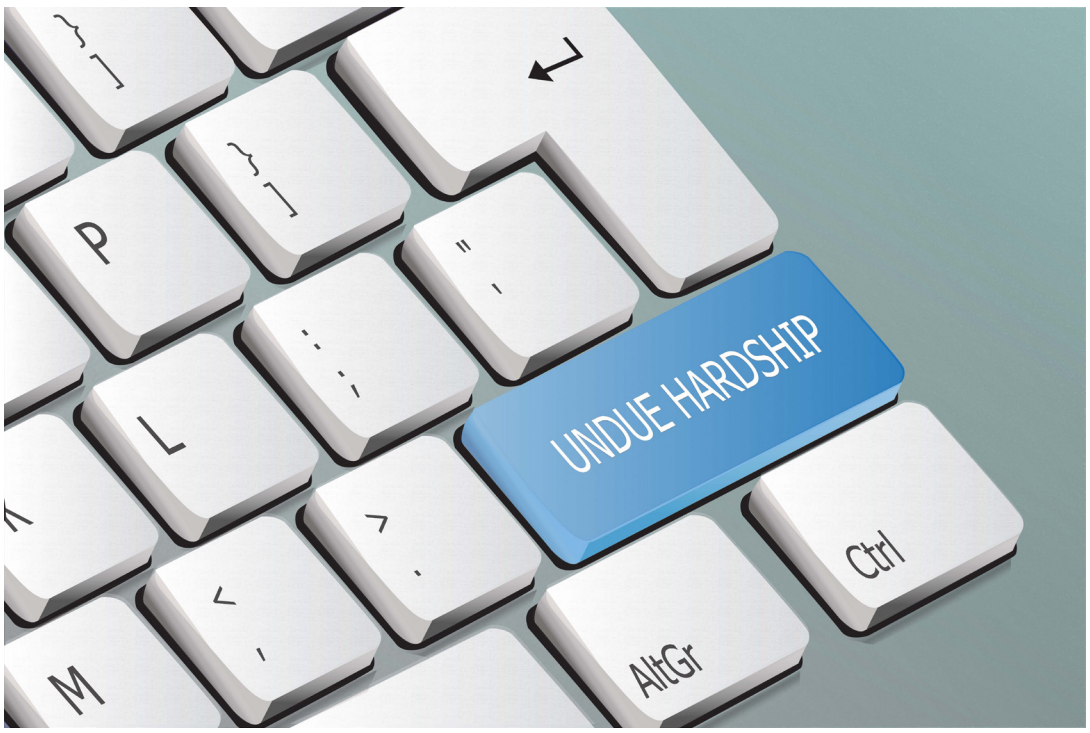
Religious Accommodations:

U.S. Supreme Court Clarifies Formula(tion)

"Undue Hardship" ≠ "More than … de minimis"
"Undue Hardship" = "Far greater than … de minimis"



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On June 29, 2023, the U.S. Supreme Court changed the Title VII legal landscape by clarifying the standard for how employers characterize "undue hardship" when evaluating potential religious accommodations. In so doing, the Court set aside almost 50 years of Title VII "de minimis" analysis relied upon by employers since 1977.

Under Title VII of the Civil Rights Act of 1964, employers may not discriminate against employees based on their religion and must make reasonable accommodations for employees' sincerely held religious beliefs, practices, or observances. However, an undue hardship defense can be asserted by the employer if the employer can show that the proposed accommodation(s) causes a substantial burden or "undue hardship" in the employer's business. For many years, the term "undue hardship" was evaluated by the low threshold of whether an accommodation imposed more than a "de minimis" cost or burden to an employer. Going forward, that is no longer the case. Instead, a heightened standard now governs, and our Fifth Circuit was the first to apply this advanced calculus. In the employer's "undue hardship" calculation, several variables should be evaluated.

THE U.S. SUPREME COURT CLARIFIED THE "UNDUE HARDSHIP" STANDARD: GROFF V. DEJOY.

In Groff v. Dejoy, decided on June 29, 2023, the Supreme Court unanimously rejected the "undue hardship" interpretation that occupied Title VII's legal landscape for almost 50 years. The Supreme Court held that a showing of "undue hardship" requires something far greater than "more than … de minimis" as interpreted in the 1977 Hardison[2] decision. Now, an employer must prove that the burden of the religious accommodation "is substantial in the overall context of an employer's business."[3] But how does an employer assess what constitutes "substantial in the overall context of an employer's business"?

In Groff, Gerald Groff, an Evangelical Christian, believed that Sunday should be devoted to worship and rest based on his religious principles. As a United States Postal Service (USPS) mail delivery worker, Groff generally did not have to work on Sundays. However, this changed when USPS began facilitating deliveries for Amazon, which required Sunday

1 In summarizing the clarified "undue hardship" standard, Dr. Sullivan gravitated toward a computation or formulaic explanation, possibly due to her background as a former Mathematics & Physics High School Teacher.

2 Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding an "undue hardship" was "any effort or cost that is 'more than … de minimis.'")

3 Groff v. DeJoy, 143 S. Ct. 2279 (2023).

work. Because Groff was unwilling to work on Sundays, he received progressive discipline. His Sunday deliveries were distributed to other USPS staff. Eventually, Groff resigned and sued under Title VII asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business."

The district court granted summary judgment in favor of USPS based on the prior Supreme Court decision in Hardison, where "undue hardship"[4] was interpreted as requiring an employer "to bear more than a de minimis cost" in providing religious accommodation. Said another way: "any effort or cost that is 'more than … de minimis' was an "undue hardship." The court held that the de minimis cost standard was met and exempting Groff from Sunday work was an undue hardship because it had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."[5]

Ultimately, the Supreme Court in Groff held that the 1977 Hardison decision could not be reduced to the one often quoted phrase: "an 'undue hardship' was 'any effort or cost that is 'more than … de minimis.'" This legendary phrase has been viewed by courts as the authoritative interpretation. However, in responding to Justice Marshall's dissent in Hardison, the Court described the standard quite differently, stating repeatedly that an accommodation is not required when it entails "substantial" "costs" or "expenditures."[6] Some might say that Groff's new "undue hardship" standard actually comports with Hardison when read, not with the legendary quoted phrase above in isolation, but instead when considered in totality with the comprehensive context and that the Title VII undue hardship standard was simply clarified by the Supreme Court in Groff. Regardless, there is no denying that the latest Supreme Court clarification and subsequent application places renewed importance on how employers assess or calculate "undue hardship."

THE FIFTH CIRCUIT IS THE FIRST TO APPLY THE CLARIFIED "UNDUE HARDSHIP" STANDARD: HEBREW V. TEXAS DEPARTMENT OF CRIMINAL JUSTICE.

A recent case out of the Fifth Circuit Court of Appeals demonstrates the application of the clarified "undue hardship" standard in addressing religious accommodations and highlights key variables that employers will want to quantify in their formulation.

In Hebrew, Correction Officer Elimelech Shmi Hebrew was fired by the Texas Department of Criminal Justice (TDCJ) for his religious vow to keep his hair and beard long and refusing to cut his hair. After getting hired, Hebrew was given an ultimatum to either cut his hair and shave his beard or request an accommodation and take leave without pay pending a decision. Hebrew chose the latter option. In their decision, TDCJ officials denied the accommodation citing safety concerns including that Hebrew would be unable to wear a gas mask properly if chemical agents were needed due to his long beard, could have his long hair tugged by an inmate, and could hide contraband in his long hair and beard. Hebrew sued for failure to accommodate under Title VII alleging religious discrimination.

The trial court rejected Hebrew's claims, reasoning that an accommodation would impose an undue hardship bearing more than a de minimis cost because his coworkers would have to "perform extra work to accommodate" Hebrew's religious practice.

Tellingly, TDCJ's proffered reasons for refusing to accommodate were neither neutral nor based on legitimate safety concerns. Notably, other workers were permitted to have shorter beards, although the instruction manual and experts stated that facial hair of any length may compromise the seal of a gas mask. Additionally, female correction officers were allowed to keep their hair long, undermining both the neutrality and legitimacy of this safety concern argument. As for the possible hiding of contraband, the court recognized that a search might take a few extra minutes; however, it would not pose a substantial undue hardship in the overall context of the employer's $2.4 billion-dollar annual budget.

In Groff, the Supreme Court reformulated the analysis of an "undue hardship," requiring employers to show that the burden of granting a religious accommodation would result in substantial increased costs to conduct its particular business. The Groff Court concluded that "hardship" is "more severe than a mere burden." Clarifying that an employer must not only be made to show a "hardship" by illustrating some additional costs, but he must show "those costs would rise to the level of a hardship and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level."[7]

This described burden is not at all de minimis. In fact, it is far greater than de minimis and more akin to "substantial additional costs or substantial expenditures."[8]

The Hebrew Court offered a formulation to apply: the employer must show the burden would result in "substantial increased

4 Groff, 143 S. Ct. at 2286 (quoting Hardison, 432 U.S. at 84).

5 Id. at 175.

6 Groff, 143 S. Ct. at 2288-2292. Hebrew v. Tex. Dep't of Criminal Justice, 80 F.4th 717 (5th Cir. 2023).

7 Hebrew v. Tex. Dep't of Criminal Justice, 80 F.4th 717 (5th Cir. 2023).

8 Groff, 143 S. Ct. at 2295.

costs in relation to the conduct of its particular business" taking "into account all relevant factors in the case at hand, including particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."9 Not only did the Hebrew Court provide application guidance on what variables to consider when evaluating for "undue hardship," they also provided instruction on what does not constitute "undue hardship." Namely, when evaluating for factors that "affect the conduct of the employer's business, evidence of impacts on coworkers is off the table for consideration unless such impacts place a substantial strain on the employer's business." And the substantial strain must be quantified in actual costs. Moreover, employers must not only assess the reasonableness of a requested accommodation but must sua sponte consider "any and all" alternatives. Sua sponte is Latin for "of one's own accord." In this context, this translates to the employer's obligation to act by its own accord and thoroughly consider "any and all" alternative accommodations, in addition to the employee's preferred or requested accommodations.

Ultimately, the Fifth Circuit reversed the lower court's ruling, finding TDCJ's counterarguments unpersuasive and cited four reasons:

1. TDCJ argues that it would face a "more than de minimis" burden; however, a de minimis burden no longer qualifies as an undue hardship, as decided by Groff in June of 2023.
2. TDCJ did not provide evidence to support that reasonable accommodation would result in "substantial increased costs" affecting its entire business, having never quantified the cost of its identified security and safety concerns.
3. It is insufficient to cite that possible additional work for coworkers equates to undue hardship without identifying actual costs to show a substantial strain on the business.
4. TDCJ simply rejected Hebrew's requested accommodation and did not examine "any and all" possible alternative accommodations.

A FORMULAIC INTERPRETATION OF THE NEW "UNDUE HARDSHIP" ANALYSIS:

Employers consider yourself on notice: long gone are the days when an employer can deny a religious accommodation by claiming it would result in "more than a de minimis" cost to the business. In the clarified standard of what constitutes "undue hardship," an employer would be well-served to evaluate the "undue hardship" analysis by examining several variables when determining if a situation meets the new, clarified threshold of "far greater than de minimis." These variables include:

Undue Hardship Standard = **Substantial in Overall Context of Employer's Business**

Undue Hardship Standard = **Substantial, Quantified Additional Costs or Expenditures**

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Coworkers' Impact Place Substantial, Quantified Strain on Business

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Sua Sponte Consider Other (Any & All) Possible Accommodations

In sum:

"Undue Hardship" = **"Far greater than … de minimis"**