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DOING JUSTICE AND LOVING KINDNESS: A COMMENT ON *HOSTILE ENVIRONMENTS AND THE RELIGIOUS EMPLOYEE*

Charlotte Elizabeth Parsons*

Professors Beiner and DiPippa have carved out a rather narrow area of employment law to address in their article - religious discrimination created by hostile environments in secular workplaces.¹ They do not discuss run-of-the-mill discrimination such as the denial of jobs or promotions because of individuals' religions. The professors do not address quid pro quo religious discrimination such as the harassment that occurs when a job or promotion is conditioned on the employee's joining a certain church, attending Bible studies or adhering to some other religious practices. Although narrow, the main problem addressed by the professors' article—religious employees' lack of protection from hostile workplaces—is a tough one to solve.

I agree with the professors that both religious and nonreligious² employees ought to be able to work in environments free from religious hostility. The problem is that one person's religious freedom creates another's hostile environment. Yet it is no answer to simply eliminate all religious expression from the workplace. One person's nonhostile, religion-free environment tramples on another's free exercise of religion, creating a different kind of hostile environment. Title VII doesn't require the total absence of religion from the workplace. Rather, it simply requires an absence of discrimination. If only it were that simple.

Professors Beiner and DiPippa attempt to resolve the tension between religious and nonreligious employees by application of hostile environment law as developed in the race and sex cases. They emphasize a "true" totality of the

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1. Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577 (1997).

2. Professors Beiner and DiPippa use the terms "religious" and "nonreligious" employees in a very narrow sense in their article. By religious, they mean to refer to people who consider themselves part of a religious group. The professors use the term nonreligious to refer to people who are atheists, or who at least describe themselves as not practicing any particular religion. Beiner & DiPippa, *supra* note 1, at 581-83. I will adhere to these special definitions for the purpose of this comment. Nevertheless, it is important to note that the Equal Employment Opportunity Commission and courts have extended Title VII to protect the rights of nonreligious as well as religious employees, *see, e.g.*, 29 C.F.R. § 1605 (1996); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989), and courts have found atheists have the same rights as religious people under the Free Exercise Clause of the Constitution. *See Wallace v. Jaffree*, 472 U.S. 38 (1985). Thus, people who do not believe in a god or practice a religion may invoke Title VII to protect them against hostile religious environments created by employers or co-workers.

circumstances standard for determining whether a hostile environment exists and a welcomeness analysis "when appropriate."³ The professors suggest that religiously hostile environments usually occur in one of the following three categories of fact scenarios: (1) nonreligious employees request a stop to alleged harassment by religious employees who then request an accommodation; (2) hostile environments in which religious epithets and insults are directed at religious employees because of their religion; and (3) hostile environment cases in which the environment is not overtly hostile to religion but nevertheless is hostile to a particular employee because of that employee's religious beliefs.⁴

In this comment, I will briefly outline hostile environment law as applied to race and sex. I will also evaluate Beiner's and DiPippa's application of hostile environment theory to the three fact categories. Along the way, I hope to suggest some refinements to the professors' hostile environment application in an attempt provide the strongest protection possible for religious employees while avoiding potential abuses of Title VII's protections in the name of religion.

I. HOSTILE ENVIRONMENT LAW

*Rogers v. EEOC*⁵ was the first case to determine that Title VII's prohibition against discrimination with respect to "compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin"⁶ includes a prohibition against discrimination with respect to the environment in which employees work.⁷ *Rogers* involved a woman with a Spanish surname who alleged that her employer created an offensive work environment by providing discriminatory service to Hispanic clients.⁸ The Fifth Circuit was only deciding whether the EEOC could compel production of certain records.⁹ Thus, it did not elaborate on what it would take to prove that a discriminatory work atmosphere existed. The important thing was that the court determined that the "psychological fringes" are just as important as economic fringe benefits and come under the purview of Title VII.¹⁰

3. Beiner & DiPippa, *supra* note 1, at 641.

4. Beiner & DiPippa, *supra* note 1, at 580-81.

5. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

6. 42 U.S.C. § 2000e-2(a)(1) (1994).

7. *Rogers*, 454 F.2d at 237-38; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (noting the historic importance of *Rogers*).

8. *Rogers*, 454 F.2d at 236.

9. *Id.*

10. *Id.* at 241.

The ground work had been laid. Other courts expanded the Fifth Circuit's reasoning to harassment involving race,¹¹ national origin,¹² sex,¹³ and religion.¹⁴

The Supreme Court has ruled on only two cases involving a hostile environment theory of employment discrimination under Title VII. Although both dealt with sex discrimination, much of the Court's reasoning also applies to hostile environments created as a result of racial or religious discrimination.

*Meritor Savings Bank v. Vinson*¹⁵ was the first hostile environment case to reach the Supreme Court. Drawing from a number of lower court decisions and the EEOC guidelines,¹⁶ the Court confirmed that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹⁷ The court recognized, however, that not every racial, religious, or sexual insult or epithet that creates offensive feelings necessarily engenders a hostile environment.¹⁸ To be actionable, the offensive conduct "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁹ Although the Court did not specifically state how severe or pervasive the offensive conduct must be to create a hostile environment, it noted that Mechelle Vinson's allegations, which included rape, were sufficient to state a claim.²⁰

The Supreme Court also addressed the district court's finding that Vinson had *voluntarily* engaged in sexual intercourse with her supervisor, the lower court suggesting that conduct in which Vinson voluntarily participated could not be considered hostile for the purposes of Title VII.²¹ Whether Vinson's participation was forced or voluntary was irrelevant, according to the Supreme Court.²² Instead, the appropriate question is whether the alleged sexual advances were "*unwelcome*."²³

This evaluation of whether the alleged offensive conduct was welcome does not appear to play much of a role in race cases.²⁴ Perhaps this is because

11. *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977).

12. *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977).

13. *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981).

14. *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976).

15. 477 U.S. 57 (1986).

16. *Id.* at 64-67.

17. *Id.* at 65.

18. *Id.* at 67.

19. *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

20. *Id.* at 60, 67.

21. *Id.* at 68.

22. *Id.*

23. *Id.*

24. *See, e.g., Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991) (refusing

it is hard to imagine anyone wanting (welcoming) harassment based on his or her race. By requiring the plaintiff to actually prove that the conduct was unwelcome in sexual harassment cases, the Supreme Court infers that sexual conduct is an acceptable part of male/female work relationships and that it is necessary to distinguish between these normal relationships and the rare, undesired sexual attention women receive at work.²⁵ Professors Beiner and DiPippa appear to agree with the Supreme Court's inference that most sexual conduct at work is welcome or at least a component of normal male/female interpersonal work relationships and, therefore, that it makes sense to require a woman to prove the conduct was unwelcome.²⁶

For a number of reasons, I disagree with the professors and the Court on this fairly major point, especially with regard to sexual harassment. One reason is that the apparent assumption that most women welcome sexual advances from coworkers is unfounded. In fact, just the opposite appears true. In one study, researchers asked a sample of men and women what would be their reaction if someone in the workplace asked them to have sex. Of the women, 62.8% said they would be insulted compared to only 16.8% who said they would be flattered.²⁷ In addition, more women than men consistently consider more kinds of workplace sexual behavior to be harassment, including deliberate touching, letters and calls, pressure for dates, and suggestive looks.²⁸ Thus, it does not make sense to engage in a presumption that sexual behavior in the workplace is welcome and require women (the majority of sexual harassment victims) to prove the behavior is unwelcome. It is easy to understand why most men would think that women welcome sexual behavior at work. The numbers in the study flip flop based on gender. When asked their response if someone in the workplace asked them to have sex, 67.2% of men said they would be flattered by the proposition and only 15% said they would be insulted.²⁹

Another reason I disapprove of the unwelcomeness analysis is that it allows the introduction of evidence based on stereotypes of women. The

to consider unwelcomeness as an independent factor); *Brumback v. Callas Contractors, Inc.*, 913 F. Supp. 929, 939 (D. Md. 1995) (stating that the plaintiff must prove the alleged conduct is unwelcome to make out a prima facie case but then never mentioning the requirement again).

25. See also *Barnes v. Costle*, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring) ("We are not here concerned with racial epithets or confusing union authorization cards, which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.").

26. Beiner & DiPippa, *supra* note 1, at 585-86.

27. BARBARA A. GUTEK, *SEX AND THE WORKPLACE* 96 (1985).

28. UNITED STATES MERIT SYSTEMS PROTECTION BOARD OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 14-15 (1988) (comparing figures 2-3 and 2-4).

29. GUTEK, *supra* note 27, at 96.

Supreme Court in *Meritor* determined that testimony about Vinson's "dress and personal fantasies"³⁰ was "obviously relevant."³¹ This information could be obviously relevant only if one believes that a woman's general dreams or fantasies are obviously relevant to the sexual advances of a particular man. Or if one believes the stereotype which says that women deliberately dress to sexually excite or tempt every man she sees.³² Women dress the way they do for many reasons. They may find some styles more comfortable than others or dress a certain way to please a loved one or themselves. Women may even dress a certain way because they feel good about their bodies and want to highlight their good health.³³ This does not automatically translate to women asking for sexual attention just because of the way they dress. In fact, most women feel that even if they dress "properly" and behave "properly," they still will be the target of unwanted sexual advances at work.³⁴ In light of the studies indicating that most women are offended by sexual conduct in the workplace, it is likely that women rarely dress to attract sexual attention at work. Yet because of the stereotypes of women, juries and judges are apt to draw wrong conclusions about a woman because of what she was wearing.³⁵

I am curious whether any stereotypes of religious people might invade the unwelcomeness analysis in religion discrimination cases. I will discuss this possibility more fully later in this comment.

A third reason that I am dissatisfied with the unwelcomeness analysis is the problem of coping mechanisms.

Typical coping methods [for women confronted with sexual harassment] include: (1) denying the impact of the event, blocking it out; (2) avoiding the workplace or the harasser, for instance, by taking sick leave or otherwise being absent; (3) telling the harasser to stop; (4) engaging in joking or other banter in the language of the workplace in order to defuse

30. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (quoting *Vinson v. Taylor*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985)).

31. *Id.* at 69.

32. See David Holtzman & Eric Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 ST. LOUIS U. L.J. 239, 260-62 (1987) (danger of unfair prejudice is so great, evidence of dreams and dress should be received only rarely).

33. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 828-29 (1991) (Court's accepting notion of "sexually provocative" clothing denies women the right to dress as they please).

34. In one study, a full 78% of women disagreed with the statement that "[i]f a woman dresses and behaves properly, she will not be the target of unwanted sexual approaches at work." Eliza G. C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 76, 90 (reporting the results of the review's survey on sexual harassment).

35. Estrich, *supra* note 33, at 826-34; Holtzman & Trelz, *supra* note 32, at 260-63 (danger of unfair prejudice is so great, evidence of dreams and dress should be received only rarely).

the situation; and (5) threatening to make or actually making an informal or formal complaint.³⁶

At least when dealing with sexual harassment, unenlightened courts have used women's behavior to determine either that the alleged harassing conduct was welcome or that the conduct was not offensive. In reality, this behavior is often just the way the women are attempting to survive within an environment they consider offensive and unwelcome. For instance, the judge in *Highlander v. K.F.C. National Management Co.*³⁷ wrote that the plaintiff's own comments were among the factors which influenced the court's conclusion that she was not sufficiently injured to prevail in her hostile environment claim.³⁸ When the incident was first investigated, Highlander stated that she did not think that the incident "was that big of a deal" and did not want to make "a big stink about it."³⁹ By focusing on those comments and other coping behaviors, the court ignored the uncomfortable position Highlander was in as a fairly new employee making a complaint about a district training manager. Her actions, on the other hand, spoke loudly as to the effect the incident had on her. She thought it was important enough to make a complaint to the co-manager of her restaurant, to tell her husband about the incident, to request a transfer, and to tell her new manager about the incident.⁴⁰

It is plausible that employees experiencing religious hostile environments at work could also engage in similar coping behaviors. Without an educated understanding of coping mechanisms, courts risk using those behaviors to deny relief to employees who deserve it. Perhaps the effect of coping mechanisms will depend on which of the professors' three fact categories the case falls under. Or perhaps our culture is not so biased or at least not biased in the same ways regarding religion as it is when sex is involved. Thus, an unwelcomeness analysis may not present the same problems when dealing with religion as it does when dealing with sex. The professors do not address this issue.

Also in *Meritor*, the Supreme Court accepted without further explanation the EEOC Guidelines emphasis on the totality of the circumstances analysis in determining whether a hostile environment existed.⁴¹ The problem with this analysis in sex cases is not so much the concept as the application. Judges tend to separate out each event and determine that the individual event was not so

36. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1506 (M.D. Fla. 1991) (crediting expert witness's testimony regarding common responses to sexual harassment).

37. 805 F.2d 644 (6th Cir. 1986).

38. *Id.* at 650.

39. *Id.*

40. *Id.* at 646.

41. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

bad.⁴² In doing so, these judges are not evaluating the true cumulative effect or totality of the circumstances of the conduct.⁴³ In addition, judges often ignore the power differences between supervisors and those they supervise.⁴⁴ A difference in power can heighten the effects of harassment, adding to victims' feelings that they are powerless to stop the harassment.

Professors Beiner and DiPippa also appear to have some trouble with totality of the circumstances analysis regarding religious harassment cases. This is evident in their call for application of a "true" totality of the circumstances analysis. One of their complaints is that judges separate individual events (much like they do in sex discrimination cases) and then find that none of the discreet events was sufficiently hostile to trigger a Title VII violation. Another complaint seems to be that when the alleged harassment consists of religious practices, courts presume a hostile environment exists instead of engaging in "true" or rigorous analysis of the total circumstances.⁴⁵

The Supreme Court in *Harris v. Forklift Systems, Inc.*⁴⁶ reaffirmed that analyzing whether a hostile environment exists "can be determined only by looking at all the circumstances."⁴⁷ Some of the circumstances which may be considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁴⁸

In addition, the Court granted certiorari to the case to resolve a conflict among the circuit courts as to whether the abusive conduct must severely affect an employee's psychological well-being or cause injury to the employee to be actionable under Title VII.⁴⁹ The Court took a middle road between making actionable conduct that is simply offensive and requiring the conduct to inflict measurable psychological injury on the employee.⁵⁰ Psychological injury may

42. See, e.g., *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964-66 (8th Cir. 1993); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F. Supp. 1070, 1076 (E.D. Mo. 1990) (mentioning totality of circumstances but examining each event and gift individually to determine it is trivial), *aff'd*, 985 F.2d 564 (8th Cir. 1991) (mem.), *cert. denied*, 504 U.S. 918 (1992).

43. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484-85 (3d Cir. 1990).

44. See *Caleshu*, 737 F. Supp. at 1076. The judge pointed out that some of the incidents occurred away from work, but he failed to recognize that the alleged harasser was able to intrude on Caleshu away from the office precisely because of their work relationship. For example, one incident occurred while Caleshu was picking up the harasser, her boss, from the airport.

45. Beiner & DiPippa, *supra* note 1, at 592-94.

46. 510 U.S. 17 (1993).

47. *Id.* at 23.

48. *Id.*

49. *Id.* at 20.

50. *Id.* at 21.

be considered, just as all of the other circumstances, but it is not an absolute requirement. So long as the environment could reasonably be perceived as hostile or abusive and is perceived as such, no single factor is required to be present.⁵¹ The emphasis is on whether the working conditions have been discriminatorily altered, not whether a person's psyche or ability to work has been impaired.⁵²

Finally, the Court adopted a two-pronged objective/subjective standard for the perspective from which the hostile environment must be judged. To come under Title VII's purview, a hypothetical reasonable person would have to find the work environment hostile or abusive, and the victim must subjectively experience the environment as abusive.⁵³ The opinion does not include any discussion on this issue and leaves open the question of just who the hypothetical reasonable person is or should be.

This question of perspective is vital to carrying out the remedial mission of Title VII. With race discrimination in mind, the District Court of Maine explained:

Black Americans are regularly faced with negative racial attitudes, many unconsciously held and acted upon As a result, instances of racial violence or threatened violence which might appear to white observers as mere "pranks" are, to black observers, evidence of threatening, pervasive attitudes closely associated with racial jokes, comments or nonviolent conduct which white observers are also more likely to dismiss as nonthreatening isolated incidents. (Citations omitted.) The omnipresence of race-based attitudes and experiences in the lives of black Americans causes even nonviolent events to be interpreted as degrading, threatening, and offensive.⁵⁴

Thus, the District Court of Maine reasoned that the appropriate perspective from which to judge whether a hostile environment exists is a reasonable black person when racial harassment is at issue. A simple reasonable person standard would let stand unremedied discriminatory conduct based on racial beliefs and stereotypes prevalent in our society.⁵⁵ Some, but by no means all judges have recognized the power and potential pitfalls of perspective in judging sexual

51. *Id.* at 22.

52. *Id.* at 24 (Scalia, J., concurring).

53. *Id.* at 21-22.

54. *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515-16 (D. Me.), *modified*, 765 F. Supp. 1529 (D. Me. 1991).

55. *Id.* at 1516 n.11.

harassment cases.⁵⁶ As a result, some courts employ a reasonable woman standard while others use a reasonable person standard.⁵⁷

Professors Beiner and DiPippa recognize that the Supreme Court's failure to expand on the objective reasonable person standard leaves unclear what standard will be adopted in the context of religious discrimination.⁵⁸ Will it be a reasonable religious person? Which standard is chosen is too important simply to say it is unclear. Perhaps the professors' reluctance to advocate for a standard is rooted in the difficulty of defining it. They question whether a general religious person standard should be used or an average person of the same religious group of the plaintiff.⁵⁹ Even then, the definition of group could mean, for instance, Presbyterians as a whole, a particular Presbyterian synod, plaintiff's particular Presbyterian church, a particular Bible study, women's group or Sunday school class, or the board of deacons or elders. Is the appropriate reasonable person an average member of one of these groups. If so, which one? Obviously, the more narrowly defined a group is and the more closely a plaintiff identifies with the group, the more likely it will be that an average reasonable person from that group will support the plaintiff's subjective perception that a hostile environment exists. This is not a question of how far Title VII should go to protect an individual's quirkiness. Rather it is a question of tolerance and how far the entire society is willing to go to protect minority religious views and practices.

Again, professors Beiner and DiPippa recognize that the current state of law on this point is unclear. Their failure to attempt a clarification could be because they believe that who exactly should be the reasonable person is more problematic in religious harassment cases than when dealing with race or sex based discrimination. I do not think this is necessarily true. In any status discrimination case, making the objective standard too broad will lead to an

56. Compare *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting reasonable woman standard because "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-09 (M.D. Fla. 1991) (relying on expert testimony to explain difference between men's and women's reactions) and *Estrich*, *supra* note 33, at 845 ("[R]easonable person' of no explicit gender. . . is at best meaningless, given that men and women do not view harassment in the same way; at worst, it implies that the reasonable person is male.") with *Ellison*, 924 F.2d at 884 (Stephens, J., dissenting) ("Application of the [reasonable woman standard] presents a puzzlement which is born of the assumption that men's eyes do not see what a woman sees through her eyes.") and *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (adopting perspective of reasonable person to give appropriate protection to both plaintiffs and defendants), *cert. denied*, 481 U.S. 1041 (1987), abrogated on other grounds by *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

57. See, e.g., *Ellison*, 924 F.2d 872, 879 (reasonable woman); *Rabidue*, 805 F.2d 611, 620 (reasonable person).

58. Beiner & DiPippa, *supra* note 1, at 588-89.

59. Beiner & DiPippa, *supra* note 1, at 588-89.

entrenchment of the current discriminatory, hostile norms Title VII was intended to eradicate.⁶⁰ Thus, who is ultimately determined to be the reasonable person will have a major effect on the professors' entire hostile environment analysis. It will affect everything from determining whether the conduct was unwelcome to whether a hostile environment was created under all the circumstances. In light of the reasonable person standard's importance, my objection is that the professors do not attempt to more clearly define it.⁶¹

II. THREE FACT CATEGORIES

The professors suggest that most religious hostile environment cases fall within three fact scenario categories. Two deal with situations in which religious employees allege discrimination because of environments hostile to their religions. The other involves scenarios in which nonreligious employees allege discrimination because of hostile environments created by religious employees' religious practices. In each of these categories, the professors focus on applying hostile environment law to protect the religious practices of religious employees without unreasonably burdening the right of other employees not to practice religion.

A. Religious Slurs as Religious Harassment

Professors Beiner and DiPippa call these the "easy and noncontroversial cases."⁶² They involve slurs and epithets such as calling Jews "kikes" or "Christ killers." I would add that these scenarios also include symbolic conduct such as painting a schwastika on a Jewish person's locker. In addition, I would include in this scenario conduct which, although not on its face anti-religious, nevertheless is hostile and aimed at individuals because of their religion. Examples of this could include equipment sabotage, the silent treatment or other shunning activities, and even physical abuse.⁶³

60. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (sex); *Harris v. International Paper Co.*, 765 F. Supp. 1509 (D. Me.), modified on other grounds 765 F.Supp. 1529 (D. Me. 1991) (race); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202 (1989). But see, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986) (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp 419, 430 (E.D. Mich. 1984)) ("Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to - or can - change this."), *cert. denied*, 481 U.S. 1041 (1987), abrogated on other grounds by *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

61. Beiner & DiPippa, *supra* note 1, at 588-89.

62. Beiner & DiPippa, *supra* note 1, at 614.

63. *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (urinating in gas tank

I agree with the professors that these are the relatively easy cases. If Title VII and other anti-discrimination laws did not protect religious people from this kind of discrimination, the statutes “would fail to meet even the most minimal expectations of their supporters.”⁶⁴ This kind of conduct has been the basis of numerous successful race and sex hostile environment discrimination claims.⁶⁵ Judges appear to have no trouble reaching similar conclusions regarding religious discrimination claims.⁶⁶

One potential problem in this area, however, could occur when religious employees or managers use religious slurs or epithets as part of their own exercise of religion. Professors Beiner and DiPippa do not address this issue directly. I will deal with it during my discussion of the next scenario.

B. Religious Employees Who “Harass” Coworkers

The professors characterize this scenario as one in which some employees engage in religious activities on the job that harass or bother their coworkers.⁶⁷ For instance, an employee’s religious beliefs may require him or her to proselytize, wear a button with a particular message, or pray in public. Other employees may find these activities offensive or bothersome, particularly if they are the target of the conduct as in the case of proselytizing. These other employees then complain that the religious employee’s activities have created a hostile environment and request the employer to stop the harassing conduct. At this point, the religious employee requests some sort of accommodation that would permit him or her to carry on the religious conduct on the job in some manner.⁶⁸

Up to the point that employees ask their employer to stop the harassing conduct by the religious employee, this scenario is much like the other hostile environment cases. Someone creates an offensive environment in terms of race, color, religion, national origin, or sex. Once the employer knows or should have known of hostile conduct, the employer’s duty is to stop the

of woman’s car); *Hansel v. Public Serv. Co.*, 778 F. Supp. 1126, 1128, 1130 (D. Colo. 1991) (noting that the plaintiff was hit over the head with a crescent wrench with such force that her helmet was dented; shunned and ostracized by coworkers).

64. Beiner & DiPippa, *supra* note 1, at 614.

65. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1473-74, 1485-86 (3d Cir. 1990) (suggesting that putting lime in shirts, destroying work product, and causing files to disappear could be examples of sex discrimination when seen in the context of the total circumstances); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1520-21 (D. Me. 1991) (finding that sabotaged machine and attack by coworker with a sledge hammer in hand constituted racial discrimination).

66. Beiner & DiPippa, *supra* note 1, at 614 & n.236.

67. Beiner & DiPippa, *supra* note 1, at 601.

68. Beiner & DiPippa, *supra* note 1, at 595-96.

conduct.⁶⁹ What is different in religious discrimination cases is that the First Amendment guarantees the free exercise of religion (although this freedom is not without some limitations)⁷⁰ and Title VII attempts to provide some leeway for employees' religious practices by requiring employers to make accommodations which do not create "undue hardship" on the employer's business.⁷¹ Were it not for religion's special status, the employer's only duty would be to stop the religiously offensive conduct. Instead, the employer is faced with trying to balance the rights of employees on both sides of the issue.

Professors Beiner and DiPippa assert that in spite of religion's special status, religious employees actually receive less protection under Title VII than employees discriminated against because of other statuses.⁷² They suggest one reason is that courts improperly inquire into whether the employees' conduct is required by their religious beliefs rather than ask the very narrow question of whether employees sincerely believe their conduct is required by their religion. A second reason is an improper application of the accommodation requirement in which courts have determined that undue hardship is anything more than a *de minimis* burden. A third reason is that employers are trying to secularize the workplace by taking action against religious employees even before coworkers complain. They explain employers' actions by suggesting that employers have more to fear from a claim by a nonreligious employee than a claim by a religious employee because religious employees' claims are rarely successful.⁷³

1. *Sincerely Held Beliefs*

In determining whether an employee should receive an accommodation, courts are not supposed to inquire into whether the employee's religion requires a particular conduct.⁷⁴ Rather, courts should only determine whether the employee sincerely holds that particular religious belief. If the employee is sincere in his or her belief, an accommodation should be attempted.⁷⁵

69. *E.g.*, *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349-50 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

70. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) ("[T]he [free exercise clause] embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879).

71. 42 U.S.C. § 2000e(j) (1994).

72. Beiner & DiPippa, *supra* note 1, at 595-610.

73. Beiner & DiPippa, *supra* note 1, at 595-602.

74. *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953); *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).

75. Beiner & DiPippa, *supra* note 1, at 599, 602-03.

Notice that a determination of sincerity looks solely at the employee's subjective beliefs. The inquiry may look at such indicia of sincerity as how closely the employee attempts to live in accord with the belief both on and off the job and whether the employee has discussed the belief with anyone else. The inquiry should *not* look at whether any particular religion adheres to the employee's religious beliefs and practices. If the court did this, it would be determining what is a religious practice or activity. Thus, it is simply irrelevant whether other Catholics, Buddhists, Methodists, or witches believe the same or follow the same religious practices as this employee who is a Catholic, Buddhist, Methodist, or a witch. This particular religious employee may sincerely believe he or she has special religious insight and must live out that insight in his or her daily activities.

Professors Beiner and DiPippa point out that courts seem to have trouble staying away from a comparison of mainstream religious practice to the religious practices of a particular employee when trying to determine the employee's sincerity.⁷⁶ For instance, the parties in *Wilson v. U.S. West Communications*⁷⁷ stipulated that Wilson's beliefs were sincere.⁷⁸ Wilson believed she was required to wear a specific, very graphic anti-abortion button as part of her covenant with God to be a "living witness."⁷⁹ Nevertheless, the court pointed out that Wilson's supervisors, who were also anti-abortion Catholics, asked her to stop wearing the button.⁸⁰ It is not clear from the opinion that the trial court relied on this fact when it determined that Wilson's covenant did not require her to wear the button, but it seems likely.⁸¹

The professors imply by their discussion of this issue that employers ought to be required to attempt accommodation for any religious belief or practice sincerely held by an employee. They suggest that this would provide real protection for those with minority religious beliefs, the people who are most in need of Title VII's protections.⁸² I agree with the professors up to a point, but there should be some limits.

When sincerely held religious beliefs result in religious practices by employees which create hostile environments discriminating on the basis of other statuses protected by Title VII- race, color, sex or national origin -Title VII should not require employers to accommodate those religious practices. Otherwise, Title VII's goal of preventing discrimination against the statuses

76. Beiner & DiPippa, *supra* note 1, at 602-04.

77. 58 F.3d 1337 (8th Cir. 1995).

78. *Id.* at 1340.

79. *Id.*

80. *Id.* at 1339.

81. *See id.* at 1338-41.

82. Beiner & DiPippa, *supra* note 1, at 604.

other than religion could be thwarted. For instance, members of the Christian Identity religion believe "that white people are the true Israelites, and that blacks are subhuman and Jews are 'the children of Satan.'"⁸³ If employers were required to accommodate Christian Identity employees by permitting segregation or other derogatory behavior against blacks, Jews or mongrels, Title VII's advances toward tolerance and equal opportunity in the workplace would be eliminated.

So again, I agree with professors Beiner and DiPippa that employers should be required to attempt accommodation of even minority sincerely held religious practices. However, I would not require accommodation under Title VII when the religious practices discriminate on the basis of race, color, sex or national origin, which are protected statuses under Title VII. The professors address religious practices which allegedly discriminate against other religious practices in their discussion on the accommodation burden to employers. I will do the same.

2. *Undue Hardship*

Title VII defines religion to include "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."⁸⁴ Courts have interpreted undue hardship to be anything that creates more than a de minimis cost or burden.⁸⁵ Professors Beiner and DiPippa assert that application of the de minimis burden standard clashes with rules developed in the context of Title VII's application to other forms of discrimination and with the intent of Congress when it included the religious accommodation requirement in Title VII.⁸⁶ With this I agree. The problem is fleshing out a standard which respects employees' desires to practice their religions, respects employers' desires to run efficient, profitable businesses and avoids colliding with the Constitution's Establishment Clause.

The professors admit the difficulty of this problem. Although they say that no "hard and fast" rules can apply, they suggest that each accommodation case can be equitably resolved by applying a few general principles. To start

83. SOUTHERN POVERTY LAW CENTER, A DIVINE MANDATE, IN FALSE PATRIOTS 11, 11 (1996). For similar teachings, see CAREY DANIEL, GOD THE ORIGINAL SEGREGATIONIST AND SEVEN OTHER SEGREGATION SERMONS (n.d.), which gives Biblical authority for the Baptist author's arguments advocating separation of the races and inferiority of blacks. See, e.g., *id.* at 32.

84. 42 U.S.C. §2000e(j) (1994) (emphasis added).

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

86. Beiner & DiPippa, *supra* note 1, at 604-10.

with, some initial time robbing and its associated costs should be permitted. This would be in keeping with courts' interpretations in the context of other statuses. In those cases, neither employee preferences (biases) which cause disruption in the workplace nor customer preferences (biases) which cause a loss of business qualify as appropriate reasons to allow the employer to discriminate against blacks or whites, Jews or Christians, or whomever.⁸⁷ Thus, one accommodation could be to let religious employees continue their practices if the only reason other employees object is personal preference or stereotype - even in the face of some cost to the employer.⁸⁸

In addition, the professors would extend the principles which Steven D. Jamar advocates for use in religious secular employer and non-religious employee disputes.⁸⁹ These principles are "accommodation, equality, neutrality, tolerance, and inclusion."⁹⁰ It makes sense to apply these principles in determining an appropriate balance for religious practices on the job. The tendency of courts to favor nonreligious practices and employees is not neutral and almost promotes secularism as the only "religion" entitled to real protection under Title VII.⁹¹ Favoring inclusion and accommodation would give more diverse people equal opportunities for employment. Finally, professors Beiner and DiPippa suggest that tolerance is the concept that most vividly applies to coworker disputes. They argue that if coworkers were more tolerant of the religious beliefs of their fellow workers, less commotion would be created by what may be considered "extreme" religious views.⁹²

Up to this point I agree with the professors' suggested solutions for determining what are appropriate accommodations. I disagree with them on one point. They state that if "the accommodation of an employee's religious practices results in harassment of other employees *based on these employees' religious beliefs*, the accommodation principle has gone too far."⁹³ They seem to be saying that if accommodation of one employee's religious practices or beliefs would be offensive to a second employee's religious practices or beliefs, then the accommodation should not be required. However, this would allow the second employee's religious practice to trump the first employee's religious

87. See, e.g., *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

88. Beiner & DiPippa, *supra* note 1, at 604-07.

89. Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 780-89 (1996).

90. *Id.* at 780; Beiner & DiPippa, *supra* note 1, at 607-08.

91. See *School Dist. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting) (stating that refusal to permit religious exercise could be seen "as the establishment of a religion of secularism"); Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 CATH. LAW. 289, 305-07 (1991).

92. Beiner & DiPippa, *supra* note 1, at 608.

93. Beiner & DiPippa, *supra* note 1, at 607 (emphasis added).

practice. This would have the crazy result of honoring the one who complains first. Instead, I would treat religious objections to accommodations no differently than nonreligious objections and apply the same principles discussed above.

3. *Unwelcomeness Evaluation*

Professors Beiner and DiPippa assert that not all religious discussion and practice create hostile environments. Therefore, they would require a plaintiff complaining of a religious coworker's religious practices to prove that the religious conduct was not welcome. In the above discussion, I have already critiqued the welcomeness analysis as applied to sexually hostile environments. In a nutshell, current American culture does not respect women's protestations against sexual conduct. If men believe "no" means "yes," the problem of women plaintiffs proving that the sexual conduct was unwelcome may be insurmountable.⁹⁴ Thus, it may be more appropriate to require the defendant in sex cases to prove as an affirmative defense that his (or her) conduct was welcome.

The professors allude to a similar problem when determining whether a hostile religious environment has been created. However, instead of assuming the conduct is welcome and not hostile, as in the sex cases, courts seem to assume that almost any religious practice in the workplace is unwelcome and creates a hostile environment.⁹⁵ With that assumption under their belts, courts do not engage in a rigorous totality of the circumstances evaluation.⁹⁶ This presumption of hostility may not be factually based, is unnecessary and unfairly favors non-religious employees. Perhaps this is why the professors believe a welcomeness determination is appropriate in religious hostile environment cases and that the proof of unwelcomeness should lie with the plaintiff. Thus, they would ask whether a reasonable person, perhaps even whether a tolerant reasonable person,⁹⁷ would find that this religious conduct was unwelcome and created a hostile working environment.

94. See, e.g., *Kouri v. Liberian Servs., Inc.*, 55 Fair Empl. Prac. Cas. (BNA) 124 (E.D. Va. 1991), *aff'd sub nom. Kouri v. Todd*, 960 F.2d 146 (4th Cir.), *cert. denied sub nom. Kouri v. Liberian Servs., Inc.*, 506 U.S. 865 (1992); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F. Supp. 1070 (E.D. Mo. 1990), *aff'd*, 985 F.2d 564 (8th Cir. 1991), *cert. denied*, 504 U.S. 918 (1992); *Estrich*, *supra* note 33, at 828.

95. Cf. *Beiner & DiPippa*, *supra* note 1, at 585-86, 592-93; *Brierton*, *supra* note 91, at 290 (courts assume illegal work rules or hostile environment created when employer has religious motivation).

96. Cf. *Brierton*, *supra* note 91, at 290.

97. Here, we are not talking about a religious person, because in these cases the victim would be a nonreligious coworker or coworker of a different religious belief from the religious employee alleged to be creating the hostile environment.

4. *Employer Fear*

If courts respected employees when determining whether their religious beliefs are sincerely held, if courts allowed for reasonable employer burdens when determining whether accommodations cause undue hardship, and if courts engaged in a true totality of the circumstances analysis when determining whether hostile environments have been created, religious employees would be more likely to win antidiscrimination law suits. If this were to happen, employers would have less incentive to attempt elimination of all religious practice from the workplace out of fear of a law suit by a nonreligious employee. This would allow for balance in the workplace. Nonreligious practices would no longer trump religious practices, and the touchstone on all sides would be tolerance.

C. Offensive Conduct or Displays As Religious Harassment

The professors discuss a third category of scenarios in which religious workers complain about activities or displays which are not themselves religious but which offend the employees because of their religious beliefs.⁹⁸ This category probably represents the most difficult to deal with in an intellectually honest and consistent manner.

At first glance, cases in this category are similar to the “easy” cases discussed above, because the offensive conduct is not necessarily religious in nature. The difference here is that those engaging in the conduct often have been doing so for some time without realizing it is religiously offensive. According to the professors, only when a new (or newly converted) person complains is the religious offensiveness apparent. In other words, this category of behavior does not involve equipment sabotage, shunning, or some of the other kinds of abusive behaviors discussed above. Instead, this category is typified by objections to displays of Playboy or other crude sexual conduct or talk in the workplace. This nonreligious behavior attacks religious employees’ souls, almost as an invitation to sin, rather than attacking their person.⁹⁹

After my first reading, I was ready to agree with the professors’ argument that the law ought to treat this kind of environmental harassment similar to the way it is treated in sex discrimination cases. Sex discrimination is a primary research interest for me, and I would like to eliminate pornography from employment using any means possible—almost. The problem in the religious discrimination context is that there are no limiting principles. For instance,

98. Beiner & DiPippa, *supra* note 1, at 621.

99. See Beiner & DiPippa, *supra* note 1, at 634.

eating pork could be considered religiously offensive to some. Suppose that this religious person put coworkers on notice that this practice was offensive when done in his or her presence. Should it be considered religious hostile environment discrimination if the coworkers react by continuing to eat pork? What if they start eating their pork with great ceremony in front of the religious employee? What if they start taunting the employee? What if it were religiously offensive for a man to shave his beard or anyone to eat on a fasting day? According to the professors' theory, all a religious employee must do to create a banned activity or display is put the employer on notice that it is religiously offensive. Just about any behavior could be considered religiously offensive to someone. I do not detect any limiting principle, especially considering that religious belief is purely subjective. At least in the sex and race hostile environment cases, sex and race provide some boundaries for what conduct will come under the purview of Title VII. Religion does not seem to provide the same kind of boundaries.

I spoke with Professor DiPippa about my concerns over the lack of limits in this kind of religious discrimination case. He suggested that the common requirements for proving employer liability in hostile environment discrimination cases—the pervasiveness of the harassing conduct, imputing knowledge of the harassment to the employer, and the employer's lack of reasonable response—provide sufficient boundaries. I am not so sure. In race and sex cases, a single person can create a hostile environment by continuing to repeat the offensive conduct.¹⁰⁰ One could imagine that being confronted day in and day out by someone who eats pork sausage biscuits during morning breaks would create a hostile environment for someone who sincerely believes that anyone who eats pork sins. In my hypothetical, imputing knowledge to the employer is easy because the religious employee will complain directly to the employer. Once gaining knowledge, the employer generally is responsible for taking reasonable steps to end the harassing conduct.¹⁰¹ If the employer continues to allow the employee to eat pork sausage, bologna, or hotdogs in the workplace, should the employer be liable for religious discrimination? Instead of a total ban on pork, should the employer be required to provide separate break rooms for the pork eaters so those offended by the practice will not be confronted by it? Segregation of employees on the basis of one of the protected statuses violates the principles of Title VII.¹⁰²

100. See *Ellison v. Brady*, 924 F.2d 872, 880-81 (9th Cir. 1991).

101. *Id.* at 881-82.

102. See 42 U.S.C. § 2000e-2(a)(2) (1994); Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment under Title VII?*, 37 B.C. L. REV. 643 (1996) (exclusion from outside activities which give employees exposure to persons with power at their place of employment limits advancement opportunities). Cf. *Brown v. Board of Education*, 349

What if wearing cologne or perfume, tatoos, or body piercing jewelry (including earrings) were considered religiously offensive? I see nothing in the suggested limiting principles that would place any bounds on what could be considered religious discrimination based on the professors' definition of what counts as a hostile environment in this category. Perhaps Professors Beiner and DiPippa intend reasonableness to provide the bounds. Maybe they would ask whether a reasonable religious person would find the allegedly offensive conduct created a hostile environment. I have already discussed the problem with the reasonableness standard. Make the reasonable person too general, and minority religious practices will receive no protection. Make the standard too narrow, and it fails to provide limits.

I do not have any suggestions for solving this problem. I understand how the conduct the professors describe could, and perhaps should, create liability for a religious hostile environment under Title VII, especially when the harassment turns personal after the religious employee makes a complaint.¹⁰³ I just cannot think of a consistent way to draw the line.

I do agree with professors Beiner and DiPippa that accommodation would be totally inappropriate in these situations.¹⁰⁴ When dealing with hostile environments of any kind, accommodation puts the onus on the victim of the discrimination, requiring the victim to somehow adapt. Rather, the goal should be to eliminate the hostile environment. Only in the very narrow category mentioned above in which an employee's religious practices are alleged to have created a hostile environment should accommodation be considered. Only in those cases are religious employees asking for a flexing of employers' general work rules as envisioned by Title VII.¹⁰⁵

III. CONCLUSION

Professors Beiner and DiPippa mentioned that there were not as many cases dealing with religious hostile environments from the perspective of religious employees as they expected.¹⁰⁶ Perhaps this is because there is little religious harassment in the workplace. Somehow, I do not believe we are that tolerant-yet. A more plausible reason may be that religious employees are discouraged from filing suit because, in the few cases on record, the religious

U.S. 294 (1955) (all other factors being equal, segregation of minority group deprives them of equal educational opportunities).

103. See Beiner & DiPippa, *supra* note 1, at 621-22 (religious employee's wife became target of sexual comments after complaints made about co-workers' sexual language).

104. Beiner & DiPippa, *supra* note 1, at 627.

105. See Beiner & DiPippa, *supra* note 1, at 627-28.

106. Beiner & DiPippa, *supra* note 1, at 589-91.

employee usually loses. Another plausible reason may be that religious employees have not had the language to describe and discuss the harassment they endure. This was a problem for people suffering sexual harassment until the mid 1970s.

It is not surprising either that women would not complain of an experience for which there has been no name. Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible. The unnamed should not be mistaken for the nonexistent. Silence often speaks of pain and degradation so thorough that the situation cannot be conceived as other than it is¹⁰⁷

Whatever the reason for the lack of legal activity in the area of religious harassment, Professors Beiner and DiPippa lay some good foundations for adapting sexual and racial harassment law to religious harassment. Still, some refinements are needed. When dealing with the easy category of religious harassment, the professors should expressly include symbolic behavior and other harassing behavior, such as equipment sabotage and shunning, to provide as much protection to religion as the other statuses receive under Title VII. When dealing with the category in which religious practices are alleged to have created the hostile environment, a clear exception to the accommodation requirement should be made when the religious practice discriminates on the basis of one of the other statuses protected by Title VII. In addition, I hope the professors will address the reasonable person standard as applied to religious hostile environments in a future article.

Finally, I hope the professors will revisit their treatment of the category which involves harassment created by activities or displays which are offensive because of an employee's religious beliefs. The examples they give of people having to choose between following their religion or keeping their jobs are heart-wrenching. Still, there should be some bounds to what counts as hostile environment discrimination in this category, and I see none. Until the professors articulate some well-reasoned limits, I would advocate against application of hostile environment theory to this category.

As always when I am teaching or writing, I am reminded of the prophet Micah. This is especially so when writing this comment which overtly addresses the fit of religion and law in a secular society. Micah told the people that all God required was that they do justice, love kindness and walk humbly

107. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 27-28 (1979) (citations omitted).

with their God.¹⁰⁸ I hope I have lived up to Micah's admonition in this comment.

108. *Micah* 6:8 (my paraphrase).

