RELIGIOUS DISCRIMINATION AND ACCOMMODATION

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I. INTRODUCTION

Claims of religious discrimination in the workplace are on the rise. According to the Equal Employment Opportunity Commission (EEOC), religious discrimination charges filed with the agency doubled from 1,388 in fiscal year 1992 to a record level of 2,880 in fiscal year 2007.\(^1\) In response to that rise in religious-discrimination complaints, on July 22, 2008, the EEOC issued a comprehensive new compliance manual section specifically addressing the issue of religious discrimination.\(^2\)

This paper covers the federal and state laws that impose obligations on public employers to respect their employees’ religious beliefs. It begins at the federal level by outlining the basic legal framework relating to religious discrimination in the workplace under federal statutory law (Title VII of the Civil rights Act of 1964) and the U.S. Constitution (specifically, the Equal Protection Clause and the First Amendment). This paper’s coverage of federal religious-discrimination law includes an overview of the EEOC’s new compliance manual section on religious discrimination. Next, this paper briefly outlines the two Texas statutes prohibiting religious discrimination.

II. TITLE VII

A. Employer’s Statutory Duty to Accommodate

Title VII prohibits employment discrimination based on race, color, religion, sex, national origin, and protected activity.\(^3\) Concerning religion, Title VII requires employers to make reasonable accommodations for employees whose sincerely held religious beliefs conflict with their job duties.\(^4\) To state a prima facie case for failure to accommodate a religious belief, the employee must prove three elements: (1) he has a bona fide religious belief which conflicts with his employer’s job requirement; (2) he informed his employer of his belief; and (3) he was disciplined for failure to comply with a conflicting employment requirement.\(^5\) Only after the plaintiff establishes a prima facie case does the inquiry begin into whether the employer reasonably accommodated the employee’s religious belief.\(^6\)

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\(^4\) See 42 U.S.C. § 2000e(j) (defining religious discrimination to include “all aspects of religious observance and practice, as well as belief” and requiring an employer to accommodate employees’ religion unless doing so would impose an “undue hardship on the conduct of the employer’s business”).


\(^6\) See Turpen, 736 F.2d at 1026 (“With a prima facie case established, the burden shifts to the employer to show that it was unable reasonably to accommodate the plaintiff's religious needs without undue hardship.”); E.E.O.C. v. B.J. Servs. Co., 921 F. Supp. 1509, 1513 (N.D. Tex. 1995) (same).
While Title VII does protect employees’ religious beliefs, it does not protect their personal preferences.\(^7\) When the employee’s request is based on personal preference rather than religious belief, the employer does not have the burden of coming forward with evidence that it could not accommodate the employee’s conduct without undue hardship.\(^8\)

A reasonable accommodation of an employee’s religion is one that eliminates the conflict between the employer’s employment requirements and the employee’s religious practices.\(^9\) Once the employer reasonably accommodates the employee’s religious beliefs, the statutory inquiry ends. “The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”\(^10\) Typically, an employer is able to satisfy its duty to accommodate an employee’s religious beliefs, without incurring undue hardship, by modifying the employee’s work schedules or job-duty assignments.\(^11\)

An employer’s duty to accommodate does not require the employer to incur an undue hardship.\(^12\) “The Supreme Court has described ‘undue hardship’ as any act requiring an employer to bear more than a ‘de minimis cost’ in accommodating an employee’s religious beliefs. The

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\(^7\) See *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998) (distinguishing between the employee’s religious belief that she needed to make a religious pilgrimage — which Title VII did protect — and her secular preference for when she wanted to make the trip — which Title VII did not protect); *Brown v. G.M. Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) (distinguishing between an employee who wished to have Friday night off because his religion forbade him from working after Sundown on Friday — who would be protected by Title VII — and an employee who might ‘wish to have Friday night off for secular reasons’ — who would not be protected by Title VII).

\(^8\) See *Brown v. Polk County*, 61 F.3d 650, 656 (8th Cir. 1995) (explaining that a county employee’s practice of allowing prayers in his office before the start of the workday was merely using county property for personal purposes and was “not an activity protected at all under the law” so the county could not be held liable for its actions in forbidding the practice).

\(^9\) See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (discussing whether a school board’s leave policy constituted a reasonable accommodation of an employee’s religious beliefs) (*quoted in Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998)); *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1286 (S.D. Tex. 1996) (explaining that the employer’s accommodation efforts should be focused on eliminating the conflict between the employee’s religious beliefs and his job duties), aff’d, 110 F.3d 793 (5th Cir. 1997).

\(^10\) *Ansonia*, 479 U.S. at 69; accord *Beadle v. City of Tampa*, 42 F.3d 633, 637 (11th Cir. 1995) (“[T]he extent of undue hardship on the employer’s business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.”).

\(^11\) See, e.g., *Rodriguez v. City of Chicago*, 156 F.3d 771, 776 (7th Cir. 1998) (employer accommodated a police officer’s religious belief by allowing him to transfer so that he was no longer required to guard an abortion clinic); *Ryan v. United States*, 950 F.2d 458, 462 (7th Cir. 1991) (employer accommodated an F.B.I. agent’s religious beliefs by allowing him to swap assignments); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) (employer accommodated an employee’s religious beliefs by allowing the employee to transfer to another position).

\(^12\) See *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000) (“An employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but is not required to incur undue hardship.”).
Court has also recognized that the phrase ‘de minimis cost’ entails not only monetary concerns, but also the employer’s burden in conducting its business.  \(^\text{13}\)

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer’s business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees’ job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee’s share of potentially hazardous or burdensome work.  \(^\text{14}\)

**B. Employee’s Duty**

An employee who refuses to explore and discuss possible accommodations with his employer is making a mistake. Courts expect an employee to engage in bilateral cooperation in the search for an acceptable reconciliation of the employee’s religious needs and the employer’s business exigencies.  \(^\text{15}\)

An employee also makes a mistake if, once his employer offers a reasonable accommodation, he rejects it. Courts have recognized that when an employee refuses an accommodation, it is the employee — not the employer — causing the religious conflict.  \(^\text{16}\) Thus, while an employer has the duty to reasonably accommodate an employee’s religious practices, an employee likewise has the corresponding duty to make a good-faith attempt to accommodate his religious needs by taking advantage of the accommodation his employer offers him — even if it is not his first choice.  \(^\text{17}\) Title VII does not entitle an employee to the accommodation of his choice.  \(^\text{18}\) Nor does the Act entitle the employee to accommodation on his own terms.  \(^\text{19}\) For example, where an employer offered an employee the reasonable accommodation of covering up

\(^{13}\) Beadle, 42 F.3d at 636 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 n. 15 (1977)).


\(^{15}\) See Ansonia, 479 U.S. at 69 (“[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.”) (quoting Brener, 671 F.2d at 145-146).

\(^{16}\) See Rodriguez, 156 F.3d at 776 (faulting a city police officer for refusing the city’s offer of a reasonable accommodation — a transfer) (relying on Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993)).

\(^{17}\) See Beadle v. Hillsborough County Sheriffs Dep’t, 29 F.3d 589, 593 (11th Cir. 1994) (faulting a former employee of a county prison for failing to take “full advantage of the accommodations offered to him”; his employer by made provisions for him to announce his need for shift swaps during roll call and to advertise his need for swaps on the department’s bulletin board, but he did neither).

\(^{18}\) See B.J. Servs. Co., 921 F. Supp. at 513 (explaining that Title VII does not guarantee an employee the accommodation of his choice); Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390-391 (10th Cir. 1984) (explaining that the employer is not required to accommodate the employee’s specific desire).

\(^{19}\) See Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 (5th Cir. 1982) (faulting the employee for not attempting to use the accommodation the employer offered him — shift swapping with other employees).
a graphic anti-abortion button she had been wearing to work, the employee could not justifiably reject that accommodation on the ground that she would have preferred her employer to accommodate her by belief by instructing those employees who were offended by her button to “ignore the button and go back to work.”

“The court reasoned, “does not require an employer to allow an employee to impose his religious views on others. The employer is only required to reasonably accommodate an employee’s religious views.” The bottom line is that the employee cannot insist on specific or more beneficial accommodations of religious practices, nor must the employer offer one, if the accommodation offered by the employer is reasonable.

In other words, the employee must not reject reasonable means of eliminating the conflict between his religious beliefs and the demands of his job. Rather, he must make some effort to cooperate with the employer’s attempt at accommodation. When an employee will not try to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts, he forfeits the right to have his beliefs accommodated.

C. Accommodation: Examples from EEOC Compliance Manual

EXAMPLE 31
Clarifying a Request

Diane requests that her employer schedule her for “fewer hours” so that she can “attend church more frequently.” The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. While Diane’s request lacked sufficient detail for the employer to make a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the

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20 See Wilson v. U.S.W. Commc’ns, 58 F.3d 1337, 1341 (8th Cir. 1995).

21 Wilson, 58 F.3d at 1342.

22 See E.E.O.C. v. Universal Mfg. Corp., 914 F.2d 71, 72 (5th Cir. 1990) (warning employees that once they are offered a reasonable accommodation, they “cannot insist upon a specific or more beneficial one” and the employer has no obligation to offer a more specific or beneficial accommodation).

23 See Hudson v. Western Airlines, 851 F.2d 261, 266-267 (9th Cir. 1988) (faulting an employee for her “own failures to avail herself of reasonable means to eliminate the conflict between her religious beliefs and her employment demands”).

24 See Smith v. Pyro Mining, Co., 827 F.2d 1081, 1085 (6th Cir. 1987) (“Although the burden is on the employer to accommodate the employee’s religious needs, the employee must make some effort to cooperate with an employer’s attempt at accommodation.”); see also Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1488 (10th Cir. 1989) (“[A]n employee or applicant has a duty to cooperate with an employer’s efforts to accommodate his religious practices.”).

25 See Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir. 1977) (“Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible. In such a case, the employee himself is responsible for any failure of accommodation and his employer should not be held liable for such failure.”).
information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting the accommodation would pose more than a *de minimis* burden on the employer’s business.

* * *

**EXAMPLE 33**  
**Employer Not Obligated To Provide Employee’s Preferred Accommodation**

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. In response, her employer offered to allow her to work on Thursday, which she found inconvenient because she takes a college class on that day. Even if Tina preferred a different schedule, the employer is not required to grant Tina’s preferred accommodation.

**EXAMPLE 34**  
**Accommodation By Transfer Where Accommodation in Current Position Would Pose Undue Hardship**

Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating “directly or indirectly in ending a life,” and that this proscription prevents her from assisting with abortions. She asked the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concluded that it could not accommodate Yvonne within the Labor and Delivery Unit because there were not enough staff members able and willing to trade with her. The hospital instead offered to permit Yvonne to transfer, without a reduction in pay or benefits, to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform any such procedures. The hospital’s solution complies with Title VII. The hospital is not required to grant Yvonne’s
preferred accommodation where it has offered a reasonable alternative solution that eliminates the conflict between work and a religious practice or belief under its existing policies and procedures. If there had been no other position to which she could transfer, the employer would have been entitled to terminate her since it would pose an undue hardship to accommodate her in the Labor and Delivery Unit.

EXAMPLE 35
Religious Need Can Be Accommodated

David wears long hair pursuant to his Native American religious beliefs. David applies for a job as a server at a restaurant which requires its male employees to wear their hair “short and neat.” When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his religious beliefs, and offers to wear it in a pony tail or held up with a clip. The manager refuses this accommodation, and denies David the position based on his long hair. Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer will be liable for denial of reasonable accommodation and discriminatory failure to hire.

EXAMPLE 36
Safety Risk Poses Undue Hardship

Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill’s dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill, and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operates. Because the evidence establishes that wearing pants is truly necessary for safety reasons, the accommodation requested by Patricia poses an undue hardship.

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EXAMPLE 40
Break Schedules/Prayer at Work

Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five specified times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid’s requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, nor will it affect his ability to perform his duties or otherwise cause an undue hardship for his employer. Thus, Rashid is entitled to accommodation.

* * *

EXAMPLE 45
Lateral Transfer Versus Transfer to a Lower-Paying Position

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position without posing an undue hardship. The employer can accommodate the lineman by offering a lateral transfer to another assignment at the same pay, if available. If, however, no job at the same pay is readily available, then the employer could satisfy its obligation to reasonably accommodate the lineman by offering to transfer him to a different job, even at lower pay, if one is available.

EXAMPLE 46
Facial Hair

Prakash, who works for CutX, a surgical instrument manufacturer, does not shave or trim his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must shave or trim his beard because otherwise his beard may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable and files a Title VII charge. CutX will prevail because it offered a reasonable accommodation
that would eliminate Prakash’s religious conflict with the hygiene rule.

**EXAMPLE 47**  
**Religious Garb**

Nasreen, a Muslim ticket agent for a commercial airline, wears a head scarf, or hijab, to work at the airport ticket counter. After September 11, 2001, her manager objected, telling Nasreen that the customers might think she was sympathetic to terrorist hijackers. Nasreen explains to her manager that wearing the hijab is her religious practice and continues to wear it. She is terminated for wearing it over her manager’s objection. Customer fears or prejudices do not amount to undue hardship, and the refusal to accommodate her and the termination, therefore, violate Title VII. In addition, denying Nasreen the position due to perceptions of customer preferences about religious attire would be disparate treatment based on religion in violation of Title VII, because it would be the same as refusing to hire Nasreen because she is a Muslim.

**EXAMPLE 48**  
**Use of Employer Facilities**

An employee whose assigned work area is a factory floor rather than an enclosed office asks his supervisor if he may use one of the company’s unoccupied conference rooms to pray during a scheduled break time. The supervisor must grant this request if it would not pose an undue hardship. An undue hardship would exist, for example, if the only conference room is used for work meetings at that time. However, the supervisor is not required to provide the employee with his choice of the available locations, and can meet the accommodation obligation by making any appropriate location available that would accommodate the employee’s religious needs if this can be done absent undue hardship, for example by offering an unoccupied area of the work space rather than the conference room.
D. Case Study: George Daniels v. City of Arlington

1. Facts

George Daniels worked as a police officer for more than ten years for the City of Arlington. While assigned in a plainclothes position, he began wearing on his shirt a small, gold cross pin as a symbol of his Christianity. Later, Daniels voluntarily transferred back to patrol duties, which involved wearing the police uniform. When he continued to wear the pin on a police uniform shirt, his supervisors notified him that he was violating police department uniform regulations, which prohibit any item being worn unless approved by the police chief.

Daniels made a written request to the chief for permission to wear the cross on his uniform shirt. The chief declined, stating that he would not approve any pin that was not department-related. Daniels continued to wear the pin. The department urged him to reconsider his position on the matter and offered him three options: (1) wear a cross ring or bracelet; (2) wear the pin under his uniform shirt or collar; or (3) transfer back to a non-uniformed police position where he would be allowed to wear the pin. Daniels did not respond to those options. Instead, he continued to wear the cross on his uniform despite a direct order from the chief to refrain from doing so. The police department fired him for insubordination.

Daniels sued, claiming the department’s policy was unconstitutional on its face and that he was a victim of religious discrimination. He brought his claims under Title VII and the First Amendment.

2. Holding

The Fifth Circuit Court of Appeals affirmed a summary-judgment holding that the city had not violated Title VII or the First Amendment. On the Title VII claim, the court reasoned that while Daniels had stated a prima facie case for religious discrimination under Title VII, the city had offered him accommodations that would have allowed him to avoid a conflict between his job restrictions and his religious beliefs. Because Daniels refused accommodations and refused to even respond to the city’s offers to accommodate, he could not show that the city had violated Title VII.

On the First Amendment claim, the Fifth Circuit found that the city had a legitimate interest in maintaining the police uniform as a neutral symbol of governmental authority and any interference with Daniels’s free exercise of religion was minimal when balanced against that governmental interest. The court also held that the city’s rule was not unconstitutional on its face because, in the context of uniformed police officers, the city had the authority to adopt neutral regulations that may have the effect of limiting the free exercise of religion and free speech.

26 Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001).
III. EQUAL PROTECTION CLAUSE

Under federal law, the Equal Protection Clause is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination through statutory classifications and other government actions. Therefore, the essence of an equal protection claim is discrimination, i.e., unequal treatment between persons who are alike. The government violates that constitutional right to equal protection when it irrationally treats differently those who are similarly situated. To be actionable, the disparate treatment must be intentional. Thus, when a plaintiff brings a religious-discrimination/equal protection claim under § 1983, she must show that the government intentionally treated similarly situated individuals differently based on their religious beliefs.

IV. FIRST AMENDMENT

Governmental employers must also be cognizant of their obligations to employees under the First Amendment of the United States Constitution, which provides two different, and sometimes, competing clauses — the Free Exercise Clause and the Establishment Clause.

A. Free Exercise Clause

A free exercise claim will usually succeed or fail for substantially the same reasons as a Title VII religious-discrimination claim. Like Title VII, the First Amendment prohibits a public employer from intentionally discriminating against an employee because of her religious belief and requires an employer to reasonably accommodate an employee’s religious beliefs. Also like Title VII, the Free Exercise Clause does not protect employee conduct that is not “mandated by religious belief.” Unlike Title VII, a free-exercise claim requires the plaintiff to show a “substantial” burden on her religious practices because only “substantial” burdens on religious beliefs

27 See Harris v. McRae, 448 U.S. 297, 322 (1980) (“The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless the classification rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective.”) (internal citations omitted).

28 See Silva v. Vowell, 621 F.2d 640, 647 (5th Cir. 1980) (“A state violates the Equal Protection Clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently.”)

29 See Wash. v. Davis, 426 U.S. 229, 238-239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”); Harris, 448 U.S. at 323 n.26 (“[T]he equal protection component of the Fifth Amendment prohibits only purposeful discrimination, . . . .”).

30 Brown v. Polk County, 61 F.3d 650, 656 (8th Cir. 1995) (holding that an employee did not engage in a practice mandated by his religious beliefs when he instructed another employee to type his Bible study notes); accord Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) (faulting the plaintiff for failing to provide evidence to show that certain religious practices that he wished to engage in were “mandated by his faith”).
practices rise to the level of constitutional conflict.\textsuperscript{31} Rules of general applicability that only incidentally affect religion will survive a free-exercise attack when there is some rational basis for the government’s action.\textsuperscript{32}

B. **Establishment Clause**

The Establishment Clause of the First Amendment is a defense to state interference with an individual’s free exercise of religion. Unlike private-sector employers who must focus primarily on whether an accommodation causes an undue hardship, public-sector employers must assure that accommodation of religious practice balances with the objective of complying with the Establishment Clause. Preservation of religious neutrality is a governmental interest that justifies limiting an employee’s freedom to practice religion in the workplace.\textsuperscript{33} In fact, it is an undue hardship to force a city to sacrifice that compelling interest.\textsuperscript{34} The Supreme Court has recognized as much:

The principle by which government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.”\textsuperscript{35}

Furthermore, “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the free speech and free exercise clauses protect.”\textsuperscript{36} The question in an Establishment Clause case becomes this: Might an objective observer might perceive the exercise of religion to be government sponsorship in violation of the Establishment Clause?\textsuperscript{37}

\textsuperscript{31} Hernandez v. Comm’r, 490 U.S. 680, 699 (1989) (“The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”); Kelly v. Mun. Court, 852 F. Supp. 724, 730-31 (S.D. Ind. 1994) (holding that a bailiff who insisted on reading the Bible in court was not acting on central religious belief because he had other opportunities to read the Bible), aff’d, 97 F.3d 902 (7th Cir. 1996).


\textsuperscript{33} See United States v. Bd of Educ., 911 F.2d 882, 889 (3rd Cir. 1990) (recognizing the government’s “compelling interest in maintaining the appearance of religious neutrality”).

\textsuperscript{34} See id. at 890.


\textsuperscript{37} See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (inquiring into whether an objective high-school student would perceive a pregame prayer “as stamped with her school’s seal of approval”).
V. TEXAS LAW

A. Labor Code

The Texas Labor Code also provides a cause of action for religious discrimination in employment, as part of Texas’s anti-discrimination statute.\(^38\) Texas courts have repeatedly held that Texas’s anti-discrimination statute is modeled after Title VII, and must be interpreted substantively in the same manner.\(^39\) Even burdens of proof under the Texas Labor Code are determined by looking to federal case law interpreting Title VII.\(^40\) Therefore, there seems to be no support for the position that the Texas Labor Code provides broader protection from discrimination or different standards for religious accommodation than under Title VII. As a practical matter, however, the state statute does allow a plaintiff to bring a religious discrimination claim under state law as a means of avoiding federal court jurisdiction on purely tactical grounds.

B. Texas Religious Freedom Act

Texas has enacted the Religious Freedom Act, which is codified in the Civil Practices and Remedies Code.\(^41\) The Act provides that a government agency may not substantially burden a person’s free exercise of religion, unless the agency can establish that its action was taken “in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that interest.”\(^42\)

At present, there are no reported cases under this statute involving employment disputes. (Most of the litigation under this statute has arisen over land use, prisoners’ rights, and public

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\(^38\) See TEX. LAB. CODE § 21.051 (Vernon 2008) (making it an unlawful employment practice for an employer to discriminate against an employee or applicant based on religion).

\(^39\) See Grant v. Joe Myers Toyota, Inc., 11 S.W.3d 419, 423 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (turning to federal interpretations of Title VII when deciding a plaintiff’s religious-discrimination claim brought under the TCHRA); see generally NME Hosps., Inc. v. Rennels, 994 S.W.2d 142, 144 (Tex. 1999) (looking to analogous federal precedent under Title VII for guidance when interpreting the TCHRA); Chevron Corp. v. Redmon, 745 S.W.2d 314, 316-317 (Tex. 1987) (turning to precedent interpreting Title VII for guidance when interpreting the TCHRA); Specialty Retailers v. DeMoranville, 933 S.W.2d 490, 492 (Tex. 1996) (“Because one purpose of the Commission on Human Rights Act is to bring Texas law in line with federal laws addressing discrimination, federal case law may be cited as authority.”); Stinnett v. Williamson County Sheriff’s Dep’t., 858 S.W.2d 573, 576 (Tex. App. — Austin 1993, writ denied) (“In interpreting the Human Rights Act, it is proper to look to interpretation of parallel federal laws, Title VII of the Civil Rights Act of 1964, . . . .”).

\(^40\) See Farrington v. Sysco Food Servs., 865 S.W.2d 247, 251 (Tex. App. — Houston [1st Dist.] 1993, writ denied) (looking to federal case law interpreting Title VII when determining burdens of proof under the TCHRA).

\(^41\) See TEX. CIV. PRAC. & REM. CODE §§ 110.001-.012 (Vernon Supp. 2001).

\(^42\) TEX. CIV. PRAC. REM. CODE § 110.003.
school issues.\textsuperscript{43}) It is surprising that the Act has not yet sparked any reported litigation in the employment context, since Section 110.011(b) of the Act makes it applicable to claims regarding employment. And plaintiffs would benefit from the fact that an employer faces a more onerous compelling-state-interest standard under the Act, as opposed to the reasonable-accommodation standard an employer would face under Title VII or the TCHRA. It seems likely, therefore, that this statute will soon begin to be asserted by employee advocates to provide broader protection for public employees than what is available under Title VII or the First Amendment. (Interestingly, the White House has adopted the compelling-state-interest standard for claims by federal employees alleging failure-to-accommodate against the federal government.\textsuperscript{44} That federal standard may turn out to be helpful in interpreting the Texas Religious Freedom Act when the Act is inevitably interpreted in the employment setting.)

The Act requires would-be plaintiffs to give the government agency advance notice of the plaintiff’s contention that the agency’s practice is substantially burdening her free exercise of religion.\textsuperscript{45} That notice is designed to give the government agency an opportunity to remedy the interference.\textsuperscript{46} A remedy implemented by a government agency (1) may be designed to reasonably remove the substantial burden on the person’s free exercise of religion; (2) need not be implemented in a manner that results in an exercise of governmental authority that is the least restrictive means of furthering the governmental interest, and (3) must be narrowly tailored to remove the particular burden for which the remedy is implemented.\textsuperscript{47} If the government agency cures the interference, the would-be plaintiff may not sue under the Act.\textsuperscript{48} That notice-and-avoidance procedure allows the government agency to avoid the compelling-interest inquiry (described above) by accommodating the potential plaintiff’s religious beliefs. Thus, when a Texas government agency takes steps to reasonably accommodate an employee’s religious belief, a subsequent claim brought under the Texas Act is analyzed more like a federal claim under Title VII. Only if there has been no attempt to accommodate the religious practice does the more stringent standard established by the Act control.

\section{VI. CONCLUSION}

Federal and state law prohibit discrimination on the basis of religion in the public workplace. Public employers also have additional obligations under the U.S. Constitution. Reasonable accommodation is mandated under statutory and constitutional provisions. Advising


\textsuperscript{45} \textsc{Tex. Civ. Prac. Rem. Code} § 110.006(a) (requiring notice as a prerequisite to suit).

\textsuperscript{46} \textsc{Tex. Civ. Prac. Rem. Code} § 110.006(c).

\textsuperscript{47} \textsc{Tex. Civ. Prac. Rem. Code} § 110.006(d).

\textsuperscript{48} \textsc{Tex. Civ. Prac. Rem. Code} § 110.006(e).
managers on this issue requires a working knowledge of the laws outlined in this paper. Because this is an evolving area of employment law, advice should be sought from qualified counsel when serious issues in this area arise in the government employment environment.