

# RELIGIOUS SPEECH IN THE WORKPLACE: HARASSMENT OR PROTECTED SPEECH?

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Charita Chalmers, an evangelical Christian factory employee, wrote personal letters to two different co-workers, one of them her supervisor, outside of the office. The letters asserted that each of the co-workers had done immoral things and needed to ask God for forgiveness. The letters upset the co-workers; one received her letter while in the hospital, and the supervisor's wife intercepted the other. She mistakenly interpreted it to mean her husband was having an affair. At the demand of the supervisor, Chalmers was fired.<sup>1</sup>

The *Chalmers* case raises several cross-cutting questions under Title VII of the Civil Rights Act of 1964,<sup>2</sup> which prohibits discrimination on the basis of religion in the terms or conditions of employment.

(1) Had Chalmers not been fired, could the supervisor have sued the company claiming that Chalmers had harassed him on religious matters and that the company was liable for religious discrimination because it did not discipline her? (The Fourth Circuit suggested that the supervisor indeed could have sued the company.<sup>3</sup>)

(2) After Chalmers lost her job, she sued the company claiming that it had discriminated against her on the basis of

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1. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996).  
 2. 42 U.S.C. § 2000e to e-16 (1994).  
 3. See *Chalmers*, 101 F.3d at 1021.

her religious activity, and also—under Section 701(j) of Title VII<sup>4</sup>—that the company had failed to "reasonably accommodate" her religiously motivated practice of chastising fellow employees for their behavior. Did Chalmers have a valid claim under either of these theories? (The Fourth Circuit said no; it ultimately upheld the firing of Chalmers on the ground that she had never informed the company that she had a practice of writing accusatory letters to co-employees and because the disruption the letters had caused could not be accommodated by the company.<sup>5</sup>)

Religious speech in the workplace thus presents important legal questions for both employers and employees:

(1) If an employee makes statements on religious matters that disturb or offend other employees, is the employer just as liable for "religious harassment" under Title VII as for statements that amount to racial or sexual harassment?

(2) If, on the other hand, that employee's speech is prohibited by Title VII rules or the employer's policies, does that restriction on the employee violate his legal rights—either under the First Amendment's speech and religion protections, or under Title VII's own provisions that require employers to make reasonable accommodation for employees' practices?

(3) If the employer herself engages in the religious expression or activity—for example, if Chalmers owned the business or supervised the other employees when she wrote the letters—how does the analysis change? This situation raises special considerations and issues that may indeed change the analysis.

In discussing each of these three issues, this Article argues that courts must take account of the interests both of employees who wish to speak religiously in the workplace and of those who might be driven from the workplace by intolerable attacks on their own religious beliefs or status. The Article reviews the developing standards for restricting "harassment" under Title VII, as well as constitutional and other defenses to such restrictions, and suggests ways to protect the interests of both religious and non-religious employees—as well as the interests of employers to speak religiously without pressuring employees on religious matters.

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4. 42 U.S.C. § 2000e(j).

5. See *Chalmers*, 101 F.3d at 1021.

## I. SOME BASIC CONSIDERATIONS

In order to appreciate the issue fully, one must first grasp the underlying considerations concerning religious speech in the workplace and the potential tensions between these considerations. First, the law should protect employees from mistreatment or harassment at work on the basis of their religious faith or the lack of it. Such harassment and mistreatment of workers can occur through words as well as through physical actions. Threats against a person because of his religious views, or repeated unwelcome verbal religious advances, can—just as with racial or sexual harassment—render the "terms and conditions" of the workplace intolerable for the victim. For this reason, the Supreme Court has approved of characterizing racial and sexual harassment as actionable discrimination under Title VII.<sup>6</sup> Religious harassment, too, presents a serious concern because it can create barriers to the participation of people with unpopular or minority religious views in economic life. Moreover, religious speech and activity in the commercial workplace do not present the same considerations as do religious speech and activity within a non-profit, distinctively religious community such as a church or a religious school. In the latter contexts, rights of religious speech and activity are guaranteed by Section 702 of Title VII, which exempts religious organizations from liability for religious discrimination in employment decisions.<sup>7</sup> This Article, instead, concerns religious speech and activity in the broader commercial marketplace, where the government has a stronger interest in ensuring that people of all faiths can participate.

Second, the law must, at the same time, recognize rights of religious speech even in the for-profit workplace, including speech both by employees and employers. The employer or

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6. See, e.g., *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (recognizing that a violation of Title VII occurs when race discrimination pollutes the work environment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986) (noting that sexual harassment that creates a hostile or offensive working environment may violate Title VII); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993) (holding that discriminatory behavior that permeates the work environment violates Title VII).

7. See 42 U.S.C. § 2000e-1; *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (interpreting § 702 to permit religious school to impose religiously grounded behavioral rules on its employees).

employee who wants to speak religiously should not have to leave constitutional rights behind when she enters the economic marketplace. To allow substantial restrictions on free speech and free exercise rights in the workplace—whether for employees or employers—“ignores the reality of people’s social and political lives. . . . A great part, maybe even the majority, of most Americans’ [ ] speech happens in the workplace, where people spend more of their waking hours than anywhere else except (possibly) their homes.”<sup>8</sup> Courts and agencies must be careful not to act on the premise, explicit or implicit, that “religion should not be part of business affairs.”<sup>9</sup> A danger exists, as Judge John Noonan has warned, that government will assume “that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time.”<sup>10</sup> That kind of thinking can lead to severe restrictions on the conscience of “those who seek to integrate their lives and to integrate their activities.”<sup>11</sup> It reflects “a latent spirit of indifference, if not hostility, to deeply-held religious beliefs” to which many Americans adhere.<sup>12</sup>

In other words, to eliminate the religious expression of serious religious believers in the workplace is to make it very difficult for *them* to participate in the marketplace, too. Such a

8. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1849 (1992). As one state court has put it, “Attempting to earn a living does not require an individual to sacrifice all religious precepts.” *Jasniowski v. Rushing*, 678 N.E.2d 743, 750-51 (Ill. App. 3d) (holding that landlord’s religious freedom was significantly burdened by rule requiring him to rent to an unmarried couple against his beliefs), vacated on other grounds, 174 Ill. 2d 563, 685 N.E. 2d 622 (1997); *Thomas v. Anchorage Equal Rights Comm.*, 165 F.3d 692, 712-14 (9th Cir. 1999) (same). The significance of burdens on religious activity in the workplace also partly underlies the Supreme Court’s decisions forbidding the state to condition unemployment benefits on an individual’s engaging in work forbidden by her religious beliefs. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987); *Frazee v. Div. of Empl. Security*, 489 U.S. 229 (1989).

9. *Brown Transp. Corp. v. Pennsylvania Human Relations Comm’n*, 578 A.2d 555, 561 (Pa. Commw. 1990).

10. *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 625 (9th Cir. 1988) (Noonan, J., dissenting).

11. *Id.*

12. *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 875 (Minn. 1985) (Peterson, J., dissenting), *appeal dismissed*, 478 U.S. 1015 (1986). *See also* Theresa M. Beiner and John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 619-20 (1997) (criticizing decisions that treat religion “as a stranger or an intruder into the workplace” and thereby “make a sharp distinction between the secular and the sacred that is itself a theological judgment and that many workers are not willing or able to make”).

policy constitutes another form of exclusion from economic life. The very existence of the religious discrimination provisions in Title VII, especially the provision requiring accommodation of employees' religious practices, reflects our legal tradition's judgment that citizens can legitimately carry their religious beliefs into the commercial marketplace and should be protected in so doing.

The fact that many widespread religions in America proselytize increases the opportunities for conflict between religious speech and workplace limits. Many members of these faiths believe, as a matter of conscience, that they must communicate religious truths to others, even if—in fact, perhaps precisely because—those truths disturb and unsettle those who hear them. Proselytization of other workers can conflict with laws against workplace harassment on the basis of religion, especially if one reads the harassment laws broadly. Indeed, courts and enforcement agencies have classified it as illegal discrimination when an employer put Bible verses on paychecks and in company newsletters<sup>13</sup> and when an employee repeatedly talked about his religious faith and criticized other faiths in ways that "depressed" his co-workers.<sup>14</sup> Although these proselytizing activities may offend others in the workplace, bans on such activities impose a serious burden on religious freedom and should be subject to exacting legal standards.

Government interests in protecting the ability of people of different faiths to participate in economic life may justify some limited restrictions on certain forms of speech in the workplace, particularly certain kinds of speech by employers. But the point is that both rights must be respected: "every employee's right to religious expression and every employee's countervailing right not to be harassed because of his religion or lack thereof."<sup>15</sup> In some ways, the proper balance resembles that reflected in the First Amendment: religious activity has strong legal protection,

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13. See *Brown Transp.*, 578 A.2d at 562.

14. See *Sapp's Realty, Or. Comm'r of Bureau & Labor Indus.*, Case No. 11-83 (Jan. 31, 1985).

15. *The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary to Review EEOC's Proposed Guidelines on Religion in the Workplace*, 103rd Cong. 39 (1996) (statement of Douglas Laycock, professor at University of Texas School of Law), 39 [hereinafter Laycock Testimony].

but so does the right of people to make their own decisions about religion without pressure from those with power, in this case economic power. However, there is an important distinction, for First Amendment purposes, between religious activities of government and those of private speakers. Current Establishment Clause jurisprudence gives government little latitude to speak religiously;<sup>16</sup> but the employer or employee who speaks religiously, as a private party, has his own constitutional rights of speech and religious exercise. The speech of employees, and even of employers, thus receives protection that government religious speech does not.

One other important factor cuts in favor of vigorous protection for religious speech by employers and employees. To the extent that federal or state laws against workplace harassment restrict speech, they do so on the basis of the content of the speech and the effect that such content has on the listener. Speech that denigrates a race, a sex, or a religion is singled out for restriction.<sup>17</sup> The first axiom of modern free speech law is that restrictions based on the content or the communicative impact of speech are subject to stringent review. Again, that does not mean that no restrictions are possible on religious speech in the workplace, but it means that the government must take great care in restricting such speech.

Indeed, at least certain kinds of religious speech in the workplace should receive greater constitutional protection than racist or sexist speech do. A good portion of disturbing or "offensive" religious speech is simply the discussion of religious ideas, the advancing of some ideas, and the criticism of others. Such forms of religious speech, however provocative, differ from racist and sexist speech, which typically involve an attack on the personal characteristics or status of an individual. To attack someone's ideas can madden and disturb that person, but it remains distinct from attacking the person himself. Moreover, the First Amendment should allow such criticism of ideas more latitude than attacks on status or characteristics.<sup>18</sup>

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16. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all.")

17. See discussion *infra* notes 36-38 and accompanying text.

18. See *infra* notes 96-97 and accompanying text.

## II. THE LEGAL FRAMEWORK CONCERNING WORKPLACE RELIGIOUS SPEECH

To sort out the cross-cutting and overlapping legal rules concerning religious speech in the workplace, it is helpful first to detail the sources of restrictions on such speech, and then the sources of protection against such restrictions.

### *A. Sources of Restrictions on Religious Speech*

Restrictions on religious speech in the workplace can be imposed by one of two actors: the employer through his own workplace rules, or the government through liability for religious discrimination or harassment under civil rights laws.

#### 1. Employer Rules

A fair number of restrictions on employee speech involve rules imposed by the employer on his own initiative, although the nature of these rules may assume an infinite variety of forms. Company policies might limit employees from speaking on certain subjects, from speaking in certain areas of the workplace, from displaying personal messages at their workstations or in their offices, or from displaying more than a certain number of posters or messages. In setting such rules, the employer generally seeks to balance concerns of workplace efficiency and employee morale. Some restrictions on speech may be necessary to prevent constant disruptions of work and undermining of workers' morale. On the other hand, many employers "recognize that an absolutist policy forbidding [nearly all speech] could have a devastating impact on employee morale, which in turn could adversely affect the business' bottom line."<sup>19</sup> Because of such considerations, employers have some incentives to stop short of the most burdensome restrictions.

#### 2. Federal and State Anti-Harassment Law

Alternatively, the operation and influence of civil rights laws may function in conjunction with, or independently of, the employer to restrict religious speech. Under both federal and

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19. Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649, 664 (1997).

state law, severe on-the-job harassment may amount to discrimination, and harassment is, quite properly, not limited to physical conduct such as stalking or unwanted touching. Verbal statements that harass an employee so as to create intolerable conditions for her in the workplace based on her religion may be considered a form of discrimination—just as harassing statements based on race or sex may amount to discrimination based on those prohibited factors. Thus, harassment law sometimes regulates speech. The danger lies in pushing it too far, for then harassment law regulates speech that is constitutionally protected.

This section discusses the rules for proving religious harassment under Title VII. The discussion focuses on the restatement and modification of harassment rules that the Supreme Court made in several decisions in the 1997 Term. Although those decisions concerned sexual harassment, presumably similar rules apply to religious harassment, except where some difference in treatment is necessary.

After the Court's recent decisions, two ways remain of showing that harassment on the job constitutes discrimination under Title VII—that the harassment results in "discriminat[ion] against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . religion."<sup>20</sup> The first way applies when a "tangible adverse employment action" is taken against an employee. In *Burlington Industries v. Ellerth*,<sup>21</sup> the Court said that when an employer or supervisor takes a tangible action against an employee—firing, demoting, transferring, or refusing to promote her—because of her refusal to submit to the supervisor's (sexual) demands, the action itself is the "change in the terms and conditions of employment" that triggers Title VII.<sup>22</sup> Presumably this standard applies to religious demands as well. Thus, if a supervisor asks an employee to go to his church, the employee refuses, and the supervisor demotes her, the employee plainly has an immediate right of action.

On the other hand, when the employer takes no such action—that is, the employer has made no threats or has not

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20. 42 U.S.C. § 2000e-2(a)(1) (1994).

21. 118 S. Ct. 2257 (1998).

22. *Id.* at 2265.

fulfilled the threats she made—*Ellerth* says that a plaintiff is only discriminated against in his conditions of employment if the work atmosphere is "hostile and abusive." Making out such a "hostile work environment" claim, *Ellerth* reiterates, requires a showing of "severe or pervasive conduct."<sup>23</sup> Thus, if a supervisor or other co-worker insults the plaintiff's religious faith—directly or by, for example, putting up an insulting poster in the office—but does not take any "tangible" action against the plaintiff, discrimination (a change in the terms and conditions) exists only if the activity is severe or pervasive. The distinction between these categories—tangible action and hostile environment—is set forth in *Ellerth* mostly for the purpose of determining whether the employer is vicariously liable for an employee's harassing conduct, but the Court also invoked the distinction with respect to the "threshold question whether a plaintiff can prove discrimination" in the first place.<sup>24</sup>

One important goal of *Ellerth* seems to be to limit the class of situations in the first category—"tangible employment actions"—so that most challenges to harassment by co-employees will be hostile environment claims and will require the showing of severity and pervasiveness. The tangible employment action category is the Court's reworking of the familiar "quid pro quo" category from previous sexual harassment case law, but *Ellerth* complains that the previous decisions had "put expansive pressure on the definition" of a quid pro quo.<sup>25</sup> *Ellerth* appears to re-draw the lines so that only when a threat "is carried out," as opposed to being "unfulfilled," do the terms and conditions automatically change.<sup>26</sup> In all cases falling short of this standard, the harassment must be severe and pervasive—as at least one lower court decision following *Ellerth* has confirmed.<sup>27</sup>

This narrowing of the quid pro quo category is questionable. It might be read to suggest that when a supervisor threatens an employee with demotion unless she sleeps with him, or unless

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23. *Id.* (citing *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993)).

24. *Ellerth*, 118 S. Ct. at 2265.

25. *Id.*

26. *Id.*

27. See *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 775-76 & n.3 (W.D. Ky. 1998) (following *Ellerth* and analyzing case involving demoralizing threats by supervisor against employee, but with no actual job action, as a hostile environment claim requiring showing of severity and pervasiveness).

she attends church or converts to his faith, the victim must either give in to the threat, get demoted, or wait for the threats to happen over and over again (so as to be "severe and pervasive"). But the Court probably did not mean to erect such a high threshold for triggering suit when a supervisor engages in harassment. *Ellerth* left open the question "whether a single unfulfilled threat" by a supervisor could create a hostile environment.<sup>28</sup> Certainly a strong argument exists that a single threat is enough, given the control that a supervisor typically exercises over an employee's day-to-day working conditions. Whatever the legal rubric, a court may hold even a small number of threats from a supervisor or employer sufficient to trigger the plaintiff's right to sue.<sup>29</sup>

In any event, speech by co-workers, even supervisors, under Title VII will usually only constitute harassment if it is severe and pervasive. This structure of rules under Title VII will not necessarily apply to state human rights statutes, many of which have different texts or statutory backgrounds from the federal law. However, some states interpret their own statutes to follow the federal interpretation of Title VII.<sup>30</sup>

Last term's major sexual harassment decisions, *Ellerth* and *Faragher v. City of Boca Raton*,<sup>31</sup> focused even more on a separate question: under what circumstances an employer can be held liable for harassment committed by its supervisory employees. The Court said that the employer is automatically liable for its own "tangible employment actions."<sup>32</sup> But when the only claim of a hostile work environment results from co-workers' actions, the employer may escape vicarious liability by showing that it "exercised reasonable care to prevent and correct promptly any . . . harassing behavior" and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities."<sup>33</sup> Some observers,

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28. *Ellerth*, 118 S. Ct. at 2265.

29. See discussion *infra* Part V.A.

30. See, e.g., *Henegar v. Sears, Roebuck & Co.*, 965 F. Supp. 833, 836 (N.D.W. Va. 1997) (holding that "the evidentiary standards for suits . . . are identical to . . . Title VII"); *Finnemore v. Bangor Hydro-Electric Co.*, 645 A.2d 15, 17 (Me. 1994) (finding it appropriate in a case of first impression to follow federal precedent in interpreting a state statute).

31. 118 S. Ct. 2275 (1998).

32. *Ellerth*, 118 S. Ct. at 2269.

33. *Ellerth*, 118 S. Ct. at 2269-70; *Faragher*, 118 S. Ct. at 2292-93.

including the dissenters in *Ellerth*, believe that the affirmative defense the Court created does not give enough protection to employers.<sup>34</sup> At least, however, the Court made reasonably clear what an employer must do in order to avoid liability. Because suing the employer is in practice the only way for harassed employees to gain effective legal relief, the amount of leeway that an employer receives under the Court's new doctrine is important; it will determine the extent to which anti-harassment law pressures employers to restrict employees' speech.

### *B. Sources of Legal Protections for Religious Speech*

A variety of legal provisions currently protect religious speech in the workplace. The protections depend on the source of the restriction on speech—whether the restriction is imposed by harassment law in the private workplace, by a government employer in its workplace, or by a private employer independent of any legal rule.

#### 1. Anti-Harassment Liability Limits in the Private Workplace

If the basis for restricting workplace speech is an anti-harassment rule under Title VII or a similar state civil rights law, then various protections of free speech and free exercise of religion become relevant. These constitutional protections apply only to governmental action. Thus, if a private employer simply imposes restrictions on employee speech on his own initiative, without being compelled or influenced to do so by civil rights laws, no First Amendment issue arises. But employer restrictions are often based on the threat that the employer will be held responsible under Title VII or state law for permitting employee harassment. As was just noted, recent Supreme Court decisions make it more clear than ever that employers, in order to avoid Title VII liability, should take steps "to prevent and correct promptly any sexually [or, presumably, religiously] harassing behavior."<sup>35</sup> Thus, a First Amendment issue does arise when a private employer defends its restriction on the basis that it is necessary to avoid Title VII liability for permitting harassment. At that point, courts must

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34. See *Ellerth*, 118 S. Ct. at 2271-75 (Thomas, J., dissenting, joined by Scalia, J.).

35. *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

determine whether the employer can constitutionally be held liable for harassment under the circumstances in question. If the employer cannot constitutionally be held liable, that determination undercuts the employer's rationale for restricting employees' speech.

#### a. Freedom of Speech

The constitutional protection of freedom of speech is particularly relevant to workplace harassment laws because, to the extent such law reaches speech, it does so on the basis of the content of the speech—indeed, even on the basis of the viewpoint being expressed. In the case of religious harassment in particular, speech that expresses a positive attitude toward one or more religious beliefs is permitted, but speech that expresses a negative attitude is subject to restriction. In addition, an employee may bother and annoy other workers about political or social topics without worrying about Title VII rules, but he is subject to those rules when he bothers or annoys others about religious matters. Workplace harassment laws cannot be defended as content-neutral time, place, and manner restrictions. Instead, they must be subject to the more exacting standards that govern restrictions based on the content of the expression.<sup>36</sup>

The argument that First Amendment review should be more lenient in workplace cases because harassment laws protect "captive audiences" of co-workers who cannot easily avoid the offending speech cannot be maintained. As Eugene Volokh has pointed out,<sup>37</sup> a great many core cases of free speech involve some group of persons who cannot easily avoid the speech—for example, the courthouse employees exposed to the profane jacket slogan in *Cohen v. California*.<sup>38</sup> The Court, therefore, has never let the element of a captive audience alone serve as a basis for restriction of speech except when the speech came into the recipient's home.<sup>39</sup> Other than the decisions involving

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36. For detailed review and discussion of the doctrine making content-based restrictions presumptively invalid, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY. L. REV. 189 (1983).

37. See Volokh, *Freedom of Speech*, *supra* note 8, at 1838-40; Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 314-16 (1996).

38. 403 U.S. 15 (1971) (upholding the right to display the slogan on the jacket).

39. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding restriction on

speech that reached into the privacy of the home, the only restrictions the Court has upheld because of the presence of a captive audience were either content-neutral<sup>40</sup> or "involved the government acting as high school educator or as proprietor."<sup>41</sup>

The captive audience argument would have particularly broad consequences when applied to speech in the workplace. If hearers cannot easily avoid disturbing workplace speech because they must spend the lion's share of their time in that environment, it is also true that the employees who speak must spend much of their time in that environment. As Part I of this Article emphasized, to restrict expression in the workplace is to deprive people of the ability to speak in the place where they are likely to spend the largest share of their waking hours and devote much of their energy.

### b. Freedom of Religion

Workplace speech that is restricted by civil rights law may also come within legal protections for religious freedom. The first source of such protection is the Constitution's Free Exercise Clause. In recent interpretations of that clause, the Supreme Court has said that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."<sup>42</sup> Thus, to the extent that anti-harassment law restricts religiously motivated speech, it is subject to strict constitutional limits. The governing doctrine also states that laws that are not "neutral and generally applicable," but rather single out religious activity for restriction, are subject to strict scrutiny.<sup>43</sup> Anti-harassment law triggers strict scrutiny under this standard. It is not generally applicable, because religious harassment is one of a few forms of harassment prohibited under the civil rights laws, along

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offensive language over radio waves); *Rowan v. Post Office Dep't.*, 397 U.S. 728 (1970) (upholding law allowing homeowner to refuse further mailings of sexually-oriented ads).

40. See, e.g., *Volokh, Freedom of Speech*, *supra* note 8, at 1833-38.

41. *Volokh, Thinking Ahead*, *supra* note 34, at 315. The decisions include *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (regulation of sexually explicit speech in public schools); and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city's refusal to accept political advertisements for ad space on its buses).

42. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

43. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down laws against killing of animals that, because of numerous exceptions, applied only to certain religious animal sacrifices). *Accord Smith*, 494 U.S. at 880.

with racist and sexist harassment. The singling out of religious harassment means also that anti-harassment law is not "neutral" with respect to religion. Moreover, an extremely large share of the activity prohibited by laws against religious harassment will be sincere, religiously-motivated activity in which a person of one faith criticizes another faith in aggressive or disturbing ways. The mere fact that much of the activity forbidden is religious may not suffice to trigger strict free exercise scrutiny, but the presence of that factor will push courts toward such scrutiny on the ground that the law is not generally applicable.

Religious harassment liability also implicates the protections of the Religious Freedom Restoration Act. Under RFRA, laws that impose substantial burdens on religious exercise, including religious speech, must be justified as the least restrictive means of serving a compelling governmental interest.<sup>44</sup> RFRA is invalid as applied to state or local anti-harassment laws because of the Court's decision in *City of Boerne v. Flores*,<sup>45</sup> which struck down those applications as exceeding Congress's Fourteenth Amendment enforcement powers and violating principles of federalism.<sup>46</sup> Although *Boerne* greatly restricted the impact of RFRA, the act likely remains valid as applied to federal laws such as Title VII. As two courts of appeals have held, the application of RFRA to federal laws does not impose a congressional judgment on other governments but rather constitutes an exercise of Congress's Article I powers to amend its own statutes.<sup>47</sup>

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44. 42 U.S.C. § 2000bb-1 to -4 (1994).

45. 521 U.S. 507, 117 S. Ct. 2157 (1997).

46. See 117 S. Ct. at 2169-72.

47. See *In re Young*, 141 F.3d 854 (8th Cir. 1998), cert. denied, 119 S. Ct. 43 (1998) (upholding RFRA after *Boerne* as applied to the federal Bankruptcy Code); *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996) (holding—before *Boerne*—that RFRA barred a Catholic nun's Title VII claim of sex discrimination in hiring against the university). A later section of this Article considers arguments that religious speech may not receive special protection from laws applicable to other kinds of speech, because such distinctive treatment for religious speech itself violates the content- and viewpoint-neutrality requirements of the First Amendment. See *infra* Part II.B.3. But that argument, whatever its merits, does not help shield anti-harassment laws from scrutiny under RFRA or the First Amendment, because anti-harassment laws are themselves content- and viewpoint-based. Thus, protecting religious speech from such laws simply protects it from discriminatory regulation.

## 2. Constitutional Complications in the Government Workplace

To the extent that Title VII anti-harassment laws apply in the government workplace, then the same protections for speech and religious exercise apply as in the private workplace. In addition, these protections restrict even the government as employer—that is, even when the government promulgates its own rules for its own workplace. Unlike a private employer, the federal or state government does face First Amendment restrictions when it limits its employees' speech on its own initiative. Those restrictions on government are, admittedly, more flexible than when the government regulates speech outside its own workplace—that is, when the government acts as sovereign. The government may regulate its employees' speech when their speech interests are outweighed by the government's interest "in promoting the efficiency of the public services it performs through its employees."<sup>48</sup> Nevertheless, these standards do limit the government's control over its employees' speech.

On the other hand, the Establishment Clause places special limits on government endorsement or promotion of religion. The government may be required to limit the speech of its officials when such speech can be "reasonably perceived" as a state endorsement of religion or as putting state pressure on people to engage in a religious practice.<sup>49</sup> For example, if a supervisor in a government office conducted an official prayer as part of each required staff meeting, she would not only commit religious discrimination but would also violate the Establishment Clause by forcing employees to be present at a religious observance.<sup>50</sup> For a government agency to insert an official religious message in its publications would almost certainly violate the Establishment Clause—even though a

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48. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (holding that a school board could not fire a teacher for expressing her opinions about a matter of public concern).

49. *Allegheny v. ACLU*, 492 U.S. 573 (1989) (forbidding official endorsements of religion through prominently-positioned religious symbols on public property); *Lee v. Weisman*, 505 U.S. 577 (1992) (forbidding the state to sponsor, direct, or coerce participation in a religious exercise).

50. See *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, § 1-D (White House, Aug. 14 1997) <<http://www.pub.whitehouse.gov/urires/12R?urn:pd:/oma.eop.gov.us/1997/8/21/1.text:1>> [hereinafter *Guidelines on Religious Exercise*]. See also *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997) (police chief would violate both Establishment Clause and Title VII if he suggested dispatcher should attend church or suffer adverse job consequences).

private employer should be able to include such messages in its publications.<sup>51</sup>

One distinction between religious speech by government and that of private employers is particularly worth noting. If religious speech by a government supervisor takes on the character of official government speech, then the remedy is to stop the speech, not simply to excuse citizens or other employees from listening to it—just as the remedy in *Lee v. Weisman* was to prohibit an officially-sponsored prayer at a public school graduation, not simply to excuse dissenting students. A private employer, however, presents a different situation. Although the private employer still must not coerce employees to listen to religious speech in some circumstances—for example, by requiring them to attend a prayer meeting at the beginning of the workday—the remedy in such situations should generally be to exempt the employee from the rule, not to prohibit the speech altogether.<sup>52</sup> Such a distinction in treatment takes proper account of the greater limits on government than on private religious speech.

Even though the Constitution prohibits official religious speech by a government supervisor, not all religious speech by government supervisors amounts to official speech implicating the Establishment Clause. Some such speech is simply that of the supervisor, not the government, and so is legally protected. The Eighth Circuit decision in *Brown v. Polk County*<sup>53</sup> illustrates the interplay of constitutional and statutory rules concerning religious speech by government employees. In *Brown*, a county supervisor was reprimanded and ultimately fired for, among other things, various religious activities in the workplace. He sued bringing claims under both Title VII and the First Amendment. The court upheld the county's power to discipline him for having directed a secretary to type his Bible study notes.<sup>54</sup> Indeed, such a directive by the supervisor to an underling is not only constitutionally unprotected, it might itself be a violation of Title VII or the Establishment Clause. However, the court held that Title VII and the Free Exercise Clause barred the county from acting against the supervisor for

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51. See *infra* Part V.

52. See discussion *infra* notes 132-34 and accompanying text.

53. 61 F.3d 650 (8th Cir. 1995).

54. *Id.* at 655-56.

engaging in "spontaneous prayers [and occasional] affirmations," displaying religious posters in his office, and other actions that, according to the county, "could be considered to be religious proselytizing, witnessing, or counseling."<sup>55</sup> The court said that the restrictions on such activities were too broad and were not necessary to avoid religious harassment by the supervisor, disruption in the workplace, or an official endorsement of religion.

In 1997, President Clinton signed Guidelines on Religion in the Federal Workplace that address a number of these issues. The Guidelines attempt to protect employee speech while also forbidding harassment, disruption, or official endorsements of religion.<sup>56</sup> Examples from the Federal Guidelines illustrate a number of the points in this Article's discussion.

### 3. Statutory Protections against Private Employer Restrictions

Finally, if a private employer has restricted workplace speech on its own, without basing the restriction on the need to comply with anti-harassment laws, then the constitutional protections of speech and religious exercise do not apply. In such cases, the protection for speech must come only from Title VII itself, which reaches private employers. In particular, the protection could stem from two different Title VII theories.

#### a. Disparate Treatment of Religious Speech

If the employer has singled out religious speech for restriction, while permitting other kinds of speech to go unrestricted, then the speaker himself will be able to claim that he has been discriminated against in the terms and conditions of his employment on the basis of his religion. The employee in such a case asserts a simple theory of disparate treatment on the basis of religion. A disparate treatment claim in the context of religious speech does not differ significantly from disparate treatment claims in other contexts. For example, a court may apply the general disparate treatment test of *McDonnell-Douglas*

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55. *Id.* at 656, 658-59.

56. See *Guidelines on Religious Exercise*, *supra* note 50, § 1-A (protecting religious speech unless it is "outweighed by [the] interest in efficient provision of public services"; it "intrudes upon the legitimate rights of other employees"; or it "creates the appearance, to a reasonable observer, of an official endorsement of religion").

*Corp. v. Green*,<sup>57</sup> under which the plaintiff can show discrimination against his religious beliefs by undercutting the employer's assertedly "neutral" reasons for its action.

#### b. Accommodation of Religious Speech

Suppose, by contrast, that the employer has restricted religious speech not in itself or alone, but pursuant to a neutral workplace rule restricting speech on many other subjects as well. This situation presents a more challenging legal problem than does the simple disparate treatment of religious speech.

An employer might be held liable under Title VII for prohibiting an employee's religious practice even pursuant to a neutral, across-the-board work rule. As already noted, a separate provision, Section 701(j), defines religious discrimination to include the effect of neutral work rules on employees' religious practices and requires the employer to "reasonably accommodate" an employee's religious practices unless doing so would cause the employer "undue hardship."<sup>58</sup> Most issues under this provision concern forms of religiously required conduct rather than religious speech, including matters such as days off for employees' Sabbath observance, the ability of employees to wear religiously required clothing on the job, and employees' objections to joining or supporting a union.<sup>59</sup> However, the duty to accommodate may extend to pure religious speech as well. If it does, then any broad restriction of employees' religious speech—whether under anti-harassment rules or by the employer's own rules—would collide with the duty to accommodate. For example, if an employer restricted employees from putting up posters at their work stations, a religious employee might nevertheless argue that the employer could accommodate her display of religious posters without undue hardship or disruption.

In fact, the accommodation provision has given only limited protection to employee religious speech—just as it has given little protection to non-speech religious conduct by employees.

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57. 411 U.S. 792, 802 (1973).

58. 42 U.S.C. § 2000e(j) (1994).

59. For extensive discussion, see Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719 (1996); Laura S. Underkuffler, "Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581 (1989).

Just as in cases involving religiously mandated conduct, courts have held that (i) the employee cannot demand an accommodation if it costs the employer anything more than a de minimis amount of money or other hardship,<sup>60</sup> and that (ii) an accommodation suggested by the employer may be "reasonable" even though it does not significantly remove the burden on the employee's religious practice.<sup>61</sup> These rules have held in speech cases, even though in many instances an employer could accommodate speech more easily than conduct. Employee speech often does not tangibly alter the employer's work practices, unlike the potentially necessary adjustments when an employee assigned to work on his Sabbath seeks an accommodation. To accommodate speech, the employer often needs to do no more than inform other employees not to be bothered or distracted by the speech.

Although such accommodation seems innocuous, courts have showed much willingness to allow employers to stop employee speech based on questionable assertions that the speech would inevitably cause disruption. For example, in *Wilson v. U.S. West Communications*,<sup>62</sup> a Catholic employee opposed to abortion wore a button and a T-shirt with photographs of a fetus. When other employees complained, the employer told her not to wear the photographs, and when she refused it fired her. She sued under the religious accommodation provision. The court held, in a quite illegitimate exercise of second-guessing, that the plaintiff's religious beliefs did not really require her to wear the button in front of other employees.<sup>63</sup> The court also suggested that

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60. See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). *Hardison* held that an employer could discharge a Seventh-Day Adventist employee who refused to work on Saturday, because shifting other employees to cover Saturday shifts would involve more than minimal costs such as overtime pay and would conflict with seniority provisions in the relevant collective bargaining agreement.

61. See *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60 (1986). *Philbrook* held that the employer made a reasonable accommodation by giving an employee three days' paid leave a year for religious observances. Even though the employee's faith required him to be absent more often, the employer had no duty to do anything more and did not even have to show "undue hardship."

62. 58 F.3d 1337 (8th Cir. 1995).

63. *Id.* at 1341. This holding disregarded the Supreme Court's admonition that courts evaluating religious freedom claims "should not undertake to dissect religious beliefs" or act as "arbiters of scriptural interpretation," but rather should ask only whether the claimant had an "honest conviction" that his religion required him to act. *Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981).

forcing the employer to allow the button would go beyond requiring a reasonable accommodation because the button had offended other employees and disrupted their work.<sup>64</sup> In effect, the court held that the negative reactions of other employees per se suffice to justify restricting an employee's speech. Such a doctrine does not provide adequate protection under Title VII for religious speech. After all, as other commentators have noted, an employer can in no way justify a refusal to hire blacks or women on the ground that hiring them would disturb other employees.<sup>65</sup>

Congress has recently considered a bill that would strengthen the religious accommodation provision. The Workplace Religious Freedom Act<sup>66</sup> provides that "undue hardship" means not just a de minimis cost, but rather "significant difficulty or expense."<sup>67</sup> The bill also provides that an accommodation is not reasonable if it fails to remove the conflict with the employee's religious practice; in such a case the employer will have to rely on showing undue hardship from any accommodation.<sup>68</sup> By finally putting teeth in the accommodation provision, these amendments could give significant protection to religious speech in the workplace. In particular, employers might find it difficult to show that simple speech caused significant difficulty or expense, which the bill defines as an "identifiable cost [considered] in relation to the size and operating cost of the employer."<sup>69</sup>

A question remains whether the accommodation provision should apply at all to the effect of neutral rules on workplace speech, as opposed to workplace-related conduct like Sabbath observances or objections to union membership. Textually, the duty to accommodate should still apply. Speech is certainly a form of religious "practice or observance," indeed a particularly common form. In fact, the wearing of religious clothing, jewelry, or hairstyles is often a form of expression—and such

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64. *Wilson*, 58 F.3d at 1342 ("[W]e have no doubt that [instructing co-workers to ignore the button or separating Wilson from the co-workers] would result in an undue hardship to U.S. West").

65. See Beiner and DiPippa, *supra* note 12, at 605-06.

66. S.1124, 105th Cong. (1997). The bill has not yet been reintroduced in the current 106th Congress.

67. *Id.* § 2(a)(2). This provision would partially reverse *Hardison*.

68. *Id.* § 2(b)(1). This provision would partially reverse *Philbrook*.

69. *Id.* § 2(a)(2)(A).

practices often trigger Section 701(j) accommodation issues, with courts or the EEOC often holding that the practice must be accommodated.<sup>70</sup>

Yet there are arguments that religious activity in the form of pure speech should not fall within the duty to give accommodation from a neutral workplace rule. The primary argument is that for constitutional reasons, speech with a religious motivation or content may not be treated any more favorably than speech with other content or motivations. Because the accommodation provision is limited to religious activity, as applied to speech it would single out religious speech for protection from content-neutral workplace rules. For example, if an employer forbade employees from putting messages on their office doors, it arguably would be objectionable that one employee could seek a legal accommodation to display a religious poster but another could not seek accommodation to display a political message or an advertisement for an upcoming concert or charity drive. Neutrality on the basis of content or viewpoint is an important principle in the jurisprudence of the Free Speech Clause. A number of the Court's recent decisions concerning religious speech emphasize that it should not be treated any differently than speech with other content. Although those decisions all forbade treating religious messages less favorably than other messages,<sup>71</sup> arguably the same principles of content- and viewpoint-neutrality forbid treating religious messages more favorably.<sup>72</sup>

Even if this attack on accommodation of religious-only

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70. See e.g., *Carter v. Bruce Oakley, Inc.*, 849 F.Supp. 673 (E.D.Ark, 1994) (Jewish employee's religious practice of wearing beard); *EEOC v. Electronic Data Systems, Inc.*, 31 FEP 588 (W.D. Wash. 1983) (same); *Karrien v. Oliver T. Carr, Inc.*, 38 FEP 882 (D.D.C. 1985) (Black Muslim wearing religious pin on his security guard uniform); *EEOC Dec. No. 81-20, 27 FEP 1809* (April 8, 1981) (Pentecostal woman's obligation to wear skirt and not pants). Cf. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (finding no duty to accommodate Sikh employee's religious need to wear beard because it would raise safety concerns).

71. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (exclusion of religious symbol from public forum); *Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819 (1995) (exclusion of religious magazine from funding program for student publications); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993) (exclusion of religious film from classrooms open to community groups); *Widmar v. Vincent*, 454 U.S. 263 (1981) (exclusion of religious student group from facilities open to other groups).

72. See Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. (forthcoming 1999) (on file with author).

speech is accepted, it would not necessarily doom all accommodations of religious activity, such as the Religious Freedom Restoration Act or the many statutory accommodations for particular kinds of religious practices. A distinction might be made between speech and conduct. Special accommodation of religiously inspired conduct could be validated by, perhaps even required by, the special concern for religious conduct found in the Free Exercise Clause. But when religious activity takes the form of speech rather than conduct, then it could be argued that the content-neutrality principles of the Free Speech Clause control.<sup>73</sup>

The only decision where the Supreme Court has actually invalidated a provision specially protecting religious speech is *Texas Monthly v. Bullock*,<sup>74</sup> which held that a state sales tax exemption limited to religious publications violated the Establishment Clause. The fractured opinions in that case produced no majority analysis and thus no clear guiding principle. Justice Brennan's plurality opinion emphasized that the sales tax exemption removed no more than a monetary burden from religious publications and, by decreasing the tax base, imposed burdens on competing publications.<sup>75</sup> The Section 701(j) accommodation provision as applied to religious speech does not suffer from those vices, because it lifts actual prohibitions on religious activity by employers and because it is bounded by the proviso that the accommodation need only be reasonable and should not impose undue hardship on

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73. This content-neutrality requirement for religious speech should not be extended to destroy all special accommodation for religiously mandated conduct as well. A great deal of religiously mandated conduct has some expressive content or purpose. Indeed, opponents of accommodating religious conduct have wielded the Free Speech Clause as a weapon, arguing that all accommodations violate the requirement of content-neutrality. See, e.g., William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989). The result of such an extension of the "speech" concept would be, ironically, the opposite of the Supreme Court's tendency in *Employment Division v. Smith*. There, the Court suggested that the addition of a speech interest to a free exercise claim might create a "hybrid" that would increase protection for religious activity against a generally applicable law. 494 U.S. at 881-82. By contrast, this argument from content-neutrality, if pushed too far, would create a "negative hybrid" in which expressive elements of religious conduct *barred* the application of increased protection for such conduct. In order to preserve the permissibility of accommodation of religiously mandated conduct, the requirement of content neutrality must be limited to cases of pure religious speech, like verbal statements or the distribution of literature.

74. 489 U.S. 1 (1989).

75. See *id.* at 15-20.

others.<sup>76</sup> But Justice White's concurrence sounded the theme of content neutrality concerning speech; he said that limiting the exemption to religious publications violated the Free Press Clause by treating some publications more favorably than others.<sup>77</sup>

On the other hand, one can also defend special protection for religious speech in the workplace. Remember that religious speech is, at least potentially, singled out for special limitation in the workplace by the very existence of anti-harassment rules. Perhaps, then, a special accommodation for religious statements that do not harass or unduly disrupt appropriately compensates the speaker for that special restriction. Without the duty to accommodate weighing in the balance, the law arguably creates incentives for employers to restrict religious speech. In other words, special limitations on abusive religious speech and special protection for non-abusive religious speech can both be explained by a consistent principle: an employee's religious beliefs and duties form a particularly important part of his identity, and neither harassment by other employees or restriction by the employer should pressure or restrict those beliefs and duties.

Moreover, in many instances of employee speech the employer has no clear, across-the-board, content-neutral policy governing the situation. Charita Chalmers's employer had no express policy forbidding disturbing personal calls to co-workers, nor did Wilson's employer have an express policy defining certain kinds of buttons or garb as prohibited. When the employer has no such policy or practice, a danger exists that the employer's restriction of speech will be selective.<sup>78</sup> Therefore, requiring the employer to show some disruption or other significant cost before it restricts the speech can ensure that the employer acts from more than just disagreement with or hostility to the employee's message. The high status of religious speech justifies efforts to root out such hostility.

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76. See *Estate of Thornton v. Caldor*, 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) (Title VII accommodation provision is constitutional because it "calls for reasonable rather than absolute accommodation").

77. *Texas Monthly*, 489 U.S. at 25-26 (White, J., concurring).

78. For somewhat similar reasons, no doubt, the Supreme Court has retained strict free exercise scrutiny for government actions that rest on "individualized governmental assessments" of citizens' behavior, even while it has eliminated scrutiny for "across-the-board" or "generally applicable" laws. *Smith*, 494 U.S. at 884, 881.

One approach may potentially solve this problem. The question whether a statutory accommodation for religious activity extends to religious speech has arisen before. It confronted supporters of the Religious Freedom Restoration Act, which requires the government to accommodate religious activity when it conflicts with generally applicable governmental laws and regulations.<sup>79</sup> RFRA's supporters did not press to give religious speech any special shield from content-neutral laws concerning the time, place, and manner of expression—even though the application of those laws might not literally meet the compelling interest requirement of RFRA. At the same time, they did not want to exclude religious speech altogether from the definition of protected religious exercise. They settled on insertions in the legislative history stating that religious speech would be subject to neutral, "reasonable time, place, and manner restrictions" just like other speech.<sup>80</sup> The insertion of similar language in the legislative history of the proposed Workplace Religious Freedom Act would help clarify that religious speech has equal status in the workplace, but not preferred status as against clear rules that limit the time, place, or manner of speech neutrally. Such a provision would allow the enforcement of explicit or clear employer time, place, or manner policies, but it would still leave the employer subject to an accommodation challenge under Section 701(j) when an employer could not show that it had a blanket, across-the-board rule that would restrict other speech in the same way as it had restricted the plaintiff's religious speech. In the *Wilson* case, no such clear policy existed; therefore, the religious employee properly raised a Section 701(j) challenge. Had the Eighth Circuit taken the concept of accommodation seriously, it would have required more than a few negative reactions from employees to justify the employer's restriction of her speech.

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79. After the partial invalidation of RFRA in *Boerne*, the statute applies only to federal laws. See *supra* notes 45-47 and accompanying text.

80. See S. Rep. No. 103-111, at 13 (1993), reprinted in 1993 U.S. CODE CONG. & ADMIN. NEWS 1892, 1903 ("[W]here religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place, and manner restrictions are permissible consistent with first amendment jurisprudence.").

### III. WHEN CAN RELIGIOUS STATEMENTS BE ACTIONABLE "HARASSMENT"?

With the legal framework set forth, this Article now turns in detail to perhaps the most significant question concerning workplace religious speech: when can such speech amount to actionable "religious harassment" that creates a "hostile work environment?" In analyzing various recurring fact situations, the Article applies legal standards both from Title VII harassment law itself and from the First Amendment's speech and religion protections.

The Supreme Court's standard for a hostile work environment is that the harassment in question must be "severe and pervasive." The factors going into this determination are set forth in *Harris v. Forklift Systems, Inc.*:<sup>81</sup> the frequency of the conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. In most cases, this multi-factor analysis may suffice to protect speech and give guidance to employers and employees. But a number of problem areas remain.

In considering the First Amendment implications of religious harassment law, one must remember that such laws impose content-based restrictions on speech. If an employer restricted speech in the workplace on an across-the-board, content-neutral basis—for example, a policy that said "no employee messages on company bulletin boards or on the outside of office doors"—that policy would operate quite differently. Similarly, Charita Chalmers, the employee who wrote the proselytizing letters to co-workers, well may have been fired under a neutral employer rule prohibiting employees from bothering each other about personal matters. The restrictions imposed or encouraged by Title VII, however, are not content-neutral. When it was suggested that Chalmers' letters might have been especially troublesome—that they might have amounted to illegal harassment—because they constituted *religious* speech, the court should have subjected that rationale to strict constitutional scrutiny.

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81. 510 U.S. 17, 23 (1993).

A. *Easy Cases: Threats and Continued Unwelcome Speech*

Some easy cases illustrate situations in which liability for religious harassment through words is uncontroversial and proper. Many harassment cases concern threats to act against the plaintiff because of his or her religion. Even though threats involve the use of words and speech, they always have been actionable without any First Amendment limitations if the threats are sufficiently immediate. If a supervisor makes such threats—for example, threatening to demote the employee or withhold a pay raise if he does not convert or attend church—they may well amount to harassment under the *Harris* factors. Certainly, if the threat is carried out and the employee is demoted, it becomes a "tangible employment action" under *Burlington Industries v. Ellerth*. Moreover, similar threats by a co-worker also may be actionable; in any event, no constitutional provision bars making them actionable. In one reported case, a Buddhist employee sued after a co-worker repeatedly threatened him saying "I want to fight you; you [as a Buddhist] don't fight me back."<sup>82</sup> Such statements would be actionable against the employer if they had the effect of creating a hostile work environment to which the employer did not adequately respond.<sup>83</sup> In addition, the statements certainly are entitled to only minimal constitutional protection.

Even if the speech does not rise to the level of threats, it is similarly unprotected if it is directed solely at an individual after that individual has given clear notice that the speech is unwelcome. The right of free speech does not include the right to force another person to listen to a one-on-one communication against her will. As Eugene Volokh has argued, when the speech is communicated only to an unwilling listener, it has little First Amendment value.<sup>84</sup> Thus, once the recipient says that the speech directed at her individually is unwelcome and asks that it stop, any significant further speech can provide the basis for harassment liability. Such a rule must be interpreted sensibly—perhaps the speaker permissibly may attempt one or two times to communicate until the listener

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82. *Sarin v. Raytheon Co.*, 905 F. Supp. 49, 50 (D. Mass. 1995).

83. *See id.* at 52-54 (avoiding the hostile-environment question by holding the employer had taken sufficient steps to avoid liability).

84. For a fuller presentation of this argument, see Volokh, *Freedom of Speech*, *supra* note 8, at 1863-67.

gives clear notice that the speech is unwelcome—but once notice is given, the speaker has no right to continue to directly address an unwilling listener.

Such a limitation on "directed" speech, however, does not authorize an individual objector to cut off speech that is made not solely to him but to other, perhaps willing, listeners as well. To the extent the speech reaches others, it still may have considerable First Amendment value. Even an employee who has given clear notice of his objection may not thereby simply stop all forms of speech that are heard by other employees in the workplace. The speech would have to be unprotected for some other reason.

Another class of situations appropriate for harassment liability is that involving simple insults against the plaintiff's religion with little or no exposition of religious ideas. In one case, a Jewish policeman received insults from his fellow officers such as "the f\*\*\*king Jew," "the bagel," and "your people killed our Lord."<sup>85</sup> In another case, co-workers targeted a Jewish employee with statements such as "resident Jew," "rich Jew," and "you killed Christ . . . so you'll have to hang from the cross."<sup>86</sup> Perhaps a small number of such references would be insufficient disruption to constitute statutory harassment under the *Harris* factors. Nevertheless, the statements are entitled to little or no constitutional protection. They well may be proscribable as "fighting words," a category of offensive words that directly insult an individual, that "are no essential part of any exposition of ideas, and [that] are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>87</sup> To be sure, the Court has narrowed the fighting words doctrine close to the point of elimination,<sup>88</sup> and in *R.A.V. v. City of St. Paul*<sup>89</sup> the Court held that the government cannot prohibit even fighting words if it singles out only those that communicate racially or religiously bigoted messages.<sup>90</sup> In

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85. *Goldberg v. City of Philadelphia*, No. CIV.A.91-7575, 1994 WL 313030, at \*1 (E.D. Pa. June 29, 1994).

86. *Weiss v. United States*, 595 F. Supp. 1050, 1053 (E.D. Va. 1984).

87. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

88. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 816-21 (1997).

89. 505 U.S. 377 (1992).

90. See *id.* at 383-84.

spite of the current narrowed reading of the doctrine, one might still prohibit direct racial, sexual, or religious insults in the workplace rather than in the broader society, as did the *R.A.V.* ordinance. The strong social concern with preventing these particular kinds of discrimination in places of employment might justify content-based regulation of insults in the workplace, but it cannot justify restrictions that go beyond threats and direct insults.

### *B. Problem Cases: Appropriate Limits on Liability for Religious Harassment*

A number of situations remain in which the imposition of liability for religious harassment poses dangers to freedoms of speech and religious exercise. Principles must be delineated for some of the most common problem cases. Several of these principles are based on considerations set forth earlier in this Article.

#### 1. Supervisor Speech

Speech by a supervisor certainly is more likely to have an effect on an employee's work environment, other things equal, than similar speech by a co-worker. A danger exists, however, that the law will treat every statement by a supervisor as a threat or as "severe and pervasive," thereby eliminating the free speech of those employees. The law should protect both interests, and the Federal Workplace Guidelines do a creditable job of balancing them. Under those guidelines, a supervisor may invite the employees under her authority to come to religious services but may not pressure them. The supervisor must be careful to "dispel [any] . . . misperceptions" that she is exerting pressure, but statements by supervisors are not treated as inherently coercive.<sup>91</sup>

#### 2. Critical Speech versus Harassment

Most importantly, it is crucial to separate critical or offensive statements by other employees from "hostile or abusive" statements. As was noted in Part I, religious statements, especially dogmatic or proselytizing ones, often challenge and

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91. *Guidelines on Religious Exercise*, *supra* note 50, § 1-B(2).

disturb listeners. The speaker may well assert that others are misguided on the most important and significant matters in life and are therefore headed for eternal damnation. As the Supreme Court recognized in *Cantwell v. Connecticut*,

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.<sup>92</sup>

The rejected Guidelines on Religious Harassment proposed by the Equal Employment Opportunity Commission in 1993<sup>93</sup> had serious flaws because they failed adequately to separate critical speech from harassment. In an effort to close potential loopholes in coverage, the EEOC Proposed Guidelines used broad language that threatened to sweep in and chill a great deal of protected speech. First, the definition included speech that showed an "aversion" or that was "intimidating" as well as speech that showed hostility.<sup>94</sup> This definition suggested additional grounds of illegality that might reach speech that was no more than strongly critical of the beliefs of another faith. Second, the EEOC Proposed Guidelines included a catch-all not just for conduct that "unreasonably interfer[es] with . . . work performance," but also conduct that "[o]therwise adversely affects an individual's employment opportunities,"<sup>95</sup> again suggesting, by the broadening of language, that any kind of effect might matter.

Most importantly, the Guidelines contained no discussion of limits on harassment liability, and no examples of religious speech or action that the EEOC would view as outside the statute and regulations or as constitutionally protected. In

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92. 310 U.S. 296, 310 (1940).

93. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. pt. 1609) (proposed Oct. 1, 1993) [hereinafter *Guidelines on Harassment*].

94. See *id.* § 1609.1(b)(1).

95. *Id.*

essence, the EEOC made no recognition that this issue had two sides—two rights of religious freedom that deserve protection, and two groups of employees, harassment victims and religious speakers, who should not face grave difficulties in participating in economic life.<sup>96</sup> As a result, the EEOC Guidelines would have inevitably pushed the law toward overenforcement and toward unacceptable restrictions on workplace religious speech.

Other sources of law do a better job separating critical religious speech from religious harassment. For example, the *Harris* factors call for a distinction between speech that is "threatening" and speech that is merely "offensive." They also limit liability to acts that "unreasonably interfere with work performance," leaving out the broad catch-all category of "otherwise affects an individual's work performance."

The Federal Workplace Guidelines also balance concerns better than the EEOC Proposed Guidelines did. For example, the Federal Guidelines allow one employee to tell another that the other should convert or be subject to eternal damnation, at least until the recipient indicates that any further messages of that sort are unwelcome.<sup>97</sup> Such statements may be deeply offensive or disturbing to the recipient, but they are protected because the alternative is to forbid proselytizing altogether.

Even with these improvements, however, the standards in *Harris* and the Federal Workplace Guidelines are not always clear. Is saying that all other faiths are damned "threatening" or an "unreasonable" interference under *Harris*? The *Harris* factors, like those of any multi-factor balancing test, can be excessively vague and thus might chill legitimate, protected speech. The analysis would be clearer if it contained the following suggested categorical rules.

First, it cannot be religious discrimination for an employee simply to express her own faith affirmatively. This rule would protect almost all displays of religious clothing, jewelry, and art, as well as probably the largest share of religious statements. It simply is not harassment of others to say something positive about one's own faith. As the EEOC itself

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96. See Laycock Testimony, *supra* note 15, at 40. For further criticisms of the flaws in the EEOC proposal, see David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119, 132-42 (1995).

97. See *Guidelines on Religious Exercise*, *supra* note 50, § 1-A(3), example (c).

acknowledged in the fact sheet on its Proposed Guidelines, "It is one thing to express one's own beliefs; another to disparage the religion or beliefs of others."<sup>98</sup> This was a sensible qualification from the EEOC, but, unfortunately, the agency failed to include it in the guidelines themselves.<sup>99</sup> The protection of "affirmative" or "positive" statements applies unless the statements are directed toward an individual who has already indicated that such statements are unwelcome.<sup>100</sup>

Admittedly, often no clear distinction exists between affirmative and negative statements. "Jesus is the only way to avoid eternal damnation" might be something more than just an affirmative statement of faith because it implies the negative statement that others are damned. The "affirmative statement" rule, however, will at least protect a wide range of religious expression that stands the furthest away from actionable threats and insults.

Moreover, a second, independent reason suggests why the statement "Jesus is the only way to avoid eternal damnation" should not be actionable. Anti-harassment law should not reach all "negative" or "disparaging" statements. It should distinguish between statements by employees of their religious beliefs and attacks by employees on the personal characteristics of employees of other faiths. The former is protected religious speech even if it is "negative" and disturbing and says, explicitly or implicitly, that employees who hold other beliefs will spend eternity in hell. The reason is that religion typically involves a set of ideas, as do political, ethical, or social theories. Religion is not simply a status of persons, as race and sex primarily are. To disagree with someone on religious ideas and to criticize his beliefs vigorously is, in significant part, a discussion of ideas—a discussion of the other's "tenets," as *Cantwell* puts it<sup>101</sup>—and is not simply a personal attack based on another's status. Thus, as was noted in Part I,<sup>102</sup> certain kinds of religious speech are entitled to greater constitutional protection than are racist or sexist speech. To say that someone else's beliefs are wrong, even to say so in the sharpest terms,

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98. EEOC Proposed Guidelines, Fact Sheet.

99. See Laycock Testimony, *supra* note 15, at 42.

100. See *supra* note 84 and accompanying text.

101. See *Cantwell*, 310 U.S. at 310.

102. See *supra* note 18 and accompanying text.

lies at the core of protected speech.

Some forms of speech do attack a person's religious status rather than her religious beliefs or ideas—for example, when a worker says to a co-worker that "all Jews are money-grubbers," or "all Christians are gay-killers." Such statements in the workplace present tougher legal questions because they do not discuss or criticize other people's religious ideas, but rather attack the people themselves and their personal characteristics. The case for protecting such statements in the workplace is therefore weaker. As was noted above, under the *R.A.V.* decision such statements could not be prohibited as discrimination if they occurred in the public arena, but perhaps the law may proscribe them in the workplace (assuming these statements are sufficiently severe) in order to achieve the particularized goal of preventing religious discrimination in employment. The chief point that should be recognized, however, is that criticism of religious ideas, as opposed to an individual's personal characteristics, cannot be prohibited even if it is aggressive and disturbing, unless it is forced directly on an employee who has indicated the statements are unwelcome.

### 3. Accumulated Speech versus Harassment

Finally, it is necessary to examine another complication—what might be called the problem of "cumulative activities." Can a harassment plaintiff argue, under the factors of *Harris*, that even if certain statements or expression would be innocuous if done by one person, they become "severe and pervasive" if done by employees throughout the workplace? For example, even though employees are free to put religious messages on their workstations like "Jesus saves," could an atheist employee complain if every employee displayed that message, because he was constantly confronted with it? The *Harris* factors leave open the possibility that such cumulative activity might be actionable under the statute. The two most relevant factors are frequency and severity—which arguably could be met by an accumulation of statements by many different employees—and the other two factors are merely balanced against those two in a multi-factor, and ultimately vague, test.

The First Amendment, however, does not permit liability for otherwise protected expression just because it occurs

frequently. As Eugene Volokh has argued, if the government imposes liability for an accumulation of otherwise protected expression by different employees, it is difficult for the employer to avoid such liability except by prohibiting each *individual* instance.<sup>103</sup> The employer cannot have a rule that "employees may make religious statements until the total effect becomes severe and pervasive," because such a rule is incomprehensible for the individual employee.

It is this dynamic—the need to prevent every instance of behavior in order to prevent an accumulation of instances—that has helped to produce some startlingly overbroad employer policies and court injunctions. For example, in a religious harassment case—admittedly a case of real harassment—the court "ORDERED that the Defendant, its agents, servants, and employees, shall hereafter refrain from any racial, religious, ethnic, or other *remarks* or slurs *contrary to their fellow employees' religious beliefs*."<sup>104</sup> That order forbids making a remark that simply disagrees with the complainant's beliefs. Even more broadly, it forbids every single instance of such remarks.

Volokh identifies a real problem, but his solution goes too far the other way. He would limit hostile environment claims *only* to "directed speech—speech that is aimed at a particular employee"—and protect *all* "undirected speech, speech between other employees [or printed material] that is overheard [or seen] by the offended employee."<sup>105</sup> Under that standard, very abusive, intimidating speech could severely accumulate as long as it was not directed at a particular plaintiff. The workplace could be filled with circulars that say "Jews are f\*\*\*ing money-grubbers" or "fundamentalists are f\*\*\*ing morons."

Moreover, Volokh passes over the fact that many instances of harassment through "accumulated" effect involve an accumulation of conduct by a single employee or a small

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103. See Volokh, *Freedom of Speech*, *supra* note 8, at 1812-14 ("[T]he only practical way for an employer to avoid liability based on the sum of all offensive statements is by instituting a policy that will bar each individual statement.").

104. *Turner v. Barr*, 806 F. Supp. 1025, 1030 (D.D.C. 1992). See also Volokh, *Freedom of Speech*, *supra* note 8, at 1814-16 (cataloguing similarly broad restrictions of speech in racial and sexual harassment orders or policies).

105. Volokh, *Freedom of Speech*, *supra* note 8, at 1846.

group. While it would be virtually impossible for an employer to police large numbers of comments made by several employees, it is possible for an employer to tell each individual employee to exercise restraint and not repeat abusive comments over and over again. Finally, even under the Supreme Court's recent decisions, employers are not automatically liable for every instance of employee harassment. They may avoid liability for supervisors' harassment by setting up reasonable procedures for hearing and acting on individual complaints of harassment.<sup>106</sup> The employer may be even more free from vicarious liability when the harasser is not a supervisor but simply a co-worker.<sup>107</sup> As Deborah Epstein has pointed out, through the grievance procedure, an employer can address particular complaints and distinguish cases that rise to the level of harassment from those that do not.<sup>108</sup> Even with such procedures, however, the employer must decide when to restrict or discipline the alleged offender. Thus, it is necessary to have some clear rules that give employers and employees notice of what speech is subject to restriction.

A more modest, and perhaps more preferable, solution than Volokh's would simply state that protected speech cannot be labeled severe and damaging to the plaintiff just by virtue of the cumulative or aggregated effect of many employees engaging in the speech. Thus, because the statement "Jews are f\*\*\*ing money-grubbers" might well be unprotected in itself as an example of discriminatory "fighting words" in the workplace,<sup>109</sup> the statement could be actionable under Title VII, without constitutional problems, if it occurred frequently enough to produce a hostile environment. Unquestionably, an objecting plaintiff could bring an action if a single co-worker made the offending statement over and over again. By contrast, the statements "Jesus saves" and "Anyone without Jesus is going to hell" are protected speech. These words ought not constitute harassment merely because employees say them or display them frequently—subject to the condition that the statements do not solely target an individual who has indicated

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106. See *supra* notes 32-34 and accompanying text.

107. See *Faragher*, 118 S. Ct. at 2290-91.

108. See Epstein, *supra* note 19, at 663.

109. See *supra* text accompanying notes 87-90 (discussing the legal concept of "fighting words" and distinguishing *R.A.V. v. City of St. Paul*).

they are unwelcome and the employer does not force the statements on the employee.

#### IV. OTHER "RELIGIOUS HARASSMENT" ISSUES

Part IV considers several other recurring issues surrounding the definition of religious discrimination and religious harassment in the workplace.

##### A. *Harassment because of an Employee's Lack of Religious Faith*

Does Title VII protect against workplace discrimination because of an employee's *lack* of a religious faith? If other employees, or a supervisor, badger a non-religious employee to attend church or some other religious meeting, is this discrimination "because of the individual's religion?" The cases all hold yes, and they are correct.

The self-conscious professed atheist is protected because he has a particular belief on religious matters,<sup>110</sup> but even the employee who has no self-conscious or considered position on religious matters—the simply nonreligious employee—also enjoys protection from discrimination or harassment because of that status. The purpose of the laws against religious discrimination—to avoid economic coercion or pressure in matters of religion—has equal importance in that situation.

##### B. *Speech on Secular Topics that Offends an Employee's Religious Beliefs*

Bryan Finnemore, a fundamentalist Christian, worked in a garage where his co-workers repeatedly made sexually explicit remarks that offended his religious beliefs, although the remarks themselves were not explicitly on religious matters.<sup>111</sup> He claimed that those conditions created a hostile work environment. The case raises the question of whether speech that offends an employee's religious beliefs can constitute religious harassment if the speech is on a "secular" topic—that is, not an explicitly or distinctively religious topic.

In Finnemore's case, the comments appear to have been targeted at the victim because of his religious beliefs, and thus

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110. See *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1998); *Young v. Southwestern Sav. and Loan Ass'n.*, 509 F.2d 140, 144 (5th Cir. 1975).

111. See *Finnemore v. Bangor Hydro-Electric Co.*, 645 A.2d 15, 16 (Me. 1994).

they did amount to religious discrimination, assuming they were severe and pervasive. Finnemore had complained to his co-workers that the comments offended his religious beliefs, and they reacted by focusing their sexual comments thereafter on the subject of Finnemore's wife.<sup>112</sup> In literal terms, Finnemore's co-workers treated him differently "because of [his] religion" — that is, because of the religious objection he had raised to the co-workers' speech. In other words, if the remarks target the recipient because of his religion, then discrimination is proven and the comments need not reflect an explicitly or distinctively religious topic.

If no such intentional targeting of the religious employee existed, for instance if Finnemore's co-workers made the same lewd comments indiscriminately toward everyone in the workplace, might the employee nonetheless claim religious harassment? In a recent article, Theresa Beiner and John DiPippa appear to argue that this claim has merit.<sup>113</sup> Although many of the cases they cite involved intentional targeting of a religious employee, they also object to a decision in which the court dismissed a claim on the ground that it found no such intent to discriminate.<sup>114</sup> Beiner and DiPippa are only partially correct in their objection. In such a case of "non-targeted" offensive secular speech, the religious employee should not be able to argue religious harassment or disparate treatment, but the employee may have a claim for an accommodation under Section 701(j).

To come within the terms of Title VII, the plaintiff in such a situation would have to argue that the "conditions of [his] employment" had grown intolerable as a result of the offense to his faith, even though he was not targeted because of his faith. In other words, he would argue that the *effect* of the words made his conditions intolerable because of his faith, even though the speakers did not have an *intent* to single him out

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112. *See id.* at 16.

113. Beiner and DiPippa, *supra* note 12.

114. The case, *Juzwick v. Frank*, No. 93-1082, 1994 U.S. Dist. LEXIS 19416, at \*7 (W.D. Pa. Dec. 27, 1994), ruled that the playing of offensive sexually-explicit music was not religious harassment. Beiner and DiPippa object to the court's "finding that the music was not played with the intent to discriminate against the plaintiffs' religion." Beiner & DiPippa, *supra* note 12, at 624-25. That suggests that they believe that pervasiveness, rather than actual intent, is the proper factor to consider in attempting to establish a religious harassment claim. *See, e.g., id.* at 626-27.

because of his faith. The plaintiff, however, does not have a proper disparate treatment claim under Title VII, precisely because of the lack of intent to single out or target him because of his religion.

To support his claim, the religious employee might suggest that generalized speech against a particular religion, such as posters attacking the religion, can constitute discrimination against an employee even though it does not target that employee. Thus, the relevant inquiry rests on the effect of the speech on employees, not the intent to direct the speech at them. One must remember, though, the important differences between speech on religious subjects and speech on secular subjects that offend religious employees. A slur on a distinctively religious subject inherently targets those who hold that religious belief or identity. Moreover, limiting liability to speech on distinctively religious subjects provides a manageable stopping point and gives the speakers some notice that their speech will likely offend certain religious persons. By contrast, allowing disparate-treatment liability for the religious offense caused by speech on any secular subject would both broaden restrictions on speech in a vast new category of cases and provide less notice that such speech would offend a religious person. A wide spectrum of viewpoints may offend adherents of particular religions. If employees repeatedly make derogatory jokes about cows, thereby deeply (but unintentionally) offending a Hindu co-worker, could those statements create liability for religious harassment?

In its recent *Oncale v. Sundowner Offshore Services, Inc.* decision, the Supreme Court recognized the possibility that liability for same-sex harassment would expand Title VII into a "general civility code for the American workplace"; however, it said that this danger is taken care of by the requirement under Title VII that the plaintiff actually suffer disadvantage in employment terms and conditions.<sup>115</sup> Moreover, the Court said that in cases not involving sexual propositions, the fact that the plaintiff would have to show some discriminatory motivation on the part of the harasser, such as "general hostility to the presence of women in the workplace," cabined liability.<sup>116</sup>

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115. 118 S. Ct. 998, 1002 (1998).

116. *Id.*

Similarly, when the speech has no distinctively religious content but offends a religious employee, a good argument exists for requiring targeting as a condition of basic Title VII liability. Under the reasoning of *Oncale*, the relevant targeting could be a "general hostility to the presence of [religious people, or people of a particular religion] in the workplace."<sup>117</sup> The discriminatory motivation of the speakers need not be aimed solely at the particular plaintiff, but some sort of targeting of religious employees should be required to merit a Title VII claim for disparate treatment.

Beiner and DiPippa point out that in cases of racial and sexual harassment "intent is not a required element of the claim."<sup>118</sup> The language from *Oncale* quoted above seems to qualify that proposition, requiring at least a generalized animus against blacks or women in the workplace. In any event, the effect of secular speech on a religious employee in some ways presents a more troublesome case for pure disparate-impact liability than do racial or sexual harassment. There are inherent limits on the kinds of subjects that may create an abusive situation for members of a particular race or sex—usually only comments in some way relating to race or sex will have such an effect. In contrast, employees hold such a wide range of religious beliefs and tenets that a correspondingly wide range of secular statements might offend particular employees, as in the example of the Hindu employee who resents the derogatory remarks about cattle.

A better way to handle the effect of offensive secular speech on religious employees is to permit the religious employee to seek an accommodation under Section 701(j) protecting him from the offensive speech. The accommodation provision is premised precisely on the notion that even a neutral work policy may have a discriminatory effect on a particular religion.<sup>119</sup> Moreover, the accommodation route is less likely to impose burdensome restrictions on the speech of other employees. Although using a disparate-impact theory in the case of offensive secular speech might lead to suppressing the speech altogether, the accommodation provision requires only

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117. *Id.*

118. Beiner & DiPippa, *supra* note 12, at 624 & n.314.

119. In this case, it could be said that the relevant work policy is the employer's decision not to shield objecting employees from the offensive speech.

that the employer do something reasonable to protect the religious employee from the offensive speech. Transferring the objecting employee away from the speech, perhaps to another workroom, usually would offer a sufficient accommodation and, therefore, the most to which the objecting employee would be entitled. Indeed, to suppress other employees' speech altogether when such speech does not target any co-worker or any particular faith may be "unreasonable" and "unduly burdensome." The law should strongly protect religious employees in their own speech, and the objections of these employees to secular speech deserve reasonable accommodation. Nevertheless, courts should be reluctant to allow their objections to suppress the speech of others.<sup>120</sup>

*C. Speech or Actions on Secular Subjects, Motivated by Religious Beliefs*

A similar problem—the converse of the previous one—concerns speech or action in the workplace that is not about a distinctively religious subject, but is motivated by the actor's religious beliefs and offends or burdens an employee. This problem could arise in many different situations, as exemplified by the following cases:

\* A pregnant employee considered having an abortion. Her position upset other employees because of their Christian beliefs, and they talked about it angrily on the job. The employer ended up firing the pregnant employee.<sup>121</sup>

\* One employee began living with a married co-worker. This action upset their supervisor, a devout Christian, who forbade the couple from being together on the job. The employee resigned and later sued after the company did not rehire her,

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120. One may draw an analogy to the objections of religious families to offensive materials in required public school curriculums. I believe that students should have a constitutional entitlement to opt out of reading objectionable materials whenever reasonably possible. *See, e.g.,* Thomas C. Berg, *State Religious Freedom Statutes in Public and Private Education*, 32 U.C. DAVIS L. REV. (forthcoming 1999) (on file with author). But the objecting student may only opt out herself; she has no right to remove the offending materials from the curriculum. *See, e.g.,* *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (holding that a school board's refusal to remove a book from the curriculum over a parent's religious objection did not violate the First Amendment).

121. *See Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544 (W.D. Mich. 1994). For these purposes, I set aside the issue of whether the employer discriminated on the basis of pregnancy, although the court held that the employer had done so.

claiming constructive discharge.<sup>122</sup>

\* An evangelical Christian who ran a painting business repeatedly criticized his hired assistant for sleeping with his (the assistant's) girlfriend.<sup>123</sup>

Each of the cases involves "secular" statements or work rules motivated by the religious beliefs of the speaker or actor and resulting in "harassment" or action against the plaintiff.

If the speech or work rule is targeted at the plaintiff solely because of her religion, or lack of it, then the defendant has committed discrimination "because of the [plaintiff's] religion." These cases, however, typically do not involve such discrimination. The employer or the co-workers would criticize or act against *any* person who engaged in extramarital sex or considered an abortion, even if that person were a Christian. Indeed, perhaps the employer or co-workers would speak especially critically of a Christian engaging in these activities. At minimum, no evidence suggests that the speakers would apply their objection only to non-Christians.

Therefore, for similar reasons as those in the previous section, such "secular" speech or activity should not constitute religious discrimination simply because religious beliefs motivate the speaker or actor. Rather, the discrimination stems from the plaintiff's objectionable conduct itself. However, in two of the decisions above—the abortion dispute and the case of the two workers sleeping together—the courts suggested that the company would have committed religious discrimination if it had acted against the plaintiffs because their conduct offended the religious beliefs of the owners or of other workers. That proposition is incorrect according to the text of Title VII, which prohibits discrimination "against any individual . . . because of *such individual's* . . . religion."<sup>124</sup> The discrimination must be because of the *employee's* religion, not the employer's.

To this textual argument, the plaintiff employee might respond that she experiences discrimination or harassment because of her own *lack* of a religious belief that the conduct in question—the unmarried pregnancy or the extramarital

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122. See *Henegar v. Sears, Roebuck and Co.*, 965 F. Supp. 833 (N.D.W.Va. 1997).

123. See *Meltebeke v. Bureau of Labor and Indus.*, 903 F.2d 351 (Or. 1995).

124. 42 U.S.C. § 2000e-2(a) (1994) (emphasis added).

affair—is wrong. The plaintiff might further argue that a non-religious employee could not be forced to attend a prayer meeting, that such forced attendance could be conceptualized as discrimination based on the employee's decision to *reject* religion.<sup>125</sup> The plaintiff might then question why the same protection should not apply to her decision to reject religious norms against abortion or extramarital affairs.

The answer is that the discrimination or harassment in the case of the pregnancy or extramarital affair results from the employee's conduct, not his religious beliefs or the lack thereof. For example, if the employee conceded that the conduct was wrong under religious standards but still engaged in the conduct, the employer or other workers would still criticize the conduct or punish the employee for it. By contrast, if an employee merely expressed the view that abortion was permissible under Christianity, and the employer fired him for that, the employer's action would constitute discrimination based on the employee's religious beliefs.

Several good reasons support parsing Title VII in this way. As was the case in the previous section, imposing liability for secular work rules motivated by religious beliefs will trigger legal restrictions on employers and co-workers in a huge new category of cases in which lines are not easily drawn. If an employer has told his employees he believes that every work rule follows from his religious beliefs, can an employee arrive late for work and then claim that to punish him would impermissibly discriminate against him because the employer's religious beliefs motivated the rule? Even more importantly, the new category will place a severe restriction on religious employers' ability to bring values into the workplace if those values are grounded in religion. As the first section of this Article argued, any rule that substantially restricts employers' ability to pursue religious values in the workplace should cause serious concern.

Extending liability to any secular work rule motivated by religion also has only a tenuous connection to the proper goals of Title VII's religious-discrimination prohibition. Extending liability to restrict such rules will give protection to an employee in many situations where the employee does not

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125. See Part IV.A.

have a serious claim of conscience justifying his behavior. In many cases—as in the case of the employees sleeping together—the employee will simply argue that he believes his conduct is permissible. That claim departs sharply from one of a duty to act according to the dictates of conscience, to one that seeks freedom from conscience. The importance of religious freedom in America, emphasized in this Article, rests on the importance of enabling people to follow conscience, not on the importance of enabling them to be *free* from conscience.

In some cases, however, the employee's conduct might be based on her *own* dictates of conscience. If so, then her claim should be for a reasonable accommodation of her religious practice, under Section 701(j), against harassment by co-workers or action by the employer. One can imagine the claim that the employee's religious conscience requires her to have an abortion so as to save herself from serious health problems and continue to care for her current children. Such a situation raises difficult questions about the definition of "religion"—how broadly it should be defined, and how much courts should defer to an employee's characterization of her practice as religiously demanded. Those questions have vexed scholars for years, and this Article will not attempt to resolve them.

Regardless, a few reasons urge caution in extending the definition of religion under Section 701(j) to a very broad scope. First, the more the courts extend the definition and defer to the claimant, the more risk they create of insincere claims advanced for self-serving purposes rather than conscientious ones. Second, certain issues, like marital status and abortion, arguably have been resolved already by Congress in one way or another. For example, the court in the *Turic* abortion case held that the hotel violated the Pregnancy Discrimination Act (PDA) by firing the employee, Kimberly Turic, who had considered abortion.<sup>126</sup> This case may or may not correctly interpret the PDA, but the theory has more plausibility than the claim of religious discrimination. Similarly, courts should not evaluate employer rules against extramarital sex under a religious discrimination theory. When Congress enacted the general prohibition on religious discrimination in Title VII, it surely did not contemplate a prohibition on all business owners

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126. See *Turic*, 849 F. Supp. at 558-59.

with religious scruples from treating extramarital sex differently from marital sex. By contrast, some states have explicitly prohibited marital-status discrimination. A strained reading of the religious discrimination statute should not decide the matter. Instead, specific acts of Congress or state legislatures should make the final determinations.

## V. EMPLOYER SPEECH AND ACTIONS

The final section of this Article returns in more detail to some differences that arise when the religious speech or activity in question is by the employer, rather than by non-supervisory employees.

### A. *"Tangible Employment Actions"*

The first difference is that much of what the employer itself does will be "tangible employment actions" in themselves, and thus constitute actionable discrimination immediately under *Ellerth*, as well as being by definition attributable to the employer for purposes of assigning liability. Only the employer can perform the "tangible employment" act of firing or demoting an employee. Moreover, even if the employer's religious activity is not a tangible employment action, it is still more likely, under the circumstances, to have a "severe and pervasive" effect on the employee than is activity by other employees; therefore, it is more likely to constitute actionable harassment. For example, when an employer encourages a worker to attend church, the worker is likely to feel more pressure to do so than if a co-worker urged it. These activities, then, are quite likely to be prima facie covered by Title VII or analogous state anti-harassment statutes. The only question is whether the employer has some statutory or constitutional exemption to engage in those activities nonetheless.

#### 1. Hiring on a Religious Basis

First, consider the question whether a for-profit, commercial employer may discriminate on the basis of religion in employment when his business does not provide religious products or services. Such a policy clearly counts as religious discrimination under Title VII and state statutes, and case law recognizes no statutory or constitutional defense for such a

"secular" employer.<sup>127</sup> This Article has generally taken that fact as a given. Nevertheless, the question deserves a closer look because the decisions have not fully appreciated its complexity.

On the one hand, some employers feel a deep duty to create a religious atmosphere at work and a community of religious believers doing the work. Such employers feel obligated, in Judge Noonan's words,<sup>128</sup> to integrate their religious beliefs and identity fully into this important aspect of their lives. On the other hand, some employers might use the defense simply to exclude a religious group they dislike. A very real risk exists that allowing the defense might produce widespread exclusion of minority faiths from the employment market—at least in areas of the nation where the population is heavily of one religious faith.

An appropriate line could be drawn between these two situations by allowing a commercial business making secular products to hire on religious grounds if and only if the employer's actions show a serious effort to integrate religion into all aspects of the business. For example, an employer, in addition to preferring born-again Christians as employees, might also conduct regular prayer or religious study meetings, require employees to observe a significant code of conduct, and take other steps showing a pervasive integration of religion into the business's activities. If such evidence shows the business to be pervasively religious, then it would qualify as a "religious organization" and thus be exempt from Title VII's (§ 702) prohibitions on religious discrimination in employment.<sup>129</sup>

Such evidence would show that the employer indeed has a

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127. See, e.g., *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 617-21 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989); *In re State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 852-53 (Minn. 1985) (both rejecting free exercise defenses as well as the statutory defense that the business was a "religious organization" permitted to hire on a religious basis). The discussion here deals with the general run of for-profit businesses providing secular products or services. By contrast, non-profit religious organizations such as churches or schools, as well as for-profit businesses producing distinctively religious items such as scriptures or religious jewelry, will much more readily qualify as "religious organizations" exempt under Section 702 of Title VII. They may also readily be able to assert that religious faith is a "bona fide occupational qualification" for a particular position in the organization. See Title VII, § 703(e)(1), 2000e-2(e)(1).

128. See *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 625 (9th Cir. 1988) (Noonan, J., dissenting).

129. See 42 U.S.C. § 2000e-1(a) (1994) (providing that the statute does not apply to a religious organization with respect to the hiring of persons of a particular religion to carry out its activities).

serious free exercise interest based on his sincere belief in integrating religion into the workplace. Even a commercial employer that is pervasively religious in this sense can be seen as an organization run on ideological grounds—one that therefore should be entitled to hire employees to advance that ideology just as a secular ideological organization such as the Sierra Club is legally free to require that its employees be committed to that organization's ideology of environmentalism. The requirement of pervasive religiosity would also make it more difficult for employers to advance spurious self-interested claims based on a desire simply to exclude a religious minority or minorities from the workplace. Few employers will add a pervasive pattern of explicit religious activities to their work schedules unless they are serious about their religious commitment.

In fact, recognizing a limited right of religion-based hiring by pervasively religious commercial businesses could obviate some of the conflicts between employers' religious speech and employees' right to do their work without religious "harassment." It may actually be better for employees of different or minority faiths to avoid a certain employer altogether than to be hired and then exposed to pervasive religious speech that disturbs and ostracizes them. Recognizing a legal right to hire only persons of a particular faith raises the concern that minorities will be shut out of economic life, but that concern can be significantly reduced if the religious-hiring exemption is limited to commercial businesses that are truly religious in the pervasive way explained above.

## 2. Employer Religious Speech

As has already been noted, however, the case law rejects any exemption allowing commercial businesses to engage in religion-based hiring. Consequently, the situation still persists in which a devoutly religious employer has or might have employees of a different faith, and yet the employer seeks to speak religiously in the workplace.

If an employer requires employees to attend religious meetings, that requirement should be treated as a tangible employment action under *Ellerth*. Courts have held that such

action is religious discrimination in itself.<sup>130</sup> They have also rejected the employer's free exercise defense.<sup>131</sup> As was suggested earlier, however,<sup>132</sup> the appropriate remedy for such a case of discrimination is not to enjoin the employer from conducting meetings, but rather to forbid the employer from requiring attendance by any employee who objects. The Ninth Circuit correctly tailored the remedy in this way in *EEOC v. Townley Engineering and Manufacturing Co.*<sup>133</sup> As the court there remarked, such a limit on the remedy is necessary in order to preserve the ability of employers to express themselves in the workplace without coercing employees. The court stated, "Where the religious practices of employers, such as the Townleys, and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices."<sup>134</sup>

One questionable decision concerning required religious meetings is *Kolodziej v. Smith*,<sup>135</sup> which rejected a claim against a manufacturer who required a managerial employee to attend seminars in interpersonal relationships, which included Scripture citations and biblical arguments in favor of female submission. The court said that these seminars did not constitute a religious "devotional service" as was the case in *Townley Engineering*,<sup>136</sup> but the court appeared to assume—without foundation—that "devotional services" were the only kind of religious meeting that should not be forced on employees.

### *B. Are "Severity and Pervasiveness" Inherent in Employer Speech?*

Although employer actions are more likely to constitute tangible employment actions or create a pervasively hostile

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130. See, e.g., *Townley Eng'g*, 859 F.2d at 613-14; *Young v. Southwestern Sav. and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975). See also *Venters v. City of Delphi*, 123 F.3d at 956, 971-77 (7th Cir. 1997) (finding in each case that the supervisor pressuring the employee to attend church or suffer adverse job consequences behaved discriminatorily).

131. See, e.g., *Townley Eng'g*, 859 F.2d at 619-21.

132. See *supra* note 52 and accompanying text.

133. 859 F.2d at 621.

134. *Id.*

135. 588 N.E.2d 634 (Mass. 1992).

136. *Id.* at 638.

environment, courts should avoid speculation about "inherent" coercion. Courts cannot assume that every instance of workplace religious speech or activity by an employer is coercive or intolerable to the reasonable employee. If courts make such an assumption, then they have effectively ruled that employers may not bring their faith into the economic marketplace where they spend most of their time and devote much of their resources and energy. Courts can be more ready to find a tangible action or hostile work environment from the employer's activity, but they should still require strong, non-speculative evidence that the employee reasonably would feel threatened or intolerably harassed.

A number of examples should be treated as simple speech by the employer. Suppose that the employer-sponsored prayer meetings are in fact voluntary. In that case, conducting them is not a tangible employment action. Thus, in order to find liability under *Ellerth*, the conduct would have to be severe and pervasive. Truly voluntary prayer meetings should not be held to create a hostile environment. Courts should be careful to look for indications that the prayer meetings are *not* voluntary—that those who attend them are favored by the employer in some way, but courts may not simply assume that all employer speech is coercive.

As a second example, suppose the employer puts religious statements on company publications, such as an employee newsletter, a general workplace bulletin board, or paychecks. Under its state religious discrimination statute, a Pennsylvania court forbade the employer to engage in those activities with respect to an offended employee once the employee objected.<sup>137</sup> That was an error. A significant basis for the court's decision was that the employee thought "religion should not be part of business affairs" and feared that "a[n] . . . employee needed to be Christian to be promoted into upper management."<sup>138</sup> These rationales for finding harassment are far too broad because they would prevent employer religious speech to willing listeners even if not directed at the plaintiff.

According to the opinion in the Pennsylvania case, the

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137. See *Brown Transp. Corp. v. Pa. Human Relations Comm'n*, 578 A.2d 555, 562 (Pa. Commw. 1990).

138. *Id.* at 561-62.

employer actually fired the employee for complaining about the bulletin board and the checks. The firing action certainly went beyond employer speech and could be the basis for a claim of religious discrimination.<sup>139</sup> If the plaintiff had not been fired—if he were simply raising a legal challenge to being paid with religiously imprinted checks—then his only possible claim would have been under a religious accommodation (assuming he had a religious objection to the checks) and not under a harassment theory such as the one the court upheld. The accommodation theory, if applicable, would not stop the employer from speaking religiously, but it would require the employer to take some steps, where possible, to minimize the plaintiff's exposure to the offending speech. The question concerning accommodation should be whether it is possible to accommodate the plaintiff without barring speech to other willing listeners. Nothing can, or should, be done to restrict the speech on the bulletin board or the newsletter because they reach willing listeners as well. With respect to the paychecks, however, perhaps the employer could pay the plaintiff on different checks without Bible verse imprints. Such an accommodation would probably not impose undue costs on the employer.

Finally, suppose the employer plays religious music over the public address system of the office or factory. Once again, the employer should accommodate the objecting employee if he can—but it may be much more difficult to do so with public address music, which all employees will almost inevitably hear, than with messages on a bulletin board. Including some religious music in a mix of selections should plainly not be actionable. By contrast, an objecting employee could plausibly argue that constant religious music over the P.A. system amounts to "severe and pervasive" conduct because, unlike with the newsletter or paycheck, the employee could never avoid it. The constant music could be analogized to forcing the employee to participate in an ongoing religious meeting. However, the P.A. music differs from the prayer meeting in a crucial way. Although individual employees can easily be excused from a prayer meeting, imposing liability for the P.A. music on the grounds of religious harassment would prevent

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139. *See id.*

the employer from communicating that expression to other, willing employees. Therefore, as discussed previously,<sup>140</sup> courts should not treat the playing of the music as harassment unless it explicitly insults and denigrates people on the basis of religion.

One final point should be recognized with respect to employer speech. An employer may find it hard to administer the "severe and pervasive" standard with respect to employee speech, as Eugene Volokh argues,<sup>141</sup> because of the problem of controlling the accumulated speech of many employees, but it should be easier for an employer to administer the standard with respect to her *own* speech. Thus, the employer may be able to draw a sensible line as to how much religious music it will play, or how much to fill up the company newsletter or bulletin board with proselytizing speech. The standard is still not perfect because it balances a number of factors and may be too uncertain and potentially chilling on religious speech. At least, however, there is some basis for the employer to govern her own speech by it.

## VI. CONCLUSION

All Americans who believe in the importance of conscience should support some laws against severe and pervasive religious harassment in the workplace. Because of the importance of the workplace in people's lives, it is indeed critical to protect them from deprivation of full status there, or even effectively driven out, because of their beliefs on religious matters. Recognizing the importance of full participation in the workplace, however, also means, just as much, that religious speech by workers and employers should have strong legal protection. If devout religious people are severely restricted in expressing their conscience at work, then they are deprived of full participation in economic life. Courts and agencies must draw lines carefully. If they do so, then both free speech law and religious discrimination law can serve the goals of protecting the exercise and expression of religious conscience in the workplace.

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140. See *supra* Part III.A., text accompanying and following note 84.

141. See *supra* notes 103-04 and accompanying text.