

GROFF V. DEJOY: HARDISON IS DEAD, LONG LIVE HARDISON!

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For decades, lower courts and litigators labored under the (mis)impression that the Supreme Court meant what it said in *TWA v. Hardison*: that an employer can deny a religious accommodation if it imposes anything more than a “*de minimis*” (or minimal) cost on the employer’s business.¹ So understood, *Hardison* cost countless religious minorities their jobs and allowed this country’s largest employers to deny religious accommodations by pointing to the all but trifling administrative burdens of providing such accommodations (like facilitating voluntary shift swaps or permitting religious garb in the workplace). It took 46 years, but the Supreme Court in *Groff v. DeJoy* finally “clarified” that *Hardison*’s *de minimis* standard was, in the words of Justice Sotomayor, merely “loose language.”² Going forward, this means that lower courts must interpret Title VII’s religious accommodation provision—requiring workplace religious accommodations absent “undue hardship”—consistent with the statute’s plain textual meaning.³ *Groff* therefore corrects *Hardison*’s grave error and helps ensure that all Americans will be treated fairly in the workplace.

BACKGROUND

In *Groff v. DeJoy*, postal carrier Gerald Groff sought a Sabbath accommodation from the United States Postal Service (USPS) so he could observe his religiously mandated day of rest.⁴ At first, he was accommodated. But after USPS entered into a contract with Amazon to deliver packages seven days a week, Groff faced progressive discipline for refusing to work on his Sabbath. Groff eventually resigned and sued.⁵ Both the district court and Third Circuit concluded that Title VII didn’t require USPS to accommodate Groff because any accommodation would impose more than a *de minimis* burden on USPS. Groff petitioned the Supreme Court to hear his case.

The Supreme Court granted review on January 13, 2023, causing most Court watchers to believe that it would overturn *TWA v. Hardison*. But after oral argument, this conventional wisdom was thrown into doubt. Justice Gorsuch, for example, appeared to focus on the numerous

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¹ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

² *Groff v. DeJoy*, 143 S. Ct. 2279, 2297 (2023) (Sotomayor, J., concurring).

³ 42 U.S.C. § 2000e(j).

⁴ *See* 143 S. Ct. at 2286.

⁵ *See id.* at 2286-87.

points of “common ground” between the parties.⁶ And forceful arguments from the Solicitor General, combined with concerns over statutory *stare decisis* coming from several corners, suggested a narrower ruling. It was therefore unsurprising that initial reactions to the Court’s opinion in *Groff* were also uncertain: On the one hand, the Court *did not* overturn *TWA v. Hardison*. On the other, the Court repeatedly emphasized that *Hardison*’s most enduring legacy, the *de minimis* standard, was no longer good law.

So, how can we understand *Groff* and *Hardison* going forward? And what does *Groff* mean for religious minorities? Put simply, *Groff* gave *Hardison* a brain transplant. Instead of overruling the decision, the Supreme Court replaced what every federal court had treated as *Hardison*’s key holding with a brand-new standard. This new legal test is both more consistent with the statutory text and will better protect the rights of religious minorities in the workplace.

I. THE WORLD BEFORE *GROFF*

If you had only listened to oral argument in *Groff* and then read the Supreme Court’s opinion, you would be forgiven for thinking that most courts had been correctly interpreting the phrase “undue hardship” in Title VII, and that “not all courts, but some courts” had taken *Hardison*’s “‘*de minimis*’ language and run with it.”⁷ Therefore, all the Supreme Court needed to do in *Groff* was “clarify”⁸ a “single . . . sentence”⁹ from *Hardison*—a sentence which had been “leading courts of appeals astray.”¹⁰ Further, you might also believe this clarification was hardly controversial, as even the Solicitor General of the United States (representing USPS) agreed “the ‘*de minimis*’ language should not be taken literally.”¹¹

While all technically true, the problem with such a conclusion is that this is not how lower courts have understood *Hardison* for the past 46 years. Before *Groff*, federal appellate courts uniformly read *Hardison* as definitively interpreting Title VII to require evidence of only *de minimis* costs to deny religious accommodations.¹² The Justices who decided *Hardison* seemed to

⁶ Transcript of Oral Argument at 61:16–18, *Groff v. DeJoy*, 143 S. Ct. 2279 (2023) (No. 22-174).

⁷ *Id.* at 66:15–16.

⁸ *Id.* at 74:9.

⁹ *Groff*, 143 S. Ct. at 2291.

¹⁰ Transcript of Oral Argument at 71:7, *Groff v. DeJoy*, 143 S. Ct. 2279 (2023) (No. 22-174).

¹¹ *Id.* at 67:14–15.

¹² *See, e.g.*, *Lowe v. Mills*, 68 F.4th 706, 720 (1st Cir. 2023) (“Title VII does not define ‘undue hardship,’ *see id.* § 2000e, but current law holds that “[a]n accommodation constitutes an “undue hardship” if it would impose more than a *de minimis* cost on the employer.” (quoting *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004))); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 486 (2d Cir. 1985) (applying *Hardison*’s *de minimis* standard); *United States v. Bd. of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 894 (3d Cir. 1990) (same); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008) (same); *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013) (same); *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 825 (6th Cir. 2020) (“But the company did not have to offer any accommodation that would have imposed an ‘undue hardship’ on its business—meaning (apparently) anything more than a ‘*de minimis* cost.’” (quoting *Hardison*, 432 U.S. at 84)); *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (“To require [an employer] to bear more than a *de minimis* cost in order to give [an employee] Saturdays off is an undue hardship. (From now on, we’ll use the phrase “slight burden” to avoid the Latin.)” (quoting *Hardison*, 432 U.S. at 84)); *Mann v. Frank*, 7 F.3d 1365, 1369 (8th Cir. 1993) (“*Hardison* held that any accommodation involving more than *de minimis* costs to the employer constitutes undue hardship.” (citing *Hardison*, 432 U.S. at 84)); *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1468 n.11 (9th Cir. 1996) (“The Supreme Court has made it clear that

read it this way too. Writing in dissent, Justices Marshall and Brennan pointed out (to no avail) that after *Hardison*, employers “need not grant even the most minor special privilege to religious observers to enable them to follow their faith.”¹³ They even questioned “whether simple English usage permits ‘undue hardship’ to be interpreted to mean ‘more than *de minimis* cost.’”¹⁴

Nor was *Hardison*’s *de minimis* language simply a case of faulty terminology masking proper application of the law, as the Solicitor General at oral argument seemed to suggest.¹⁵ It is clear that Congress enacted statutory text imposing a broad religious accommodation mandate on employers. When Congress amended Title VII in 1972, debate over workplace religious accommodations—and Sabbath observance in particular—took center stage. The Amendment’s author, West Virginia Senator Jennings Randolph, was a Seventh-day Baptist,¹⁶ who repeatedly criticized the “partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days.”¹⁷ The Amendment’s text reflected these concerns, explaining that accommodation of the employee’s “religious observance and practice, as well as belief,” was required unless the employer “demonstrates” the accommodation would impose an “undue hardship on the conduct of the employer’s business.”¹⁸

But while Congress enacted a statute whose plain text required robust accommodations, within five years *Hardison* essentially repealed it. The promise of vigorous religious accommodations therefore turned into a paper tiger that employers could subvert by citing minor administrative costs, hypothetical burdens, and imagined or real co-worker displeasure.¹⁹ Thus, rather than protecting the rights of religious minorities, Title VII’s religious accommodation framework after *Hardison* dealt loss after loss to religious employees, *especially* religious minorities. Across all religious accommodation appeals decided since 2000, employers prevailed 83.7% of the time when the undue hardship defense was raised.²⁰ Yet claims brought by Christian plaintiffs (excluding Christian faiths that are primarily practiced by racial minorities) were over twice as likely to prevail as claims brought by employees of minority faiths.²¹

Indeed, despite Senator Randolph’s best efforts, *Hardison*’s reinterpretation of Title VII made it significantly easier for employers to deny religious accommodation for those employees most likely to suffer from unfair prejudice in the workplace: religious minorities. Instead of increasing

an accommodation that imposes more than a *de minimis* cost to the employer constitutes an undue hardship.” (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 367, 371 (1986)); *Graff v. Henderson*, 30 F. App’x 809, 810 (10th Cir. 2002) (applying *Hardison*’s “*de minimis*” standard); *Dalberiste v. GLE Assocs., Inc.*, 814 F. App’x 495, 498 (11th Cir. 2020) (same).

¹³ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (Marshall, J., dissenting).

¹⁴ *Id.* at 92 n.6 (Marshall, J., dissenting). As the majority in *Groff* points out, *Hardison* also suggests that the burden on TWA in that case was “substantial,” but *descriptions* of the burden on TWA do not change the opinion’s *legal holding* that anything more than a *de minimis* burden is an undue hardship. *Groff*, 143 S. Ct. at 2292.

¹⁵ See Transcript of Oral Argument at 71:11–72:3, *Groff v. DeJoy*, 143 S. Ct. 2279 (2023).

¹⁶ 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, 584 (2000).

¹⁷ 118 CONG. REC. S228 (daily ed. Jan. 21, 1972) (statement of Sen. Randolph).

¹⁸ 42 U.S.C. § 2000e(j).

¹⁹ See Petition for Writ of Certiorari at 25–31, *Dalberiste v. GLE Associates*, 141 S. Ct. 2463 (2021) (mem.); Petition for Writ of Certiorari at 22–26, *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227 (2021).

²⁰ See Petition for Writ of Certiorari at 29, *Dalberiste v. GLE Associates*, 141 S. Ct. 2463 (2021) (mem.).

²¹ See *id.* at 30.

religious diversity in the workforce, *Hardison* allowed employers to cite the very administrative costs associated with increasing religious diversity (like flexible dress codes to accommodate religious garb or shift swaps to allow Sabbath observance) to justify *restricting* workplace accommodations. This in turn decreased workplace tolerance for religious diversity. As one federal judge put it before *Groff* was decided, “The irony (and tragedy) of decisions like *Hardison* is that they most often harm religious minorities — people who seek to worship their own God, in their own way, and on their own time.”²²

II. GROFF

Groff mercifully corrected this state of affairs. But rather than confront *Hardison*’s error head on, *Groff* took a different tack. It carefully parsed *Hardison*’s text and concluded “it [wa]s doubtful” the Court in *Hardison* intended its gloss on the “undue hardship” standard to constitute an “authoritative interpretation” of Title VII or “to take on th[e] large role” that lower courts had ascribed to it.²³ While scholars can debate whether this revisionist reading of *Hardison* is correct, the bottom line is that *Groff* rejected the lower courts’ unanimous interpretation of *Hardison*. And in doing so, *Groff* explained that “like the parties,” the Supreme Court now “understand[s] *Hardison* to mean that ‘undue hardship’ is shown when a burden is substantial in the overall context of an employer’s business.”²⁴ While the Court justified this reinterpretation by a careful reading of *Hardison*, the test it adopted looked as much to Title VII’s text as to *Hardison* itself, using dictionary definitions to explain that an “undue hardship” was not only a hardship (“something hard to bear”), but one that rises “to an ‘excessive’ or ‘unjustifiable’ level.”²⁵

Having reinterpreted “undue hardship,” the Court also provided several guideposts for lower courts going forward. First, the Court embraced the EEOC’s position that “temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs” *do not* impose an undue hardship in employers.²⁶ Second, the Court suggested that providing “incentive pay” or coordinating across offices “with a broader set of employees” were accommodations the lower courts should consider on remand, implying that such accommodations would not impose an undue hardship.²⁷ Finally, rather than look to related Americans with Disabilities Act caselaw or simply adopt the EEOC’s existing guidance (as *Groff* and USPS suggested, respectively), the Court invited lower courts to develop post-*Groff* precedent by using standard tools of statutory interpretation to “resolve whether a hardship would be substantial in the context of an employer’s business in the commonsense manner that [they] would use in applying any such test.”²⁸

Groff also directly addressed a question that often arises in accommodation cases: when and how should courts factor in impacts on coworkers when assessing undue hardship? For instance, what if other employees start grumbling about a religious accommodation — does a decrease in

²² *Memphis Light, Gas & Water*, 952 F.3d at 829 (Thapar, J., concurring).

²³ *Groff*, 143 S. Ct. at 2291–92.

²⁴ *Id.* at 2294.

²⁵ *Id.* at 2294.

²⁶ *Id.* at 2296.

²⁷ *Id.* at 2297.

²⁸ *Id.* at 2296.

coworker morale count as an undue hardship? Without completely barring courts from considering these impacts, *Groff* significantly narrowed their use in the undue hardship analysis in two ways. First, the Court made clear that some “burdens” on coworkers are simply “off the table.”²⁹ These include a coworker’s dislike or hostility toward “religious practices and expression in the workplace” and the “mere fact of an accommodation.”³⁰ As the Court explained, “a hardship that is attributable to employee animosity . . . cannot be considered ‘undue.’”³¹ To hold otherwise would put “Title VII . . . at war with itself,” as it was enacted to forbid “bias or hostility to a religious practice.”³² Second, the Court emphasized that merely citing an impact on coworkers is insufficient; instead, courts must take the “further logical step” seriously and determine how the alleged impact on coworkers would “affect the conduct of the employer’s business.”³³

III. THE WORLD AFTER *GROFF*

So where do things stand now? After *Groff*, there is no question that the *de minimis* standard is out. Instead, courts must apply the “actual text”³⁴ of Title VII’s religious accommodation provision. This will likely result in significantly more religious accommodations in the workplace. For large employers, it is hard to see how the costs of providing an accommodation—like overtime or incentive pay, or the administrative cost associated with shifting schedules—would rise to the level of an undue hardship in all but the most unusual cases (like an NFL quarterback unable to work on Sundays). But even for small employers, many accommodations can be made at little to no cost—they simply require flexibility and the willingness to work *with* religious employees instead of against them. And for Sabbatarians in particular—by confirming that voluntary shift swaps, occasional incentive or overtime pay, and minor administrative costs are not undue hardships—the Court has all but guaranteed more accommodations.

CONCLUSION

Groff on its face carefully “clarifies” (without overturning) existing precedent and adopts an interpretation of Title VII that both parties generally supported—a fact that the Court notes repeatedly throughout the opinion. This modest approach shows why the Court’s opinion garnered the votes of all nine Justices. But make no mistake, *Groff* is also a significant repudiation of nearly 50 years of precedent interpreting Title VII. Lower courts therefore cannot ignore *Groff*; going forward, they must interpret Title VII’s religious accommodation provision according to its text. While only time will tell, this appears to be a significant victory for religious minorities and for all those who seek the opportunity to make a living without sacrificing their faith.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*