

# RELIGIOUS ACCOMMODATIONS FOR POLICE OFFICERS: A COMPARATIVE ANALYSIS OF RELIGIOUS ACCOMMODATION LAW IN THE UNITED STATES, CANADA, AND THE UNITED KINGDOM

Lynn A. Grunloh\*

## I. INTRODUCTION

The tenets of Sikhism require its followers to wear the religious symbols of both a beard and a turban.<sup>1</sup> Officers of the Royal Canadian Mounted Police, however, are subject to a strict grooming policy that requires all officers to wear a traditional uniform.<sup>2</sup>

A devout Baptist police officer in the state of Indiana was forbidden from gambling and aiding others in their gambling efforts.<sup>3</sup> He was assigned by the police force to a full-time position as a Gaming Commission agent at a casino in Indiana.<sup>4</sup>

These stories illustrate the serious problem of a police officer's religious observances. Part II of this Note provides a brief overview of the history of religious accommodations in the United States under Title VII's prohibition of religious discrimination. This section also discusses the problems, both economic and social, associated with religious accommodations directed towards police officers. Finally, this section addresses a new circuit court decision that may create a statutory exemption for police officers and the department's duty, or lack thereof, to accommodate religious beliefs.

Part III of this Note examines Canadian law regarding religious discrimination. This section examines the country's efforts to add religious minorities to its police force and the subsequent problems associated with the policy. Additionally, this section addresses the concerns of Canadian citizens pertaining to the ensuing diversity in the police force.

Part IV of this Note presents the United Kingdom's comprehensive regulations concerning religious discrimination as an example for both the United States and Canada. This section highlights the reluctance of the United Kingdom's employers to implement the new regulations.

Finally, Part V discusses the potential benefits of Canada and the United States using the United Kingdom's recently enacted regulations. This section

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\* J.D. Candidate 2006, Indiana University School of Law-Indianapolis; B.S. Entrepreneurship and Small Business Management 2003, Illinois State University.

1. Grant v. Canada, [1995] F.C. 158, *available at* <http://reports.fja.gc.ca/fc/1995/pub/v1/1995fca0229.html> (last visited Jan. 7, 2006).

2. *Id.*

3. Endres v. Indiana State Police, 349 F.3d 922, 923 (7th Cir. 2003).

4. *Id.* at 924.

focuses on the history of both the United States and Canada with regard to police officers and religious accommodation. It concludes that a comprehensive scheme may serve to resolve ambiguities.

## II. UNITED STATES: ARE POLICE OFFICERS STATUTORILY EXEMPTED FROM RELIGIOUS ACCOMMODATIONS?

### A. Overview

#### 1. Title VII and the Prohibition of Religious Discrimination

In the United States, Title VII of the Civil Rights Act of 1964 provides for equal employment opportunity by prohibiting discrimination on the basis of race, color, religion, sex, or national origin.<sup>5</sup> Title VII was implemented as a result of the Civil Rights movement toward racial equality in America.<sup>6</sup> The statute was Congress's response to this movement and an attempt to address racism in American labor markets.<sup>7</sup> The statute sought to economically integrate African Americans into the mainstream of society in order to address the "de jure system of segregation and discrimination" in public, as well as private, employment.<sup>8</sup> Although race was the primary motivator behind adoption of the statute, it also addressed religious discrimination.

Under Title VII, an "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . but such term does not include, (1) the United States . . . or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation . . ."<sup>9</sup> The term "person" includes "governments" and "governmental agencies."<sup>10</sup> Furthermore, the Supreme Court has held that employers are covered under Title VII without regard to whether they receive federal funding.<sup>11</sup> The Court reasoned that Title VII was broadly aimed at eradicating discrimination throughout the economy.<sup>12</sup> Therefore, police departments are covered under the language of Title VII.

An "employee" is defined as "an individual employed by an employer . . ."<sup>13</sup> Exemptions to this definition do not include "employees subject to the

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5. 42 U.S.C. § 2000e-2(a)(1) (2004).

6. SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 45 (2d ed. 2000).

7. *Id.*

8. *Id.* at 55.

9. § 2000e(b).

10. § 2000e(a).

11. *Gebser v. Lago Vista Sch. Dist.*, 524 U.S. 274, 286-87 (1998).

12. *Id.* at 286.

13. § 2000e(f).

civil service laws of a State government, governmental agency or political subdivision.”<sup>14</sup> Therefore, police officers are unquestionably covered by Title VII’s definition of employee.

“Religion” is defined as “all aspects of religious observance and practice, as well as belief . . . .”<sup>15</sup> Usually whether an employee’s action constitutes a religious practice is not an issue.<sup>16</sup> In cases when it presented an issue, an expansive approach was used.<sup>17</sup> In *United States v. Seeger*<sup>18</sup> and *Welsh v. United States*,<sup>19</sup> the Supreme Court developed a standard that defined religious practices to include moral or ethical beliefs as to what is right and wrong, noting that these beliefs are held with the sincere strength of traditional religious views.<sup>20</sup> Even if a religious group espouses no such belief or rejects a certain belief, the employee’s belief will still qualify as a religion.<sup>21</sup> Therefore, Title VII can be said to encompass a very broad definition of religion.

Based on the definition of “employer,” “person,” “employee,” and “religion,” it appears that a police officer would receive extensive protection from religious discrimination while on duty. However, Title VII provides for an exemption that limits the breadth of such protection.<sup>22</sup>

## 2. *Title VII and the Duty to Accommodate Religious Observance or Practice*

Religious discrimination is prohibited “unless an employer demonstrates that he is unable to reasonably accommodate an employee’s, or prospective employee’s, religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>23</sup> Therefore, under Title VII, employers are required to reasonably accommodate an employee’s or an applicant’s religious practice or observance.<sup>24</sup> An accommodation of a religious observance or practice is not required if doing so would impose an undue hardship on the employer.<sup>25</sup> Therefore, religious discrimination is not entirely prohibited under Title VII.

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14. *Id.*

15. § 2000e(j).

16. 29 C.F.R. § 1605.1 (2005).

17. *Id.*

18. *United States v. Seeger*, 380 U.S. 163 (1965).

19. *Welsh v. United States*, 398 U.S. 333 (1970).

20. § 1605.1.

21. *Id.*

22. § 2000e(j).

23. *Id.*

24. ESTREICHER & HARPER, *supra* note 6, at 607.

25. *Id.* at 612.

According to the Equal Employment Opportunity Commission (EEOC),<sup>26</sup> once an employee or prospective employee notifies the employer of a need for religious accommodation, the employer has the statutory obligation to reasonably accommodate this request.<sup>27</sup> The employer may refuse to accommodate the employee when the employer demonstrates that an undue hardship would “in fact result from each available alternative method of accommodation.”<sup>28</sup> The mere assumption that other employees might also need an accommodation is not an undue hardship.<sup>29</sup> If multiple alternatives exist, the EEOC will determine reasonableness by looking at the alternatives contemplated by the employer, the alternatives actually offered to the employee, and alternatives it finds for accommodating religious practices.<sup>30</sup> Thus, from the EEOC’s application of Title VII, it appears that the requirement of reasonable accommodation is a fairly stringent standard for the employer to defeat.

The EEOC also stated that the employer must offer the alternative that least disadvantages the employee’s employment opportunities.<sup>31</sup> The EEOC has suggested some alternatives that employees should consider.<sup>32</sup> For example, one reasonable accommodation recognized by the EEOC is a voluntary substitute or swap with another employee with substantially similar qualifications.<sup>33</sup> Another reasonable accommodation recognized by the EEOC is flexible scheduling, which includes “arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.”<sup>34</sup> Finally, when an employee cannot be accommodated as to the entire job or an assignment within that job, the employer should change the job assignment or offer the employee a lateral transfer.<sup>35</sup> Based on this guidance, the employer has quite an extensive duty to accommodate an employee’s religion.

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26. Title VII created an Equal Employment Opportunity Commission (EEOC). *Id.* at 56. Claimants must first file charges with the EEOC in order to take advantage of the agency’s ability to investigate and the opportunity to reach an informal conciliation. *Id.* at 1071. Also, the EEOC can file suit on behalf of claimants. *Id.* The EEOC does not have the power to issue substantive regulations under Title VII, but it does provide interpretative guidance. *Id.* at 56. Furthermore, the Supreme Court has announced a strong rule of deference to an agency’s interpretation of its governing statute. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

27. § 1605.2(c)(1.).

28. *Id.*

29. *Id.*

30. § 1605.2(c)(2).

31. § 1605.2(c)(2)(ii).

32. § 1605.2(d)(1).

33. § 1605.2(d)(3)(i).

34. § 1605.2(d)(3)(ii).

35. § 1605.2(d)(3)(iii).

Although the plain language of Title VII does not provide any guidance as to the degree of accommodation required, the Supreme Court has held that a reasonable accommodation does not require more than a *de minimis* cost to the employer.<sup>36</sup> In *Trans World Airlines v. Hardison*, the Court held that allowing an employee to only work four days a week, in order for the employee to observe his religious practices, was an undue hardship on the employer.<sup>37</sup> The Court reasoned that the employee's job was essential and he was the only available person to perform this job on the weekends.<sup>38</sup> Furthermore, leaving the job empty would have impaired Trans World Airlines's operations, or would have forced them to pay premium wages to someone that was not regularly scheduled to work Saturdays.<sup>39</sup> The Court pointed out that requiring Trans World Airlines to bear additional costs just to give this particular employee weekends off would involve unequal treatment of employees on the basis of religion.<sup>40</sup> Therefore, by requiring the employer only bear a *de minimis* cost, the Supreme Court has apparently articulated a more lenient standard for employers as compared to the EEOC's guidelines.

Trans World Airlines was a private employer, so the Supreme Court did not directly address the uniqueness of government employers. However, the government as an employer creates complicated issues due to the First Amendment.<sup>41</sup> The Supreme Court has said " 'the government may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause.' "<sup>42</sup> Furthermore, principles have been established for

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36. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

37. *Id.*

38. *Id.* at 69.

39. *Id.*

40. *Id.* at 84.

41. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. However, the Supreme Court recently stated that "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." *City of San Diego v. Roe*, 125 S.Ct. 521, 523 (2004). The court in *City of San Diego v. Roe* held that an officer that was discharged for offering sexually explicit videos for sale online was not protected under the First Amendment because his actions had injurious effect on the mission of the police department. *Id.* at 526.

42. Mark Tushnet, *The Emerging Principle of Accommodation of Religion*, 76 GEO. L.J. 1691, 1691 (1988) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 48 U.S. 136, 144 (1987)). See also GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1414 (4th ed. 2001) ("[T]he Establishment clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion") (quoting *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 854 (1995)). Reasonable accommodations reflect a qualified claim to special treatment on the basis of religion. ESTREICHER & HARPER, *supra* note 6, at 607. The proposition that the establishment clause is not violated in this instance is based on the idea that there are permissible cases of government action towards religion, which facilitate religious liberty. Tushnet, *supra* at 1691. These facilitations refer to both the establishment and free exercise clauses and suggest that accommodations are guided by the interpretation of both religion clauses. *Id.* But see *Thornton v. Caldor*, 472 U.S. 703, 709-10 (1985) (explaining that a state statute, which provided Sabbath

reasonable accommodation when the government is acting as an employer. A reasonable accommodation that protects a religious practice may impose costs on the government's efficiency.<sup>43</sup> However, the issue of cost is usually decided against the employee and for the government; therefore, the courts have required only a minimal level of accommodation of religious employees.<sup>44</sup> Arguably then, accommodations for government employees, like those required by the Court in *Trans World Airlines*, may not entail more than a *de minimis* cost to the employer.

Furthermore, the courts usually impose on the employee a duty to cooperate with the employer to find an acceptable accommodation.<sup>45</sup> The courts disagree over how broad the employee's duty to cooperate is and whether it requires the employee to compromise his or her religious beliefs.<sup>46</sup> Most courts, however, do not require the employee to compromise religious beliefs because bilateral cooperation is appropriate in balancing the employer's needs.<sup>47</sup> Therefore, employees should be cooperative and willing to compromise in an effort to reach an accommodation that is acceptable to both parties.

It appears that the EEOC's guidance regarding Title VII has not been strictly followed in the courts. For example, the EEOC first articulated that the employer must accommodate the employee unless an undue hardship would "in fact" result from each alternative method of accommodation.<sup>48</sup> This standard seems more stringent than the *de minimis* cost standard established in *Trans World Airlines*.<sup>49</sup> Black's Law Dictionary defines *de minimis* as "1. Trifling; minimal. 2. . . . so insignificant that a court may overlook it in deciding an issue or case."<sup>50</sup> The EEOC did not interpret undue hardship as requiring a "minimal" accommodation because it required the employer to give the employee the alternative that least disadvantages the employee's employment opportunities.<sup>51</sup> Furthermore, the EEOC contemplated the employer offering a different job assignment if flexible arrival/departure times or floating/optional holidays did not rid the workplace of religious conflict.<sup>52</sup> The Supreme Court implicitly rejected the idea of job reassignment with its "minimal" standard of accommodation.<sup>53</sup> Consequently, the Supreme Court's interpretation of

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observers with an absolute right not to work on their Sabbath, violated the Establishment Clause because the statue did not have a clear secular purpose and advanced religion).

43. See Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 615 (2000).

44. *Id.* at 609.

45. *Id.* at 597.

46. *Id.* at 599.

47. *Id.* at 600.

48. 29 C.F.R. § 1605.2(c)(1) (2005).

49. *Trans World Airlines*, 432 U.S. at 84.

50. BLACK'S LAW DICTIONARY 352 (7th ed. 2000).

51. § 1605.2(c)(2)(ii).

52. § 1605.2(d)(3)(iii).

53. See *Trans World Airlines*, 432 U.S. at 84.

reasonable accommodation for a private employer seems to contradict the EEOC's general interpretation of Title VII.

In addition, the applicability of offering reasonable accommodation to government employees has conflicted with the EEOC's guidance. The EEOC did not contemplate resolving the issue of cost against the employee<sup>54</sup> as the Supreme Court has so held.<sup>55</sup> Furthermore, courts have imposed a duty to cooperate on the employer that includes compromising religious beliefs.<sup>56</sup> However, the EEOC considered having the employer offer alternative accommodations and allow the one that is least disadvantageous to the employee.<sup>57</sup> The courts's interpretations of Title VII have generally favored the employer, both governmental and private, while the Commission has favored the employee. This tension is especially prevalent in the area of religious accommodations of police officers.

*B. The Applicability of Religious Accommodations to Police Officers under Title VII*

Title VII did not establish a specific provision regarding police officers, but the uniqueness of their position in society deserves special attention. The Los Angeles Police Department (LAPD) states its mission as follows:

[T]o safeguard the lives and property of the people we serve, to reduce the incidence and fear of crime, and to enhance public safety while working with the diverse communities to improve their quality of life. Our mandate is to do so with honor and integrity, while at all times conducting ourselves with the highest ethical standards to maintain public confidence.<sup>58</sup>

Police officers exist to prevent crime and disorder and are accordingly dependent on the public's approval of their existence and its respect for their ability to maintain peace.<sup>59</sup> Police officer managers and supervisors exist to "define problems, to establish objectives, and to assist line police officers in the accomplishment of the police mission."<sup>60</sup> A manager is evaluated based on the

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54. See generally § 1605.2.

55. ESTREICHER & HARPER, *supra* note 6, at 612 (discussing *Trans World Airlines*).

56. Kaminer, *supra* note 43, at 599.

57. § 1605.2(c)(2)(ii).

58. LAPD Online, *To Protect and to Serve: Mission Statement*, at [http://www.lapdonline.org/general\\_information/dept\\_mission\\_statement/mission\\_stmnt.htm](http://www.lapdonline.org/general_information/dept_mission_statement/mission_stmnt.htm) (last visited Nov. 12, 2005).

59. LAPD Online, *To Protect and to Serve: Management Principles*, at [http://www.lapdonline.org/general\\_information/dept\\_mission\\_statement/mgmt\\_principles.htm](http://www.lapdonline.org/general_information/dept_mission_statement/mgmt_principles.htm) (last visited Nov. 12, 2005).

60. *Id.*

excellence of his subordinates in achieving the department's goals.<sup>61</sup> "The life's blood of good management is a thoroughly systematic, two-way circulation of information, feelings, and perceptions throughout the organization."<sup>62</sup>

In order to protect the public, managers rely heavily on subordination and public respect.<sup>63</sup> The dangerous nature of their jobs and their importance in our society necessarily require subordination.<sup>64</sup> However, the need for subordination and the importance of protecting the public can lead to conflicts with Title VII, and the courts have struggled in dealing with these tensions.

The courts have unanimously decided that employers are not required to accommodate religious employees in a way that results in health or safety hazards to the public.<sup>65</sup> The issue of health and safety is a factor for police departments because they are responsible for public safety.<sup>66</sup> The safety of the public is a significant societal goal, and an accommodation, even a "reasonable" one that threatens or harms this goal is usually held to be more than a *de minimis* cost.<sup>67</sup> Police departments, however, are still required to eliminate a conflict between employment requirements and religious practices as long as they will not suffer an undue hardship.<sup>68</sup> These conflicting interests are considered for each reasonable accommodation request within a police department.

In order for a police officer to claim a denial of religious accommodation, which requires a showing of religious discrimination, the officer must plead that "(1) he had a bona fide belief that compliance with an employment requirement is contrary to his religious faith, (2) he informed his employer about his views, and (3) his refusal to comply with the employment requirement caused his injury."<sup>69</sup> In evaluating these elements, the courts weigh the competing interests of eliminating conflict in the police force with the public's safety.

Three areas of a police officer's religious practice have been addressed under Title VII's religious accommodations. First, a police officer's appearance and its religious aspects raised safety concerns and subordination problems, as well as Title VII issues. Second, the request of paid holidays, vacation time, and overtime for religious practices raised issues within the

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61. *Id.*

62. *Id.*

63. *See generally id.*

64. *See id.*

65. Kaminer, *supra* note 43, at 616.

66. *Id.*

67. *Id.*

68. *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998). However, reasonable accommodations do not require "satisfaction of an employee's every desire." *Id.* at 777 (quoting *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993)).

69. *Gold v. City of Chicago*, No. 85-C4885, 1985 U.S. Dist. LEXIS 14709, at \*4 (N.D. Ill. Oct. 21, 1985).



officer's ranks and under Title VII. Finally, an officer's request for a job reassignment raised Title VII issues.

### *1. Police Officer's Religious Appearance*

Police officers are under strict requirements regarding their appearance while on duty. For example, the LAPD requires an officer to be "neat and clean at all times while on-duty . . . ."<sup>70</sup> Specifically, male employees are under several requirements:

[Male officers] shall keep their hair properly trimmed. The hair shall be at least moderately tapered, shall not extend below the top of the shirt collar nor cover any portion of the ear, and shall not interfere with the proper wearing of the uniform hat. . . . Sideburns shall not extend beyond a point even with the bottom of the ear lobe and shall extend in a cleanshaven, horizontal line. . . . A short and neatly trimmed mustache of natural color may be worn. . . . A growth of whiskers shall be permitted only for medical reasons or when required by the nature of the assignment. An employee with a medical condition which precludes his shaving shall be assigned duties requiring the least possible public exposure.<sup>71</sup>

Clearly there is not much room for deviation from acceptable appearance standards for police officers.

Religious observances or practices affect an officer's appearance. For example, Sikh Muslims are required to wear beards as a part of their daily religious practice.<sup>72</sup> Police departments often implement grooming policies that do not permit officers to wear beards for the purpose of creating a uniform look within the police force.<sup>73</sup> Courts generally hold that a failure to accommodate this particular religious practice is unlawful discrimination.<sup>74</sup> Policies such as these are revised in order to reasonably accommodate good faith religious observances, such as wearing a beard.<sup>75</sup>

In addition, Sikh Muslims are required to wear turbans as a central element of their daily religious observances.<sup>76</sup> In a dispute in New York, the

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70. LAPD Online, *The Department Manual: Volume 3 Management Rules and Procedures*, at 157, at [http://www.lapdonline.org/pdf\\_files/manual/volume3.pdf](http://www.lapdonline.org/pdf_files/manual/volume3.pdf) (last visited Nov. 12, 2005) [hereinafter LAPD Department Manual on Management].

71. *Id.* at 157-58.

72. *United States v. City of Wilmington*, No. 96-447-MMS (D. Del. 1997), at <http://www.usdoj.gov/crt/emp/documents/wilmingtoncd.htm> (last visited Nov. 12, 2005).

73. *Id.*

74. *Id.*

75. *Id.*

76. James Barron, *Two Sikhs Win Back Jobs Lost by Wearing Turbans*, N.Y. TIMES, Jul. 29, 2004, at B3.

police department attempted to justify a denial of a turban accommodation because it created "safety issues."<sup>77</sup> An accommodation allowing for the police officers to wear turbans was deemed reasonable despite the safety issues presented by the department because the hardship was not more than a *de minimis* cost.<sup>78</sup> In both of these situations, therefore, the interest of eliminating the conflict between the job requirements and the employee's religion outweighed the health or safety issues implicated.

Rastafarians wear dreadlocks as a spiritual declaration that symbolizes their African ancestors.<sup>79</sup> Long twists or braids in the hair violate police department's grooming policies that prohibit "ragged, unkempt or extreme appearances."<sup>80</sup> An example of a permissible hairstyle in a police department is the "Box Fade" hairstyle, which is presumably not a ragged, unkempt or extreme appearance.<sup>81</sup> Courts usually require an accommodation for this hairstyle for the same reasons Sikh Muslims are allowed to wear beards.<sup>82</sup> Again, eliminating the conflict between the job and the employee's religion superseded the costs imposed by the accommodation.

The police department can generally accommodate an officer's appearance for a religious purpose because of the minimal costs imposed on the department's efficiency.<sup>83</sup> However, the level of cost imposed on the department becomes a more overriding issue with regard to an officer's work schedule.

## 2. *Paid Holidays, Vacation Time, Overtime: Reasonable Accommodations?*

Religious observances often require an officer to miss work. Police departments, however, have strict policies regarding an officer's schedule. The LAPD stipulates the following:

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77. *Id.*

78. *Id.*

79. David France, *Law: The Dreadlock Deadlock*, NEWSWEEK, Sept. 10, 2001, at 54.

80. *Id.*

81. *Id.*

82. *Id.* Followers of Sikhism adhere to the 5K's – Kanga, Kachha, Kara, Kirpan, Kesh. Sikh Net, *5K – Panj Kakar*, at <http://www.sikh.net/SIKHISM/W/5kakar.htm> (last visited Nov. 12, 2005). The Kesh refers to a Sikh's hair, which they are forbidden to cut, and also applies to a beard. *Id.* The belief is founded on the understanding that man was created in the true image of the Lord WaheGuru and that the Lord wanted hair to grow. *Id.* Therefore, it is an act against the Lord's will for a Sikh to trim his hair. *Id.* Sikhs also wear turbans following the 10th Guru, Guru Gobind Singh, who initiated the Khalsa brotherhood. Belief Net, *Sikhism* (2005), at [http://www.beliefnet.com/index/index\\_10036.html](http://www.beliefnet.com/index/index_10036.html) (last visited Nov. 12, 2005).

83. CNN, *Trooper's Work, Religion Clash Over Riverboat Casino Duty* (Aug. 24, 2000), at <http://archives.cnn.com/2000/US/08/24/trooper.dilemma.ap>. "The one area that people have been winning in religion is in hairstyle . . . It's very simple to accommodate the individual by having the individual put their long hair up in a hat." *Id.*

[Officers] shall be in actual attendance on-duty for a minimum of eight hours on each day that he/she is assigned to work. . . . All officers shall work 261 days in each calendar year. Each officer shall normally be entitled to eight regular days off during each 28-day deployment period. Additionally, each officer shall receive thirteen days off in lieu of a holiday . . . . An employee may be allowed time off to observe a religious holiday when such allowance will not interfere with the proper performance of Department operations. Time off shall be deducted from the employee[']s accrued overtime, compensatory equivalent time off, or accrued vacation time.<sup>84</sup>

Tension obviously arises between allowing an officer to practice religious observances and disrupting the department's operations.<sup>85</sup>

The leading Supreme Court case in the area of paid holidays, vacation time, and overtime is *Trans World Airlines, Inc. v. Hardison*.<sup>86</sup> The Supreme Court's rationale in denying the claim of religious discrimination was that accommodating a leave request by a particular employee necessarily discriminated against other employees on the basis of their religious beliefs.<sup>87</sup> *Trans World Airlines* refused to allow an employee to take off work on Saturdays for religious purposes because his job was essential and he was the only one who performed that particular task on Saturday.<sup>88</sup> In other words, to accommodate this particular request, the employer would bear more than a *de minimis* cost due to the effect on the other employees.<sup>89</sup>

Based on this holding, a case in Illinois allowed a suit challenging the police department's practice of granting additional paid holidays to "minority" religions.<sup>90</sup> In *Ka Nam Kuan v. City of Chicago*, the Northern District of Illinois stipulated the factors to be considered in determining whether a burden imposes more than a *de minimis* cost: "the number of employees accommodated, the magnitude of the overtime the city must pay, or the extent of the impact of the policy on the city's budget, and the work schedules of the police officers who are not accommodated."<sup>91</sup> A court must also determine if

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84. LAPD Department Manual on Management, *supra* note 70, at 170-71.

85. See CNN, *supra* note 83 (explaining that Orthodox Jews or Seventh-day Adventists are required to observe the Sabbath and officers are required to work around the clock, which leads to problems with religious accommodations). See also RIVERSIDE WEBSTER'S II DICTIONARY 598 (rev. ed. 1996) (defining "Sabbath" as "Saturday, the 7th day of the week, set apart as a day of worship by Jews and some Christians[.]" or "Sunday, the 1st day of the week, set apart as a day of worship by most Christians.").

86. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

87. *Id.* at 85.

88. *Id.* at 68.

89. *Id.* at 84.

90. *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 257 (N.D. Ill. 1983).

91. *Id.* at 259.

the city must pay overtime wages to substitute employees on a regular basis.<sup>92</sup> Courts are sometimes willing to require an employer to discriminate against some employees in order to allow others to observe their Sabbath.<sup>93</sup>

In addition, another case in Illinois allowed an Orthodox Jew to bring a claim asserting the police department's failure to reasonably accommodate her requests.<sup>94</sup> The Northern District of Illinois allowed a Chicago police officer to bring a religious discrimination claim based on the fact that she repeatedly requested her work schedule be altered to allow her to observe the Sabbath and other religious holidays.<sup>95</sup> The officer argued that these denials forced her to use vacation, unpaid leave, and sick days in order to practice her faith.<sup>96</sup>

Some courts find that requiring an employee to use unpaid leave is a reasonable accommodation.<sup>97</sup> Most courts further require an employee to use some vacation days to observe religious holidays.<sup>98</sup> Nevertheless, a few courts follow the proposition that if the employee stands to lose a benefit, such as vacation time, which is enjoyed by other employees, he or she is discriminated against on the basis of religion.<sup>99</sup>

As evidenced by the LAPD Department Manual, religious observances can often be accommodated, but only with a cost to the employee.<sup>100</sup> An officer may be forced to use unpaid leave, vacation time or some other job related benefit.<sup>101</sup> However, the EEOC recommends flexible scheduling, permitting an employee to make up lost time, and utilizing the accommodation with the least disadvantage to the employee.<sup>102</sup> Once again, the courts have adopted a more stringent standard against the employee than what the EEOC recommended.

### 3. *Job Assignments: Religious Accommodations or Required Aspect of the Job?*

The nature of the police department demands compliance with manager orders.

The Department is an organization with a clearly defined authority. This is necessary because unquestioned obedience of a superior's lawful command is essential for the safe and prompt performance of law enforcement operations. The most

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92. *Id.*

93. *Id.* at 258.

94. *Gold v. City of Chicago*, No. 85-C4885, 1985 U.S. Dist. LEXIS 14709, at 1 (N.D. Ill. Oct. 21, 1985).

95. *Id.*

96. *Id.*

97. Kaminer, *supra* note 43, at 607.

98. *Id.* at 608.

99. *Id.*

100. LAPD Department Manual on Management, *supra* note 70, at 171.

101. Kaminer, *supra* note 43, at 607.

102. §§ 1605.2(c)(2)(ii), (d)(3)(i).

desirable means of obtaining compliance are recognition and reward of proper performance and the positive encouragement of a willingness to serve. However, negative discipline may be necessary where there is a willful disregard of lawful orders, commands, or directives.<sup>103</sup>

However, unquestioned obedience to a superior's command may lead to a conflict with an officer's religious beliefs. Exceptions to orders may lead to chaos in the department with all officers choosing which assignments to cover.<sup>104</sup> Therefore, the courts are required to strike a balance between the religious officer's request and the cost to the department.

It is difficult for police officers to accommodate religious employees that are "choosy" about assignments based on religious observances or beliefs.<sup>105</sup> In *Ryan v. United States Department of Justice*, the Seventh Circuit addressed the difficult issue of Federal Bureau of Investigation (FBI) agents swapping assignments based on religious practices.<sup>106</sup> Ryan's Roman Catholic religion prevented him from investigating groups that destroyed government property in opposition to violence.<sup>107</sup> Ryan was discharged because he "repeatedly refused to carry out a lawful order to investigate an unsolved federal offense; he declined to swap assignments; he would not promise to carry out similar orders in the future and implied he would refuse to participate in related matters . . ."<sup>108</sup> The denial of Ryan's religious discrimination suit was based on his unwillingness to cooperate with the police department's offers of accommodation.<sup>109</sup>

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103. LAPD Online, *The Department Manual: Volume 1 Policy*, at 8-9, at [http://www.lapdonline.org/pdf\\_files/manual/volume1.pdf](http://www.lapdonline.org/pdf_files/manual/volume1.pdf) (last visited Oct. 21, 2005) [hereinafter LAPD Department Manual on Policy].

104. CNN, *supra* note 83.

105. *Ryan v. United States Dep't of Justice*, 950 F.2d 458, 462 (7th Cir. 1991). However, for private employers, "[t]ransferring a religious employee to another position – even if the position is less desirable – has been deemed a reasonable accommodation so long as the employee's employment status is reasonably preserved." Kaminer, *supra* note 43, at 608. "Religiously motivated selectivity in the work one is willing to perform is an 'aspect of religious observance and practice' that the employer must disregard unless it demonstrates that it is 'unable to reasonably accommodate . . . without undue hardship.'" *Ryan*, 950 F.2d at 461 (quoting *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986)).

106. *Ryan*, 950 F.2d at 459. Law enforcement agencies, like the FBI and police departments, are entitled to insist that their agents or officers follow orders. *Id.* at 461. Obedience is vital in an organization responsible for public safety. *Id.*

107. *Id.* at 460. Ryan's religious belief was described in the U.S. Bishop's Pastoral Letter on War and Peace, which said that Roman Catholics were called to be "peacemakers." *Id.* At no point was the seriousness of Ryan's sincerity questioned. *Id.*

108. *Id.* at 460-61. The court noted that reallocating work between agents is the most obvious accommodation. *Id.* at 461. However, the court refused to decide whether several swaps would create an undue hardship because the demand for such accommodation may overwhelm the agency. *Id.* at 461-62.

109. *Id.*

The Seventh Circuit revisited reasonable accommodations for police officers in *Rodriguez v. City of Chicago*.<sup>110</sup> Rodriguez, a Catholic, refused to stand guard outside an abortion clinic because of his religious beliefs.<sup>111</sup> The court found that the police department reasonably accommodated Rodriguez's beliefs by providing the opportunity for him to transfer to a district that did not have abortion clinics.<sup>112</sup> A transfer would eliminate the conflict between Rodriguez's job and his religious beliefs without a reduction in salary or a risk to the public safety.<sup>113</sup> Again, this case of religious discrimination failed because of Rodriguez's unwillingness to cooperate with the department's offers of reasonable accommodations.

Based on the decisions in *Ryan* and *Rodriguez*, it appears courts are willing to allow an officer an opportunity to alter his job assignment in order to protect his religious beliefs. The officer must cooperate with the department and accept the alternative offered. However, the Seventh Circuit recently altered this standard in favor of the department.

### C. *A New Approach to Religious Accommodations in the Seventh Circuit*

A recent Seventh Circuit decision deviated from its past application of the law pertaining to reasonable accommodations of religion and possibly created a statutory exemption for law enforcement employers.<sup>114</sup> Ben Endres was hired as a certified Indiana State Trooper in 1991, and in March 2000 he was assigned as a Gaming Commission Agent to the Blue Chip Casino in Michigan City, Indiana.<sup>115</sup> Riverboats in Indiana cannot leave the dock without a

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110. *Rodriguez*, 156 F.3d 771. See generally *Uphold Law, Judge Tells Officer*, WASH. POST, Jun. 26, 1991, at D5. A police sergeant refused to arrest abortion protestors because it violated his religion. *Id.* The sergeant previously asked for a different assignment to avoid abortion clinics, but the department refused. *Id.* The court found that the police department did not have to accommodate this religious belief because "police must uphold the law, whether they personally agree with a specific law." *Id.*

111. *Rodriguez*, 156 F.3d at 772. Following a mass demonstration outside abortion clinics throughout the city of Chicago, the police department assigned officers "clinic duty" on Saturday mornings. *Id.* at 773. Clinic duty requires the officer to establish a police presence near the clinic. *Id.* Rodriguez, a Roman Catholic, believes "an elective abortion is the wrongful taking of human life and that individuals have a general moral obligation to avoid participation in, or facilitating, an elective abortion." *Id.* However, Rodriguez had no problem going to the abortion clinic in the case of an emergency. *Id.*

112. *Id.* at 775. The court referred to this transfer as a "paradigm of 'reasonable accommodation.'" *Id.* (quoting *Wright*, 2 F.3d at 217).

113. *Id.* at 776.

114. Adina Matusow, *Baptist Cop's Fight Tests Civil Rights Act*, LEGAL TIMES, Apr. 12, 2004, at 8. For a discussion of religious objections in the medical field, see Marilyn Gardner, *Pharmacists' Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11 (discussing pharmacists who refuse to fill prescriptions because of religious objections).

115. Brief of Intervener United States of America, *Endres v. Indiana State Police* (No. 3:01-CV-0518) (Nov. 12, 2001), available at <http://www.usdoj.gov/crt/emp/documents/endresbrief.htm> (last visited Oct. 2, 2005).

“gaming officer” on board.<sup>116</sup> The assignment consisted of monitoring blackjack tables, slot machines,<sup>117</sup> certifying gambling revenue, investigating complaints from the public about the gaming system, and conducting licensing investigations.<sup>118</sup> Endres, however, was a member of the Community Baptist Church, which “holds as a tenant of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should not, in any way, participate in and/or facilitate gambling.”<sup>119</sup> A conflict arose between Endres’s religious beliefs and his assigned duty as an officer.

Endres informed the department of the conflict and that he would not be able to accept the assignment.<sup>120</sup> He requested an alternative assignment, but this request was denied.<sup>121</sup> Endres did not report for duty and, as a result, was charged with “a refusal to comply with a written order and insubordination”; Endres was subsequently terminated.<sup>122</sup> Endres argued to the Indiana State Police Board that he was hired to defend safety and not to regulate gambling.<sup>123</sup>

He further argued that he was willing to investigate a crime in a casino, which is part of enforcing the law and not becoming part of an immoral activity.<sup>124</sup> After his termination was upheld, Endres filed a complaint based on the department’s failure to attempt to make a reasonable accommodation of his religious belief in violation of Title VII.<sup>125</sup>

The District Court refused to dismiss Endres’s Title VII claim based on sovereign immunity.<sup>126</sup> The police department took an interlocutory appeal from this denial to the Seventh Circuit.<sup>127</sup> The court chose not to decide the constitutional issue of whether Title VII is an appropriate exercise of Section Five of the Fourteenth Amendment deciding instead to focus on whether Title VII obliges the department to grant Endres’s requested accommodation.<sup>128</sup> The court held that a “task specific request for religious accommodation by an employee of a law enforcement agency or other ‘paramilitary’ employer is *per se* unreasonable.”<sup>129</sup> The court pondered, “[m]ust prostitutes be left exposed to

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116. CNN, *supra* note 83.

117. *Id.*

118. Brief for Petitioner at 3, *Endres v. Indiana State Police* (No. 03-1183) (Feb. 17, 2004), *available at* [http://www.jenner.com/files/tbl\\_s18News/RelatedDocuments147/971/endres\\_cert2.pdf](http://www.jenner.com/files/tbl_s18News/RelatedDocuments147/971/endres_cert2.pdf) (last visited Nov. 12, 2005).

119. Brief of Intervener United States of America, *supra* note 115.

120. *Id.*

121. *Id.*

122. *Id.*

123. CNN, *supra* note 83.

124. *Id.*

125. Brief for Petitioner, *supra* note 118, at 4.

126. *Id.* See also Brief for Intervener United States of America, *supra* note 115 (“Congress has the power to abrogate States’ Eleventh Amendment immunity to private suits under federal statutes enacted pursuant to Section 5 of the Fourteenth Amendment.”).

127. Brief for Petitioner, *supra* note 118, at 5.

128. *Endres v. Indiana State Police*, 334 F.3d 618, 623 (7th Cir. 2003).

129. Brief for Petitioner, *supra* note 118, at 6.

slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?"<sup>130</sup> The court stated that "nothing in the text . . . of Title VII [supports] its conclusion that 'paramilitary' organizations were not required, like all other employers, to reasonably accommodate an employee's religion."<sup>131</sup>

The Seventh Circuit issued a new opinion in *Endres* following a motion for rehearing.<sup>132</sup> Again the court did not require the police department to accommodate *Endres's* request because "[j]uggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors."<sup>133</sup> The court did not interpret either *Ryan*<sup>134</sup> or *Rodriguez*<sup>135</sup> to require the police department to offer an alternative assignment to *Endres*.<sup>136</sup> This opinion, however, did contain a dissent that questioned the majority's decision to strike out the "reasonable accommodation requirement from the statute as it applies to police and fire personnel."<sup>137</sup> Consequently, *Endres's* case of religious discrimination was unsuccessful despite the department's failure to attempt to accommodate his religious belief.

### I. Future Implications of the *Endres* Decision

The *Endres* decision may raise questions in the minds of public safety and emergency personnel as to their right to receive religious accommodations.<sup>138</sup> The plain language of Title VII does not suggest "that law enforcement agencies, fire departments, or any other 'paramilitary' employers are exempt from the reasonable accommodation provisions."<sup>139</sup> However, "police officers and firefighters have no right under Title VII . . . to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."<sup>140</sup> The *Endres* decision comes at a time

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130. *Endres*, 334 F.3d at 623.

131. Brief for Petitioner, *supra* note 118, at 7-8.

132. *Id.* at 8.

133. *Endres*, 349 F.3d at 925. The court noted that the Gaming Commission was an unpopular assignment and the police department had to draft volunteers. *Id.*

134. *Ryan*, 950 F.2d at 458.

135. *Rodriguez*, 156 F.3d at 771.

136. *Endres*, 349 F.3d at 926. In fact, the court said "agencies such as police and fire departments designed to protect the public from danger may insist that *all* of their personnel protect *all* members of the public – that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds." *Id.*

137. Brief for Petitioner, *supra* note 118, at 8.

138. *Endres*, 349 F.3d at 930 (Ripple, J., dissenting). "Congress apparently saw no reason to exempt categorically such organizations from the plain mandate of the statute and preferred that the boundaries of the reasonable accommodation requirement be established in case-by-case adjudication." *Id.* at 930. Many will be puzzled by this "blanket exemption." *Id.*

139. *Id.* at 929.

140. *Rodriguez*, 156 F.3d at 779. Police officers are not entitled to demand their duties to conform to their religious views. *See id.* (Posner, R., concurring).



where there is a new assertiveness and an increasing number of people that demand public space in the name of religion.<sup>141</sup> When the employer is not a regular employer, like a paramilitary organization, it may not be reasonable to accommodate specific conscientious objections due to the demands of professional discipline.<sup>142</sup> The *Endres* decision, therefore, suggests a fear that reasonable accommodations within the police force may lead to officers refusing to perform their public safety duties in emergency situations.

## 2. *Societal Concerns Regarding Police Officers' "Choosing" of Assignments*

Reasonable accommodations reflect the societal commitment to religious pluralism.<sup>143</sup> Religious choices are so central to human dignity that they require special protections through reasonable accommodations.<sup>144</sup> If religious minorities were left without the protection of Title VII in the police force, they might face pressure to assimilate to the majority position or move to isolated communities where they can live together as "coreligionists."<sup>145</sup> Either of these choices could "impoverish the larger society."<sup>146</sup> Furthermore, there is a need for professions to develop more tolerance, understanding, and openness to religious beliefs of the professions' members.<sup>147</sup> Religious accommodations recognize the importance of individual self-realization through religion, which is fundamental to a free society.<sup>148</sup>

Religious accommodations in the police force raise a conflicting social issue. A police force that regularly provides religious accommodations for specific conscientious objections may diminish public confidence in the

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141. Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggle for Public Space*, 78 TUL. L. REV. 1687, 1707 (2004).

142. *Id.* at 1709.

[T]hirty or forty years ago, most policemen assigned to protect a casino or a barroom would have accepted that as part of their jobs; they would have done it, regardless of their personal, religious views . . . [because] they did not think it was the state's job to design their public responsibilities in a way that accommodated or complemented their personal religious views.

*Id.* at 1710. *But see, e.g.,* *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a religious employee is entitled to unemployment compensation for a refusal to work on Saturday for religious reasons).

143. ESTREICHER & HARPER, *supra* note 6, at 607.

144. *Id.*

145. *Id.*

146. *Id.*

147. Sullivan, *supra* note 141, at 1687.

148. *Id.* at 1688. "It is an important project in any society, but particularly so in one such as ours, which [is] . . . 'rich in everything except the warmth of human connection.'" *Id.* (quoting Gary Krist, *If It's Not One Thing, It's Another*, N.Y. Times, Aug. 24, 2003, at 7).

neutrality of its protectors.<sup>149</sup> Courts' denial of religious accommodations in this context is not always based on the inconvenience of the police department, rather it is based on the "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect."<sup>150</sup> It is an undue hardship to the police department when the public confidence erodes through "recognition of a right of recusal by public-safety officers . . ."<sup>151</sup> For example, an individual might think police will "first start asking questions about my life to determine whether I am a sinner who should be allowed to be a victim."<sup>152</sup> Police officers are required to protect individuals engaged in illegal activities, not the actual activity itself; therefore, perhaps they should be denied religious accommodations in order to bolster public confidence.<sup>153</sup>

However, there is a conflicting school of thought suggesting the possibility that allowing a police officer a religious accommodation from an "immoral" duty might lead the officer to "zealously" do the job that accommodates his religious beliefs.<sup>154</sup> A risk of "half-hearted" enforcement by the police officer may arise if the officer's religious beliefs are not accommodated.<sup>155</sup> Both of these issues are at the forefront of the religious accommodations in the police force debate.

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149. Eugene Volokh, *Intermediate Questions of Religious Exemptions: A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, available at <http://www1.law.ucla.edu/~volokh/intermed.htm> (last visited Nov. 12, 2005).

150. *Rodriguez*, 156 F.3d at 779.

The public knows that its protectors have a private agenda . . . [b]ut it would like to think that they leave that agenda at home when they are on duty – that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policeman protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policeman protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges . . . want to think that U.S. Marshals protect us . . . whether . . . we vote for or against the pro-life position in abortion cases.

*Id.*

151. *Id.* at 779-80.

152. Agnosticism/Atheism Blog, *Supreme Court Rejects Case of Religious Police Officer*, Apr. 20, 2004, at <http://atheism.about.com/b/a/080227.htm> (last visited Nov. 12, 2005).

153. *Id.* See also Agnosticism/Atheism Blog, *Police Assignments vs. Religious Beliefs*, Dec. 2, 2003, at <http://atheism.about.com/b/a/047154.htm> (last visited Nov. 12, 2005) (explaining that the *Endres* case raises other concerns; perhaps Catholic hospitals may choose not to provide contraception services and although it is a private institution it provides a vital public service akin to that of the police).

154. Volokh, *supra* note 149. Citizens may remain skeptical if "there's an emergency at an abortion clinic . . . and the police officer [that is exempted from protecting abortion clinics] is summoned to attend to it, will he do his best?" *Id.*

155. *Id.*

*D. Summary of the United States: Religious Accommodation Law in the Seventh Circuit. A Trend?*

Title VII's definition of religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."<sup>156</sup> Title VII's definition of religion does not explicitly exempt law enforcement agencies, fire departments, or other paramilitary employers.<sup>157</sup> However, the Seventh Circuit's decision in *Endres* can be read to create such an exemption from Title VII,<sup>158</sup> which deviates from every other circuit in the United States.<sup>159</sup> The United States Supreme Court denied certiorari in *Endres*.<sup>160</sup> Therefore, the statutory ambiguity remains unanswered by the highest court and is left open to interpretation by the lower courts. An international perspective may provide some guidance to the questions left after *Endres*.

### III. CANADA RELIGIOUS ACCOMMODATIONS FOR THE ROYAL CANADIAN MOUNTED POLICE

#### A. Overview

In Canada, religion is a prohibited form of discrimination in employment.<sup>161</sup> An employer may discriminate on the basis of religion only if it has a "bona fide justification."<sup>162</sup> A bona fide justification is established when the "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."<sup>163</sup> The

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156. 42 U.S.C. § 2000e(j) (2004).

157. *Endres*, 349 F.3d at 929.

158. Matusow, *supra* note 114.

159. *Endres*, 349 F.3d at 927.

160. *Endres v. Indiana State Police*, 541 U.S. 989 (2004), *cert. denied*.

161. Canadian Human Rights Act, R.S.C., ch. H-6, §§ 2, 7 (1977) (Can.). This provision is based on the principle that "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated . . ." *Id.* at § 2.

162. *Id.* at § 15(2).

163. *Id.* See also INNIS CHRISTIE, GEOFFREY ENGLAND & W. BRENT COTTER, *EMPLOYMENT LAW IN CANADA* 91 (2d ed. 1993). "The essence of the duty of 'reasonable accommodation' and the reason why its role in human rights statutes is crucially important is that it takes account of the unique characteristics and circumstances of the *individual* employee and requires the employer to make reasonable efforts to accommodate those circumstances." *Id.* An example of a reasonable accommodation is exempting a Sikh Muslim who is a maintenance electrician from a hard hat requirement on the job site. *Id.* at 89. This is not to be confused with a bona fide occupational qualification (BFOQ):

various provinces in Canada have exempted some industries and occupations from reasonable accommodations.<sup>164</sup> Thus, both Canada and the United States have an undue hardship standard for reasonable accommodations.

The Canadian courts have stipulated guidelines for an employee requesting an accommodation. First, the employee must take initiative by requesting the specific accommodation and explaining why it is needed.<sup>165</sup> Employees need to be flexible, realistic, and deal with the employer in good faith.<sup>166</sup> In turn, the employer should respect the dignity of the employee asking for accommodation and assess his or her need based on the needs of the religious group.<sup>167</sup> The employer may need to consider alternatives to the requested accommodation and, if accommodation is not possible due to undue hardship, be fully prepared to demonstrate the hardship.<sup>168</sup> The courts approach the issue of undue hardship on a case-by-case basis.<sup>169</sup>

Factors the courts consider in determining whether undue hardship exists include "the cost of accommodation (both present and reasonably foreseeable costs), and health and safety risks to the person requesting accommodation, to other employees and to the public."<sup>170</sup> Some level of expense inflicted on the

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[A] limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives . . . . In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

*Id.* at 87-88 (quoting *Ont. Human Rights Commn v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 208). An example of a BFOQ is a rule banning non-Catholics from teaching at Catholic schools. *Id.* at 90.

164. *Id.* at 101. Four provinces exempt domestic workers engaged in the employer's private residence; one province exempts farm workers living in the employer's private residence; one province exempts religion instructors in religious schools; one province exempts persons who are employed to look after medical needs of their employers, sick children, or a relative who is ill. *Id.*

165. P.A. Neena Gupta, *The Employers Duty to Provide Religious Accommodation* (June 2004), at <http://www.hrinfodesk.com/preview.asp?article=13142> (last visited Nov. 12, 2005).

166. *Id.*

167. *Id.* For an example of a religious accommodation policy, see Yosie Saint-Cyr, *Sample Religious Accommodation Policy* (July 2004), at <http://www.hrinfodesk.com/articles/samplereligiousaccommodationpolicy.htm> (last visited Jan. 16, 2006).

168. Gupta, *supra* note 165.

169. *Id.*

170. *Id.* In no circumstances will the court look at the discriminatory preferences of co-workers or customers. *Id.* Other factors the court considers include the impact on the morale of other employees and the interchangeability of the workforce and other facilities. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] S.C.R. 489, 502 (holding that the employee did not have to work on days prohibited by his religion because the employer failed to show undue hardship and therefore had a duty to accommodate).

employer is acceptable, but an undue interference with the operation of the business or undue expense to the employer is not required.<sup>171</sup>

Reasonable accommodation law in Canada is very similar to that in the United States because both consider health and safety of the public, alternative accommodations, and cooperation on both sides. Canada, however, took affirmative, self-imposed steps to accommodate police officer's religion.

*B. Religious Accommodation for the Royal Canadian Mounted Police: More Tolerant than the United States?*

Canada has taken a more tolerant approach to diversity within the police workforce than the United States.

The Government of Canada recognizes cultural diversity as a fundamental characteristic of Canadian society and . . . the Royal Canadian Mounted Police (RCMP) is committed to providing effective police services that are appropriate, sensitive and equally responsive to all segments of Canada's diverse society. The RCMP is committed to . . . all laws prohibiting discrimination on any ground, regardless of . . . religion . . . .<sup>172</sup>

In fact, Canada actively recruits Sikh Muslims who are required to wear a beard and turban as part of their religious practice, without restrictions.<sup>173</sup> These affirmative, self-imposed steps towards religious diversity contrast with the court-imposed steps in the United States.

*1. Appearance of the Royal Canadian Mounted Police*

In mid-1987, the Royal Canadian mounted Police (RCMP) implemented affirmative action policies within the force for the sole purpose of recruiting visible minorities.<sup>174</sup> The RCMP wanted to "remove a barrier to the

171. *Id.*

172. R.C.M.P. Career Opportunities, *The RMCP's Commitment to Cultural Diversity*, at <http://www.keremeos.com/rcmp/careers.html> (last visited Nov. 12, 2005). In fact, the RCMP Cadet Training Program provides a chapel in which trainees can practice their faith. *Id.*

173. Ahluwalia, P., *I was Made for a Purpose*, SIKH SPECTRUM (Apr. 11, 2001), at [http://www.sikh\\_spectrum.com/042003/purpose.htm](http://www.sikh_spectrum.com/042003/purpose.htm) (last visited Nov. 12, 2005).

174. Grant v. Canada, [1995] F.C. 158, available at <http://reports.fja.gc.ca/fc/src/shtml/1995/pub/v1/1995fca0229.shtml> (last visited Nov. 12, 2005).

The force noted that preventing visible minorities from joining would be "fruitless" because the Canadian Armed Forces, Canadian National Railway, and Minister of Correctional Services all accommodated religious minorities. *Id.* Furthermore, the Metro Toronto Police allowed turbans, but the individuals were not permitted to go on industrial sites that required hard hats, to do traffic duties where hard hats were required, or to perform duties that required a gas mask. *Id.*

employment of . . . Sikhs.”<sup>175</sup> At this time, RCMP recruiting teams told Sikh Muslims they could wear beards and turbans instead of the traditional felt hat required of RCMP officers.<sup>176</sup> However, in situations where the officer is performing duties that require special headdress or safety equipment, the officer must remove the turban.<sup>177</sup> By imposing accommodations on themselves, religious minorities are likely to feel welcome within the RCMP.

In fact, the Canadian courts have gone as far as requiring a beard exemption policy to extend equally to religious and non-religious employees. The Waterloo Regional Police Services (WRPS) implemented a policy allowing officers to only wear beards for religious, medical, or investigative purposes.<sup>178</sup>

Once the beard policy was challenged, the court found it to be an irrational rule because WRPS lacked a legitimate reason for such a broad prohibition.<sup>179</sup> The court found that a beard policy taking into account health and safety or a policy merely regulating appearance and maintenance of a beard would be legitimate.<sup>180</sup> Therefore, the accommodation of appearances cannot unduly affect other police officers in the force.

Canada's approach reflects more acceptance and tolerance of deviations of a police officer's appearance. Likewise, the United States allows similar religious accommodations of appearance, but often only after resistance.

## 2. *Paid Holidays, Vacation Time, Overtime, and Job Assignments: No More Religious Accommodations?*

In the midst of actively recruiting religious minorities, the RCMP addressed other accommodation issues. Specifically, the Deputy Director of Personnel Planning noted two other concerns that the RCMP would not accommodate.<sup>181</sup> Attempts of religious accommodations regarding certain activities, such as using or carrying a firearm, often failed.<sup>182</sup> Furthermore, religious claims failed when employees could not work on specific holidays,

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175. *Id.*

176. *Id.* The RCMP's "ceremonial uniform" consists of a "felt hat, scarlet tunic, blue breeches with a yellow cavalry stripe, brown Strathcona boots and jack spurs and such other items as the Minister might approve." *Id.* Before any change in this traditional uniform is made the RCMP looks to the following factors: "tradition; uniformity of dress; ease of public identification of uniformed officers; safety considerations." *Id.*

177. *Id.* The RCMP's policy also required that officers receiving religious accommodations based on appearance perform all duties assigned to them. *Id.*

178. *Regional Municipality of Waterloo Police Services Board v. Waterloo Regional Police Ass'n*, 1999 C.L.A.S.J. LEXIS 7640, at 6 (2000).

179. *Id.* at 48-49.

180. *Id.* at 48.

181. *Grant v. Canada*, [1995] F.C. 158.

182. *Id.*

such as the Sabbath.<sup>183</sup> However, in other employment contexts the employer has a duty to consider and grant requests for religious leave.<sup>184</sup>

The RCMP created an application for Sikhs that were exempted from the traditional uniform policy.<sup>185</sup> It required them to agree to the following language: "Notwithstanding that I may be granted the exemption requested . . . I hereby undertake to perform all duties assigned to me by the RCMP and to wear any special headdress or safety equipment that is necessary for bona fide operational reasons or is required by law."<sup>186</sup> Therefore, although religious employees are allowed exemptions for appearance when appearance is not a bona fide occupational qualification, they appear to be mostly excluded from accommodations regarding work schedules and job reassignment by signing the application form.<sup>187</sup>

Religious employees of the RCMP are excluded from various areas based on a balancing of factors. The factors include:

[T]he economic consequences for the employer; the size of the employer's organization; the magnitude of any safety risks and who would bear the costs of injury that might arise; the degree of interference with the operation of the employer's business including problems of morale that might result from a prospective accommodation measure and the interchangeability of work force and facilities available to an employer.<sup>188</sup>

Based on these factors, the Commission of the RCMP concluded that only allowing accommodations in appearance survived the balancing of factors.<sup>189</sup>

### 3. *Societal Concerns: Religious or Traditional Appearance?*

The RCMP's acceptance of religious minorities was met with much societal resistance.<sup>190</sup> In *Grant v. Canada*, concerned members of society brought suit against the RCMP challenging the recently enacted policy of

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183. *Id.*

184. Gupta, *supra* note 165. In addition to the equal number of paid religious holidays that all employees receive, the employee may still request accommodation for additional paid leave days, such as floating days, compassionate leave days, or unpaid leave. *Id.*

185. *Grant v. Canada*, [1995] F.C. 158.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* The court, however, noted that "every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. . . . It was a wise man who said there is no greater inequality than the equal treatment of unequals." *Id.*

190. *Id.*

allowing turbans and beards.<sup>191</sup> The plaintiffs had great pride and attachment to the traditional appearance of the RCMP.<sup>192</sup> They further asserted that they had a real interest in retaining the religious neutrality of the uniform based on this pride.<sup>193</sup> The court held that there was no evidence that officers wearing turbans deprived any person of liberty or security.<sup>194</sup> Furthermore, the plaintiff's assertion that a "visible manifestation of a Sikh officer's religious faith, as part of his uniform, will create a reasonable apprehension of bias was not based upon any concrete evidence."<sup>195</sup>

*Grant* evidences Canadian society's unwillingness to allow religious accommodations for police officers.<sup>196</sup> This unwillingness is likely based on the notion that police are supposed to protect everyone and not just those who follow an officer's particular religious beliefs. This is similar to the fear generated in the United States and its citizens' unwillingness to allow officers religious exceptions.

As a result, Canada actually accommodates fewer religious practices in the RCMP than the United States. This is in spite of the RCMP's efforts to encourage diversity, namely religious diversity, within its workforce.

#### IV. UNITED KINGDOM: SETTING THE STANDARD FOR RELIGIOUS ACCOMMODATIONS

##### A. *Overview and History*

The European community has recognized crucial human rights issues related to religion.<sup>197</sup> In *Prais v. Council of the European Communities*, the plaintiff wanted to compete for a position available on the Council of the European Communities.<sup>198</sup> To qualify for the position, all candidates were required to take a test; however, the date of the test conflicted with the plaintiff's religious obligations.<sup>199</sup> The Council refused to administer the test at a later date, so the plaintiff filed a claim based on Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides:

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Case 130/75, *Prais v. Council of the European Communities*, 1976 E.C.R. 1589.

198. *Id.*

199. *Id.* Vivian Prais was Jewish and Friday, May 16, 1975, the date for the written test in the competition, was the first day of the Jewish feast of Shavuot, during which it is not permitted to travel or to write. *Id.*



[F]reedom to manifest one's religions or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>200</sup>

The Council argued that the European convention did not grant the plaintiff the rights she claimed.<sup>201</sup> The Council reasoned that accommodating religion would require it to "set up an elaborate administrative machinery"<sup>202</sup> for the following reasons:

[I]t would be necessary to ascertain the details of all religions practised in any Member State in order to avoid fixing for a test a date or a time which might offend against the tenets of any such religion and make it impossible for a candidate of that religious persuasion to take part in the test.<sup>203</sup>

The Court agreed with the Council and ruled that the test had to be administered on the same date for everyone, oddly enough, due to the principle of "equality."<sup>204</sup> Therefore, the plaintiff's right to freedom of religion was suppressed by a need for a uniform test date for all candidates in order to ensure "equality."

As evidenced in *Prais*,<sup>205</sup> the United Kingdom commonly did not prohibit discrimination in employment on the basis of religion until the passage of new regulations.<sup>206</sup> Ironically, the United Kingdom did prevent discrimination on

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200. *Id.* See also Hellenic Resources Net, *The European Convention on Human Rights*, Nov. 4, 1950, available at <http://www.hri.org/docs/ECHR50.html#Convention> (last visited Nov. 12, 2005).

201. *Prais*, 130/75 1976 E.C.R. 1589.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Northern Ireland, however, prohibits discrimination on the basis of religion or belief. Gay Moon & Robin Allen, *Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications*, 580 EUR. HUM. RTS. L. REV. 602, 585 (2000). The protection of religious beliefs stems from the country's historical religious conflicts. *Id.* For an explanation of the history of the conflict in Northern Ireland, see Wikipedia, *History of Northern Ireland*, at [http://en.wikipedia.org/wiki/History\\_of\\_Northern\\_Ireland](http://en.wikipedia.org/wiki/History_of_Northern_Ireland) (n.d.) (last visited Nov. 12, 2005). In fact, Northern Ireland went as far as allowing a policy of 50-50 religious recruitment policy into the Police Service. *Police Recruitment Policy Upheld*, BBC NEWS, July 23, 2002, available at [http://news.bbc.co.uk/1/hi/northern\\_ireland/2144722.stm](http://news.bbc.co.uk/1/hi/northern_ireland/2144722.stm) (last visited Nov. 12, 2005). The policy required that 50% of new recruits be Catholic. *Id.* This policy was upheld against a challenge by a Protestant claiming discrimination because recruitment was not merit based. *Id.* The court reasoned that the need to correct religious imbalance was necessary because a police force should be representative of the community it serves. *Id.*

the basis of various other categories, such as persons undergoing gender reassignment surgery and marital status.<sup>207</sup> Those who faced religious discrimination at work were without a legal remedy.<sup>208</sup> In order to circumvent this problem, religious discrimination cases were presented as race discrimination cases, which led to interesting results.<sup>209</sup> For example, Sikhs were classified as a racial group,<sup>210</sup> Rastafarians as a religious group,<sup>211</sup> Jews as a religious group,<sup>212</sup> gypsies as a racial group,<sup>213</sup> and Muslims as not being a racial group.<sup>214</sup> The lack of an obvious bright line between race and religion, along with the lack of protection of religious beliefs, led to frustration among religious groups.<sup>215</sup>

To add to the frustration, a statutory provision allowed workers to opt out of work on Sunday.<sup>216</sup> The Sunday Trading Act of 1994 and the Shops Act of 1950 were based on the Christian religion and its observation of the Sabbath on Sunday.<sup>217</sup> Therefore, many Muslim workers were not able to visit the mosque on Fridays, and many Jews were not able to observe the Sabbath on Saturdays.<sup>218</sup> One concession was made to Sikhs by exempting them from wearing safety helmets on construction sites.<sup>219</sup> Needless to say, non-Christian religious groups were frustrated at the arbitrariness of the protection of religious practices.<sup>220</sup>

Based on these examples, it is obvious that there were major issues regarding equality in religious rights in the United Kingdom. However, a large part of the United Kingdom, absent Northern Ireland, did not view religion as an issue of equal treatment.<sup>221</sup> Rather, religious rights were addressed only as those rights to hold and practice religious beliefs.<sup>222</sup> Therefore, equal treatment on the basis of religion was not afforded in the workplace or even generally in society.<sup>223</sup>

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207. Helen Pritchard, *Discrimination in Employment*, in THE HANDBOOK OF EMPLOYMENT RELATIONS, LAW & PRACTICE 150 (Brian Towers ed., 2003).

208. *Id.*

209. Moon & Allen, *supra* note 206, at 584.

210. *Mandella v. Dowell Lee* [1983] 2 A.C. 548.

211. *Dawkins v. Dep't of Env't* [1993] I.R.L.R. 284.

212. *Seide v. Gillette Industr.* [1980] I.R.L.R. 427.

213. *Comm'n for Racial Equal. v. Dutton* [1989] 1 All E.R. 306.

214. *Tariq v. Young C.O.I.T.* 24773/88.

215. Moon & Allen, *supra* note 206, at 584-85.

216. *Id.* at 586.

217. *Id.* at 585-86.

218. *Id.*

219. *Id.* at 586.

220. For a discussion of the special status of the Church of England with the Crown and the State, *see id.* at 587 (explaining the rights of certain Church of England bishops to participate in the House of Lords and the freedom it enjoys from planning laws).

221. *Id.*

222. *Id.*

223. *See generally* TROWERS & HAMLINS EMPLOYMENT DEPARTMENT, EMPLOYMENT LAW FOR CHARITIES 48-69 (Emma Burrows ed., 2003).

The tide began to turn in the late 1990s.<sup>224</sup> The recognition of limitations on the protections offered to some religious beliefs by current law led to profound changes in the United Kingdom.<sup>225</sup> The Amsterdam amendment to the E.C. Treaty introduced a new Article 13 E.C., which provides:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>226</sup>

Based on this amendment, the Council agreed to two new Directives.<sup>227</sup> The first Directive, proposed in December of 1998, outlawed discrimination on the grounds of race, which covered housing and education.<sup>228</sup> The second Framework Directive, proposed in November of 2000, required member states to implement legislation outlawing discrimination in the workplace on the grounds of religion and sexual orientation.<sup>229</sup>

The second Framework Directive required the new legislation on religion to be implemented by December 2, 2003.<sup>230</sup> As a result, the United Kingdom approved the Employment Equality (Religion or Belief) Regulations in 2003.<sup>231</sup> Employers in the United Kingdom are now required to treat all religions equally in the workplace.

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224. See generally Chartered Institute of Personnel and Development (2003), RELIGIOUS DISCRIMINATION: AN INTRODUCTION TO THE LAW, available at <http://www.cipd.co.uk/changeagendas.com> (n.d.) (last visited Oct. 8, 2004) (on file with author) [hereinafter CIPD].

225. Moon & Allen, *supra* note 206, at 580.

226. *Id.* at 583.

227. *Id.*

228. *Id.*

229. CIPD, *supra* note 224, at 1. See Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment and Occupation, 2000 O.J. (L 303) 16 [hereinafter Council Directive]. The decision to outlaw discrimination on the basis of religion in the workplace was based on the idea that “[e]mployment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realizing their potential.” *Id.* Furthermore, religious discrimination “may undermine . . . the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.” *Id.* at 16-17. Apparently religious equality in housing and education does not contribute to these goals. See Moon & Allen, *supra* note 206, at 583 (noting only the race directive applies to housing and education).

230. CIPD, *supra* note 224, at 1.

231. *Id.*

## B. *Comprehensive Statutory Scheme*

### 1. *General Overview*

The Regulations prohibit direct and indirect discrimination, harassment and victimization that is based on an individual's religion or belief.<sup>232</sup> The Regulations define the scope of "religion" simply as "any religion, religious belief or similar philosophical belief."<sup>233</sup> The explanatory notes to the Regulations suggest a number of factors when deciding what constitutes religion: whether there is collective worship, a clear belief system, or a profound belief affecting a way of life or view of the world.<sup>234</sup> These notes do not have legal effect, so it will largely be up to employers, employment tribunals, and courts to resolve this ambiguity.<sup>235</sup> It is interesting that the notes do not require a belief in a supreme being, which has been a requirement to qualify as a religion in United Kingdom courts outside of discrimination law.<sup>236</sup> Ultimately, it is unclear as to how religion will be interpreted under the new regulations.

Direct discrimination occurs when an employee is treated less favorably on the grounds of religion than other employees are treated.<sup>237</sup> Indirect discrimination occurs where:

[A] provision, criterion or practice is applied equally to persons not of the same religion or belief, and persons of a particular religion or belief are put at a disadvantage when compared to other persons, and the provision, criterion or practice cannot be shown to be a proportionate means of achieving a legitimate aim.<sup>238</sup>

"Victimization" occurs when an employee is treated differently because he or she has engaged in one of the following:

[B]rought proceedings against the alleged discriminator or any other person under the Regulations given evidence or information in connection with proceedings brought by any person against the alleged discriminator or any other person under the Regulations otherwise done anything under or by

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232. *Id.*

233. *Id.* at 5.

234. *Id.* at 6.

235. *Id.* (noting that Rastafarians, Humanists, Satanists, Pagans, cults and animal rights activists will likely qualify for protection under the Regulations).

236. *Id.*

237. *Id.* at 1.

238. *Id.* at 2-3.

reference to the Regulations in relation to the alleged discriminator or any other person, or alleged that the alleged discriminator or any other person has committed an act which would amount to a contravention of the Regulations.<sup>239</sup>

Finally, harassment is “unwanted conduct that violates the dignity of a person or creates an intimidating, hostile, degrading, humiliating or offensive environment.”<sup>240</sup> The Regulations extensively protect religion in the workplace.

The Regulations, however, do provide for certain exceptions to the general prohibition on religious discrimination.<sup>241</sup> Where the nature of the job, or the context in which it is being carried out, create a genuine occupational requirement, discrimination is allowed as long as there is a legitimate objective and the requirement is proportionate.<sup>242</sup> An organization with a particular religious ethos is also exempted from the general prohibition.<sup>243</sup> However, these exceptions only apply to recruitment, promotion, transfer, training, benefits, and dismissal.<sup>244</sup> The exceptions do not apply to the terms of employment or to any other detriment to the employee, such as demotion.<sup>245</sup>

Finally, in an effort to avoid ambiguities in application, the Regulations specify provisions for certain employers.<sup>246</sup> Provisions extend religious protection to public office-holders, barristers, partnerships, trade organizations, employment agencies, government training to assist people in obtaining employment, and the police.<sup>247</sup> Therefore, the Regulations unambiguously state that the police are subject to its prohibition of religious discrimination.

## 2. *The Regulations Applicability to Police Officers*

The Regulations pointedly state that “all police constables enjoy the same protection from discrimination and harassment as employees.”<sup>248</sup> The office of

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239. *Id.* at 3.

240. *Id.* at 3.

241. *Id.* at 4.

242. Moon & Allen, *supra* note 206, at 594.

243. *Id.*

244. CIPD, *supra* note 224, at 4.

245. *Id.*

246. *Id.*

247. *Id.*

248. The Department of Trade and Industry, *Explanatory Notes for the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003*, at 33, at [http://www.dti.gov.uk/er/equality/so\\_rb\\_longexplain.pdf](http://www.dti.gov.uk/er/equality/so_rb_longexplain.pdf) (last visited Jan. 22, 2005) (on file with author) [hereinafter Notes]. The Regulations state, “‘employment’ means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions shall be construed accordingly.” The Employment Equality (Religion or Belief) Regulations, (2003) SI 2003/1660, *available at* <http://www.legislation.hms.gov.uk/si/si2003/20031660.htm> (last visited Nov. 12, 2005) [hereinafter Employment Regulations].

police constable is treated as "employment" for the purposes of the Regulation.<sup>249</sup> The constables' employer is the chief officer of the force to which they belong or the police authority when the discriminatory acts are done by that authority.<sup>250</sup> The police officers covered are the National Criminal Intelligence Service and National Crime Squad; officers in forces such as the British Transport Police; Ministry of Defence Police, Royal Parks Police; and police cadets.<sup>251</sup> Therefore, the Regulations undoubtedly cover police officers' practice of religion.

However, the Framework Directive cautioned against strict applicability towards the police.<sup>252</sup> The Directive does not require employers to hire or keep employees that are incompetent and unavailable to perform essential functions of the job or its relevant training.<sup>253</sup> Furthermore, it provides:

[T]he armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.<sup>254</sup>

The Directive goes on to provide that the Armed Forces may choose not to apply provisions regarding disability or age due to its need to safeguard combat effectiveness.<sup>255</sup> However, nowhere in the Directive does it state that the police force may choose not to apply the provisions on religious discrimination.<sup>256</sup> Therefore, it may be presumed that, absent an officer's inability to do the job, religious discrimination is categorically prohibited.

### C. *Anticipated Impact in the Workplace and in Society*

Due to the recent enactment of the Regulations, their interpretation is the subject of much speculation throughout the United Kingdom. There has never been specific legislation in the area of religious discrimination in the workplace.

This void may lead to fundamental changes in workplace culture.<sup>257</sup> In fact, society does not view religious discrimination as a problem.<sup>258</sup> Only two percent of the public believes employers discriminate against employees on the

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249. Notes, *supra* note 248.

250. *Id.*

251. *Id.*

252. Council Directive, *supra* note 229, at 17.

253. *Id.*

254. *Id.*

255. *Id.*

256. *See generally id.*

257. *New Laws Could Revolutionize Office Culture*, BBC NEWS, July 23 2002, available at <http://news.bbc.co.uk/1/hi/business/2357279.stm> (last visited Nov. 12, 2005).

258. *Id.*

basis of religion.<sup>259</sup> There is also a concern that legislation may not lead to a more tolerant society and instead may breed resentment among some workers.<sup>260</sup> This is especially relevant in light of the societal view that religious discrimination is not a problem in the workplace.

In addition to creating valuable rights for employees, the Regulations pose difficult challenges to employers.<sup>261</sup> First, employers face the difficulty caused by the low level of understanding of many religions and the manifestations of their subsequent beliefs.<sup>262</sup> Due to the Regulations' expansive definition of religion, employers should be cautious in assuming that less conventional beliefs fall outside the scope of the Regulations.<sup>263</sup> Furthermore, it is not enough that employers simply avoid direct religious discrimination. They must also avoid implementing a policy that puts a religious employee at a "particular disadvantage" unless the policy is a "proportionate means to achieve a legitimate end."<sup>264</sup> At first glance, it may seem the employer's hands are tied because, along with the Religious and Belief Regulations, the employer is also now subject to Sexual Orientation Regulations.<sup>265</sup> It is likely that religious employees will object, based on genuinely held religious grounds, to working with homosexual employees.<sup>266</sup> The only guidance given to employers in this situation is to use proportionate means and strike a balance between the conflicting sides.<sup>267</sup>

Another problem stemming from the implementation of the Regulations is tolerating the expression of religious beliefs.<sup>268</sup> It will be difficult for employers when this expression of religious belief proves offensive toward others and leads to discrimination.<sup>269</sup> For example, some religions have beliefs regarding the role of women in society or sexual orientation.<sup>270</sup> Attempts to suppress this expression may lead to a claim of discrimination under the new Regulations; however, allowing the employee to freely express these views may lead to tension within the workplace.<sup>271</sup> Furthermore, the employer could be liable for claims of harassment when the comments amount to harassment of

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259. *Id.*

260. *Id.*

261. Stephen Levinson, *Religious Discrimination*, EMPLOYMENT LAW BULLETIN, Oct. 2003, at 4.

262. *Id.*

263. *Id.* at 5 (noting that non-believers are likely covered under the Regulations).

264. *Id.*

265. *Id.*

266. *Id.* at 5-6 (explaining other "hot spots" including dietary requirements, prayer facilities, dress codes, holidays, and restrictions on hours of work).

267. *Id.*

268. Richard Nicolle, *Employment – A Little Respect*, LAWYER, Jun. 23, 2003, at 2003 WL 61848628, at 2.

269. *Id.*

270. *Id.*

271. *Id.*

other employees.<sup>272</sup> The exercise of all rights, however, must be proportionate and balanced against the competing rights of other parties.<sup>273</sup> One way to strike a balance is to implement a policy of cultural sensitivity providing training and a mutual understanding and respect for others.<sup>274</sup>

Despite intense speculation as to how employers and employees will receive the new Regulations, it appears little progress has been made.<sup>275</sup> As of November 2003, only thirty-three percent of employers updated policies for religious beliefs within the workplace, although employees were going to be able to bring claims as of December.<sup>276</sup> This presents a problem because the new Regulations did not place a cap on the level of awards for successful claimants.<sup>277</sup> Of those who did update their policies, the driving factor for a large majority was the company's reputation.<sup>278</sup> Only half of the employers wanted to develop diversity within the workforce.<sup>279</sup> Perhaps the employers are approaching the implementation of the new Regulations from the wrong perspective.

There is little evidence that the police force is taking implementation of the new Regulations seriously. The Metropolitan Police Authority cites the new Regulations as a consideration for an important policy to prioritize.<sup>280</sup> However, it may be too soon to judge the Regulations' effectiveness in police departments in the United Kingdom.

#### V. CONCLUSION: UNITED KINGDOM AS AN EXAMPLE FOR THE UNITED STATES AND CANADA?

The United Kingdom's Regulations promise religious tolerance in the workplace. However, the reluctance of employees to implement them, and society's perception that there is no discrimination in the workplace may diminish its effectiveness. In addition, it is too soon after adoption of the Regulations to see the effect they will have in the police force.

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272. *Id.*

273. *Id.* at 3.

274. *Id.*

275. *Employment – Discrimination Polices Get Short Shrift From Employers*, LAWYER, 2003 WL 61849637, at 1 (Nov. 3, 2003). This lack of progress may be attributable to employer confusion. *Anti-Discrimination Agencies: New Beginning or Bitter End?*, LAWYER, 2002 WL 24528190, at 1 (Sept. 16, 2002). "Having six different laws – on race gender, disability, age, religion and sexual orientation – will be as confusing for employers as for the public." *Id.* at 2. Therefore, a movement towards a uniform commission and a uniform law is emerging in the UK. *Id.* A call for an overarching equality commission is necessary because presently there are six commissions dealing with the six separate strands of discrimination. *Id.* A single human rights commission, as well as a single unified law may solve the confusion. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 2.

279. *Id.*

280. Metropolitan Police Authority, *Summary of the Policing and Performance Plan 2004/05*, at 4, available at <http://www.mpa.gov.uk> (last visited Jan. 16, 2006).



However, the Regulations serve as an example that should be considered by the United States and Canada. Given both countries' history of problems with religious accommodations in the police force, a comprehensive statutory scheme may better serve the interests of the public, government, and police officers. Additionally, such a statutory scheme will definitively establish the law regarding police officer's religious accommodation; thus, the courts will be able to uniformly address the issue. As Aristotle once said, "[l]aws should be constructed so as to leave as little as possible to the decision of those who judge."<sup>281</sup>

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281. Fort Liberty, *Quotes About Law*, at <http://www.fortliberty.org/quotes/quotes-law.shtml> (last visited Nov. 12, 2005).

