attend a religious festival known as the Feast of Tabernacles which is observed annually in the fall for seven days, was hired by the Watertown School District as junior high school industrial arts teacher for the 1973-1974 school year. In the early part of September, 1973,Wangsness requested in writing, a leave of absence from October 11, 1973 through Friday, October 19, 1973 to attend the Feast of Tabernacles. The request was denied by the principal and superintendent. Thereupon, Wangsness appealed to the school board. The school board denied the request and informed the plaintiff that his contract would be terminated if he took the leave.

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[124]Ibid.

Wangsness subsequently took the leave and was discharged by the defendent school board.

Following the termination of his contract, Wangsness filed a complaint with the Equal Employment Opportunities Commission (EEOC) and about the same time, filed a complaint with the South Dakota Commission on Human Rights.[125]

Decision

After filing his complaint with the EEOC alleging religious discrimination in violation of 42 U.S.C. 2000e-2(a)(1), the EEOC determined that there was reasonable cause to believe that the defendent school board had violated Title VII of the Civil Rights Act of 1964. Thereafter, Wangsness pursued action in the United States District Court of South Dakota. The district court, upon review of the evidence, held for the plaintiff.[126]

Discussion

In holding for the plaintiff, the court adjudged;

(1) that the plaintiff established a prima facie case of religious discrimination under 42 U.S.C., 2000e-2(a)(1);

(2) that the school board failed to make a good faith effort to accommodate the plaintiff's religious needs;

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[125]Wangsness v. Watertown, 541 F. Supp. 332 (1982).

[126]Ibid.

(3) that the school board failed to show that any reasonable accommodation would have resulted in undue hardship on the school system.[127]

In addressing the prima facie aspect,the court cited Brown v. General Motors in outlining the elements:

(1) a bona fide belief that compliance with work requirements is contrary to the plaintiff's religious faith;

(2) the plaintiff has informed the employer about the conflict; and

(3) the plaintiff was discharged because of refusal to comply with the work requirement.[128]

After establishing a prima facie case of discrimination, the burden shifts to the employer to accommodate the employee and if the efforts are unsuccessful, to demonstrate that to accommodate, an undue burden exists. This was not evident in the action of the defendent school board. In addressing the school board's hardship, the court deduced from the evidence that Wangsness had left detailed lesson plans with satisfactory instructions to the replacement teacher; the school board was unable to demonstrate that accommodating Wangsness would result in undue hardship.[129]

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[127]Ibid.

[128]Brown v. General Motors Corporation, 601 F2d 956 (1979).

[129]Wangsness v. Watertown, 541 F. Supp. 332 (1982).

Pinsker v. Joint District No. 28J
554 F. Supp. 1049 (1983)
735 F. 2d 388 (1984)

Facts

Gerald Pinsker, a Jewish teacher,brought suit under Title VII of the Civil Rights Act of 1964 claiming that the school year in the district was arranged so that in most school years Christian teachers need not use their personal leave days to observe religious holidays; but as a non-Christian, he claimed the school calendar interferred with the free exercise of his religion.[130]

Decision

The United States District Court for the District of Colorado entered judgement for the school district and the teacher appealed. On appeal the Tenth Circuit Court affirmed the findings for the school district.[131]

Discussion

The Court of Appeals held that the plaintiff was aware of the school board's policy at the time of his employment and did not then consider the leave provisions an impediment to his religious beliefs and practices. The contract

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[130]Pinsker v. Joint District No. 28J., 735 F2d 388 (1984).

[131]Ibid.

governing employment of teachers was one regularly negotiated between the defendent and the bargaining unit representing the teachers and was not one where employment was religiously tolerable and then became unacceptable by change of conditions. In fact, the leave provisions had become more liberal since the plaintiff's employment. The court held that the limitation of two days paid personal leave for teachers had tones of arbitrariness but the allowance of two days paid leave was a creature of negotiations which had a legitimate compelling public interest at the base. Moreover, the court held that a line had to be drawn in order to serve the students for whose benefit the school system exists. In finding for the school board, the court reasoned that the policy and practices neither jeopardized the teacher's job nor his observation of religious holidays. The policy,although it may require teachers to take occasional unpaid leave, is not an unreasonable accommodation of teachers' religious practices. Loss of a day's pay for time not worked does not constitute substantial pressure on a teacher to modify his or her behavior. The trial correctly determined that a prima facie case of religious discrimination did not exist.[132]

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[132] Ibid.

Philbrook v. Ansonia Board of Education
757 F.2d 476 (1985)

Facts

Ronald Philbrook, a teacher in the Ansonia School District and a member of the World Wide Church of God whose tenets prohibited secular work on church holy days,brought suit under Title VII, alleging that the school board's policy of allowing only three days of paid leave for religious observance and not allowing three days of paid leave for personal business to be used for religious observance conflicted with his religious beliefs.[133]

Decision

The United States District Court for the Division of Connecticut held that the teacher failed to prove religious discrimination. On appeal by the teacher, the Second Circuit Court of Appeals reversed and remanded the case.[134]

Discussion

In finding for the plaintiff, the Circuit Court drew on the Brown v. General Motors case in deducing from the evidence that Philbrook had satisfied the tests of proving a prima

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[133]Philbrook v. Ansonia Board of Education, 757 F2d 476 (1985).

[134]Ibid.

facie case of discrimination by the bona fide religious belief, informing the employer of the belief, and suffering for failure in complying with the employment requirements.[135] The appeals court in finding that the teacher had established religious discrimination held that Title VII requires that an employer accommodate an employee's religious needs short of an undue hardship. In this case, the teacher had offered to notify the school board well in advance and work alternate hours for makeup time missed from the regular school day. In addition, offer was made to meet with the substitute to ensure the quality and continuity of his student's education. The appeals court declared that under such circumstance it was unreasonable under Title VII for the school board not to accommodate the teacher's need for up to six days per year of paid leave for religious purposes.[136]

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[135]Brown v. General Motors Corporation, 601 F2d 956 (1979).

[136]Philbrook v. Ansonia Board of Education, 757 F2d 476 (1985).

CHAPTER VI

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

Early American settlers brought to this country their religious beliefs and practices centering around the Sabbath observances that had emerged from the Protestant Reformation. Their laws reflected the majority's attitude toward the Sabbath with beliefs and practices to insure its proper observance.

In this pluralistic religious environment, the constitutional writers did not attempt to define religion; but insisted that the federal government should not aid religion or prohibit its practice by the citizens. The several states remained free to enact legislation respecting religion until 1940 when the Fourteenth Amendment was adjudged to embrace all the liberties guaranteed by the First Amendment, rendering the states as incompetent as the federal government respecting religion.

The years since the passage of the Civil Rights Act of 1964 represent a period of unprecedented judicial activity concerning religious accommodation and discrimination complaints resulting from employment practices by private and public employers. The courts have considered and ruled on

cases brought under First Amendment guarantees and provisions of the Civil Rights Act of 1964 that required the employer to make reasonable accommodation for religious beliefs and practices short of undue hardship on the conduct of business.

Judicial decisions arising from litigation of the Civil Rights Act of 1964 and its amendments have found the provisions to be constitutional. The private or public employee is assured the right of free exercise of religion compatible with employment work rules. The employee and the employer share a responsibility to make accommodation for religious observances within these guidelines that although the Federal Constitution is neutral in respect to the establishment of a particular religion, the several states have statutes respecting religion in providing for employment schedules apart from the Sunday Sabbath.

All states provide for a sabbath observance in various ways.

Twenty-five states, the District of Columbia, and Puerto Rico have statutes granting public employees Sunday as a legal public holiday.

Twenty-five states have statutes inferring Sunday as a holiday by enumerating the work week exclusive of Sunday.

The states of Minnesota, Mississippi, Missouri, Oklahoma, Vermont, and Washington treat Sunday as the Sabbath in their statutes.

Ten states enumerate religious observance for the non-Sunday Sabbatarian.

Thirteen states have statutes granting religious observance for Good Friday.

North Carolina is the only state granting Easter Monday as a legal public holiday.

All fifty states, District of Columbia, and Puerto Rico, have statutes granting December 25th (Christmas) as a legal public holiday.

Arkansas, Georgia, South Carolina, and Wisconsin have statutes granting December 24th or a portion of the day as a legal public holiday.

Florida, Minnesota, and South Carolina have statutes providing December 26th as a legal public holiday.

All fifty states, District of Columbia, and Puerto Rico have statutes allowing the Governor or President of the United States to grant a special day or the last Thursday in November as a legal holiday for public worship and thanksgiving.

North Carolina is the only state to provide Yom Kippur as a legal holiday.

Rhode Island is the only state to provide for a Jewish Sabbath.

Kentucky, Mississippi, New Hampshire, New York, Oklahoma, Rhode Island, and South Carolina currently proscribe Sunday work excepting acts of mercy, charity, or acts of necessity

Questions and Answers

In the introductory material in Chapter I, some basic questions relating to the topic of this dissertation were proposed. Discussion developed around those six questions will provide insight concerning reasonable accommodation for religious observance by public school employees.

1. What constitutes reasonable accommodation for religious holiday observance by employees?

The major judicial decisions have focused on the reasonable accommodation/undue hardship dichotomy to consider anything more than a de minimis cost to the employer as an undue hardship on the conduct of business. The duty to accommodate falls upon the school board with neutrality rather than conferring employee privilege. Hardship by the employer cannot be hypothetical or conceivable but must be by demonstrative evidence that in so accommodating, the school board sufferred more than a de minimis cost. A de minimis cost includes an incidental burden such as administrative cost or temporary disruption of the work schedule.

2. When does religious accommodation (either short term or leave of absence for religious observance) for an employee place an undue hardship on the school board?

The school board, after being notified that the employee's religious requirements conflicts with the work schedule,

suffers an undue hardship after demonstrating that a qualified substitute is unavailable. The school board has the responsibility to find a replacement for a teacher's taking a religious leave of absence in the same manner as other reasons for leaves of absence, consistent with its jurisdictional authority to grant leaves of absence.

3. What is the legal authority of the school board to establish policy concerning religious holiday observance by the employee?

The common civil calendar (Gregorian) adopted by the more advanced nations takes into account the five-day work week leaving the Sabbath (Seventh-day and First-Day) free for the majority religions to observe their beliefs and practices. Moreover, the fifty states, District of Columbia, and Puerto Rico provide by statute the number of days school is to be in session as well as other special observances. School boards must accommodate employees' religious needs that conflict with the work week providing that in so accommodating those needs the conduct of the school's operation is not impaired. Policy governing that accommodation must meet constitutional muster by being secular in nature, neither promoting nor inhibiting the free exercise of religion, and being free from excessive entanglements with religion.

4. What are the legal aspects in implementation of policy by the school administration?

The Supreme Court's tripartite test applies to any policy respecting leaves of absence for religious purposes that the school board may adopt. The assurance of First Amendment religious rights of employees should be safeguarded by the school administration. Moreover, the administration should be aware of the provisions of the Civil Rights Act of 1964 which guarantees a nondiscrimination in employment practices. Receiving the employee's announcement of his religious needs conflicting with the work schedule and seeking mutual accommodation is essential in avoiding discrimination on grounds of religion.

5. Based on the results of recent court cases, what specific issues relating to religious holidays observance by employees are being litigated?

The Hardison case represents a reasonably clear model for establishing reasonable accommodation and undue hardship. A review of cases since Hardison reveals that criteria set forth there are used by inferior courts in litigation of reasonable accommodation.

The issue of discrimination on religious grounds in employment practices is being litigated in frequent occurances. In establishing a prima facie case of discrimination, the Brown case established three elements to be used, as follows: 1) Did the employee notify the employer that he held a bona fide belief that compliance with work requirements

is contrary to his religious faith? 2) Did the employee inform the employer about the conflict? 3) Was the employee discharged because of his refusal to comply with the work requirement?

6. Based upon the established legal precedents, what are the legally acceptable criteria for policy making concerning religious accommodation?

The Supreme Court and the Court of Appeals, relying on the Supreme Court landmark cases, have established criteria for policy making by the Lemon tripartite test. The judicial decision has affirmed the constitutionality of the Civil Rights Act of 1964 in employment practices intended to eliminate discrimination on grounds of religion and avoid a breach of the wall between church and state as set forth in Everson.

Conclusions

Based on review and analysis of major judicial decisions, the following conclusions are drawn:

(1) Though enactments respecting activity on the Sabbath had their genesis in religion, judicary decisions have come to regard the Sabbath as a secular day of rest in the public interest and benefits occurring to a particular religion are incidental.

(2) The school boards must show that accommodating an employee's religion practices causes an undue hardship in the

operation of the school by demonstrative evidence rather than on a hypothetical or conceivable basis.

(3) Undue hardship has to be demonstrated beyond a de minimis cost.

(4) The school board does not have to guarantee that an employee will never be asked to forego religious observance to fulfill employment needs.

(5) The employee must demonstrate accommodation on his or her part before shifting the total burden of accommodation to the employer.

(6) The employee must advise the employer of his religious needs that, if followed, will conflict with the employment work schedule and the employer has the burden to accommodate those beliefs short of undue hardship on the conduct of business.

(7) The employee, after notifying the employer of his religious needs and if not accommodated, has to establish a prima facie case of discrimination under provision of Title VII before shifting the burden of accommodation to the employer.

(8) The employer does not have to accommodate purely personal preference of its employees.

(9) Employer work rules respecting religion must meet constitutional muster by (a) being secular in nature; (b) not promoting or inhibiting free exercise of religion by the employees; (c) not causing an entanglement between its rules and religion.

(10) Accommodation for religion observance cannot abrogate a collective bargaining agreement between school board and teachers' unions.

Recommendations

Based on an analysis of judicial decision, the following recommendations are made:

(1) School boards and administrators should be aware of the plurality of religious beliefs held by the employees and adopt policies that are neutral in intent and effect.

(2) School boards and administrators should guarantee that policy dealing with employment practices are within the First Amendment limits as interpreted by the courts.

(3) School boards and administrators must be vigilant in keeping within the guidelines of the Civil Rights Act of 1964 in pre-employment and employment practices to eliminate discrimination on grounds of religion.

(4) School boards and administrators must ensure that neutrality is maintained in application of policy on religious observance by the employees.

(5) School boards and administrators should grant leaves of absence for religious reasons consistent with guidelines for other leaves of absence.

(6) School boards and administrators must be aware that undue hardship in making religious accommodation is construed by federal legislation as a relative rather than absolute

determination.

(7) School boards and administrators should not summarily refuse all requests for religious accommodation but accommodate the religious practices of current and prospective employees unless refusal can be justified by tangible hardship.

(8) School boards and administrators must be aware that cost associated with accommodation is compared with the employer's operating cost, size, and number of persons actually requiring accommodation.

(9) School boards and administrators, when made aware of an employee's religious needs, should provide more than one alternative for religious accommodation.

(10) School boards and administrators should adopt policy allowing at least four accommodation alternatives: voluntary substitution, flexible work scheduling, lateral transfer, and change of job assignments.

(11) School boards should be aware that religious accommodation results in undue hardship when proof is provided that such accommodation is a violation of a bona fide seniority clause in a collective bargaining contract.

(12) School boards and administrators should be aware that the First Amendment guarantees are beyond the reach of public sentiment and cannot be compromised by provincial opinion.

Concluding Statement

While no school board policy will ensure against the

initiation of court action by employees who feel that their religious rights have been violated, school boards and administrators can reduce the probability of having policies invalidated by formulating and implementing guidelines assuring neutrality and shared responsibility for reasonable accommodation for absences and leaves. Recent judicial decisions have required the employee to accept more responsibility in achieving a reasonable accommodation with the employer.

Further study is recommended to assist school boards and administrators in formulating and implementing policy to address issues emerging from recent judicial decisions that, while safeguarding individual religious rights, do not give religious concerns control over all secular interests at the market place.

Additional study is recommended to assist school boards and administrators in 1) avoiding religious discrimination in employment practices, 2) assessing instructional impact of teacher leaves of absence, and 3) developing criteria in establishing de minimis cost of religious accommodation for employees.

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APPENDIX

STATE STATUTES PROVIDING RELIGIOUS ACCOMMODATION FOR PUBLIC SCHOOL EMPLOYEES

...ALABAMA...

Holidays enumerated; observance of Veterans' Day by closing of schools, banks and government offices; bank closings on certain other holidays.

Section 1-3-8

(a) Sunday, Christmas day,...and the days designated by the governor for public thanksgiving shall each be deemed a holiday. If any holiday falls on Sunday, the following day is the holiday...

...ALASKA...

School holidays.

Section 14.03.050

(a) Public schools shall not be in session on school holidays which are...Thanksgiving Day...Christmas Day,...If one of these holidays falls on a Saturday, the Friday immediately preceding is a school holiday. If one of these holidays falls on a Sunday, the Monday immediately following is a school holiday. A teacher shall not be required to perform

employment services on these holidays, nor may the salary of a teacher be diminished because the teacher does not perform employment services on a school holiday.

Day in session.

Section 14.03.040

Each day within the school term is a day in session except Saturdays, Sundays and days designated as holidays...

...ARIZONA...

ARTICLE 1. SCHOOL YEAR AND ATTENDANCE REQUIREMENTS

School year; school month; holidays

Section 15-801

(a) Except as may be otherwise authorized by the superintendent of public instruction to accommodate an approved extended school year operation, the school year shall begin July 1 and end June 30 and a school month is twenty days, or four weeks of five days each.

(b) When Thanksgiving Day or December 25 occurs within the school week, the schools shall be closed and the compensation of the teachers shall not be diminished on that account. Governing boards of school districts may declare a recess during the Christmas holiday season not to exceed two school weeks and teachers shall receive compensation during the

recess.

...ARKANSAS...

HOLIDAYS

Official holidays.

Section 69-101

The following days are hereby declared to be the sole official holidays applicable to State Government in Arkansas:...
Thanksgiving Day - the fourth Thursday in November;
Christmas Eve - December 24;
Christmas Day - December 25.

Commercial paper payable day after holiday--Holiday falling on Sunday.

Section 69-103

...In case any legal holiday which falls upon Sunday, the next succeeding Monday shall be a legal holiday instead.

Thanksgiving day a legal holiday.

Section 69-107

Any day made or designated by Act of Congress of the United States of America as a day of general Thanksgiving shall be proclaimed by the Governor as a legal holiday.

School "month" and school "day" defined.

Section 80-1602.

The term "month" as used in this act shall be construed to mean a period including twenty (20) school days, or four (4) weeks of five (5) such days each....

CONSTITUTION OF ARKANSAS

Article 2, sec. 24

Religious liberty.

Section 24

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other.

NOTES

Sabbath Breaking.

The Sabbath statute is a civil regulation providing for a

day of rest and imposes on no one any religious ceremony or form of worship. Scales v. State, 47 Ark. 476, 1 S.W. 769, 58 Am Rep. 768. (1886).

Christian Religion.

The Christian religion is part of the common law, and its institutions may be protected by law. Shover v. State, 10 Ark. 259.

...CALIFORNIA...

HOLIDAYS

Days that are holidays; Memorandum of understanding; Altering date of holiday.

Section 6700.

The holidays in this state are:

(a) Every Sunday....

(l) December 25th.

(m) Good Friday from 12 noon until 3 p.m.

(n) Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.

Holidays falling on Saturday or Sunday.

If...December 25th falls upon a Sunday, the Monday following is a holiday....

NOTES

"Holiday" has reference to day set apart for worship, for

reverence to memory of great leaders and benefactors, to rejoice over some great national or historical event, or to rekindle flame of an idea. Vidal v. Backs 218 C 99, 21 P2d 952, 86 ALR 1134 (1933)

...COLORADO...

School year - national holidays.

Section 22-1-112

The school year shall begin on the first day of July and end on the thirtieth day of June. The term "national holidays" in this title shall be construed to mean Thanksgiving day, Christmas day, New Year's day...

HOLIDAYS

Legal Holidays - effect.

Section 24-11-101

(1) The following days, viz: ...the twenty-fifth day of December, commonly called Christmas day; and any day appointed or recommended by the governor of this state or the President of the United States as a day of fasting or prayer or thanksgiving, are hereby declared to be legal holidays and shall, for all purposes whatsoever, as giving notice of the dishonor of bills or exchange, drafts, bank checks, promissory notes, or other negotiable instruments and also for the

holding of courts, be treated and considered as is the first day of the week commonly called Sunday.

...CONNECTICUTT...

CHAPTER 2

LEGAL HOLIDAYS AND STANDARD OF TIME

Days designated as legal holidays

Section 1-4

In each year...the twenty-fifth day of December (known as Christmas) and any day appointed or recommended by the governor of this state or the president of the United States as a day of thanksgiving, fasting or religious observance, shall each be a legal holiday, except that whenever any of such days which are not designated to occur on Monday occurs upon a Sunday, the Monday next following such day shall be a legal holiday and whenever any of such days occurs upon a Saturday, the Friday immediately preceding such day shall be a legal holiday. When any such holiday occurs on a school day, there shall be no session of the public schools on such day.

Towns to maintain schools.

Section 10-15

Public schools including kindergartens shall be maintained in each town for at least one hundred eighty days of actual school sessions during each year. When public school sessions are cancelled for reasons of inclement weather or otherwise, the rescheduled sessions shall not be held on Saturday or Sunday.

Persons who observe Saturday excepted from Sunday Law.

Section 53-303.

No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, or who conscientiously believes that the Sabbath begins at sundown on Saturday night, and actually refrains from secular business and labor during said period, and who has filed written notice of such belief with the prosecuting attorney of the court having jurisdiction, shall be liable to prosecution for performing secular business and labor on Sunday, provided he shall not disturb any other person who is attending public worship.

...DELAWARE...

CHAPTER 5. LEGAL HOLIDAYS

Designation.

Section 501

The following days shall be legal holidays in this state: ...Good Friday; ...the fourth Thursday in November, known as Thanksgiving Day; the 25th of December, known as Christmas.
If any of the legal holidays fall on Sunday, the Monday following shall be a legal holiday.

...FLORIDA...

LEGAL HOLIDAYS

Legal holidays designated

Section 683.01

(1) The legal holidays are; The first day of the week, commonly called Sunday; ...Thanksgiving Day; December 25, Christmas day; Good Friday;...
(2) Whenever any legal holiday shall fall upon a Sunday, the Monday next following shall be deemed a public holiday for all and any of the purposes aforesaid.
(16) School vacation period. - That period of the school year beginning on or before December 24 and continuing for a period of time to be fixed by the school board which shall include January 1, shall be set apart as a vacation period, and that time shall not be considered a part of the school month.

GEORGIA

HOLIDAYS AND OBSERVANCES

Public and legal holidays.

Section 1-4-1.

(a) The following days are declared to be public and legal holidays in Georgia: ...

(11) The fourth Thursday in November, known as Thanksgiving Day;

(12) December 25, known as Christmas Day; and

(13) Any day proclaimed or designated by the Governor of this state or the President of the United States as a day of fasting and prayer or other religious observance.

(b) Whenever a public and legal holiday, occurs on a Saturday, the preceding Friday shall be observed as a public and legal holiday. Whenever a public and legal holiday occurs on a Sunday, the following Monday shall be observed as a public and legal holiday.

Religious holidays.

Section 1-4-2

The only days to be declared, treated, and considered as religious holidays shall be the first day of each week, called Sunday.

...HAWAII...

GENERAL PROVISIONS

CHAPTER 8

HOLIDAYS

Holidays designated.

Section 8-1

The following days of each year are set apart and established as state holidays:

The Friday preceding Easter Sunday, Good Friday;

The fourth Thursday in November, Thanksgiving Day;

The twenty-fifth day of December, Christmas Day;...

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

Hours of work of officers and employees; compensation for overtime; and premium pay.

Section 80-4

For pay and leave purposes, if a legal holiday falls on a Sunday and following Monday is observed as a holiday pursuant to section 8-2:

(1) For employees whose regular workweek does not include Sunday, the next regular workday following Sunday shall be held and considered a legal holiday, in lieu of the holiday which so occurs on Sunday.

...IDAHO...

CONSTRUCTION OF STATUTES

Holidays enumerated.

Section 73-108

Holidays, within the meaning of these compiled laws, are:
Every Sunday;...
Fourth Thursday in November (Thanksgiving Day);
December 25 (Christmas);
Every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday.
Any legal holiday that falls on Saturday, the preceding Friday shall be a holiday and any legal holiday enumerated herein other than Sunday that falls on Sunday, the following Monday shall be a holiday.

...ILLINOIS...

Holidays.

Section 17-2201

...the twenty-fifth of December, commonly called Christmas Day..

Holidays.

Section 122-24-2

...A teacher shall not be required to teach...Good Friday... December 25th and any other day appointed by the President of the United States or Governor as a day of fast or thanksgiving. School boards may grant special holidays whenever in their judgment such action is advisable. No deduction shall be made from the time or compensation of a teacher on account of any legal or special holiday.

Good Friday.

Section 17-2202

(1) The Friday immediately before Easter Sunday of each year known as Good Friday shall be a legal holiday in this state.

...INDIANA...

CHAPTER 9

LEGAL HOLIDAYS

Legal Holidays.

Section 1-1-9-1

The following are legal holidays within the state of Indiana for all purposes:...the movable feast day of Good Friday;... Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25; the day of any general, national, state or

city election or primary; and the first day of the week, commonly called Sunday.

Government of schools.

Section 33-512

(9) To determine school holidays. Any listing of school holidays shall include not less than the following: New Year's Day, Memorial Day, Independence Day, Thanksgiving Day, and Christmas Day..

...IOWA...

Legal public holidays.

Section 33.1

The following are legal public holidays: ...

8. Thanksgiving Day, the fourth Thursday in November.

9. Christmas Day, December 25.

CHAPTER 33. PUBLIC HOLIDAYS

Paid holidays.

Section 33.2

State employees are granted, except as provided in the fourth paragraph of this section, the following holidays off from employment with pay:

7. Christmas Day, December 25.

School year.

Section 279.10

The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and may be maintained during the entire calendar year.

...KANSAS...

Article. - LEGAL HOLIDAYS

Legal public holidays designated.

Section 35-107

(a) On and after January 1, 1976, the following days are declared to be legal public holidays and are to be observed as such:

Thanksgiving Day, the fourth Thursday in November;

Christmas Day, December 25.

Chapter 69. - SABBATH

Section 69-101

Persons keeping Saturday as Sabbath; when exempt from military duty or jury service. No person whose religious faith and practice is to keep the seventh day of the week, commonly called Saturday, as a day set apart by divine command as the

Sabbath of rest from labor and dedicated to the worship of God, shall be subject to perform military duty or to serve as a juryman in a justice's court on that day, except that such person shall be subject to perform military duty at any time in case of insurrection, invasion, or time of war.

...KENTUCKY...

Holidays. (Effective January 1, 1986)

Section 2.110

(1)...the 25th day of December (Christmas Day) of each year, and all days appointed by the President of the United States or by the governor as days of thanksgiving, are holidays, on which all the public offices of this Commonwealth may be closed; and subject to the provisions of subsection (2) of this section, shall be considered as Sunday for all purposes regarding the presenting for payment or acceptance, and of protesting for and giving notice of the dishonor of bill... If any of the days named as holidays occur on Sunday, the next day thereafter shall be observed as a holiday...

Working on Sunday - Work of necessity or charity,...and certain businesses and employers excluded.

Section 436.160

(1) Any person who works on Sundays at his own or at any other occupation or employs any other person, in labor or

other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system....

(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one (1) day in each seven (7).

School month and school day.

Section 158.060

Twenty (20) school days, or days in which teachers are actually employed in the schoolroom, shall constitute a school month in the common schools. The legal holidays designated by the state board of education to be observed may include the first Tuesday after the first Monday in November of each year and shall be counted as school days. No teacher shall teach on Saturdays except in cases of emergency and then only upon authorization of the state board of education....

...LOUISANA...

Days of public rest, legal holidays and half-holidays.

Section 55.

A. The following shall be days of public rest and legal holidays and half-holidays:

(1) The following shall be days of public rest and legal holidays; Sundays,...Good Friday...the fourth Thursday in November, Thanksgiving Day; December 25, Christmas Day;...

...MAINE...

Holidays.

Section 4802

The following provisions shall apply to school holidays.

1. Unconditional holidays. Public schools shall close on the following days:

G. Thanksgiving Day, as designated by the Governor; and

H. Christmas Day, December 25th.

2. Conditional holidays. Public schools shall close on the following days unless the school board votes to keep its school open and observe the day with special exercises as defined in section 4803:

A. New Year's Day, January 1st; and

B. Washington's Birthday, the 3rd Monday in February.

Special observance days.

Section 4803.

Days marked by special observances shall be established as

follows:

5. Temperance Day. Temperance Day, March 1st, shall be observed by studying the history and benefits of temperance laws for at least 45 minutes. The commissioner shall prepare appropriate materials for this observance;

Sunday Holidays.

Section 4804

When a holiday or special observance falls on a Sunday, the following Monday shall be considered the holiday or day of special observance.

Definition of Lord's Day.

Section 3201.

The Lord's Day includes the time between 12 o'clock on Saturday night and 12 o'clock on Sunday night.

Saturday as holy day.

Section 3209.

No person conscientiously believing that the 7th day of the week ought to be observed as the Sabbath, and actually refraining from secular business and labor on that day, is liable to said penalties for doing such business or labor on the first day of the week, if he does not disturb other

persons.

Legal holidays.

Section 1051.

No court may be held on Sunday or any day designated for the annual Thanksgiving...or on Christmas Day.

...MARYLAND...

Legal holidays.

Article 1, Section 27.

(a) "Legal holiday" defined - In this code and any rule, regulation, or directive adopted under it, "legal holiday" means:

(6) Good Friday;

(13) The fourth Thursday in November, for Thanksgiving Day;

(14) December 25, for Christmas Day;

(16) Each other day that the President of the United States or the Governor designates for general cessation of business.

SABBATH BREAKING

Working on Sunday; permitting children or servants to game hunt, etc.;...and certain persons excepted.

Section 492

No person whatsoever shall work or do any bodily labor on

the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fowling, hunting, or unlawful pastime or recreation.

(2) To any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, and whose business establishment or establishments...are actually closed on that day; or

(3) To any person who conscientiously believes that the Sabbath begins at sundown on Friday night and ends at sundown on Saturday night and who actually refrains from secular business and labor during such period, and whose business establishment.....are actually closed during such period.

...MASSACHUSETTS...

<u>"Legal Holiday" - Eighteenth</u>

Chapter 4, Section 7

"Legal Holiday" shall include...and Christmas Day, or the day following when any of said days occur on Sunday,...and Thanksgiving Day.

Establishment of Guidelines for celebration of Christmas and Other Festivals.

Chapter 71, Section 31A

The school committee may set appropriate guidelines for the celebration of Christmas and other festivals observed as holidays for the purpose of furthering the educational, cultural and social experiences and development of children.

Sunday Is Common Day of Rest;

Chapter 136, Section 1.

Sunday shall be a common day of rest. Sections one to eleven, inclusive, of this chapter may be cited as the Common Day of Rest Laws.

One Day's Rest in Seven; Penalty.

Chapter 149, Section 47.

Whoever, except at the request of the employee, requires an employee engaged in any commercial occupation or in the work of transportation or communication to do on Sunday the usual work of his occupation, unless he is allowed during the six days next ensuing twenty-four consecutive hours without labor, shall be punished by a fine of not more than fifty dollars; but this and the following section shall not be construed as allowing any work on Sunday not otherwise authorized by law.

One Day's Rest in Seven; Penalty.

Chapter 149, Section 48.

Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop in the commonwealth shall allow every person, except those specified in section fifty, but including watchmen and employees maintaining fires, employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days.

Penalty for Requiring Labor on Holiday.

Chapter 149, Section 45.

Whoever requires an employee to work in any mill or factory on any legal holiday, except to perform such work as is both absolutely necessary and can lawfully be performed on Sunday, shall be punished by a fine of not more than five hundred dollars.

...MICHIGAN...

Seventh day as sabbath, period of time included.

Section 18-.856(1)

Sec. 1. Whenever in the statutes of this state, rights, privileges, immunities or exemptions are given or duties and responsibilities are imposed on persons who conscientiously believe the seventh day of the week ought to be observed as the sabbath, said sabbath or seventh day shall mean and be construed in accordance with the worship and belief of such person to include the period from sunset on Friday evening to sunset on Saturday evening.

Legal Holidays

Public holidays for bills and notes transactions and holding of courts; banking business; adjournment of cases; Saturdays.

Section 18.861

The following days namely:...December 25, Christmas day;...

Analysis of Note

13. What days are holidays....the 25th day of December, commonly called "Christmas Day,"...and any day appointed or recommended by the governor of this state or the President of the United States as a day of fasting and prayer or thanksgiving were holidays, under a prior act. People v. Ackerman, 80 Mich. 588.

Holiday on Sunday, observance on Monday.

Section 18-862

Sec. 2 Whenever ..or December 25 shall fall upon Sunday, the next Monday following shall be deemed a public holiday for any or all of the purposes aforesaid.

Public Holidays....

Section 18-861

The following days namely:...December 25, Christmas day;.... and the fourth Thursday of November, Thanksgiving Day, for all purposes whatever as regards...except as otherwise provided in this act, shall be treated and considered as the first day of the week, commonly called Sunday and as public holidays or half holidays.

...MINNESOTA...

Conduct of school on certain holidays.

Section 126.13

The governing body of any district may contract with any of the teachers thereof for the conduct of schools, and may conduct schools, on either, or any, of the following holidays, provided that a clause to this effect is inserted in the teacher's contract; Lincoln's and Washington's birthdays, Columbus Day and Veterans' Day,...

Holidays, (Subdivision 5.)

Section 645.44

"Holiday" includes...Thanksgiving Day, the fourth Thursday in November; and Christmas Day, December 25; provided, when ...Christmas Day, December; falls on Saturday, the following day shall be a holiday. (effective January 1, 1986)

SABBATH BREAKING

Sabbath breaking; day

Section 624.01

The law prohibits the doing on the first day of the week of the certain acts specified in section 624.02, which are serious interruptions on the repose and religious liberty of the community, and the doing of any such acts on that day shall constitute Sabbath breaking. Under the term "day", as used in this section and section 624.02, is included all the time from midnight to midnight.

...MISSISSIPPI...

Legal Holidays.

Section 3-3-7.

The following are declared to be legal holidays,...the day fixed by proclamation by the governor of Mississippi as a day of thanksgiving which shall be fixed to correspond to

the date proclaimed by the President of the United States (Thanksgiving Day); and the twenty-fifth day of December (Christmas Day). Provided, however, that in the event any holiday herein before declared legal shall fall on Sunday, then the next following day shall be a legal holiday.

Closing of schools for holidays and emergencies.

Section 37-13-65

(1) The county superintendent of education, with the approval of the county board of education, may close all schools in the county school system for the Christmas holidays for an equal period of time, but not exceeding two weeks.
(2) The board of trustees may close all schools in the municipal separate school district for the Christmas holidays for an equal period of time, but not exceeding two weeks,...

Holidays.

Section 37-13-69.

All public schools of this state may observe such legal holidays as may be designated by the state board of education, and no sessions of school shall be held on holidays so designated and observed...The holidays thus observed shall not be deducted from the reports of the superintendents, principals and teachers shall be allowed pay for full time as though they had taught on said holidays.

Sunday - Violations of Sabbath generally.

Section 97-23-63

If any person on the first day of the week, commonly called Sunday, shall himself labor at his own or any other trade, calling or business, or shall employ his apprentice or servant in labor or other business, except it be in the ordinary household offices of daily necessity or other work of necessity or charity, or other activity hereinafter expressly excepted, he shall, on conviction, be fined.... Nothing in this section shall prohibit churches or religious societies or their officers, agents and employees from transacting any business, or performing any action the first day of the week, commonly called Sunday,...

...MISSOURI...

Public holidays.

Section 9.010

...the fourth Thursday in November, and the twenty-fifth of December, are declared and established public holidays; and when any of such holidays falls upon Sunday, the Monday next following shall be considered the holiday.

School holidays.

Section 171-051

School holidays include...December twenty-fifth,...

No penalty, when

Section 578.115

No person may be denied employment or advancement in employment because of his or her refusal to work on his or her normal day of worship.

...MONTANA...

Legal holidays and business days.

Section 1-1-216

(1) The following are legal holidays in the state of Montana:

(a) Each Sunday;

(j) Thanksgiving Day, the fourth Thursday in November;

(k) Christmas Day, December 25;

(2) If any of the above-enumerated holidays (except Sunday) fall upon a Sunday, the Monday following is a holiday. All other days are business days.

School holidays.

Section 20-1-305

(1) Pupil instruction and pupil-instruction-related days shall not be conducted on the following holidays:...

(f) Christmas Day (December 25);...

(2) When these holidays fall on Saturday or Sunday, the preceding Friday or the succeeding Monday shall not be a school holiday.

Commemorative exercises on certain days.

Section 20-1-306

Attorney General's Opinions.

"School Holidays" and "Legal Holiday": School district employees, nonteaching and teaching alike, throughout the state of Montana, are entitled to days off on those holidays enumerated in 20-1-305, rather than the holidays of 1-1-216. School district employees are therefore entitled only to days off on...Christmas Day,...

Provisions of school code excepted.

Section 20-1-307

Attorney General's Opinions.

"School Holidays" and "Legal Holidays": School district employees, nonteaching and teaching alike, throughout the state of Montana, are entitled to days off on those holidays enumerated in 20-1-305, rather than the holidays of 1-1-216. School district employees are therefore entitled only to... Christmas Day,...

...NEBRASKA...

ARTICLE 3

MISCELLANEOUS PROVISIONS

Holidays, enumerated:....

Section 62-301

(1) For the purpose of the Uniform Commercial Code and section 62-301.1, the following days shall be holidays: ...; Thanksgiving Day, the fourth Thursday in November;... and Christmas Day, December 25. If any of such dates fall on Sunday, the following Monday shall be a holiday.

...NEVADA...

Legal holidays; closing of state and county offices, courts, banks, savings and loan associations, public schools and University of Nevada System.

Section 236.015

1. The following days are declared to be legal holidays for state and county government offices:...Fourth Thursday in November (Thanksgiving Day); December 25 (Christmas Day). Any day that may be appointed by the President of the United States or by the governor for public fast, thanksgiving or as a legal holiday except for any Presidential appointment of the fourth Monday in October as Veterans' Day.

Governor may proclaim holidays:...

Section 223.130

1. The governor shall have the power to issue proclamations designating certain days or weeks as holidays or legal holidays for purposes of celebration or otherwise.
2. All days declared by the governor to be legal holidays shall be observed by the closing of all offices of the state and subdivisions thereof,...public schools, unless all or part thereof are specifically exempted.

SCHOOL TERMS: HOLIDAYS AND OBSERVANCES

School year.

Section 388. 080

1. Except as otherwise provided in subsection 2, the public school year commences on the 1st day of July and ends on the last day of June.

...NEW HAMPSHIRE...

Holiday Work

Holidays

Section 275-28

No employee shall be required to work in any mill or factory

on any legal holiday, except to perform such work as is both absolutely necessary and can lawfully be performed on the Lord's Day.

Sunday Work.

Section 275-32

Whoever requires an employee engaged in any occupation to do on Sunday the usual work of his occupation, unless he is allowed during the six day next ensuing 24 consecutive hours without labor, shall be fined not more than $50; provided that this section and the following section shall not be construed as allowing any work on Sunday not otherwise authorized by law.

Day of Rest.

Section 275-33

No employer shall operate any such business on Sunday unless he has posted in a conspicuous place on the premises a schedule containing a list of employees who are required or allowed to work on Sunday and designation the day of rest for each, and shall promptly file a copy of such schedule and every change therein with the labor commissioner. No employee shall be required to work on the day of rest designated for him. Whoever violates this section shall be fined $50.

School Holidays.

Section 288:4

Any school, college or university which is supported by money which is appropriated by the state or by any city, town or school district shall not be open for regular instructional purposes on Veterans' Day and Memorial Day as established in RSA 288:1 and as observed as provided in RSA 288:2. Any person who permits or authorizes such school, college or university to be open in violation of this section shall be guilty of a violation.

Sunday Work.

Section 332-D:1

No person shall do any work, business, or labor of his secular calling, to the disturbance of others, on the first day of the week, commonly called the Lord's Day, except works of necessity and mercy, and the making of necessary repairs upon mills and factories which could not be made otherwise without loss to operatives; and no person shall engage in any play, game, or sport on that day.

Exceptions.

Section 332-D:4

Nothing in this chapter shall prevent the selectmen of any

town, or the city council of any city, from adopting bylaws and ordinances permitting and regulating retail business, plays, games, sports, and exhibitions on the Lord's Day, provided such bylaws and ordinances are approved by a majority vote of the legal voters present and voting at the next regular election...

Holidays.

Section 288:1

Thanksgiving Day whenever appointed.
...and Christmas Day are legal holidays.

Falling on Sunday.

Section 288:2

When either of the days mentioned in RSA 288:1 falls on Sunday, the following day shall be observed as a holiday.

...NEW JERSEY...

CHAPTER 1

LEGAL HOLIDAYS AND EFFECT THEREOF

Presentment or payment of bill; checks; transaction of public business; state and county offices closed.

Section 36: 1-1

The following days in each year shall, for all purposes whatsoever as regards...be treated and considered as the first day of the week, commonly called Sunday, and as public holidays:...the days designated and known as Good Friday; ...the fourth Thursday of November, known as Thanksgiving Day;...December 25, known as Christmas Day;...and any day heretofore or hereafter appointed, ordered or recommended by the Governor of this State, or the President of the United States, as a day of fasting and prayer, or other religious observance...

Rules regarding religious holidays.

Section 18A:36-16

The commissioner, with the approval of the state board, shall prescribe rules relative to absences for religious holidays including, but not limited to, a list of holidays on which it shall be mandatory to excuse a pupil, but nothing herein contained shall be construed to limit the right of any board of education, at its discretion, to excuse absence on any other day by reason of the observance of a religious holiday.

...NEW MEXICO...

Legal Holiday; designation.

Section 12-5-2.

Legal public holidays in New Mexico are:...Thanksgiving Day, fourth Thursday in Nôvember; and Christmas Day, December 25.

...NEW YORK...

The Sabbath.

Section 2. General Business Law

The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

5. Generally.

The public policy of the state is to set aside Sunday as a day of repose. #DePaul v. Berkowits, 1967, 54 Misc.2d 156, 281 N. Y. S. 2d 449

The Sabbath is a political and civil institution as well as a religious institution, and subject to regulation by the civil government. #People v. Polar Vent of America, Inc. 1957, 151 N.E. 2d 621

Sabbath Breaking.

Section 3

A violation of the foregoing prohibition is Sabbath breaking #Sec. 2.

Punishment for Sabbath breaking.

Section 4.

Sabbath breaking is a misdemeanor,....

Labor prohibited on Sunday.

Section 5.

All labor on Sunday is prohibited, excepting the works of necessity and charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community.

Persons observing another day as a Sabbath.

Section 6.

It is a sufficient defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons observing the first day of the week as holy time.'

GENERAL CONSTRUCTION LAW

Public holidays; half-holidays.

Section 24.

The term public holiday includes the following days in each year: the second Sunday in June, known as Flag Day;...the fourth Thursday in November, known as Thanksgiving Day; and the twenty-fifth day of December, known as Christmas Day, and if any of such days except Flag Day is Sunday, the next day thereafter; ... and each day appointed by the President of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances.

EDUCATION LAW

Conditions under which districts are entitled to apportionment.

Section 3604

8. No school shall be in session on a Saturday or a legal holiday, except general election day,...

8-b.[1] Notwithstanding the provisions of subdivision eight of this section, a trustee or board of trustees or a board of education of a school district having fewer than six hundred pupils in grades kindergarten through twelve may provide for classes to be held on any day of the week in connection with educational programs for the disadvantaged operated under the elementary and secondary education act;[2] provided, however, no pupils or teachers shall be required to attend such classes if they observe any such day as a Sabbath or a holy day in

accordance with the requirements of their religion.

...NORTH CAROLINA...

CHAPTER 103.

SUNDAYS, HOLIDAYS AND SPECIAL DAYS.

Dates of public holidays.

Section 103-4

(a) The following are declared to be legal public holidays:

(8) Easter Monday.

(11a) Yom Kippur.

(14) Thanksgiving Day, the fourth Thursday in November

(15) Christmas Day, December 25

Length of school day, month, and term: Veterans' Day.

Section 115C-84

(b) School Month. ...Whenever it is desirable to complete the school term of 180 days in a shorter term than nine calendar months, the board of education of any local school administrative unit may, in its discretion, require that school shall be taught on legal holidays, except Sundays, and in accordance with the custom and practice of such

community.

Observance of Bona Fide Religious Holidays.

Section 16 NCAC 2 F .0108 (J)

(j) Absence from school for bona fide religious holidays may be allowed for a maximum of two days within any one school year with prior approval from the superintendent. The teacher must agree to make up the amount of time for which his or her absence has been excused. The superintendent, in consultation with the teacher, shall designate such religious holidays, provided that such days are not already scheduled as vacation or other holidays in the school calendar. The designation of annual leave days(s) immediately following the last day of regularly scheduled classes for students for that school year shall be presumed to be reasonable. Any such absence shall be with full pay.

...NORTH DAKOTA...

Holidays. Holidays are as follows:

Section 1-03-01

1. Every Sunday
4. The Friday next preceding Easter Sunday and commonly known as Good Friday.
9. The fourth Thursday in November, which is Thanksgiving Day.

10. The twenty-fifth day of December, which is Christmas Day.
11. Every day appointed by the President of the United States or by the governor of this state for a public holiday.

School holidays defined.

Section 15-38-04

School holidays defined.

The following days shall be school holidays, and schools shall not be in session thereon:

(1) Every Sunday.
(4) Christmas Day, the twenty-fifth day of December.
(6) Thanksgiving Day, the fourth Thursday in November.
(7) Good Friday, the Friday next preceding Easter Monday.
(10) Every day appointed by the President of the United States or by the governor of this state for a public holiday.

...OHIO...

School holidays specified.

Section 3313.63

Boards of education may dismiss the schools under their control on...the fourth Thursday in November, the twenty-fifth day of December, and on any day set apart by proclamation of the president of the United States, or the governor of this

state as a day of fast, thanksgiving, or mourning...

First day excluded and last day included in computing time; exceptions; legal holiday defined.

Section 1.14

"Legal holiday" as used in this section means the following days:

(I) The fourth Thursday in November, known as Thanksgiving Day;

(J) The twenty-fifth day of December, known as Christmas Day;

(K) Any day appointed and recommended by the governor of this state or the President of the United States as a holiday.

If any day designated in this section as a legal holiday falls on Sunday, the next succeeding day is a legal holiday.

...OKLAHOMA...

CHAPTER 2. HOLIDAYS

Designation and dates of holidays.

Section 82.1

The designation and dates of holidays in Oklahoma shall be as follows: Each Sunday,...Thanksgiving Day on the fourth Thursday in November; Christmas on the 25th day of December;

and if any of such holidays other than Sunday at any time fall on Sunday, the succeeding Monday shall be a holiday in that year.

Additional holidays - Acts performable - Optional closing by banks and offices.

Section 82.2

The following additional days are designated as holidays: ...Mother's Day on the second Sunday in May; ...Youth Day on the third Sunday in March each year; ...and such other days as may be designated by the President of the United States or the Governor of the State of Oklahoma.

Sabbath-breaking defined.

Section 908

The following are the acts forbidden to be done on the first day of the week, the doing of any of which is Sabbath-breaking:

First. Servile labor, except works of necessity or charity.

Second. Trades, manufactures and mechanical employment.

Third. All shooting, horse racing or gaming.

Fourth. All manner of public selling, or offering or exposing for sale publicly, of any commodities, except that meats, bread, fish and all other foods may be sold at anytime, and except that food and drink may be sold to be eaten and

drank upon the premises where sold, and drugs, medicines, milk, ice and surgical appliances and burial appliances and all other necessities may be sold at anytime of the day.

...OREGON...

Legal holidays; acts deferred to next business day.

Section 187.010

(1) The following days are legal holidays in this state:

(a) Each Sunday.

(h) Thanksgiving Day on the fourth Thursday in November.

(i) Christmas Day on December 25.

(2) Each time a holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be a legal holiday. Each time a holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be a legal holiday.

Additional legal holidays.

Section 187.020

(1) In addition to those specified in ORS 187.010, the following days are legal holidays in this state:

(b) Every day appointed by the President of the United States or by the Governor as a day of mourning, rejoicing or

other special observance.

School month; holidays; teachers' holiday pay; Saturday instruction.

Section 336.010

(1) The common school month consists of 20 days.

(5) No teacher shall be required to teach on any Saturday, except as provided in the terms of the teacher's employment, or any legal school holiday....

...PENNSYLVANIA...

CHAPTER 1 SUNDAY

Section 1

Repealed. 1978. April 28, P.L. 202, No. 53, Section 2(a) (3), effective June 27, 1978.

CHAPTER 2. OTHER HOLIDAYS AND OBSERVANCES

Holidays designated:

Section 11.

Be it enacted, that the following days and half days, namely, ...the fourth Thursday in November, known as Thanksgiving Day, Good Friday, the twenty-fifth day of December, known as Christmas Day;...and any day appointed or recommended by the Governor of this State or the President of the United States as a day of thanksgiving or fastings and prayer, or other

religious observance;...

Days schools not to be kept open.

Section 15-1502

No school shall be kept open on any Saturday for the purpose of ordinary instruction, except when Monday is fixed by the board of school directors as the weekly holiday, or on Sunday,..or Christmas,...

Additional holidays; vacations.

Section 15-1503

The board of school directors in any district shall, by a majority vote, decide which other holidays may be observed by special exercises, and on which holiday, if any, the schools shall be closed during the whole or part of the day...

...RHODE ISLAND...

CHAPTER 20

HOLIDAYS AND DAYS OF SPECIAL OBSERVANCE

School holidays enumerated.

Section 16-20-1

...the twenty-fifth day of December (as Christmas Day), and each of said days in every year, or when either of the said

days falls on the first day of the week (commonly called Sunday), then the day following it, ...and such other days as the governor or general assembly of this state or the President or the Congress of the United States shall appoint as holidays for any purpose, days of thanksgiving, or days of solemn fast, shall be school holidays and no session of any school except as hereinafter provided, in this state shall be held on any one of said days....

Special holidays for war effort.

Section 16-20-2

In addition to the foregoing, the governor may proclaim school holidays for the purpose of using the school premises and/or personnel in whole or in part, for the state and/or federal administration in connection with the war effort and such days so proclaimed may, on specific recommendation of the governor be deducted by the authorities of the several cities and towns from the gross number of school days required by law.

Elections falling on religious holiday.

Section 17-18-5.1

In the event that the date for the holding of any state or municipal election,....shall fall upon the day of a religious holiday, on which the doctrines of the faith would

prohibit its followers from voting, such election shall be held upon the next business day other than Saturday then following; provided, however that nothing in this section contained shall be deemed to invalidate any election once held.

CHAPTER 1

HOLIDAYS

General holidays enumerated.

Section 25-1-1

....the twenty-fifth day of December (as Christmas Day), and each of said days in every year, or when either of the said days falls on the first day of the week,...and such other days as the governor or general assembly of this state or the President or the Congress of the United States shall appoint as holidays for any purpose, days of thanksgiving, or days of solemn fast, shall be holidays.

CHAPTER 40

SUNDAY LAWS

Work or recreation on Sunday prohibited.

Section 11-40-1.

Except as provided in section 5-22-6 to 5-22-11, inclusive, every person who shall do or exercise any labor or business or work of his ordinary calling, or use any game, sport, play or recreation on the first day of the week, or suffer the same to be done or used by his children, servants or apprentices, works of necessity and charity only excepted, shall be fined not exceeding five dollars ($5.00) for the first offense and ten dollars ($10.00) for the second and every subsequent offense; provided, further, however, that the above prohibitions shall not apply to any person or persons operating of functioning under a valid permit or license.

Faith observing other days as Sabbath.

Section 11-40-4

Every professor of the Sabbatarian faith or of the Jewish religion, and such others as shall be owned or acknowledged by any church or society of said respective professions as members of or as belonging to such church or society, shall be permitted to labor in their respective professions or vocations on the first day of the week,...and in case any dispute shall arise respecting the person entitled to the benefit of this section, a certificate from a regular pastor or priest of any of the aforesaid churches or societies or from any three (3) of the standing members of such church or

society, declaring the person claiming the exemption aforesaid to be a member of or owned by or belonging to such church or society, shall be received as conclusive evidence of the fact.

...SOUTH CAROLINA...

Unlawful to work on Sunday.

Section 53-1-40

On the first day of the week, commonly called Sunday, it shall be unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling or offering to sell, publicly or privately by telephone, at retail or at wholesale to the consumer any goods, wares or merchandise or to employ others to engage in work, labor, business or selling or offering to sell any goods, wares or merchandise, excepting work of necessity or charity. Provided, that in Charleston County the foregoing shall not apply to any person who conscientiously believes, because of his religion, that the seventh day of the week ought to be observed as the Sabbath and who actually refrains from secular business or labor on that day.

Penalties for violating prohibition on Sunday work.

Section 53-1-70

A violation of any of the provision of sec. 53-1-40 shall be punished by a fine of not less than fifty dollars nor more than two hundred fifty dollars in the case of the first offense, and by a fine of not less than one hundred dollars nor more than five hundred dollars for each and every subsequent offense....

Legal holidays enumerated.

Section 53-5-10

National Thanksgiving days, all general election days and also the first day of January,...and the twenty-fifth and twenty-sixth days of December in each year shall be legal holidays.

Christmas Eve may be declared holiday for State employees.

Section 53-5-20

The Governor of South Carolina is empowered to declare Christmas Eve of each year a holiday for State government employees.

...SOUTH DAKOTA...

Holidays enumerated.

Section 1-5-1

The first day of every week, known as Sunday;...the fourth

Thursday in November, commonly known as Thanksgiving Day... the twenty-fifth of December, commonly known as Christmas Day; and every day appointed by the President of the United States, or the Governor of this state for a public fast, thanksgiving, or holiday shall be observed in this state as a legal holiday.
If...the twenty-fifth day of December falls upon a Sunday, the Monday following is a legal holiday and shall be so observed;...

Legal discontinuance of school--Holidays--Teachers' meeting Closing because of weather or disease.

Section 13-26-3.

School shall be legally discontinued only in the event that the following days occur on a regularly scheduled school day: any day designated by the Governor of South Dakota as a day of thanksgiving,...the twenty-fifth of December, Good Friday.

Acts performed on day after holiday.

Section 1-5-4

Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which falls upon such a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon

the day appointed.

...TENNESSEE

TITLE 15

CHAPTER 1

HOLIDAYS

Legal holidays.

Section 15-1-101

...the fourth Thursday in November, known as "Thanksgiving Day"; the twenty-fifth day of December; and Good Friday; and when any one of these days shall fall on Sunday then the following Monday shall be substituted; and when any of these days shall fall on Saturday, then the preceding Friday shall be substituted; also, all days appointed by the governor or by the President of the United States, as days of fasting or thanksgiving, and all days set apart by law for holding county, state or national elections, throughout this state, are made legal holidays, and the period from noon to midnight of each Saturday which is not a holiday is made a half-holiday,...

Special days and holidays.

Section 49-6-3016.

(a) Thanksgiving Day and the twenty-fifth of December are set apart as holidays for all the public schools, and boards of education are authorized to pay the salary of teachers of all schools that have not closed their term for the year at the same rate as if the teachers had taught school on those holidays; provided, that the failure to teach on any other day or days within the scholastic term shall not be counted as time for which salary shall be allowed.

...TEXAS...

TITLE 72

HOLIDAYS -- LEGAL

Enumeration

Article 4591. (4606) (2939)

...the fourth Thursday in November and the 25th day of December, of each year,...are declared legal holidays, on which all the public offices of the state may be closed and shall be considered and treated as Sunday for all purposes regarding the presenting for the payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange,...

Holidays

Section 21.005

The public schools shall not be closed on legal holidays unless so ordered by the board of trustees.

2903 School terms and attendance; late afternoon and evening school programs.

Article. 2906

(a) Public schools shall be taught for five days in each week. Schools shall not be closed on legal holidays unless so ordered by the trustees. A school month shall consist of not less than twenty school days, inclusive of holidays,...

Scholastic week.

Section 21.003

A school week shall consist of five days, inclusive of holidays.

Holidays.

Section 21.005

The public schools shall not be closed on legal holidays unless so ordered by the board of trustees.

...UTAH...

Legal holidays - Personal preference day - Governor authorized to declare additional days.

Section 63-13-2

(1) For the period beginning with the effective date of this act, the following-named days are legal holidays in this state: Every Sunday;...the fourth Thursday of November called Thanksgiving Day; the 25th day of December, called Christmas; and all days which may be set apart by the president of the United States, or the governor of this state by proclamation as days of fast or thanksgiving. If any of the holidays provided for in this subsection (2), except the first mentioned, namely Sunday, shall fall on Sunday, then the following Monday shall be the holiday.

Holidays -- Schools may be taught on.

Section 53-1-3

Higher institutions of learning and boards of education are authorized to hold school on legal holidays, other than Sundays, provided that at least a part of the day is given over to appropriate exercises.

...VERMONT...

CHAPTER 7.

LEGAL HOLIDAYS; COMMEMORATIVE DAYS

Legal holidays

Section 371.

(a) The following shall be legal holidays:

Thanksgiving Day, the fourth Thursday in November;

Christmas Day, December 25.

CHAPTER 73. SABBATH BREAKING

Sections 3301-3308. Repealed. 1975, No. 207 (Adj. Sess.), Section 2, eff. March 27, 1976.

CHAPTER 74. A COMMON DAY OF REST

Sections 3351-3353. Repealed. 1983, No. 80, eff. April 29, 1983.

Section 3354. Repealed. 1981, No. 107, Section 7, eff. May 14, 1981.

Sections 3354a-3358. Repealed. 1983, No. 80, eff. April 29, 1983.

Former section 3354a related to an alternative day of rest for persons who observe a Sabbath other than Sunday and was derived from 1981, No. 107, Section 3.

VERMONT CONSTITUTION

CHAPTER 1

Freedom in religion; right and duty of religious worship.

Article 3

That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or

support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculia(r) mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's Day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

...VIRGINIA...

CHAPTER 3

HOLIDAYS AND SPECIAL DAYS; HOURS OF WORK, ETC.

Legal Holidays.

Section 2.1-21

It is the policy of the Commonwealth to fix and set aside certain days in the calendar year as legal holidays for the people of Virginia to honor and commemorate such holidays so established. In each year, the following days are designated as legal holidays;

The fourth Thursday in November--Thanksgiving Day to honor

and give thanks in each person's own manner for the blessings bestowed upon the people of Virginia and honoring the first Thanksgiving in 1619.

Observance of Saturday as Sabbath.

Section 18.2-343

The penalties imposed by Section 18.1-363.1 or Section 18.2-341 shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided he does not compel an apprentice or servant, not of his belief, to do secular work or business on a Sunday.

Employers to allow employees at least one day of rest in each week.

Section 40.1-28.1

Except in an emergency, every employer shall allow each person employed by him in connection with any business or service at least twenty-four consecutive hours of rest in each calendar week in addition to the regular periods of rest normally allowed or legally required in each working day.

Employees entitled to choose Sunday as day of rest.

Section 40.1-28.2

Every nonmanagerial person employed by any employer shall, as a matter of right, be entitled to choose Sunday as a day of rest in accordance with Section 40.1-28.1 and upon the filing of written notice by the employee with the employer that such employee chooses Sunday as a day of rest, no employer shall, in any manner, discharge, discipline or penalize such employee for exercising his rights under this section and the provisions of this section may not be waived on an application for employment.

Employees entitled to choose Saturday as day of rest.

Section 40.1-28.3

Any nonmanagerial employee who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, shall be entitled to choose the seventh day of the week as his day of rest in accordance with Section 40.1-28.1 and upon the filing of written notice by the employee with the employer that such employee chooses the seventh day of the week as a day of rest, no employer shall, in any manner, discharge, discipline or penalize such employee for exercising his rights under this section.

...WASHINGTON...

School holidays.

Section 28A.02.061

The following are school holidays, and school shall not be taught on these days: Saturday; Sunday;...the fourth Thursday in November, to be known as Thanksgiving Day;...and the twenty-fifth day of December, commonly called Christmas Day: Provided, That no reduction from the teacher's time or salary shall be made by reason of the fact that a school day happens to be one of the days referred to in this section as a day on which school shall not be taught.

"Legal holidays"

Section 1.16.050

The following are legal holidays: Sunday;...and the twenty-fifth day of December, commonly called Christmas Day:...and any day designated by public proclamation of the chief executive of the state as a legal holiday, or as a day of thanksgiving.

CHAPTER 9.76

SABBATH BREAKING

Sections 9.76.010 - 9.76.050 Repealed, effective July 1, 1976

...WEST VIRGINIA...

Holidays; closing of schools; time lost because of such; special Saturday classes.

Section 18A-5-2.

Schools shall not be kept open on any Saturday nor on the following days which are designated as legal school holidays, namely;...Christmas Day,...and any day appointed and set apart by the president or the governor as a holiday of special observance by the people of the state. When any such holiday falls within the employment term, it shall be considered as a day of the employment term and the full time school personnel shall receive his pay for same.

Legal holidays; official acts or court proceedings.

Section 2-2-1

The following days shall be regarded, treated and observed as legal holidays,...the fourth Thursday of November, commonly called "Thanksgiving Day"; the twenty-fifth day of December, commonly called "Christmas Day"... and all days which may be appointed or recommended by the governor of this state, or the President of the United States, as days of thanksgiving, or for the general cessation of business; and when any of said days or dates falls on Sunday, then the succeeding Monday shall be regarded, treated, and observed as

such legal holiday.

Same - Penalties; separate offenses; jurisdiction; persons observing Saturday as Sabbath.

Section 61-10-27

..,Each Sunday a person is engaged in work, labor or business or employs others to be so engaged, in violation of section twenty-five of this article, shall constitute a separate offense....

The penalties imposed by this section shall not be incurred by any person who conscientiously believes that Saturday ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided he does not compel an apprentice or servant or employee, not of his belief, to do secular work or business on a Sunday.

...WISCONSIN...

State office hours; standard work week; leaves of absence; holidays

Legal Holidays.

Section 895.20

...the fourth Thursday in November (which shall be the day of celebration for Thanksgiving), December 25,...On Good Friday the period from 11 a.m. to 3 p.m. shall uniformly be observed for the purpose of worship....

Section 16-30

(4) (a) The office of the department of state government shall be kept open on all days of the year except Saturdays, Sundays and the following holidays:

6. December 25;
7. The day following if January 1, July 4 or December 25 falls on Sunday;
8. After 12 noon on Good Friday, in lieu of the period specified in s.895.20
9. The afternoons of December 24 and 31.

...WYOMING...

HOLIDAYS

Legal holidays; dismissal of schools.

Section 8-6-101

Thanksgiving Day to be observed on the fourth Thursday in November; Christmas Day, December 25;... and upon declaration by the governor of this state, any date appointed or declared by the President of the United States as an occasion of national mourning, rejoicing or observance of national emergency are hereby declared legal holidays in and for the state of Wyoming. If...or Christmas Day or any of the fall upon a Sunday, the Monday following shall be a legal holiday.

...DISTRICT OF COLUMBIA...

Subchapter I. Business Holidays.

Holidays designated - Time for performing acts extended.

Section 28-2701.

The following days in each year, namely,... the twenty-fifth of December, commonly called Christmas Day;... and any day appointed or recommended by the President of the United States as a day of public feasting or thanksgiving.... When a day set apart as a legal holiday falls on Sunday the next succeeding day is a holiday. In such cases, and when a Sunday and a holiday fall on successive days, all commercial paper falling due on any of those days shall, for all purposes of presenting for payment or acceptance, be deemed to mature and be presentable for payment or acceptance on the next secular business day succeeding.

...PUERTO RICO...

Holidays generally.

Section 71

Holidays, within the meaning of sections 71-73 of this title, are every Sunday, ...Good Friday, ...the twenty-fifth day of December, ...and every day appointed by the President of the United States, by the Governor of Puerto Rico or by the

Legislative Assembly, for a public fast, thanksgiving, or holiday.

Closing law for commercial establishments.

Section 2201

(a) Commercial establishments shall remain closed to the public and one hour after closing no work of any kind shall be carried out therein during the days and hours stated below:

(1) All day Sunday, except the 24th and 31st of December...the 25th of December,...on Thanksgiving Day and on Good Friday.