
**TITLE VII'S UNINTENDED BENEFICIARIES:
HOW SOME WHITE SUPREMACIST GROUPS WILL BE
ABLE TO USE TITLE VII TO GAIN PROTECTION FROM
DISCRIMINATION IN THE WORKPLACE**

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I. INTRODUCTION

Although employment discrimination based on religion was not the primary impetus behind the passage of the Civil Rights Act of 1964,¹ Title VII of that legislation does, in fact, prohibit employers from discriminating against employees, former employees, and prospective employees based on their religion.² Statistics from the Equal Employment Opportunity Commission (EEOC) demonstrate that of the five protected classifications within Title VII,³ claims of religious discrimination in the workplace lag behind claims of discrimination based on race, color, sex, and national

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1. Upon signing the Civil Rights Act of 1964, President Johnson's remarks regarding the Act focused exclusively on racial issues, noting that the law was intended to widen opportunities, provide equal treatment, preserve unalienable rights, and secure entitlement to the blessing of liberty for "Americans of *every race and color*," and to "close the springs of racial poison." Lyndon B. Johnson, Radio and Television Remarks upon Signing the Civil Rights Bill (Jul. 2, 1964), in II PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: LYNDON B. JOHNSON, 1963-64, at 842-44 (1965) (emphasis added), available at <http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/640702.asp>.

2. The relevant provision of Title VII of the Civil Rights Act of 1964 provides the following:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, *religion*, sex, or national origin.

42 U.S.C § 2000e-2(a) (2006) (emphasis added). Not only was religion-based discrimination not the impetus behind the passage of the Civil Rights Act of 1964, there is also little legislative history regarding why religion was included among the classes protected by the Act. Also, unlike the other four protected characteristics (race, color, sex, and national origin), religion is the one characteristic that is actually susceptible to change. Of course, with advances in modern medicine and cosmetic surgery, some could argue that one's sex could also be changed.

3. Specifically, Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers based on race, color, national origin, religion, and sex. *Id.*

origin;⁴ but the statistics also show that these religion-based claims have been rising over the past several years.⁵

Although many of these religious discrimination claims involve “traditional” religions such as the various denominations of Christianity and Judaism and other “mainstream” religions, there have been some instances in which individuals who practice nontraditional religions have also sought Title VII protection.⁶ The federal courts typically have adopted a somewhat broad interpretation of what constitutes a “religion” covered by Title VII,⁷ yet courts have not afforded Title VII protection to everyone who has claimed that his or her beliefs were religious in nature.⁸

One set of beliefs with which courts and the EEOC have had to wrestle when determining the contours of Title VII’s prohibition against religion-based discrimination involves white supremacy.⁹ On several occasions, courts and the EEOC have had to determine whether an individual’s membership in a white supremacist organization entitles him to Title VII’s protection against religion-based discrimination.¹⁰ Although early court opinions (along with an opinion from the

4. See *infra* Part III for an analysis of the statistics regarding religion-based discrimination claims. The EEOC also receives and investigates charges regarding alleged age discrimination and discrimination based on disability. See *Discrimination by Type*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://eeoc.gov/laws/types/index.cfm> (last visited Mar. 6, 2012). Title VII is limited, however, to discrimination based on race, color, national origin, religion, and sex. 42 U.S.C. § 2000e-2(a). Disability discrimination is covered by both the Rehabilitation Act, 29 U.S.C. §§ 701–796l (2006), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, whereas age discrimination is covered by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634.

5. *Charge Statistics: FY 1997 Through FY 2010*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 6, 2012).

6. For example, plaintiffs have brought claims of religion-based discrimination in cases involving the “Church of Body Modification,” *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004); the “power of dreams,” *Torotka v. Cont’l Airlines, Inc.*, 649 F. Supp. 2d 608 (S.D. Tex. 2009); the Wiccan religion, *Van Koten v. Family Health Mgmt., Inc.*, 955 F. Supp. 898 (N.D. Ill. 1997); beliefs associated with veganism (under state law), *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663 (Ct. App. 2002); and, in one case, a claim based on an individual’s “religious” belief that centered on his consumption of cat food, *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff’d*, 589 F.2d 1113 (5th Cir. 1979).

7. See *infra* Part IV for a discussion of the broad definition of “religion” adopted by the Supreme Court and the EEOC’s incorporation of the definition into its regulations. The Supreme Court’s decisions, however, were made in the context of the conscientious objector cases of *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), not in the context of a Title VII religion-based discrimination claim.

8. For example, courts have denied Title VII protection after concluding that the “religion” the individual practiced was not a “religion” for purposes of Title VII. See, e.g., *Brown*, 441 F. Supp. at 1385 (denying that plaintiff’s “personal religious creed,” which centered on his consumption of cat food, qualified legally as a religion under Title VII). *But see* *Lorenz v. Wal-Mart Stores, Inc.*, No. SA-05-CA-0319 OG (NN), 2006 WL 1562235, at *8 (W.D. Tex. May 24, 2006) (concluding that plaintiff’s “Universal Belief System” did constitute a religion under Title VII even though only he and his mother practiced the religion).

9. See *infra* Part V for a discussion of how courts and the EEOC have handled discrimination cases involving white supremacists. The cases addressed in Part V include *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002); *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992); *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff’d*, 508 F.2d 504 (4th Cir. 1974); and EEOC Decision No. 79-06, 26 Fair Empl. Prac. Cas. (BNA) 1758 (1978).

10. See *supra* note 9 for a list of cases that consider this issue.

EEOC) ruled against granting Title VII protection to these individuals,¹¹ members of these groups have become more creative and have achieved at least some success in gaining Title VII protection against religion-based discrimination in the workplace.¹² In fact, at least one white supremacist group, the Creativity Movement, now proclaims on its website that it is a religion and that its members are now protected by federal laws that prohibit discrimination.¹³ As a result of creative use of Supreme Court precedent (and the EEOC regulations that rely on such precedent), and with the clever structuring of their white supremacist organizations, members of these groups have gained, and can continue to gain, protection from a statute that, ironically, these individuals' intolerant attitudes at least partially caused to be enacted.

This Article will first analyze Title VII and its prohibition against religion-based discrimination in the workplace; included in this Part is a discussion of the various theories of actionable religion-based discrimination.¹⁴ These theories of discrimination include the disparate treatment / failure-to-promote theory, the hostile environment theory, and the failure-to-accommodate theory. The Article will then briefly address the prevalence of religion-based workplace discrimination based on EEOC statistics.¹⁵ The Article will then discuss how the Supreme Court and other federal courts have defined "religion" for purposes of Title VII, and how the EEOC has decided to adopt the Supreme Court's rather expansive definition.¹⁶ Next, the Article will analyze several

11. See *Swartzentruber*, 99 F. Supp. 2d at 981; *Slater*, 809 F. Supp. at 810–11; *Bellamy*, 368 F. Supp. at 1026; EEOC Decision No. 79-06, 26 Fair Empl. Prac. Cas. at 1758.

12. See *Peterson*, 205 F. Supp. 2d at 1021–26 (explaining that the offensive moral beliefs of a white supremacist organization do not necessarily compromise other aspects of that organization's belief system that qualify it for religious protection).

13. Specifically, the Creativity Movement notes the following on its website: "The Creativity Movement is a Professional, Non-Violent, Progressive Pro-White *Religion*. We promote White Civil Rights, White Self-Determination, and White Liberation via 100% legal activism. We do not promote, tolerate nor incite illegal activity." THE CREATIVITY MOVEMENT, <http://creativitymovement.net/index1.html> (last visited Mar. 6, 2012) (emphasis added) (original emphasis omitted). The Creativity Movement was once referred to as the World Church of the Creator; it was forced to change its name, however, after being sued for trademark infringement. See *TE-TA-MA Truth Found.-Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002).

14. See *infra* Part II for a discussion of religion-based discrimination under Title VII. Although issues regarding religion often arise in the First Amendment context, this Article will focus on religion and Title VII of the Civil Rights Act of 1964. Although there might be some mention of non-Title VII cases in this Article, the primary focus will be on claims brought under Title VII. As many courts have noted, the term "religion" has a broader meaning in the context of Title VII than it does under the First Amendment. *E.g.*, *Conner v. Tilton*, No. C 07-4965 MMC (PR), 2009 WL 4642392, at *6 n.4 (N.D. Cal. Dec. 2, 2009) (citing *Peterson*, 205 F. Supp. 2d at 1017–18); see also *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 675 (Ct. App. 2002) (discussing how Title VII regulations extend protection to nontraditional religious organizations).

15. See *infra* Part III for a discussion of data tracking EEOC religion-based workplace complaints.

16. See *infra* Part IV for a discussion of the broad definition of "religion" adopted by the Supreme Court and the EEOC's incorporation of this definition into its regulations. See *supra* note 7 for a discussion of the fact that the EEOC has adopted the Supreme Court's very broad definition of religion, despite the fact that the Supreme Court's definition was articulated in the context of conscientious objector cases, not in cases involving employment discrimination. See generally EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (2011) (referencing Supreme Court cases to establish the standard for defining a practice as religious).

cases involving white supremacist groups (primarily the Ku Klux Klan, its various factions, and the Creativity Movement) and how the courts determined whether the beliefs such groups espouse constitute “religious” beliefs entitled to Title VII protection.¹⁷ Finally, this Article will argue that by changing the nature and structure of these groups while staying true to their underlying beliefs of white supremacy, members of white supremacist groups can benefit from Title VII protection, despite the fact that the purpose behind Title VII was certainly not to protect these individuals, and despite the fact that most individuals would find such protection unwanted.¹⁸

II. TITLE VII’S PROHIBITION AGAINST RELIGIOUS DISCRIMINATION

Just as there are various forms of sex discrimination, race discrimination, national origin discrimination, and discrimination based on color, there are also various forms of discrimination based on religion.¹⁹ In fact, because Title VII requires employers to accommodate employees’ religious observances and practices (but does not require accommodations regarding other protected classes),²⁰ there is at least one cause of action under Title VII that is unique to religion-based discrimination cases: the failure-to-accommodate cause of action. Accommodation issues also arise in the context of individuals with disabilities; those cases, however, involve either the Americans with Disabilities Act, the Rehabilitation Act, or parallel state statutes.²¹ The next few Sections of this Article will discuss and provide examples of the most common types of religion-based discrimination in the workplace. The first Section will address

17. See *infra* Part V for a discussion of how courts and the EEOC have handled cases involving white supremacists.

18. See *infra* Part VI for a discussion of how members of white supremacist groups can gain Title VII protection. This Article will only tangentially address the First Amendment issues that are inherent in any article involving religious freedoms and the restrictions government agencies place on those freedoms. The main focus of this Article will be on Title VII. Although some First Amendment cases will be addressed in some of the footnotes, the analysis involved in those cases is different than the analysis involved when analyzing Title VII cases.

19. As will be discussed, these types of claims include, among other causes of action, failure-to-promote claims, failure-to-hire claims, discriminatory discipline claims, and discriminatory discharge claims. According to the EEOC, claims of religion-based discrimination can also arise when employers discriminate against individuals based on their physical or cultural traits or clothing, based on their association with someone of a particular religion, based on an individual’s affiliation with a particular religious or ethnic group, or based on a perception that an individual is a member of a particular religious or ethnic group, regardless of whether that perception is correct. *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://eeoc.gov/laws/types/fs-relig_ethnic.cfm (last visited Mar. 6, 2012). Those cases will not be discussed at length in this Article.

20. 42 U.S.C. § 2000e(j) (2006). Another antidiscrimination statute that requires employers to make accommodations for individuals based on a protected characteristic is the Americans with Disabilities Act, which requires employers to provide reasonable accommodations to individuals with disabilities in order to allow them to perform the essential functions of their jobs. 42 U.S.C. § 12112(b)(5). Like the Civil Rights Act of 1964, the ADA does not require an accommodation if such an accommodation would cause the employer an undue hardship. *Id.*

21. The Americans with Disabilities Act can be found at 42 U.S.C. §§ 12101–12213; the Rehabilitation Act can be found at 29 U.S.C. §§ 701–796l.

“disparate treatment / failure-to-promote” claims;²² the second Section will address “hostile environment” claims; and the third Section will address “failure-to-accommodate” claims. As will be clear from the discussions of the cases in these Sections of the Article, Title VII claims based on religion are treated almost identically to claims based on race, national origin, color, and sex.²³ One unique problem for plaintiffs bringing religion-based discrimination claims, however, is that, occasionally, courts must determine whether their “religion” actually qualifies for protection under Title VII.

A. *Disparate Treatment / Failure-to-Promote Claims*²⁴

One of the most basic forms of discrimination based on religion occurs when an employer either refuses to promote, fires, refuses to hire, or takes some other type of adverse employment action against an employee because of that person’s religion. In most of these cases, courts apply the *McDonnell Douglas* burden-shifting approach, which requires the plaintiff to establish a prima facie case of discrimination; it then requires the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action; and it then allows the plaintiff to demonstrate that the employer’s proffered reason for the adverse employment action was not the actual reason, but rather the defendant took the adverse employment action because of the plaintiff’s religion.²⁵

One example of a failure-to-promote case is *Noyes v. Kelly Services*,²⁶ where a plaintiff alleged a “reverse” religious discrimination case, in which she claimed that she was passed over for a promotion because she did not follow the same religious beliefs as the person responsible for making the ultimate promotion decision.²⁷ Despite the fact that this case differed from the traditional religious discrimination case in which the plaintiff claims that *her* religion (as opposed to that of the supervisor) was the reason for the adverse action, the court used the *McDonnell Douglas* burden-shifting framework to determine that the district court should not have granted the employer’s motion for summary judgment.²⁸

22. The case addressed in that Section will actually be a “reverse” religion-based discrimination claim, in which an employer fails to promote an applicant because the applicant does not share the same religious views as the employer. Although these claims are referred to as “reverse” religion-based discrimination claims, the effect of the employer’s actions is the same: the employee or applicant suffers an adverse action because of his or her religion.

23. The one big difference is the failure-to-accommodate cause of action because Title VII does not have an accommodation requirement for cases involving race, color, national origin, or sex.

24. These failure-to-promote claims are similar to failure-to-hire claims and other employment discrimination claims where a plaintiff is asserting that he received some type of unfavorable employment decision as a result of a protected characteristic.

25. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). The *McDonnell Douglas* burden-shifting approach was further developed and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

26. 488 F.3d 1163 (9th Cir. 2007).

27. *Noyes*, 488 F.3d at 1165–66. Although this was a “reverse” religion-based discrimination case, the plaintiff in this case was still alleging that she was denied a promotion because of her religion.

28. *Id.* at 1168–73.

The appellate court first examined whether the plaintiff established a prima facie case.²⁹ According to the *Noyes* court, in a traditional religion-based failure-to-promote case, a plaintiff must demonstrate that: (1) she belonged to a protected class; (2) she was performing at a level that was consistent with her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) other employees with similar qualifications were treated more favorably.³⁰ Because this case involved "reverse" religious discrimination, however, the court determined that the first element of the prima facie case could be adjusted for this type of case.³¹ This is consistent with the well-accepted proposition that the elements of an employment discrimination plaintiff's prima facie case are flexible and can be tailored to the specific facts of a particular case.³² In *Noyes*, the district court found, and the employer did not contest, that the plaintiff established a prima facie case.³³

The court next analyzed whether the employer met its burden of articulating a legitimate, nondiscriminatory reason for not selecting the plaintiff for the position at issue.³⁴ This is merely a burden of production, and the employer only needs to come forward with evidence explaining why it made the decision it did.³⁵ The employer in this case did, in fact, meet its burden of articulating a legitimate, nondiscriminatory reason for hiring someone who was of the same religion as the person who made the promotion decision.³⁶ Specifically, the employer defended its decision by stating that: (1) it initially offered the position to an individual who did *not* follow the same religious beliefs as the decision maker, but that person turned down the offer; (2) one manager who did not follow the supervisor's religious beliefs recommended that the supervisor hire the candidate he did hire, even though the candidate was a member of the same religious group of the decision maker; and (3) the decision was ultimately made through a "consensus" of the "management group," and thus the decision was made by some people of the same religion as the decision maker and by some people who did not follow his religion.³⁷

The court then evaluated whether the plaintiff was able to create a genuine issue of material fact regarding whether the explanations proffered by the employer were a pretext for religion-based discrimination.³⁸ The court of appeals determined that the trial court misinterpreted the United States Supreme Court's decision in *St. Mary's*

29. *Id.* at 1168–69.

30. *Id.* at 1168 (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998)). Other courts have articulated the elements of a failure-to-promote prima facie case as being that the plaintiff: (1) was a member of a protected class; (2) applied and was qualified for the position in question; (3) was rejected for the position in question; and (4) the employer filled the position in question with someone of a different religion than the plaintiff. *E.g.*, *Rabinovitz v. Pena*, 89 F.3d 482, 486 (7th Cir. 1996).

31. *Noyes*, 488 F.3d at 1168.

32. *Id.* at 1169 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

33. *Id.* at 1168.

34. *Id.* at 1169.

35. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

36. *Id.*

37. *Id.*

38. *Id.* at 1169–73.

Honor Center v. Hicks,³⁹ and that it had placed too high of a burden on the plaintiff at the summary judgment stage.⁴⁰ Specifically, the court of appeals noted that the district court required the plaintiff to *prove* both that (1) the employer's articulated reasons were false; *and* (2) the real reason for the failure to promote was religion-based discrimination.⁴¹ The court noted that, at the summary judgment stage, the plaintiff is required only to create an issue of fact regarding pretext; she is not required to prove her case at this stage of the proceedings.⁴² The court then had to analyze whether the plaintiff created an issue of fact regarding whether the employer's articulated reasons were pretext for religion-based discrimination.⁴³

The plaintiff first presented evidence that the decision maker told several individuals with input into the decision-making process that the plaintiff was not interested in the at-issue position.⁴⁴ The plaintiff was able to present evidence that this was not true, and that she was, in fact, interested in the promotion.⁴⁵ Next, the plaintiff presented evidence that not only had she worked for the defendant six years longer than the person ultimately selected for the position but that she also held an MBA degree, whereas the person selected for the position did not hold that degree.⁴⁶ The plaintiff was also able to introduce evidence that the decision maker had previously favored an employee who followed the same religion as the decision maker, undermining the defendant's credibility to dispute the plaintiff's allegation.⁴⁷

Another aspect of this case that created a genuine issue of material fact was that despite the employer's statement that the decision not to promote the plaintiff was made through a management consensus, the two other people alleged to have been part of this consensus discredited that explanation and indicated that the ultimate decision was made by one person.⁴⁸ Finally, the plaintiff was able to present evidence that the person ultimately selected for the position (who was a follower of the decision maker's religion) had received favorable treatment in the past with respect to both his initial hiring and with respect to his pay, which was higher than the plaintiff's pay despite the fact that the plaintiff had an advanced degree and had six more years of service to the company than the successful candidate.⁴⁹ Looking at all of this evidence in the light most favorable to the plaintiff, the court concluded that there was sufficient evidence from which a jury could conclude that the plaintiff was denied the promotion because she did not follow the same religion as the decision maker.⁵⁰ As a result, the court of appeals reversed the district court's judgment.⁵¹

39. 509 U.S. 502 (1993).

40. *Noyes*, 488 F.3d at 1170.

41. *Id.*

42. *Id.* at 1170–71.

43. *Id.* at 1170–73.

44. *Id.* at 1171.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1171–72. Although it did not play a role in the court's decision, the court also noted that the plaintiff presented statistical evidence showing that members of the decision maker's religion were hired and

Noyes is one representative example of a disparate treatment / failure-to-promote case based on religion.⁵² Although *Noyes* was technically a “reverse” religious discrimination case, the court analyzed the case similarly to the way in which most courts analyze other Title VII failure-to-promote claims based on race, color, national origin, or sex.⁵³ And, as the next Section of this Article will show, courts also treat religion-based hostile environment claims similarly to the way they treat Title VII hostile environment claims that are based on other protected characteristics.⁵⁴

B. Hostile Environment Claims

Another theory of liability applicable to religion-based claims of discrimination (and to other claims of discrimination based on characteristics protected by Title VII) is the “hostile environment” theory, under which an employee is able to demonstrate that religion-based harassment is so pervasive or severe that it affects a term, condition, or privilege of employment.⁵⁵ Although this hostile environment theory of harassment arises most often in the sexual harassment context, courts have recognized its existence when an employee is subjected to harassment based on his religion.⁵⁶ According to most courts, in order to establish a religion-based hostile environment claim, an employee must prove the following: (1) he is a member of a protected class (that his “religion” is recognized as a religion under Title VII); (2) he was subjected to unwelcome comments, jokes, insults, etc.; (3) the comments, jokes, and insults were

promoted at a very high level, which, in addition to the plaintiff’s other evidence, could also demonstrate pretext. *Id.* at 1172–73.

51. *Id.* at 1174. Other circuits have also addressed the amount of evidence sufficient to raise a claim when a plaintiff alleges that he suffered disparate treatment because he did not follow the same religion as his supervisors. *See, e.g., Campos v. City of Blue Springs*, 289 F.3d 546, 551 (8th Cir. 2002) (holding that the plaintiff presented sufficient evidence to support a claim of religious discrimination when she alleged that her direct supervisor made it impossible for her to attend mandatory meetings); *Backus v. Mena Newspapers, Inc.*, 224 F. Supp. 2d 1228, 1230–31, 1233 (W.D. Ark. 2002) (holding that an employer’s memo requiring the plaintiff to pray and attend church, read scripture, see a Christian counselor, and be “Christlike” was sufficient evidence of religious discrimination).

52. For additional examples, see *Patterson v. Ind. Newspapers, Inc.*, 589 F.3d 357, 367–68 (7th Cir. 2009) (affirming the district court’s summary judgment in favor of the employer in a disparate treatment case); *Fischer v. Forestwood Co.*, 525 F.3d 972, 987 (10th Cir. 2008) (reversing the district court’s summary judgment in favor of the employer in a failure-to-hire claim); *Ibrahim v. Hillsborough Area Reg’l Transit Auth.*, No. 8:05-cv-1235-T-26MAP, 2007 WL 1017683, at *5 (M.D. Fla. Mar. 30, 2007) (granting and affirming summary judgment in favor of the employer in a failure-to-promote case), *aff’d*, 280 F. App’x 853 (11th Cir. 2008).

53. *See, e.g., McGowan v. Deere & Co.*, 581 F.3d 575, 579 (7th Cir. 2009) (applying a pretext analysis in a racial discrimination case).

54. *See, e.g., Rosario v. Dep’t of Army*, 607 F.3d 241, 246 (1st Cir. 2010) (discussing the similar elements that must be met for a successful sexually hostile work environment claim).

55. *E.g., Winspear v. Cmty. Dev., Inc.*, 574 F.3d 604, 610 (8th Cir. 2009); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313 (4th Cir. 2008); *Rivera v. P.R. Aqueduct and Sewers Auth.*, 331 F.3d 183, 189 (1st Cir. 2003). As was noted earlier, most hostile environment claims are sexually hostile work environment claims. The Supreme Court first recognized a sexually hostile work environment cause of action in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986), and it refined the contours of such a cause of action in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752–54 (1998); and in *Faragher v. City of Boca Raton*, 524 U.S. 775, 785–89 (1998).

56. *E.g., Shanoff v. Ill. Dep’t of Human Servs.*, 258 F.3d 696, 706 (7th Cir. 2001).

directed at the plaintiff because of his religion; (4) the comments, jokes, and insults were sufficiently pervasive or severe so as to affect a term, condition, or privilege of employment (from both an objective and subjective standpoint); and (5) a basis for employer liability.⁵⁷

Most cases involving allegations of a hostile environment turn on element (4) or (5) of the prima facie case—whether the conduct was sufficiently pervasive or severe to constitute actionable harassment, and/or whether there was a basis for employer liability.⁵⁸ Courts have made clear, however, that simple teasing and offhand comments do not rise to the level of actionable harassment, but rather a plaintiff must demonstrate that the harassment was both subjectively hostile and objectively hostile such that both the plaintiff and a reasonable person in the plaintiff's position would have found the environment to be hostile.⁵⁹ Courts routinely note that Title VII was not enacted to be a “civility code” for the workplace and that Title VII does not protect against all offensive behavior.⁶⁰ Rather, case law has clarified that the conduct must be sufficiently pervasive or severe from both a subjective and objective perspective such that it affects a term, condition, or privilege of employment.⁶¹

One example of where a plaintiff alleging a hostile environment based on religion was able to create a genuine issue of material fact with respect to whether the environment in which he worked was sufficiently hostile is *Shanoff v. Illinois Department of Human Services*.⁶² In *Shanoff*, the district court granted the employer's motion for summary judgment, but the Seventh Circuit Court of Appeals reversed, concluding that a reasonable jury could have concluded that the environment was sufficiently hostile.⁶³

The plaintiff in *Shanoff* was a white, Jewish male who alleged that his immediate supervisor, an African-American woman, violated Title VII by creating a hostile environment based on his race and religion.⁶⁴ Specifically, during the plaintiff's employment, his supervisor engaged in the following actions: (1) she referred to the plaintiff as a “haughty Jew”; (2) she made the comment that the plaintiff “did not want to see ‘this nigger get angry,’” and then “lunged at him with a pen”; (3) she turned down the plaintiff's requests to conduct presentations, and she also attempted to terminate the plaintiff's contact with medical students; (4) she stated to the plaintiff that she “kn[e]w how to put you Jews in your place”; (5) she threatened the plaintiff with bodily harm if the plaintiff filed a discrimination complaint; (6) she stated that she was

57. *E.g.*, *Wheeles v. Nelson's Elec. Motor Servs.*, 559 F. Supp. 2d 1260, 1271 (M.D. Ala. 2008); *Rossi v. Troy State Univ.*, 330 F. Supp. 2d 1240, 1245 (M.D. Ala. 2002). These elements are derived from the Supreme Court's opinions in *Meritor*, 477 U.S. at 65–67; *Harris*, 510 U.S. at 21–23; and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

58. *E.g.*, *Burlington*, 524 U.S. at 765–66; *Harris*, 510 U.S. at 22; *Rossi*, 330 F. Supp. 2d at 1245.

59. *E.g.*, *Harris*, 510 U.S. at 21–22.

60. *See, e.g.*, *Oncale*, 523 U.S. at 80–82 (noting that certain elements of the hostile environment theory require more than mere “offensive sexual connotations” to ensure that Title VII does not become a “general civility code”).

61. *Harris*, 510 U.S. at 21–22.

62. 258 F.3d 696, 706 (7th Cir. 2001).

63. *Shanoff*, 258 F.3d at 706.

64. *Id.* at 698.

tired of the plaintiff “not knowing [his] place,” and asked “when was [the plaintiff] going to learn that [the supervisor] knew how to handle white Jewish males like [the plaintiff]”; (7) she stated that she knew “damn well . . . how to handle white Jewish males like [the plaintiff] and when [was the plaintiff] going to learn”; (8) she stated that she did not “give a damn” about the plaintiff’s religious holidays after he had requested time off for those holidays; (9) she warned the plaintiff not to speak with any supervisors “about any matter without her permission”; (10) she threatened to ruin his career; (11) she stated that she was “tired of dealing with Jews like [the plaintiff]” after the plaintiff failed to use his swipe-card correctly; (12) she made comments about keeping the plaintiff’s “white Jewish ass” down; and (13) after the plaintiff took a medical leave, she called him at home, demanded that he appear at work, threatened to discharge him, and stated that she “hate[d] everything that [he was].”⁶⁵

The plaintiff eventually filed charges with the Illinois Department of Human Rights and the EEOC, alleging discrimination based on race and religion.⁶⁶ After the plaintiff filed suit in federal court, the district court determined that many of the events listed above took place prior to the 300-day limitations period and that the remaining events were not sufficiently pervasive or severe to meet the hostile work environment threshold.⁶⁷ The Seventh Circuit agreed with some parts of the lower court’s opinion; it disagreed with the district court, however, on the merits of the case and reversed the lower court’s judgment.⁶⁸ The Seventh Circuit agreed with the lower court and rejected the plaintiff’s attempts to overcome the 300-day statute of limitations and bring all of the previously mentioned events within his claim.⁶⁹ The court determined that neither the equitable estoppel doctrine nor the continuing violation doctrine applied, and thus, the plaintiff was limited to the events that occurred within the 300 days prior to the date he filed the charge of discrimination.⁷⁰

In addressing the merits of the plaintiff’s claim, the court relied on *Harris* and *Meritor*, both of which addressed sex-based hostile environments, for the proposition that for an employee to prevail in a hostile environment claim, he must demonstrate that the workplace was filled with “discriminatory intimidation, ridicule, and insult” that was “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁷¹ The key in this particular case was whether the plaintiff was able to demonstrate that a reasonable person would have found the environment to be hostile or abusive.⁷² Noting that courts must look at the totality of the circumstances, the court then evaluated the incidents of verbal harassment and the religion-based derogatory remarks that occurred within the relevant time period.⁷³

65. *Id.* at 698–701 (some alterations in original).

66. *Id.* at 701.

67. *Id.* The district court opinion can be found at *Shanoff v. Illinois Department of Human Services*, No. 99 CV 4084, 2000 U.S. Dist. LEXIS 12976 (N.D. Ill. Sept. 1, 2000).

68. *Shanoff*, 258 F.3d at 698.

69. *Id.* at 703–04.

70. *Id.*

71. *Id.* at 704 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

72. *Id.*

73. *Id.* at 704–05.

The court focused on seven of the incidents described above and ultimately concluded that “a reasonable person may certainly conclude that, from the context of all of [the supervisor’s] conduct, her remarks that were not facially discriminatory . . . were sufficiently intertwined with her facially discriminatory remarks to be motivated by her hostility to [the plaintiff’s] race and religion.”⁷⁴ The court also noted that it was able to use the time-barred conduct as additional evidence regarding the nature of the conduct that was not time barred.⁷⁵ Ultimately, the court concluded that the plaintiff was subjected to six “rather severe instances of harassment” during the limitations period, and that these events, along with the plaintiff’s supervisor’s attempts to “impede his career” and to “bully, intimidate and insult” the plaintiff, all of which were based on his race and religion, were sufficient to raise an issue of fact for the jury to determine whether he met the objective standard under *Harris*.⁷⁶

Therefore, the *Shanoff* case is one example of a hostile environment case based on religion.⁷⁷ The court analyzed the case similarly to the way courts analyze other Title VII hostile environment claims based on race, color, national origin, or sex. This is consistent with the proposition that courts must treat hostile environment claims based on religion in the same manner in which they treat hostile environment cases based on other protected characteristics.⁷⁸ As the next Section of the Article will demonstrate, however, Title VII provides an additional cause of action to people alleging discrimination based on religion that it does not provide to people claiming discrimination based on any other characteristics covered by Title VII: failure-to-accommodate causes of action.⁷⁹ Although these claims are much more common under

74. *Id.* at 705.

75. *Id.*

76. *Id.* at 705–06.

77. For additional examples, see *Winspear v. Cmty. Dev., Inc.*, 574 F.3d 604, 606–09 (8th Cir. 2009) (reversing summary judgment in favor of the employer where a coworker allegedly harassed the nonreligious plaintiff every day for three weeks, trying to get him to find God by telling him that she could speak to his recently deceased brother who was burning in hell); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316–18 (4th Cir. 2008) (reversing summary judgment in favor of the employer where coworkers of a Muslim employee consistently used degrading religious epithets, ridiculed his appearance, and suggested that he was involved in terrorism). *But see* *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 185, 191 (1st Cir. 2003) (affirming summary judgment in favor of the employer where the plaintiff, a member of “charismatic Catholicism,” was found to be subjected to unwelcome, severe, and harassing behavior, but it was not because of her religion).

78. *See* *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 n.5 (3d Cir. 2001) (explaining that although the court had never addressed a religiously hostile work environment claim, it saw “no reason to treat [the plaintiff’s] . . . claim any differently” than hostile work environment claims based on sex, race, or national origin). *But see* *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993) (declining “to adopt the specific set of requirements that are necessary to establish a prima facie case in straightforward sex and race [Title VII] discrimination cases” in a “reverse” religion-based discrimination case).

79. *See infra* Part II.C for a discussion of failure-to-accommodate claims under Title VII. Although not available for other Title VII claims, failure-to-accommodate claims are actionable under the Americans with Disabilities Act and the Rehabilitation Act. *See* Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (2006) (defining “discriminat[ion] against a qualified individual on the basis of disability” to include the failure to make reasonable accommodations for “known physical or mental limitations” of employees with disabilities); Rehabilitation Act, 29 U.S.C. § 793 (2006) (requiring firms that contract with federal agencies to “employ and advance in employment qualified individuals with disabilities,” and providing an enforcement process).

disability statutes such as the Americans with Disabilities Act and the Rehabilitation Act, courts still face these failure-to-accommodate cases under Title VII.

C. *Failure-to-Accommodate Claims*

Another type of discrimination claim based on religion, and a cause of action unique to religion-based Title VII claims, is a failure-to-accommodate claim.⁸⁰ Title VII places an affirmative duty on an employer to accommodate the religious observances and practices of employees, so long as such accommodation does not result in an undue hardship on the employer.⁸¹ In these cases, a plaintiff must prove the following: (1) there was a conflict between his religious observance or practice and his employment; (2) he informed his employer about the conflict; and (3) the employer refused to accommodate the plaintiff's request for an accommodation and the employee was discharged or penalized for failure to comply with the conflicting employment requirement.⁸² The most common example of this type of case occurs when an employee's work schedule conflicts with a religious observance or practice.⁸³

One example of this type of failure-to-accommodate case is *Heller v. Ebb Auto Co.*⁸⁴ In *Heller*, the Ninth Circuit reversed a judgment against a plaintiff who alleged his former employer violated Title VII's prohibition against religious discrimination when it terminated him after he indicated that he would be unable to attend a mandatory sales meeting because he was going to attend the ceremony for his wife's conversion to Judaism.⁸⁵ The plaintiff's wife was converting to Judaism because, under Jewish law, children must take their mother's religion, and because the plaintiff's son would not be allowed to have a bar mitzvah unless his mother converted, the plaintiff's wife agreed to convert to Judaism.⁸⁶

The conversion ceremony was scheduled for either of two particular days, both of which conflicted with the days the plaintiff's former employer set aside as being days on which no employees could take leave or vacation time.⁸⁷ The plaintiff's supervisor initially agreed to allow the plaintiff to take a two-hour leave on one of the days, and the plaintiff notified the rabbi that he would be able to attend the conversion ceremony.⁸⁸ The next day, however, the employer indicated that it would not allow the plaintiff to take off those two hours, and it made the plaintiff choose between attending

80. See 42 U.S.C. § 2000e(j) (requiring employers to "reasonably accommodate" religious observances of employees in the absence of undue hardship). The Supreme Court has addressed the religious accommodation issue in the Title VII context on at least two occasions. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977). The Court has also addressed the reasonable accommodation issue in the context of the Americans with Disabilities Act. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 393–94 (2002).

81. 42 U.S.C. § 2000e(j).

82. *Cole v. Wells Fargo Bank, N.A.*, 437 F. Supp. 2d 974, 982 (S.D. Iowa 2006).

83. E.g., *Ansonia Bd. of Educ.*, 479 U.S. at 63; *Trans World Airlines*, 432 U.S. at 66.

84. 8 F.3d 1433 (9th Cir. 1993).

85. *Heller*, 8 F.3d at 1436.

86. *Id.* at 1436–37.

87. *Id.* at 1437.

88. *Id.*

the ceremony and keeping his job.⁸⁹ When the plaintiff indicated that he would not miss the ceremony, his employment was terminated.⁹⁰ He eventually brought suit under Title VII and under the parallel Oregon state law, alleging religion-based discrimination and wrongful termination.⁹¹ After a trial, the court ruled in favor of the employer on the statutory claims, and a jury ruled in favor of the employer on the wrongful termination claim.⁹² The plaintiff then appealed to the Ninth Circuit.⁹³

The Ninth Circuit started its analysis by focusing on Title VII's substantive prohibition against discrimination and on the statute's definition of "religion."⁹⁴ It then cited the Supreme Court's opinion in *Trans World Airlines, Inc. v. Hardison*⁹⁵ for the proposition that "[t]he . . . effect of this definition [i]s to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practice of his employees."⁹⁶ The court then set forth a two-part inquiry for analyzing a Title VII religion-based, failure-to-accommodate claim.⁹⁷ Specifically, the court noted that it first must determine whether the employee can establish a prima facie case.⁹⁸ According to the court, a plaintiff can establish a prima facie case by demonstrating the following: (1) he held a "bona fide religious belief, the practice of which conflicted with an employment duty"; (2) the employee "informed his employer of the belief and conflict"; and (3) "the employer threatened him with or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements."⁹⁹ According to the Ninth Circuit, a plaintiff is not required to show that the employee made any attempt to compromise his religious beliefs or practices before seeking an accommodation.¹⁰⁰ Once the plaintiff establishes a prima facie case, the employer must prove "that it initiated good faith efforts to accommodate the [plaintiff's] religious practices."¹⁰¹

Although the district court found that the plaintiff failed to establish a prima facie case and that the employer engaged in a good faith attempt to accommodate the plaintiff's religious practice, the Ninth Circuit disagreed with both conclusions.¹⁰² First,

89. *Id.*

90. *Id.*

91. *Id.* The Oregon state statute under which the plaintiff filed suit was OR. REV. STAT. ANN. § 659.030 (West 1992) (current version at OR. REV. STAT. ANN. § 659A.030 (West 2011)).

92. *Heller*, 8 F.3d at 1437.

93. *Id.*

94. *Id.* Specifically, the court quoted 42 U.S.C. § 2000e(j) (1988), which provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." The most current language of this provision is identical. *See* 42 U.S.C. § 2000e(j) (2006).

95. 432 U.S. 63 (1977).

96. *Heller*, 8 F.3d at 1437 (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1976)) (second alteration in original) (omissions in original).

97. *Id.* at 1438.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (citing *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1512 (9th Cir. 1989)).

102. *Id.* at 1438.

the court addressed the issue of whether the conversion ceremony was, in fact, a “religious practice.”¹⁰³ Relying on Title VII’s use of the phrase “*all aspects* of religious observance and practice,” the court rejected the employer’s attempt to limit that phrase to those practices that were either *required* or *prohibited* by the plaintiff’s particular religion.¹⁰⁴ Adopting a “broad framework” for these claims, the court concluded that Title VII did, in fact, cover the plaintiff’s attendance at and participation in the conversion ceremony.¹⁰⁵

The court then addressed the employer’s argument that the plaintiff could have avoided the conflict with his employment duties by simply rescheduling the conversion ceremony.¹⁰⁶ After first rejecting as dicta a United States district court’s statement that an employee has “a duty to do everything on [his] part to help resolve the conflicts between [his] job duties and his alleged religious practices, and [he] fail[s] in this duty when [he] ma[kes] no attempt to reschedule the church function or find a substitute,”¹⁰⁷ the court then concluded that a duty to reschedule would impose “too great a burden” on employees.¹⁰⁸ The court also noted that although the plaintiff never requested to change the date of the conversion ceremony, that decision was not the result of a disregard for his job duties, but rather it occurred because he was under the impression that the conversion dates were fixed.¹⁰⁹ Because the plaintiff acted in good faith, and because the plaintiff had already notified the rabbi that he would be able to attend the conversion ceremony, the court determined that there was, in fact, a conflict between the plaintiff’s job responsibilities and a religious practice.¹¹⁰

The court next addressed the employer’s argument that because the plaintiff did not explain the nature of the ceremony, the plaintiff failed to give sufficient notice of the conflict.¹¹¹ The court quickly rejected this contention and noted that with respect to the notice requirement, “[a] sensible approach would require only enough information about an employee’s religious needs to permit the employer to understand the existence of a conflict between the employee’s religious practices and the employer’s job requirements.”¹¹² The court concluded that the plaintiff satisfied this standard because the relevant decision makers knew the plaintiff was Jewish; they knew that the plaintiff’s wife was in the process of converting to Judaism; and when the plaintiff requested time off, he indicated that the reason for the request was the conversion ceremony.¹¹³ The court therefore concluded that the plaintiff established a *prima facie* case.¹¹⁴

103. *Id.* at 1438–39.

104. *Id.* at 1438 (quoting *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978)).

105. *Id.* at 1439.

106. *Id.*

107. *Id.* at 1439 n.3 (some alterations in original) (quoting *Wessling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982)).

108. *Id.* at 1439.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

After concluding that the plaintiff established a prima facie case, the court then analyzed the accommodation burden placed on the employer.¹¹⁵ According to the Ninth Circuit, “[o]nce an employee proves a prima facie case under Title VII, the burden shifts to the employer to show that it undertook ‘some initial step to reasonably accommodate the religious belief of that employee.’”¹¹⁶ The court continued, “[A]t a minimum, the employer . . . [must] negotiate with the employee in an effort reasonably to accommodate the employee’s religious beliefs.”¹¹⁷ The employer need not make that effort, however, if it can show that any accommodation would present an undue hardship.¹¹⁸ The employer in *Heller* did not argue that there was an undue hardship, and the court therefore focused its attention on whether the employer made an adequate effort to accommodate the plaintiff.¹¹⁹ It concluded that it did not.¹²⁰ Specifically, the court noted that after the plaintiff received permission to attend the ceremony, the employer made no effort to accommodate the plaintiff or give any reason why the permission was rescinded.¹²¹ Although the employer did attempt to discuss the situation with the plaintiff after the plaintiff was fired, the court concluded that post-termination attempts to work out a resolution went only to the issue of mitigation of damages, and not to the issue of whether the employer violated Title VII.¹²² While acknowledging a duty on the plaintiff to attempt to work with his employer to find a reasonable accommodation, the court noted that “[a]n employee’s ‘concomitant duty’ to cooperate, however, arises only after the employer has suggested a possible accommodation: ‘[T]he statutory burden to accommodate rests with the employer[;] the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer.’”¹²³ Because the plaintiff’s employer made no effort to accommodate him prior to firing him, the plaintiff’s duty to cooperate never arose.¹²⁴ Finally, the court noted that the employer failed to show that it took an initial step toward accommodating the plaintiff, and therefore the plaintiff was not required to suggest an alternative accommodation or to compromise his beliefs.¹²⁵ The court therefore reversed the district court’s judgment.¹²⁶

115. *Id.* at 1439–40.

116. *Id.* at 1440 (quoting *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986) (per curiam)).

117. *Id.* (omission in original) (quoting *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989)).

118. *Id.* (citing *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (second and third alterations in original) (emphasis omitted) (quoting *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 777 (9th Cir. 1986) (per curiam)).

124. *Id.* at 1441.

125. *Id.*

126. *Id.*; see also *Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 752–53 (8th Cir. 1997) (reversing district court’s summary judgment in favor of employer who fired an employee who refused to observe the employer’s residency requirement because the area lacked a religious community where the employee could practice his faith). *But see Booth v. Maryland*, 337 F. App’x 301, 303 (4th Cir. 2009) (per curiam) (affirming the district court’s granting of summary judgment against a Rastafarian employee who brought a failure-to-accommodate claim after being demoted for refusing to remove his dreadlocks, because evidence showed he

As the previous Sections of this Article have demonstrated, there are various types of Title VII religion-based causes of action. Although most of these causes of action follow the same burden-shifting paradigms as other Title VII claims based on race, sex, national origin, or color, there are a few minor differences among the various types of causes of action. The biggest difference is that Title VII places an affirmative obligation on employers to accommodate the religious observances and practices of their employees, provided there is no undue burden placed on the employer. Although these religion-based cases typically do not turn on the issue of whether an employee's beliefs do, in fact, constitute a "religion," that question does not always have an easy answer, especially when those beliefs are unpopular or unconventional.

III. STATISTICS REGARDING DISCRIMINATION CLAIMS BASED ON RELIGION

Although the above Part demonstrated that there are various forms of Title VII religion-based discrimination claims, most discrimination charges filed with the EEOC since 1997 involve race and sex discrimination,¹²⁷ and only a small percentage involves discrimination based on religion.¹²⁸ Nevertheless, since 1997, the number of these religion-based discrimination charges has increased almost every year and has more than doubled in the last thirteen years.¹²⁹ The overall *percentage* of EEOC charges that allege discrimination based on religion has also increased during this thirteen-year time period, from a low of 2.1% of the charges alleging discrimination based on religion (1997) to a high of 3.6% of the charges alleging discrimination based on religion (2010).¹³⁰ If these trends continue, which is possible due to an increase in anti-Muslim attitudes in this country, religion-based discrimination claims will become more prevalent, and the courts will have to start deciding which non-mainstream beliefs (including those that advocate for white supremacy) constitute a religion on a more frequent basis. The EEOC has already made this determination, based on two Supreme Court cases not involving Title VII. Because the Supreme Court made its determination in the context of conscientious objector cases, however, and because the definition the Court articulated was so broad, many courts will continue to wrestle with what constitutes a "religion" for Title VII purposes.

was actually demoted for unsatisfactory work); *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (rejecting an employee's failure-to-accommodate claim because allowing the employee to discuss religion with clients and display religious items in his cubicle would create a danger of violating the First Amendment's Establishment Clause, thus rendering such an accommodation an undue hardship).

127. *Charge Statistics*, *supra* note 5. There is also a large number of retaliation charges filed with the EEOC every year. *Id.* In fact, retaliation claims have comprised from twenty to more than thirty percent of EEOC charges between 1997 and 2010. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Some of the increase in religion-based discrimination claims might be attributable to anti-Muslim sentiment after the September 11, 2001 attacks in New York, Washington, D.C., and Pennsylvania.

IV. HOW TITLE VII, THE EEOC, AND THE SUPREME COURT HAVE DEFINED
“RELIGION” AND “RELIGIOUS PRACTICE”

Although it is not necessary to determine whether a particular “religion” is protected in most religion-based discrimination claims, there are cases where the courts have wrestled with this issue. This issue arises not only in cases involving the subject of this Article (whether a white supremacist belief system constitutes a “religion”), but it has also appeared in cases where plaintiffs have alleged that their beliefs in veganism, Wicca, “Confederate Southern Americanism,” and other belief systems constituted “religions” protected by Title VII.¹³¹

Title VII itself does not provide much guidance with respect to how to define a religion; it merely states that: “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”¹³² This definition does little with respect to deciding which belief systems constitute a religion and thus provide a basis for protection under Title VII.

The EEOC has issued its opinion with respect to what constitutes a “religious practice” for Title VII purposes. Specifically, the EEOC noted the following:

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase “religious practice” as used in these Guidelines includes both religious observances and practices, as stated in Section 701(j), 42 U.S.C. 2000e(j).¹³³

The EEOC has also added “supplementary information” regarding its definition of religion, and it has stated the following:

131. See, e.g., *Chaplin v. Du Pont Advance Fiber Sys.*, 293 F. Supp. 2d 622, 629 (E.D. Va. 2003) (concluding that the plaintiffs who claimed religion-based discrimination suffered no adverse action based on their status as “Confederate Southern Americans”); *Van Koten v. Family Health Mgmt., Inc.*, 955 F. Supp. 898, 902–03 (N.D. Ill. 1997), *aff’d*, 134 F.3d 375 (7th Cir. 1998) (concluding that Wicca is a religion); *Friedman v. S. Cal. Permanente Med. Grp.*, 25 Cal. Rptr. 2d 663, 685–86 (Ct. App. 2002) (concluding that veganism is not a religion for purposes of state law). *But see Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004) (declining to decide whether being a “Confederate Southern American” entitled the plaintiff to protection).

132. 42 U.S.C. § 2000e(j) (2006).

133. 29 C.F.R. § 1605.1 (2010) (footnote omitted). As is clear from this regulation, the EEOC’s broad definition does not consider many factors several courts have used to determine whether someone’s belief system constitutes a religion. In fact, the EEOC’s position simply asks whether an individual’s moral and ethical beliefs are sincerely held with the strength of traditional religious views.

“Religious” Nature of a Practice or Belief. The Guidelines do not confine the definition of religious practices to theistic concepts or to traditional religious beliefs. The definition also includes moral and ethical beliefs. Under the Guidelines, a belief is religious not because a religious group professes that belief, but because the individual sincerely holds that belief with the strength of traditional religious views.¹³⁴

Clearly, the EEOC has taken a rather broad approach with respect to this issue. Specifically, the EEOC relies on *United States v. Seeger*¹³⁵ and *Welsh v. United States*,¹³⁶ which are both conscientious objector cases decided during the Vietnam War,¹³⁷ and gives potential Title VII plaintiffs wide latitude with respect to what constitutes a religion or a religious practice or belief. Because the EEOC relied on *Seeger* and *Welsh* for these definitions, it is appropriate to briefly discuss both of those opinions.

In *Seeger*, the Court heard three consolidated cases regarding individuals who had claimed conscientious objector status under the Universal Military Training and Service Act.¹³⁸ Pursuant to section 6(j) of the Act, individuals were exempt from combat training and service if their religious training and beliefs caused the individuals to oppose war in any form.¹³⁹ The issue with which the Court had to wrestle was the statute’s definition of “religious training and belief,” which Congress had defined as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.”¹⁴⁰ In reaching its ultimate conclusion with respect to how the definition should be interpreted, the Court engaged in a lengthy discussion of the history behind conscientious objectors and the history behind various statutes and relevant definitions of terms related to those individuals who were opposed to war.¹⁴¹ After engaging in this lengthy discussion, however, the Court ultimately concluded that there should be wide latitude for those objecting to combat training or combat itself, concluding that the appropriate test for interpreting section 6(j) was the following:

A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-

134. 45 Fed. Reg. 72,610, 72,611 (Oct. 31, 1980) (to be codified at 29 C.F.R. pt. 1605).

135. 380 U.S. 163 (1965).

136. 398 U.S. 333 (1970).

137. *Seeger*, 380 U.S. at 176; *Welsh*, 398 U.S. at 339–43. Although this Article will address these two opinions, for a more thorough discussion, see Donna D. Page, *Veganism and Sincerely Held “Religious” Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMPL. L. 363 (2005).

138. *Seeger*, 380 U.S. at 164–65.

139. *Id.* at 164 (citing 50 U.S.C. § 456(j) (2006)).

140. *Id.* at 165 (alteration in original) (quoting 50 U.S.C. § 456(j)).

141. *Id.* at 169–75.

established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.¹⁴²

Based upon this definition, the Court concluded that the beliefs espoused by the litigants in these cases were sufficient to grant them conscientious objector status.¹⁴³ Based upon very similar reasoning, the Supreme Court in *Welsh* also granted conscientious objector status to the individual involved in that case.¹⁴⁴ Although these cases did not define “religion” or “religious observance and practice” for purposes of Title VII, the EEOC has adopted this very broad definition,¹⁴⁵ and as a result, at least one white supremacist group has been able to use this interpretation in order to gain Title VII protection.¹⁴⁶

Not all courts have necessarily agreed that the *Seeger/Welsh* test is the appropriate one for courts to use when determining what constitutes a religion. For example, and also in the non-Title VII or conscientious objector contexts, one popular test used by several courts of appeals was articulated in a concurring opinion in *Malnak v. Yogi*,¹⁴⁷ where Judge Arlin Adams proposed the use of three factors to determine whether an individual’s belief system constitutes a religion.¹⁴⁸ Those three factors were: (1) “the nature of the ideas in question,” which focuses not on truth or orthodoxy, but rather on whether the subject matter of the ideas is consistent with religion; (2) the comprehensiveness of the religious belief, meaning that the belief system should answer more than one question; and (3) whether the ideas have “any formal, external, or surface signs that may be analogized to accepted religions.”¹⁴⁹ These would include “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, [and/or] observation of holidays.”¹⁵⁰ This case did not involve Title VII, and although several courts have adopted Judge Adams’s reasoning regarding what constitutes a religion, those cases have also not involved claims of religious discrimination under Title VII.¹⁵¹

Thus, courts are now left to decide whether to apply the expansive definition of religion supported by the EEOC or the more narrow interpretation suggested by Judge Adams in his *Malnak* concurrence. As the next Part of the Article will demonstrate,

142. *Id.* at 176.

143. *Id.* at 185–88.

144. 398 U.S. 333, 343 (1970).

145. 29 C.F.R. § 1605.1 (2010).

146. See *infra* Part V for a discussion of how courts and the EEOC have handled discrimination cases involving white supremacists.

147. 592 F.2d 197 (3d Cir. 1979) (per curiam).

148. *Malnak*, 592 F.2d at 200–15 (Adams, J., concurring).

149. *Id.* at 208–10.

150. *Id.* at 209.

151. *E.g.*, *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000); *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000); *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996); see also *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (establishing a three-part framework to identify whether a practice is a religion under the First Amendment that is similar to that of Judge Adams’s: “First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs”).

although courts initially took a narrow view of religion when dealing with white supremacist plaintiffs claiming Title VII protection, the most recent court to decide this issue took the more expansive approach articulated by the Supreme Court in *Seeger* and *Welsh* (and adopted by the EEOC), and did afford Title VII protection to a member of a white supremacist organization.

V. HOW THE COURTS AND THE EEOC HAVE HANDLED CASES INVOLVING
WHITE SUPREMACISTS

Up to this point of the Article, the focus has been on religion-based Title VII claims generally. The next two Parts of this Article will address: (1) how the courts and the EEOC have handled religious discrimination claims when plaintiffs have alleged that their white supremacist beliefs constituted their "religion"; and (2) how, based on the most recent United States district court opinion on the issue, members of white supremacist groups can increase their chances of gaining Title VII protection in the future.

One of the first cases to address the issue of whether Title VII's protection against religion-based discrimination extends to individuals claiming that membership in the Ku Klux Klan or other white supremacist groups affords such protection is *Bellamy v. Mason's Stores, Inc.*¹⁵² Unfortunately, in *Bellamy*, neither the United States district court nor the United States Court of Appeals for the Fourth Circuit provided much analysis before concluding that Title VII's protections did not extend to the white-supremacist plaintiff.¹⁵³

Bellamy involved a former employee suing his former employer, alleging violations of Title VII and 42 U.S.C. §§ 1985 and 1986.¹⁵⁴ According to the allegations in the plaintiff's complaint, which the district court took as being true for purposes of the motion to dismiss, the plaintiff worked for the defendant for five months before being terminated.¹⁵⁵ According to the complaint, the plaintiff performed his job in an "exemplary manner," and he was terminated solely because of his membership in the United Klans of America.¹⁵⁶

The plaintiff argued that because he was terminated as a result of his "membership in an organization which he contend[ed] is racially exclusive in composition and ideology and dedicated to antisemitism," Title VII's prohibitions

152. 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974).

153. 368 F. Supp. at 1026; 508 F.2d at 505.

154. *Bellamy*, 368 F. Supp. at 1026. 42 U.S.C. § 1985(3) (2006) provides a cause of action against private individuals who "conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." Liability can be imposed for "any act" performed "in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States." 42 U.S.C. § 1986 further provides that any person having both "knowledge that any of the wrongs" as defined in § 1985 "are about to be committed" and "power to prevent or aid in preventing the commission of the same," who "neglects or refuses so to do" will, if the conspired act is completed, be held liable "for all damages caused by such a wrongful act."

155. *Bellamy*, 368 F. Supp. at 1026.

156. *Id.*

against race-based and religion-based discrimination protected him from termination.¹⁵⁷ Instead of engaging in a comprehensive discussion regarding why Title VII did or did not protect the plaintiff, the district court simply noted the following:

Accepting the exclusivity asserted, there is no indication in the complaint that either plaintiff or any other person was discharged by the defendants because of race. Nor is there any indication that defendants have discriminated in any way against members of the caucasian race. Furthermore, the proclaimed racist and anti-semitic ideology of the organization to which [the plaintiff] belongs takes on, as advanced by that organization, a narrow, temporal and political character inconsistent with the meaning of “religion” as used in [Title VII of the Civil Rights Act of 1964]. Thus, plaintiff’s claim under [Title VII] fails to allege facts which indicate discrimination on a basis prohibited by the act, and that claim is, in the Court’s view, without merit.¹⁵⁸

Unsatisfied with the district court’s conclusion, the plaintiff appealed to the Fourth Circuit.¹⁵⁹ The Fourth Circuit framed the issue as being “whether a private employee is protected by federal law from discharge on the ground that he belongs to an obnoxious organization, i.e., whether the right of association is protected against private interference.”¹⁶⁰ Before providing a detailed analysis of the plaintiff’s claim under 42 U.S.C. § 1985(3), the Fourth Circuit briefly mentioned the plaintiff’s Title VII claim.¹⁶¹ The Fourth Circuit decided not to address whether the Ku Klux Klan (KKK) constituted a religion for Title VII purposes, as the plaintiff had referred to that organization as a “patriotic organization” in his original complaint.¹⁶² On appeal, the plaintiff tried to argue that the organization also qualified as a religion “because its meetings are full of ‘religious pomp and ceremony,’” but the Fourth Circuit declined to address whether this “religious pomp and ceremony” was enough to trigger Title VII’s protections because the plaintiff had failed to file a timely motion to amend and was therefore limited to the allegations in his complaint.¹⁶³ Thus, in one of the early cases involving this issue, the district court dismissed the plaintiff’s claim, and the Fourth Circuit did not fully address the issue. These two opinions, therefore, do not provide much guidance or influence regarding the main focus of this Article.

After the opinions in *Bellamy*, the EEOC had to decide a case involving the issue of whether the KKK constituted a religion for Title VII purposes.¹⁶⁴ The charging party had alleged that she was terminated as a result of her membership with the organization, and she filed a charge against her former employer, alleging both religion-based and race-based discrimination.¹⁶⁵ In Decision No. 79-06, the EEOC ultimately concluded that Title VII’s protection against religion-based discrimination

157. *Id.*

158. *Id.*

159. *Bellamy v. Mason’s Stores, Inc.*, 508 F.2d 504, 505 (4th Cir. 1974).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. EEOC Decision No. 79-06, 26 Fair Empl. Prac. Cas. (BNA) 1758 (1978).

165. *Id.* at 1758.

did not extend to membership in the KKK, determining that the focus of the KKK was “more political, social or economic” than religious, and thus did not warrant protection under Title VII.¹⁶⁶

In this case, the charging party worked at a nursing home, and she was ultimately discharged, allegedly as a result of her membership in the KKK.¹⁶⁷ Believing that such a discharge violated Title VII, she filed a charge with the EEOC, and that agency had to determine whether the charge fell within its jurisdiction; if discrimination based on membership in the KKK did not constitute discrimination based on religion, the EEOC would have no jurisdiction to address the issue.¹⁶⁸ The EEOC first noted that Title VII protects employees from discrimination because of their religion, but it then noted that the statute does not define “religion” and that the legislative history behind this provision of Title VII was also not particularly helpful when trying to define “religion.”¹⁶⁹ The EEOC then looked to how the Supreme Court had defined “religion,” citing both *Seeger*¹⁷⁰ and *United States v. Macintosh*,¹⁷¹ and concluded that “[i]t follows then that it is characteristic of a religion that it bears some relation to or involves the worship of a power or being to which all else is subordinate or upon which all else is ultimately dependent.”¹⁷² Continuing to rely on *Seeger*, the EEOC also noted that beliefs that are essentially political, social, or economic in nature are not religious and therefore do not warrant protection under Title VII.¹⁷³

After analyzing the Supreme Court’s interpretation of religion, the EEOC was then forced to analyze the history of the KKK to determine whether the beliefs upon which it was founded were essentially “religious” or whether they were political, social, or economic.¹⁷⁴ According to the EEOC, the KKK had three separate “lives” at the time of that opinion.¹⁷⁵ The first incarnation of the KKK began as a “loose fraternal organization of Confederate soldiers at the end of the Civil War with the avowed purpose to maintain ‘all that is chivalric in conduct, noble in sentiment, generous in manhood and patriotic in purpose.’”¹⁷⁶ The EEOC then noted that this group then began focusing on racial issues, gained support among many white southerners, and then adopted three main aims: “intimidation of the Negro, destruction of all Negro political power, and purging of carpet-baggers from the South.”¹⁷⁷ This incarnation of the KKK ceased in 1877 when Reconstruction ended.¹⁷⁸

166. *Id.* at 1759–60.

167. *Id.* at 1758.

168. *Id.*

169. *Id.*

170. 380 U.S. 163, 176 (1965).

171. 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting).

172. 26 Fair Empl. Prac. Cas. at 1758.

173. *Id.* (citing *Seeger*, 380 U.S. at 173).

174. *Id.* at 1759.

175. *Id.*

176. *Id.* (quoting 16 ENCYCLOPEDIA AMERICANA, JEFFERSON TO LATIN 550 (Americana Corp. 1976)).

177. *Id.*

178. *Id.*

The rebirth of the KKK occurred in 1915, apparently inspired by the feeling of nationalism that was growing out of World War I.¹⁷⁹ The new version of the KKK was more diverse in ideas, and “its activities included exhortation and violence against any person who did not meet [its] view of what was a proper standard of Americanism.”¹⁸⁰ In addition to targeting African Americans and carpetbaggers, the new KKK started to target “Catholics, Jews, ‘the international conspiracy,’ loose women, liquor, and all foreigners not of Anglo-Saxon stock.”¹⁸¹ This second life of the KKK experienced an eventual decline from 1926 to 1944.¹⁸²

The third incarnation of the KKK took place after World War II, and it also espoused the belief of “white Anglo-Saxon Protestant supremacy and xenophobia.”¹⁸³ This version of the KKK became extremely active after the Supreme Court’s 1954 decision in *Brown v. Board of Education*,¹⁸⁴ and it remained active during the civil rights movement in the 1960s.¹⁸⁵

After describing these three separate “lives” of the KKK, the EEOC then addressed the various laws and teachings of the KKK.¹⁸⁶ First acknowledging that such a task was difficult because of the secret nature of the organization and because of the fragmented nature of various KKK splinter organizations, the EEOC did eventually rely on the KKK’s own writings to decide whether members of the organization did, in fact, qualify for Title VII protection.¹⁸⁷ The EEOC first quoted from the “Imperial Proclamation,” which stated the following:

We, the members of this order, desiring to promote patriotism toward our civil government; honorable peace among men and nations; protection for and happiness in the homes of our people; manhood, brotherhood, and love among ourselves, and liberty, justice and fraternity among all mankind; believing we can best accomplish these noble purposes through a mystic, social, patriotic, benevolent association, having a perfected lodge system, with an exalted [sic] ritualistic form of work and an effective form of government, not for selfish profit, but for the mutual betterment, benefit and protection of our oath-bound associates, and their loved ones.¹⁸⁸

After quoting from The Proclamation, the EEOC noted that the KKK’s “Objects and Purposes” lists as its goal to “unite white male persons of listed qualifications in a brotherhood of strict regulation to ‘cultivate and promote patriotism toward our civil

179. *Id.*

180. *Id.*

181. *Id.* (citing GEORGE THAYER, *THE FARTHER SHORES OF POLITICS: THE AMERICAN POLITICAL FRINGE TODAY* 83 (1967)).

182. *Id.*

183. *Id.*

184. 347 U.S. 483 (1954).

185. 26 Fair Empl. Prac. Cas. at 1759.

186. *Id.*

187. *Id.*

188. *Id.* (quoting KNIGHTS OF THE KU KLUX KLAN, *CONSTITUTION AND LAWS OF THE UNITED KLANS OF AMERICA, INC.* (1964), reprinted in H. COMM. ON UN-AMERICAN ACTIVITIES, *THE PRESENT DAY KU KLUX KLAN MOVEMENT*, H.R. DOC. No. 377, at 181, 183–84 (1967) [hereinafter KNIGHTS OF THE KU KLUX KLAN]).

government.”¹⁸⁹ Finally, the EEOC quoted from the KKK’s Constitution.¹⁹⁰ That document provides that the KKK:

is an institution of chivalry, humanity, justice and patriotism; whose peculiar objects are [f]irst, to protect the weak, the innocent, and the defenseless from the indignities, wrongs, and outrages of the lawless, the violent and the brutal; to relieve the injured and the oppressed; to succor the suffering and the unfortunate, especially widows and orphans. Second, to protect and defend the Constitution of the United States of America and all laws passed in conformity thereto, and to protect the States and the people thereof from all invasion of their rights from any source whatsoever.¹⁹¹

The EEOC, relying on both its own interpretation of the KKK’s words, objects, and purposes, and on the previously discussed opinion in *Bellamy*, then concluded that “it is apparent that the Klan’s beliefs are more political, social or economic than theistic and they do not involve a relation to a superior being involving duties superior to those arising from any human relation.”¹⁹² As a result of its conclusion that the KKK was not a religious organization, the EEOC determined that it was without jurisdiction to further pursue the charging party’s claim.¹⁹³ Thus, another white supremacist was denied protection under Title VII’s prohibition against religion-based discrimination in the workplace.

Almost twenty years after the district court’s decision in *Bellamy*, and close to fifteen years after the EEOC’s opinion on this issue, another court was faced with the question of whether membership in the KKK qualifies for protection under Title VII’s prohibition against religion-based discrimination. In *Slater v. King Soopers, Inc.*,¹⁹⁴ the United States District Court for the District of Colorado decided to grant an employer’s motion to dismiss, concluding that the plaintiff’s membership in the KKK was not protected under Title VII’s prohibition against religion-based discrimination.¹⁹⁵

In *Slater*, the plaintiff alleged that he was terminated because of his political and religious beliefs after he organized and participated in an Adolph Hitler rally.¹⁹⁶ After first noting that Title VII’s definition of religion did not clarify the issue of whether the KKK’s belief system constitutes a “religion,”¹⁹⁷ the court relied on the Supreme Court’s previously discussed opinions in *Seeger* and *Welsh* for the proposition that the proper test for determining what constitutes a “religion” is the following: “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God.”¹⁹⁸ The court then relied on *Bellamy* and on EEOC Decision No. 79-

189. *Id.* (quoting KNIGHTS OF THE KU KLUX KLAN, *supra* note 188, at 187).

190. *Id.*

191. *Id.* (quoting KNIGHTS OF THE KU KLUX KLAN, *supra* note 188, at 187–88) (internal quotation marks omitted).

192. *Id.*

193. *Id.* at 1759–60.

194. 809 F. Supp. 809 (D. Colo. 1992).

195. *Slater*, 809 F. Supp. at 809–10.

196. *Id.* at 810.

197. *Id.* See *supra* notes 164–93 and accompanying text for a discussion of an EEOC analysis of whether the KKK came within Title VII’s definition of “religion.”

198. *Slater*, 809 F. Supp. at 810 (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

06 and concluded that the KKK's teachings did not constitute a religion, and that membership in that organization did not warrant protection under Title VII's prohibition against religion-based discrimination.¹⁹⁹ Specifically, the court noted the following: "Based on the reasoning of [EEOC Decision No. 79-06] and *Bellamy*, I conclude that the KKK is not a religion for purposes of Title VII. Rather, the KKK is political and social in nature."²⁰⁰ The court supported this conclusion by using the plaintiff's argument in a previous case that the Hitler rally involved political speech, not religious speech.²⁰¹

Another white supremacist's unsuccessful attempt to invoke Title VII's protection against religion-based discrimination occurred in *Swartzentruber v. Gunite Corp.*,²⁰² where an employee sued under Title VII's religious accommodation provision and under Title VII's prohibition against harassment based on religion (the hostile environment theory).²⁰³ As was noted earlier, unlike other provisions of Title VII, the provision regarding religion-based discrimination requires an employer to accommodate an employee if that employee's sincerely held religious belief or practice conflicts with an employer's policy or work requirement.²⁰⁴ If such a conflict exists, an employer can avoid liability by showing that it was willing to accommodate the employee's conflict or that there was no reasonable accommodation available.²⁰⁵

In *Swartzentruber*, the plaintiff, a member of the American Knights of the Ku Klux Klan, alleged that the employer was unwilling to accommodate his religious beliefs when it forced him to conceal his tattoo of a hooded individual standing in front of a burning cross.²⁰⁶ After a group of African-American employees complained to management about what it perceived to be a racist tattoo, the employer, which had a policy prohibiting racial harassment, instructed the plaintiff to cover the tattoo while working.²⁰⁷ Although the plaintiff complained about the African-American employees' tattoos, he never mentioned that his tattoo "was religious in nature or that his religious beliefs required him to display the tattoo at work."²⁰⁸ The employer monitored the plaintiff's tattoo coverage, and the plaintiff found the employer's conduct to be harassing in nature.²⁰⁹

The court started its analysis by setting out the prima facie elements of a case based on the failure to accommodate a religious belief.²¹⁰ According to the court, in

199. *Id.*

200. *Id.*

201. *Id.* The court did, however, note that the plaintiff might have had a claim under a state law that prohibited terminating an employee for lawful conduct taking place during nonwork hours. *Id.* at n.1.

202. 99 F. Supp. 2d 976 (N.D. Ind. 2000).

203. *Swartzentruber*, 99 F. Supp. 2d at 978-79.

204. See 42 U.S.C. § 2000e(j) (2006) (defining "religion" to include all aspects of religious observance, practice, or belief that an employer can reasonably accommodate without undue hardship on the employer's business).

205. *Swartzentruber*, 99 F. Supp. 2d at 979.

206. *Id.* at 978.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

order to establish such a prima facie case, a plaintiff must demonstrate: (1) a sincere religious belief, observance, or practice that conflicts with an employment requirement; (2) that the employee informed his employer of the conflict; and (3) the religious practice was the basis for the adverse employment action.²¹¹ If the employee can establish a prima facie case, the employer must accommodate the employee's religious practice unless the employer can demonstrate that such an accommodation would cause an undue hardship on the employer.²¹² Finally, it is important to note that the employer need only provide a reasonable accommodation; it need not provide the specific accommodation requested by the employee.²¹³

Without engaging in a lengthy analysis of whether membership in the KKK constitutes a religion entitled to Title VII protection, the court determined that the plaintiff could not establish a prima facie case.²¹⁴ Although the plaintiff argued that the American Knights of the Ku Klux Klan was "a religious organization,"²¹⁵ and that his tattoo depicted three of the organization's "seven sacred symbols,"²¹⁶ the court noted that the plaintiff failed to demonstrate that the employer's requirement that he cover his tattoo at work conflicted with his religious belief or that the plaintiff even informed his employer that covering the tattoo conflicted with a religious belief.²¹⁷ As a result, the court concluded that the plaintiff failed to establish a prima facie case.²¹⁸

The court then noted that even if the plaintiff had established a prima facie case, the employer satisfied its obligation of providing a reasonable accommodation for him.²¹⁹ Although not *holding* that the tattoo actually depicted a "religious belief," the court did note the following:

As [s]ome would certainly view a burning cross as a precursor to physical violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy, the court agrees with [the employer] that any greater accommodation would cause it an undue hardship. [The employer] demanded that [the plaintiff] cover his tattoo because it violated [the employer's] racial harassment policy and offended other employees. [The employer] accommodated his tattoo depiction of his *religious* belief that many would view as a racist and violent symbol by allowing him to work with the tattoo covered; Title VII doesn't require more.²²⁰

The court then addressed the plaintiff's hostile environment claim, but ultimately determined that the plaintiff's allegations did not rise to the level of actionable

211. *Id.* (citing EEOC v. United Parcel Serv., 94 F.3d 314, 317 (7th Cir. 1996); Wright v. Runyon, 2 F.3d 214, 216 n.4 (7th Cir. 1993)).

212. *Id.* at 978–79 (quoting EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1574–75 (7th Cir. 1997)).

213. *Id.* at 979 (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986)).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (first alteration in original) (omission in original) (emphasis added) (citations omitted) (internal quotation marks omitted).

harassment required under Supreme Court jurisprudence in the area of hostile environment sexual harassment law.²²¹ The court also concluded that the harassment was based on the plaintiff's membership in the KKK, not on the plaintiff's religious beliefs.²²² Thus, this was yet another Title VII case in which the plaintiff's beliefs in white supremacy did not qualify him for protection under Title VII's prohibition against religion-based discrimination.²²³

Up to this point in the Article, white supremacist plaintiffs attempting to use Title VII's prohibition against discrimination based on religion have been unsuccessful. But, in a recent case, *Peterson v. Wilmur Communications, Inc.*,²²⁴ a member of a white supremacist group *succeeded* in arguing that his white supremacist ideology fell within Title VII's definition of "religion."²²⁵ In *Peterson*, the court granted summary judgment in favor of the plaintiff, after he presented direct evidence that his employer demoted him from a supervisory position to a nonsupervisory position after learning that he was a "reverend"²²⁶ in the World Church of the Creator ("Creativity" or "Creativity Movement"), a group that has white supremacy as its central tenet.²²⁷ In *Peterson*, the plaintiff worked as a manager who supervised eight employees, three of whom were not white.²²⁸ The *Milwaukee Journal/Sentinel* published an article on the Creativity Movement, and the article contained an interview with the plaintiff.²²⁹ The article also contained a photo of the plaintiff holding a T-shirt with a picture of Benjamin Smith, who, in the summer of 1999, went on a killing spree that targeted African Americans, Jews, and Asians.²³⁰

The day after the article appeared, the plaintiff was suspended for two days, and he was eventually demoted.²³¹ The text of the demotion letter made clear that the

221. *Id.* at 979–81 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 765 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Venters v. City of Delphi*, 123 F.3d 956, 974–75 (7th Cir. 1997)).

222. *Id.* at 980.

223. See *State v. Henderson*, 762 N.W.2d 1, 17–18 (Neb. 2009) (deciding that, based on Nebraska's "explicit, well-defined, and dominant public policy," reinstatement was inappropriate for a law enforcement officer who had joined an organization affiliated with the KKK). Although *Henderson* did not involve Title VII, the case provides another example of a member of a white supremacist group failing to gain any type of protection under Title VII (inconsistent with first part of sentence) after experiencing an adverse employment action.

224. 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

225. *Peterson*, 205 F. Supp. 2d at 1023–24.

226. Although the difference between a "reverend" and a "minister" is not made clear in the opinion or on the Creativity Movement's website, the court refers to the plaintiff interchangeably as a "reverend" and "minister" throughout the opinion.

227. *Id.* at 1024–26. For purposes of this Article, I will refer to the group using its current name, Creativity Movement. See *supra* note 13 for a discussion of why the group changed its name from "the World Church of the Creator" to "the Creativity Movement."

228. *Peterson*, 205 F. Supp. 2d at 1016.

229. *Id.*

230. *Id.* For more information regarding the Benjamin Smith case, see DEVIN BURGHART, CTR. FOR NEW CMTY., AM. JEWISH COMM., "CREATING" A KILLER: A BACKGROUND REPORT ON BENJAMIN "AUGUST" SMITH AND THE WORLD CHURCH OF THE CREATOR (1999).

231. *Peterson*, 205 F. Supp. 2d at 1016.

adverse employment actions were a direct result of the plaintiff's membership in the Creativity Movement.²³² In its opinion, the court also noted that the plaintiff had a strong employment record, and that he had been disciplined only once during his six-year career with the defendant.²³³ As a result of his demotion, the plaintiff brought suit under Title VII, alleging that Creativity is a religion, and that the demotion violated Title VII's prohibition against discrimination based on religion.²³⁴

The court started its opinion with a description of the Creativity Movement, and it went into great detail regarding the organization's beliefs and teachings.²³⁵ The court cited a Creativity Movement pamphlet, which included the following language:

After six thousand years of recorded history, our people finally have a religion of, for, and by them. CREATIVITY is that religion. It is established for the Survival, Expansion, and Advancement of [the] White Race exclusively. Indeed, we believe that what is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin.²³⁶

The court noted that Creativity "considers itself to be a religion," but it does not "espouse a belief in a God, afterlife or any sort of supreme being."²³⁷ The key tenet of this "religion," according to the court and the information available on the Creativity Movement's website, is that people should "live their lives according to the principle that what is good for white people is the ultimate good and what is bad for white people is the ultimate sin."²³⁸

Because the Creativity Movement is not a traditional religion, the court had to determine whether membership within that group fell within Title VII's definition of "religion" and whether Title VII therefore afforded protection to the plaintiff.²³⁹ After admitting that making this determination can be a "delicate task," the court noted that the Supreme Court indicated that courts should exercise care in this area, and that they

232. *Id.* Specifically, the letter stated the following:

On Sunday, March 19, 2000, an article appeared in the *Milwaukee Journal/Sentinel* stating that you were a member of the World Church of the Creator, a White supremacist political organization. On Monday, March 20, 2000, the information in the newspaper article was known by everyone in our office.

Our office has three out of eight employees who are not White. As of March 20, 2000, you were their supervisor. As a supervisor, it is your responsibility to train, evaluate, and supervise telephone solicitors. Our employees cannot have confidence in the objectivity of your training, evaluation, or supervision when you must compare Whites to non-Whites.

Because the company, present employees, or future job applicants cannot be sure of your objectivity, you can no longer be a supervisor and you are hereby notified of your demotion to a telephone solicitor effective March 22, 2000.

Id.

233. *Id.*

234. *Id.* at 1016–17.

235. *Id.* at 1015–16.

236. *Id.* at 1015 (alteration in original).

237. *Id.* at 1015–16.

238. *Id.* at 1016; see also *The Five Fundamental Beliefs of Creativity*, THE CREATIVITY MOVEMENT, <http://www.creativitymovement.net/index1.html> (last visited Mar. 6, 2012).

239. *Peterson*, 205 F. Supp. 2d at 1018.

should “avoid making theological pronouncements that exceed the judicial ken.”²⁴⁰ Then, relying on *Seeger* and *Welsh*, the court articulated what it believed to be the appropriate test when deciding whether an individual’s belief system constitutes a “religion” under Title VII.²⁴¹

According to the court, the test requires a “functional approach,” and asks whether the belief system functions as a religion in that person’s life.²⁴² Stated differently, according to the court, beliefs constitute a religion if they “occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified.”²⁴³ In order to satisfy the test, a plaintiff must show the following: (1) that the at-issue belief is “sincerely held”; and (2) that the at-issue belief is “‘religious’ in [the plaintiff’s] own scheme of things.”²⁴⁴ The court also noted that a belief system does not have to “have a concept of a God, supreme being, or afterlife,”²⁴⁵ and that moral and ethical beliefs can be religious as long as they “are held with the strength of religious convictions.”²⁴⁶ Finally, the court noted that “[s]o long as the belief is sincerely held and is religious in the plaintiff’s scheme of things, the belief is religious regardless of whether it is ‘acceptable, logical, consistent, or comprehensible to others.’”²⁴⁷

The court then spent considerable time differentiating among the types of religion-based discrimination claims brought under Title VII (those in which an employer fails to accommodate a religious observance or practice and those in which an employer discriminates against an employee based on a religious belief) and correctly concluded that this case was one involving discrimination based solely on a religious belief.²⁴⁸ This distinction is important because the analysis of these types of claims is different.²⁴⁹ Also, as the court pointed out, “an employer can avoid liability for failing to reasonably accommodate religiously-motivated acts, but cannot avoid liability for taking an adverse employment action based on the employee’s pure beliefs, unaccompanied by acts.”²⁵⁰ And, consistent with the legislative history behind Title VII’s definition of “religion,” an employer “cannot lawfully take an adverse employment action against an employee based on pure belief.”²⁵¹

240. *Id.*

241. *Id.* at 1018.

242. *Id.*

243. *Id.* (alteration in original) (quoting *United States v. Seeger*, 380 U.S. 163, 184 (1965)).

244. *Id.* (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978)).

245. *Id.* (citing *Welsh v. United States*, 398 U.S. 333, 339–40 (1970); *United States v. Bush*, 509 F.2d 776, 780–84 (7th Cir. 1975) (en banc)).

246. *Id.* (quoting *Welsh*, 398 U.S. at 339–40) (misquote in original).

247. *Id.* at 1019 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)).

248. *Id.* at 1019–21, 1025–26.

249. See *supra* Part II for a discussion of the variety of actionable religion-based discrimination under Title VII.

250. *Peterson*, 205 F. Supp. 2d at 1020.

251. *Id.* at 1021; see also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 362–69 (1997) (discussing the impetus for the 1972 amendment of Title VII’s definition of religion).

The court next analyzed whether the Creativity Movement satisfied the standard to be considered a religion under Title VII.²⁵² The court easily determined that *in this case*, the Creativity Movement did meet the test of being a sincerely-held belief and of being “religious in [the plaintiff’s] own scheme of things.”²⁵³ The court first concluded that the plaintiff did, in fact, sincerely hold the at-issue beliefs, based on the plaintiff’s statement that he had a sincere belief in the Creativity Movement’s teachings and based on the fact that the employer produced no testimony to rebut that assertion.²⁵⁴ The court then concluded that the plaintiff satisfied the second prong of the test.²⁵⁵ The court noted that it needed to give “great weight” to the plaintiff’s statement that he considered the Creativity Movement to be his religion, and it also noted that the Creativity Movement did play a major role in the plaintiff’s life.²⁵⁶ Specifically, the plaintiff was a minister in the Creativity Movement for more than three years, and he had taken an oath when he assumed that role.²⁵⁷ The plaintiff also testified that he tried to put the Creativity Movement’s teachings into practice every day.²⁵⁸ Based on these facts, the court concluded that the Creativity Movement did function as a religion for the plaintiff and that Title VII therefore protected these “religious” beliefs.²⁵⁹

The court then addressed and dismissed the employer’s arguments that the Creativity Movement is not a religion entitled to Title VII’s protections.²⁶⁰ Specifically, the employer first argued that Title VII does not protect members of the Creativity Movement because the Creativity Movement, like the KKK, was a political

252. *Peterson*, 205 F. Supp. 2d at 1021–24.

253. *Id.* at 1021.

254. *Id.*

255. *Id.* at 1022.

256. *Id.* (quoting *United States v. Seeger*, 380 U.S. 163, 184 (1965)).

257. *Id.* The plaintiff took the following oath:

Having been duly accepted for the Ministry in The World Church of the Creator, I hereby reaffirm my undying loyalty to the White Race and The World Church of the Creator and furthermore swear allegiance unto Pontifex Maximus Matt Hale, and his duly appointed successors; that I will carry out all instructions assigned to me; that I will fervently promote the Creed and Program of Creativity as long as I live; that I will follow the Sixteen Commandments and encourage others to do the same; that the World Church of the Creator is the only pro-White organization of which I am a member so that my energies may not be divided; that I will remain knowledgeable of our sacred Creed, particularly of the books, Nature’s Eternal Religion and The White Man’s Bible; that I will always exhibit high character and respect; and lastly, that I will aggressively convert others to our Faith and build my own ministry.

Id.

258. *Id.*

259. *Id.* At least two courts have determined that the Creativity Movement is not a religion for purposes of the First Amendment. Specifically, in *Conner v. Tilton*, No. C 07-4965 MMC (PR), 2009 U.S. Dist. LEXIS 111892, at *39–40 (N.D. Cal. Dec. 2, 2009), the United States District Court for the Northern District of California concluded that the Creativity Movement did not pass the three-part test articulated by the Third Circuit in *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981). See also *Prentice v. Nev. Dep’t of Corr.*, No. 3:09-cv-0627-RJ-VPC, 2010 U.S. Dist. LEXIS 116248, at *13 (D. Nev. Oct. 19, 2010) (agreeing with *Conner*). When confronted with the issue of whether the Creativity Movement is a religion, the court in *United States v. Trainer*, 265 F. Supp. 2d 589, 593 (D. Md. 2003), chose not to affirmatively decide the issue, but concluded that a court may condition a prisoner’s release on his not engaging in particular activities, even if those activities involved associating with other members of the Creativity Movement.

260. *Peterson*, 205 F. Supp. 2d at 1022–24.

organization, not a religious one.²⁶¹ The court rejected this argument in two ways.²⁶² First, the court noted that simply because one white supremacist organization was not entitled to Title VII protection, that did not necessarily mean that the plaintiff was not entitled to the statute's protection in light of the fact that the appropriate test for determining what constitutes a religion hinges on subjective factors.²⁶³ Next, the court rejected the employer's argument by criticizing *Bellamy* and *Slater* for their lack of analysis.²⁶⁴ The court then addressed EEOC Decision No. 79-06 and concluded that the KKK and the Creativity Movement are sufficiently different such that the EEOC's conclusion in Decision No. 79-06 did not apply to the case before the court.²⁶⁵ The court also noted that political beliefs and religious beliefs are not mutually exclusive, and that "the fact that [the] plaintiff's beliefs can be characterized as political does not mean they are not also religious."²⁶⁶

The employer then attempted to rely on the EEOC's regulations to support its position that the plaintiff's beliefs were not religious.²⁶⁷ Specifically, the employer relied on 29 C.F.R. § 1605.1, which defines religious beliefs as "moral or ethical beliefs as to what is right and wrong," and argued that because the beliefs espoused by members of the Creativity Movement are *immoral* and *unethical*, they are not protected.²⁶⁸ The court rejected the employer's proposed interpretation of the regulation and concluded that the regulation simply "means that 'religion' under Title VII includes belief systems which espouse notions of morality and ethics and supply a means from distinguishing right from wrong."²⁶⁹ The court determined that, in this case, because the Creativity Movement satisfied this standard, Title VII protects those who follow these beliefs, regardless of whether the defendant, society, or the court disagrees with the Creativity Movement's teachings.²⁷⁰ In wrapping up its discussion of whether the Creativity Movement was, in fact, a religion, the court noted that the Creativity Movement was a religion "regardless of whether it espouses goodness or ill."²⁷¹

The court spent the remainder of the opinion determining which analysis applied to the case (the "observance or practice" accommodation analysis or the "disparate treatment / beliefs" analysis).²⁷² The court determined that this case involved the latter (adverse employment action based on an employee's beliefs, not acts), and that the

261. *Id.* at 1022–23.

262. *Id.*

263. *Id.* at 1022.

264. *Id.*

265. *Id.* at 1022–23.

266. *Id.* at 1023 (citing *Welsh v. United States*, 398 U.S. 333, 342 (1970)).

267. *Id.*

268. *Id.* (quoting 29 C.F.R. § 1605.1 (2010)).

269. *Id.*

270. *Id.*

271. *Id.* at 1024; *see also* *United States v. Trainer*, 265 F. Supp. 2d 589, 593 (D. Md. 2003) (conceding that it is possible for the Creativity Movement to be a religion, but ultimately concluding that a court has the authority to restrict the practice of such a "religion" if the restriction is reasonably related to the goal of supervising a former prison inmate).

272. *Peterson*, 205 F. Supp. 2d at 1024–26.

letter the employer sent to the plaintiff explaining his demotion clearly demonstrated that the employer acted based on the plaintiff's religious beliefs, not on any actions the employee took while working for the employer.²⁷³ The court therefore granted the employee's motion for summary judgment.²⁷⁴ In response to this decision, Matthew Hale, one of the leaders of the Creativity Movement, stated the following:

This is a great victory for our adherents everywhere who wish to freely believe in their religion without worrying about being demoted or fired from their jobs. We believe that this decision puts employers on notice that we will not tolerate being discriminated against because of our religious beliefs. We will vigorously prosecute any attempt to do so and if necessary will build our religious movement financially by divesting anti-White employers of their assets.²⁷⁵

Although the courts and the EEOC were reluctant to grant Title VII protection to white supremacist groups in the past, the decision in *Peterson*, the EEOC's broad definition of religion, and the Creativity Movement's decision to structure itself in the way it has will most likely make it easier for members of the Creativity Movement and groups with similar organizational structures and belief systems to gain Title VII's protection from religion-based discrimination.²⁷⁶ As the next Part of the Article will demonstrate, as long as these groups clearly articulate their beliefs and principles, and as long as the groups' followers adhere to those principles "religiously," courts are likely follow the *Peterson* opinion and grant these individuals protection under Title VII. And although many individuals might feel that courts should not extend protection to members of these groups, the Supreme Court has noted on at least two occasions that Title VII protects against more than only the "principal evil[s]" it was intended to correct.²⁷⁷

VI. HOW MEMBERS OF WHITE SUPREMACIST GROUPS CAN GAIN TITLE VII PROTECTIONS

As was discussed earlier, both the EEOC and the Supreme Court have adopted a very broad definition of "religion." Although the EEOC relied on non-Title VII cases

273. *Id.* at 1024.

274. *Id.* at 1026.

275. *Reverend Chris Peterson v. Wilbur Communications Lawsuit: 2000 to 2002*, CREATIVITY ALLIANCE, <http://www.rahowanow.com/religion-creativitylegal.htm> (last visited Mar. 6, 2012).

276. *But see* Conner v. Tilton, No. C 07-4965 MMC (PR), 2009 U.S. Dist. LEXIS 111892, at *39-40 (N.D. Cal. Dec. 2, 2009) (concluding that for First Amendment purposes, the Creativity Movement does not qualify as a religion under the three-factor test articulated in the Third Circuit's opinion in *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)). Under the *Africa* test, courts look at whether the belief system "addresses fundamental and ultimate questions having to do with deep and imponderable matters." *Id.* at *19-20 (quoting *Africa*, 662 F.2d at 1032). The court then looks at whether the belief system is "comprehensive in nature" and "consists of a belief system" rather than "an isolated teaching." *Id.* at *20. Finally, the court looks at whether the religion involves formal and external signs. *Id.*

277. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (noting that Title VII protects against same-sex sexual harassment even though preventing same-sex sexual harassment was not the main goal behind Title VII); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976) (concluding that Title VII protects white individuals as well as minorities, even though discrimination against minorities was the impetus behind Title VII's passage).

for its decision with respect to how to define “religion,” that definition has provided guidance for white supremacist groups and their members as to how they can structure their organizations and practices to likely gain Title VII protection. The *Peterson* opinion and the Creativity Movement provide the perfect blueprint for these groups and individuals to follow in order to gain Title VII protection. Specifically, with respect to the *Peterson* opinion, Judge Adelman made the following observations:

* “Rather than define religion according to its content, the test requires courts take a functional approach and ask whether a belief ‘functions as’ religion in the life of the individual before the court.”²⁷⁸

* “[T]he court should find beliefs to be a religion if they ‘occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified.’”²⁷⁹

* “To satisfy this test, the plaintiff must show that the belief at issue is ‘sincerely held’ and ‘religious in [his or her] own scheme of things.’²⁸⁰ In evaluating whether a belief meets this test, courts must give ‘great weight’ to the plaintiff’s own characterization of his or her beliefs as religious.”²⁸¹

* “To be a religion under this test, a belief system need not have a concept of a God, supreme being, or afterlife, or derive from any outside source. Purely ‘moral and ethical beliefs’ can be religious ‘so long as they are held with the strength of religious convictions.’”²⁸²

* “Courts also should not attempt to assess a belief’s ‘truth’ or ‘validity.’ So long as the belief is sincerely held and is religious in the plaintiff’s scheme of things, the belief is religious regardless of whether it is acceptable, logical, consistent, or comprehensible to others.”²⁸³

Applying these rules to the plaintiff in *Peterson*, it is clear why the court ruled the way it did. Evaluating the statements above, it is clear that all the plaintiff in *Peterson* needed to demonstrate was that he held a sincere belief in the Creativity Movement’s moral and ethical principles and that those principles played the part of religion in his life. In concluding that the plaintiff sincerely held the Creativity Movement’s beliefs, the court simply relied on the plaintiff’s statement that he held a “sincere belief” in the Creativity Movement’s teachings and on the absence of any contrary evidence offered by the employer.²⁸⁴ Acknowledging that the court must give “great weight” to the plaintiff’s own statements regarding how he views the Creativity Movement, the court also determined that the second part of the EEOC’s test was undisputed, relying on the plaintiff’s statement that he considers the Creativity Movement to be his religion.²⁸⁵

278. *Peterson*, 205 F. Supp. 2d at 1018 (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978)).

279. *Id.* (second alteration in original) (quoting *United States v. Seeger*, 380 U.S. 163, 184 (1965)).

280. *Id.* (alteration in original) (citation omitted) (quoting *Redmond*, 574 F.2d at 901 n.12) (internal quotation marks omitted).

281. *Id.* (quoting *Seeger*, 380 U.S. at 184) (internal quotation marks omitted).

282. *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 339–40 (1970)).

283. *Id.* at 1018–19 (citations omitted) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)) (internal quotation marks omitted).

284. *Id.* at 1021.

285. *Id.* at 1022.

Additionally, as was noted earlier, the court also gave weight to the fact that the plaintiff was a “minister” in the group and took an oath upon assuming that position.²⁸⁶ Finally, the court noted that because the plaintiff put the Creativity Movement’s teachings into practice every day, he satisfied the EEOC’s broad definition of “religion” under Title VII.²⁸⁷

The Creativity Movement has also taken several steps to make itself look more like a traditional religion, even though a belief system does not necessarily have to appear to be a “traditional” religion in order to gain Title VII protection. First, the Creativity Movement has established the Sixteen Commandments for its members.²⁸⁸ It has also established the Five Fundamental Beliefs, which are “[t]o be memorized and repeated as a sacred religious ritual by every Creator five times a day.”²⁸⁹ Additionally, some members of the movement are referred to as “reverends” and “ministers,” which is another example of using religious terms, phrases, and traditions to make this organization appear more religious than political or social.²⁹⁰ One fact that *might* explain why the Creativity Movement structured itself in this manner (and was able to gain Title VII protection) is that one of the group’s leaders, the Reverend Matthew Hale, earned a law degree from an ABA-accredited law school and could have learned valuable lessons for making his organization appear more legitimate in order to obtain these statutory protections.²⁹¹

By (1) structuring the Creativity Movement to look more like a “traditional” religion; (2) making the Creativity Movement central to its members’ lives by requiring them to repeat the Five Fundamental Beliefs; (3) having the members of the Creativity Movement understand the Sixteen Commandments; and (4) creating literature and other rules by which members of the Creativity Movement must live their lives, the leaders of the Creativity Movement have been able to successfully convince one court, and quite possibly more in the future, that strict adherents of this movement treat this belief system as “moral or ethical beliefs as to what is right and wrong”²⁹² that are sincerely held with the strength of traditional religious views—which is how the EEOC has defined “religion” under its regulations.²⁹³ As a result, the leaders of the Creativity

286. *Id.*

287. *Id.*

288. *Creativity FAQ*, THE CREATIVITY MOVEMENT, http://creativitymovement.net/ar_faq.html#16c (last visited Mar. 6, 2012) (listing sixteen commandments that espouse extreme devotion to the white race, including such goals as “assur[ing] and secur[ing] for all time the existence of the White Race upon the face of this planet” and “further[ing] Nature’s plan by striving towards the advancement and improvement of . . . future generations”).

289. *Id.* (outlining the Creativity Movement’s fundamental beliefs, including the notion that “Race is [the movement’s] religion” and that followers must “pledge” their “Religious Zeal” to those “religious beliefs”).

290. *But see* *Conner v. Tilton*, No. C 07-4965 MMC (PR), 2009 U.S. Dist. LEXIS 111892, at *32–33 (N.D. Cal. Dec. 2, 2009) (citing *Kadans v. Riles*, No. 82-5191 MRP(B), 1989 U.S. Dist. LEXIS 13865, at *3–4 (C.D. Cal. Sept. 14, 1989) (explaining that “a belief system that is secular in nature does not become a religion simply by its use of religious terminology”).

291. Pam Belluck, *Hate Groups Seeking Broader Reach*, N.Y. TIMES, Jul. 7, 1999, at A16.

292. *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1023 (E.D. Wis. 2002) (quoting 29 C.F.R. § 1605.1 (2010)).

293. *Id.*

Movement have established the perfect model for other white supremacist groups to follow in order to gain protection from discriminatory employment practices.

Although the Creativity Movement was the first white supremacist group to obtain Title VII protection based on religion, the groundwork has been laid for members of other white supremacist groups to gain Title VII protection: (1) establish moral and ethical principles by which to live and pattern one's life; (2) strictly adhere to those principles; and, perhaps, (3) use traditionally "religious" words, phrases, terminology, and traditions when spreading the message (either on the web or in print). Essentially, the more guiding principles these organizations create, and the more their followers allow these principles to guide their lives, the more likely it is that members of these groups will gain Title VII protection. The obvious irony here is that the more these people make intolerance a part of their existence, the more likely they are to gain Title VII protection. Although most people might find this to be a total perversion of the intent behind Title VII, as the Supreme Court has noted, that statute provides protections beyond the principal evils it was intended to combat.²⁹⁴ Thus, although perhaps distasteful to many, the *Peterson* reasoning seems to indicate that, unless the Supreme Court and the EEOC adopt a more stringent definition of "religion" for Title VII purposes, white supremacists will be able to seek shelter under the protections afforded by Title VII's umbrella.

One possible way for courts to limit the protections offered by Title VII is to recognize that the EEOC's definition was not based on Title VII case law, and therefore disregard the EEOC's very broad definition of "religion" and adopt the more strict interpretation articulated by Judge Adams and adopted by several courts (although not in the Title VII context).²⁹⁵ If courts were to use that test, which evaluates (1) "the 'ultimate' nature of the ideas presented," which focuses not on the truth or orthodoxy, but rather on whether the subject matter of the ideas is consistent with religion; (2) the comprehensiveness of the religious belief, meaning that the belief system should answer more than one question; and (3) whether the ideas have "any formal, external, or surface signs that may be analogized to accepted religions," the courts would be less likely to find that groups such as the Creativity Movement constitute a religion.²⁹⁶

With respect to factor (1), most of the Creativity Movement's Sixteen Commandments focus on promoting the white race and attempting to destroy all others.²⁹⁷ This type of belief system would most likely fail the first prong of Judge Adams's test, as these beliefs are not consistent with religion. With respect to factor (2), the comprehensiveness of the belief system, this would also most likely fail Judge Adams's test. Specifically, and as was noted with respect to factor (1), almost all of the Sixteen Commandments and the Five Fundamental Beliefs deal with one issue:

294. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

295. This, of course, assumes that limiting Title VII's protections is a good idea. Although most people disagree with the beliefs of groups such as the KKK or the Creativity Movement, Title VII's religion-based protections cover both popular and unpopular belief systems, so long as they are "religions."

296. *Malnak v. Yogi*, 592 F.2d 197, 208–09 (3d Cir. 1979) (Adams, J., concurring).

297. See *Creativity FAQ*, THE CREATIVITY MOVEMENT, <http://creativitymovement.net/index1.html> (last visited Mar. 6, 2012).

promoting the white race at the expense of all “inferior” races.²⁹⁸ These commandments focus predominantly on one issue, and therefore would not satisfy the second prong of Judge Adams’s test. Finally, factor (3) does, in fact, most likely weigh in favor of the Creativity Movement being viewed as a religion. The organization does have outward signs of religion such as the Sixteen Commandments, the Five Fundamental Beliefs, and designations such as “Minister” and “Reverend” for some of its members. Additionally, prior to the *Peterson* opinion, the Creativity Movement was referred to as the World Church of the Creator, which clearly evokes and uses traditionally religious terminology. Thus, even though the final factor in Judge Adams’s test probably weighs in favor of the Creativity Movement, had the court in *Peterson* applied this more restrictive definition of “religion,” it would have most likely reached a different result.

As was noted earlier, the purpose of this Article was not to determine *whether* these groups should be entitled to Title VII protection; rather, the purpose was simply to raise the issue and to demonstrate how members of these groups can increase their chances of gaining Title VII protection. Of course, the irony is that if these people do gain protection, they will be benefitting from the legislation their own intolerance caused to be enacted.

VII. CONCLUSION

When Congress enacted the Civil Rights Act of 1964, members of minority groups were the intended beneficiaries.²⁹⁹ As the courts interpreted the statute, they expanded its coverage to men, Caucasians, and other nonminorities who were the victims of discriminatory practices. Although most individuals would agree that the statute should apply both to members of majority and minority groups, some individuals would be shocked to learn that the statute has now been applied for the benefit of the people whose intolerance toward minorities was the impetus behind the passage of the Civil Rights Act.

Although the courts and the EEOC initially decided not to provide protection to individuals who advocated for white supremacy, at least one federal court has now extended Title VII’s protection to these individuals. The *Peterson* opinion, the EEOC’s broad definition of what constitutes a religion, the Supreme Court’s definition of “religion” upon which the EEOC relies, and the guidance the *Peterson* court gave to white supremacist groups make it likely that more individuals who seek protection from religious discrimination based on a white supremacist belief system will be able to find that protection. The lesson from *Peterson* is clear: if a white supremacist devotes a substantial part of his life to these beliefs, sincerely holds these beliefs, and allows these beliefs to play the role of religion in his life, he will have a very good chance of gaining Title VII protection.

The point of this Article is not to decide *whether* courts should, in fact, protect individuals with these socially unpopular beliefs; the Author certainly concedes that Title VII and other statutes are enacted not to protect only popular beliefs but are

298. *Id.*

299. See *supra* notes 1–2 for background on the purposes behind the Civil Rights Act of 1964.

enacted to, just as importantly, protect unpopular beliefs. Nevertheless, the Article has demonstrated that people with unpopular beliefs such as those grounded in white supremacy can gain protection under Title VII's prohibition against religion-based discrimination if they follow the model established by members of the Creativity Movement. Although many people oppose what the Creativity Movement stands for, the movement has established the groundwork for other unpopular groups to use in order to gain Title VII's protections. Although this was certainly not Congress's intent behind passing the Civil Rights Act of 1964, it is one of the prices society (and employers) must pay in order to ensure equality for all individuals, regardless of how their belief systems are viewed by the majority of Americans.

