

HATS OFF TO THEM: MUSLIM WOMEN STAND AGAINST WORKPLACE RELIGIOUS DISCRIMINATION IN *GEO GROUP*

INTRODUCTION

The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ This passage has come to mean that, as with many other freedoms guaranteed in the Constitution, the freedom to choose and practice a religion is an inviolable right.² Title VII of the Civil Rights Act of 1964 explicitly extended the freedom of religion into the private workplace, prohibiting, *inter alia*, religious discrimination.³ Unfortunately, such Title VII protection was denied to the Appellants in *EEOC v. GEO Group, Inc.*⁴ Several Muslim women were forced to remove their khimars—head coverings which they felt were central to their faith—based on hypothetical dangers and imagined harms advanced by their employer.⁵ In the current climate of fear and bigotry directed against Muslim-Americans, this may seem like a trivial slight. However, it unacceptably undermines Title VII’s guarantee against religious discrimination and exposes all religious adherents to further intolerance.

The Appellee in this case, GEO Group, Inc., is a private company that operates prisons for state, county, and local governments.⁶ GEO ran the George W. Hill Correctional Facility—the county prison for Delaware County, Pennsylvania—where Appellants worked during the relevant time period.⁷ GEO set a dress policy at the prison to “ensure the performance of [employees’] official duties.”⁸ In April of 2005, this policy was amended to provide that “[n]o hats or caps will be permitted to be worn in the facility

1. U.S. CONST. amend. I.

2. See Shane Ramsey, Comment, *Opting Out of Public School Curricula: Free Exercise and Establishment Clause Implications*, 33 FLA. ST. U. L. REV. 1199, 1200–01 (2006).

3. 42 U.S.C. § 2000e-2 (2006).

4. *EEOC v. GEO Group, Inc.*, 616 F.3d 265, 277 (3d Cir. 2010).

5. *Id.* at 267–68.

6. *US Detention & Corrections*, THE GEO GROUP, INC., <http://www.thegeogroupinc.com/us-corrections.asp> (last visited Oct. 7, 2010).

7. Brief of the EEOC as Appellant at 3, 7, 10, 12, *EEOC v. GEO Group, Inc.*, 616 F.3d 265 (3d Cir. 2010) (No. 09-3093) [hereinafter *EEOC GEO Group Brief*].

8. *Id.* at 3.

unless issued with the uniform.”⁹ In an October 2005 memorandum, then-Deputy Warden Matthew Holm announced that “all hats, caps or religious attire will not be permitted to be worn with your uniform or by non-uniformed employees unless specifically authorized by the Warden.”¹⁰ Thus, GEO had adopted “a zero-tolerance headgear policy.”¹¹ The warden at the time, Raymond Nardolillo, explained his reasons for implementing this strict policy: the “extremely problematic” security issue of “increased introduction of contraband, specifically drugs” and his realization “that staff were just wearing whatever they wanted on their heads and it didn’t look well.[sic] It was not a uniformed appearance.”¹²

The Appellants, Carmen Sharpe-Allen, Marquita King, and Rashemma Moss, were female Muslim employees of GEO at the prison.¹³ They protested the new, stricter headwear policy, because it specifically banned religious attire.¹⁴ As Muslim women, they felt they were required to wear the khimar, a headscarf meant to cover the hair and protect a woman’s modesty.¹⁵ All three women sought to be exempted from the policy based on their religious needs, but were denied.¹⁶

Each Appellant confronted the headwear ban under different circumstances. When she interviewed for her position as a nurse in 2004, Carmen Sharpe-Allen explained her need to wear the khimar, and was allowed to do so freely.¹⁷ She was on medical leave when the dress code was changed and was informed that she could no longer wear her khimar upon her return.¹⁸ Sharpe-Allen went to speak with Warden Nardolillo about the new policy, and he gave her the choice between her job and wearing her khimar.¹⁹ She would not compromise on this religious observance and was fired.²⁰

Marquita King worked as an intake specialist at the prison from the year 2000 onward, processing paperwork on incoming prisoners.²¹ At her interview, King was asked whether she would be willing to take her khimar off at work, and she responded affirmatively.²² King was nevertheless allowed to

9. *Id.* at 3–4.

10. *GEO Group*, 616 F.3d at 268.

11. *Id.*

12. EEOC *GEO Group* Brief, *supra* note 7, at 6.

13. *GEO Group*, 616 F.3d at 268.

14. *Id.*

15. EEOC *GEO Group* Brief, *supra* note 7, at 7.

16. *GEO Group*, 616 F.3d at 268.

17. *Id.* at 268–69.

18. *Id.* at 269.

19. *Id.*

20. *Id.*

21. *GEO Group*, 616 F.3d at 269.

22. *Id.*

wear her khimar until October 2005.²³ At that time, Nardolillo told her that she would be fired if she showed up with a khimar on her head.²⁴ King took over four weeks of medical leave due to stress from this incident; when she returned, King took her khimar off at work.²⁵

Rashemma Moss was hired as a correctional officer in 2002.²⁶ After taking her shahada, or confession of faith,²⁷ Moss began to wear a triangular headscarf underneath her uniform hat.²⁸ Nardolillo confronted her and told Moss she would be suspended without pay if she continued to wear the headscarf.²⁹ Moss testified to their discussion:

I asked him why were the female inmates that were housed at the facility able to wear it. He said, "Due to Title 37, they have the right to freedom of religion." And then I stated, "Well, I'm not incarcerated, so why don't I have a right to freedom of religion?" He said, "Because you're not. No religion will be honored." He said this is the battle that he's choosing to fight.³⁰

As she left his office, Nardolillo asked Moss whether wearing her khimar was really that important to her.³¹ Moss responded, "[y]es, my religion is important to me. Isn't your religion important to you?"³² Nardolillo replied that "he really didn't think it made that big of a difference."³³ Moss thereafter stopped wearing her khimar at work.³⁴

The EEOC, with Sharpe-Allen as the charging party, filed its complaint in September 2007, alleging that GEO had violated Title VII's guarantee against religious discrimination by refusing to accommodate Appellants' requested exemption from the dress code.³⁵ In 2008, GEO moved for summary judgment on the grounds that providing such an exception would constitute an undue burden, compromising the prison's safety and security interests.³⁶ The EEOC opposed GEO's motion, claiming that the report prepared by the EEOC's expert George Camp demonstrated GEO's concerns were without merit or

23. *Id.*

24. *Id.*

25. *Id.*

26. *GEO Group*, 616 F.3d at 269.

27. *Id.*; see JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 17–18 (2002).

28. *GEO Group*, 616 F.3d at 269.

29. *Id.*

30. EEOC *GEO Group* Brief, *supra* note 7, at 13.

31. *Id.*

32. *Id.*

33. *Id.*

34. *GEO Group*, 616 F.3d at 269.

35. *Id.* at 270.

36. *Id.*

substance.³⁷ The district court under Judge Fullam granted GEO's motion.³⁸ Judge Fullam found *Webb v. City of Philadelphia*, decided by the Third Circuit Court of Appeals in 2009, controlling the decision to grant GEO's motion.³⁹ The court in *Webb* upheld a police department's refusal to permit a female Muslim police officer to wear her khimar.⁴⁰ Judge Fullam saw "no meaningful distinction between prison guards and similar personnel" in *GEO Group*, and the police officer in *Webb*.⁴¹ He held that "[t]he same considerations advanced to justify the regulation in [*Webb*] apply equally to prison guards and employees working in the medical department."⁴²

The Third Circuit decided *Webb* on August 2, 2010, affirming the trial court's grant of summary judgment.⁴³ This follows the general trend in courts today which defers to employers' interests over the statutory rights of religious employees, particularly in the care of Muslim employees.⁴⁴ This Note seeks to counter that trend, arguing that social, political, and constitutional policy suggests that courts should be more willing to protect Muslim employees. Part I of this Note explores the precedent on reasonable accommodations and undue hardship, noting the judiciary's misinterpretation of Congressional intent. This Part also discusses case law involving Muslim employees' claims of religious discrimination in the workplace, and the general pattern they illustrate—a pattern which undervalues Muslim beliefs and grants substantial deference to employer's interests. Part II details the district court's disposition of the *GEO Group* case. It then analyzes the Third Circuit's opinion of the case, assessing the majority's rejection of the Appellants' discrimination claim and Judge Tashima's thorough dissent which comes to their defense. I argue that the Third Circuit erred in upholding the motion for summary judgment in favor of GEO. Finally, this Note concludes with some thoughts on the wider implications of the *GEO Group* decision.

37. *Id.*

38. *EEOC v. GEO Group, Inc.*, No. 07-cv-04043-JF, 2009 WL 1382914, at *1 (E.D. Pa. May 18, 2009). See *infra* Part II.A for more of Judge Fullam's reasoning.

39. *GEO Group*, 2009 WL 1382914, at *1.

40. *Webb v. City of Phila.*, 562 F.3d 256, 258, 264 (3d Cir. 2009). *Webb* is more fully discussed *infra* Part I.B, notes 152–64 and accompanying text.

41. *GEO Group*, 2009 WL 1382914, at *1.

42. *Id.*

43. *EEOC v. GEO Group, Inc.*, 616 F.3d 265, 265, 277 (3d Cir. 2010).

44. See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 321, 361 (1997); Ishra Solieman, Note, *Born Osama: Muslim-American Employment Discrimination*, 51 ARIZ. L. REV. 1069, 1083, 1085, 1086–87, 1092 (2009).

I. TITLE VII RELIGIOUS ACCOMMODATION AND MUSLIM RELIGIOUS PRACTICES

A. *Reasonable Accommodation and Undue Hardship*

Understanding the evolution of Title VII religious discrimination requires a discussion of the current form of such a claim. To make a *prima facie* case of religious discrimination, an employee must show: “(1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement.”⁴⁵ After an employee makes a *prima facie* case, the burden then shifts to the employer.⁴⁶ The employer can only carry its burden by showing “[1] it made a good-faith effort to reasonably accommodate the religious belief, or [2] such an accommodation would work an undue hardship upon the employer and its business.”⁴⁷

The concepts of “reasonable accommodation” and “undue hardship” discussed above were not an explicit part of Title VII as it was enacted in 1964. The original enactment of the Civil Rights Act of 1964 made discrimination unlawful in many areas of public life.⁴⁸ Title VII of the Act extended this protection into the employment context.⁴⁹ It prohibited discrimination against employees in hiring, classification, or segregation based on a number of traits, including religion.⁵⁰ Still, the Act made no mention of employees’ rights to practice their religion *in* the workplace, to observe

45. *GEO Group*, 616 F.3d at 271 (quoting *Webb v. City of Phila.*, 562 F.3d 256, 259 (3d Cir. 2009)).

46. *Id.*

47. *Id.* (quoting *Webb*, 562 F.3d at 259).

48. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (current version at 42 U.S.C. §§ 1981–2000h-6 (2006)). The current version of the Civil Rights Act extends protection to access to courts, rights to bring legal actions, and rights under law, 42 U.S.C. §§ 1981–83 (2006); prisoners’ rights, *id.* § 1997e; access to public accommodations and facilities, *id.* § 2000a(a)–(b); public education, *id.* § 2000c; access to federally assisted programs, *id.* § 2000c-4; and disclosures during voting, *id.* § 2000f.

49. Civil Rights Act of 1964 § 703 (current version at 42 U.S.C. § 2000e-2 (2006)).

50. *Id.* Section 2000e-2(a) currently provides:

It shall be an unlawful employment practice for an employer—

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

42 U.S.C. § 2000e-2 (2006).

practices which would impact their work, or employers' obligations to allow employees to do so.⁵¹ Title VII failed to define "religion" at all, and did not expressly indicate whether protection against religious discrimination covered religious practices as well as beliefs.⁵²

The Equal Employment Opportunity Commission, created by Title VII to help resolve employment disputes, interpreted the ban against religious discrimination to include a requirement that employers accommodate employees' religious practices.⁵³ The EEOC clarified the extent of the employer's obligation, initially as ending where the accommodation would create "serious inconvenience to the conduct of the [employer's] business,"⁵⁴ and later where the accommodation would cause "undue hardship" to the employer.⁵⁵ However, courts were not bound by the EEOC's interpretation, as shown by two cases from the early 1970s.

In *Dewey v. Reynolds Metals Co.*, the Sixth Circuit overturned a verdict in favor of Dewey, who had complained of wrongful discharge on account of his religious beliefs.⁵⁶ Dewey refused to work on Sundays, though his employment contract provided for occasional mandatory weekend work.⁵⁷ The court acknowledged that "[n]o one disputes Dewey's right to his religious beliefs," but stated the issue as "whether he has the right to impose his religious beliefs on his employer."⁵⁸ The court answered the in the negative, finding that "[t]he employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees."⁵⁹ In response to Dewey's claim that the court construed Title VII too narrowly, the court held that "[n]owhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another."⁶⁰ Though the EEOC regulations required accommodation of religious practices, the court judged

51. See Civil Rights Act of 1964 § 703.

52. See *id.* But see note 68 and accompanying text (describing the 1972 amendment adding a definition of "religion").

53. The Commission was created by Section 2000e-4. Section 2004e-4(g)(4) provides that "[t]he Commission shall have power . . . upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter."

54. 29 C.F.R. § 1605.1(a)(2) (1967).

55. 29 C.F.R. § 1605.2(b) (2010).

56. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 327–28, 332 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

57. *Id.* at 328.

58. *Id.* at 335.

59. *Id.*

60. *Id.* at 334.

that this was inconsistent with Title VII.⁶¹ The U.S. Supreme Court, upon grant of certiorari, affirmed the 6th Circuit's decision by an equally divided Court.⁶²

The next year, in *Riley v. Bendix Corp.*, a Florida district court denied Riley's wrongful discharge-religious discrimination claim.⁶³ Riley refused to work from sundown on Friday to sundown on Saturday, based on his faith in the Seventh Day Adventist Church.⁶⁴ Like the *Dewey* court, the district judge gave little weight to the EEOC's regulations as evidence of Congress' true intentions regarding Title VII.⁶⁵ The court explained its interpretation of Title VII thusly:

The guarantee of religious freedom in the United States has resulted in many forms of religion, religious philosophies and sects, and it is the absolute right of every person that these beliefs shall not be infringed upon. An employer may not refuse to employ or discharge any person because of his religious beliefs, but surely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief. If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment.⁶⁶

In 1972, Congress responded to *Dewey* and *Riley* by amending Title VII's definition of "religion."⁶⁷ Congress added section 701(j), which reads: "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."⁶⁸ This language is substantially similar to that of the EEOC's regulations on reasonable accommodation and undue hardship discussed above.⁶⁹ While the courts in *Dewey* and *Riley* specifically rejected

61. *Dewey*, 429 F.2d at 334.

62. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 689 (1971).

63. *Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971).

64. *Id.* at 584.

65. *Id.* at 588.

66. *Id.* at 590.

67. See 118 CONG. REC. 705–13 (1972) (statement of Sen. Randolph) (discussing a proposal to amend Title VII to protect the fundamental right to be free from religious discrimination that "our courts have on occasion determined . . . is nebulous"). Congress included *Dewey* and *Riley* in the legislative record of 701(j) to show specifically the reasoning they meant to overturn in amending Title VII. *Id.* at 706–13.

68. Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2006).

69. Bilal Zaheer, Note, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(J)*, 2007 U. ILL. L. REV. 497, 508 (2007).

applying the EEOC's regulations, Congress demonstrated with 701(j) that those regulations embodied the legislative intent behind Title VII.⁷⁰

This intent is confirmed by the statement of Senator Jennings Randolph, the main proponent of 701(j). As a member of a minority religion, Senator Randolph was concerned about how Title VII's religious discrimination provision was being interpreted.⁷¹ He equated the concept of religious freedom in the First Amendment with that in Title VII; this concept included "not merely belief, but also conduct; the freedom to believe, and also the freedom to act."⁷² According to Senator Randolph, judicial interpretation had "clouded" this essential element of Title VII, and so legislative action was needed to bring courts back to what "was originally intended by the Civil Rights Act."⁷³ Even with this great advance in the cause of employees' religious rights, there was a critical flaw with 701(j) as enacted in 1972. Congress used the terms "reasonable accommodation" and "undue hardship," but failed to define them, leaving courts with wide discretion to interpret their meaning.⁷⁴ Since 1972, the courts have again gone the way of *Riley* and *Dewey*; while the duty to accommodate is recognized, courts have negated its practical effectiveness by heavily favoring employers' interests.⁷⁵

The U.S. Supreme Court established this deferential stance in two seminal cases, which analyzed the duty to accommodate and the standard for evaluating undue hardship. First was *Trans World Airlines, Inc. v. Hardison*, where in 1977 the Supreme Court held that TWA could not reasonably accommodate, without suffering undue hardship, an employee whose religious obligations prohibited him from working on Saturdays.⁷⁶ The Court noted that 701(j) makes an employer's obligation to make reasonable accommodations clear, but it does not define the extent of the obligation.⁷⁷ Thus, in seeking to

70. See *Reid v. Memphis Publ'g Co.*, 468 F.2d 346, 351 (6th Cir. 1972) (The "legislative history of this amendment stresses that the regulation (29 C.F.R. § 1605.1) [701(j)] did express the prior intention of Congress. This subsequent congressional affirmation strengthens our conclusion about the validity of the regulation."); *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116 (5th Cir. 1972) ("If there were any doubt as to the effect to be given to these guidelines because of a lingering doubt as to whether they truly expressed the will of Congress, a significant event [the addition of the 701(j) amendment] has since transpired which lays to rest any such doubt."); *Mich. Dep't of Civil Rights v. Gen. Motors Corp.*, 317 N.W.2d 16, 25 (Mich. 1982) ("Indeed, the 1972 amendment was characterized as having validated or affirmed the [EEOC] guideline's interpretation of Title VII's ban on religious discrimination.").

71. 118 CONG. REC. 705 (1972) (statement of Sen. Randolph).

72. *Id.*

73. *Id.* at 705–06.

74. Nantiya Ruan, *Accommodating Respectful Religious Expression in the Workplace*, 92 MARQ. L. REV. 1, 14–15 (2008); Zaheer, *supra* note 69, at 509.

75. Zaheer, *supra* note 69, at 510.

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

77. *Id.* at 74.

define it, the Court held that religious accommodations create an undue hardship when they impose more than a *de minimis* cost on the employer.⁷⁸ The Court further explained that Title VII's protection against discrimination applies for "majorities as well as minorities," and that "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must . . . deprive [other employees] of their contractual rights, in order to accommodate or prefer the religious needs of others."⁷⁹

Justice Marshall's dissent in *Hardison* characterized the decision as a "fatal blow to all efforts under Title VII to accommodate . . . religious practices."⁸⁰ The majority had simply construed the EEOC's current regulations and the newly amended Civil Rights Act to "not really mean what they say."⁸¹ "[A] society that truly values religious pluralism," Marshall argued, "cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job."⁸² And, of course, the *Hardison* majority takes "the very position that Congress expressly rejected in 1972" when it added 701(j) to Title VII.⁸³

The Court decided *Ansonia Board of Education v. Philbrook* in 1986, explaining the "reasonable accommodation" aspect of employers' duty to accommodate.⁸⁴ There, an employee brought suit against his employer for refusing to allow him to miss work for six days per year for religious observance.⁸⁵ The Court found "no basis in either the statute [701(j)] or its legislative history" requiring an employer to make any specific accommodation.⁸⁶ Additionally, "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end."⁸⁷ While the Court stated that 701(j) provides little guidance in regards to

78. *Id.* at 84. *De minimis*, meaning trifling or minimal, from the Latin *de minimis non curat lex* ("The law does not concern itself with trifles."). BLACK'S LAW DICTIONARY 496 (9th ed. 2009). In his *Hardison* dissent, Justice Marshall "seriously question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost.'" *Hardison*, 432 U.S. at 93 n.6 (Marshall, J., dissenting). He felt that the majority did not adequately explain the undue hardship standard, and that the Court "may have believed that such a burden exists whenever any cost is incurred by the employer, no matter how slight." *Id.* at 92 n.6 (Marshall, J., dissenting).

79. *Hardison*, 432 U.S. at 81.

80. *Id.* at 86 (Marshall, J., dissenting).

81. *Id.* at 86–87 (Marshall, J., dissenting).

82. *Id.* at 87 (Marshall, J., dissenting).

83. *Id.* (Marshall, J., dissenting).

84. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986).

85. *Id.* at 62–63. The employee, Ronald Philbrook, became a member of the Worldwide Church of God in 1968. *Id.* at 62. This faith requires adherents to avoid secular work on holy days, which fall on approximately six school days per year. *Id.* at 62–63.

86. *Id.* at 68.

87. *Id.*

reasonable accommodation, it did note that Senator Randolph hoped employers would be flexible in accommodating employees' religious practices.⁸⁸ With that in mind, the Court found that "bilateral cooperation" between employer and employee to find a reasonable accommodation is appropriate.⁸⁹ Still, the Court did not want employees to be able to wait for the best accommodation possible.⁹⁰ Thus, the Court held that an employer need only show that it offered a reasonable accommodation to satisfy its duty under 701(j).⁹¹ The Court remanded for additional factual findings to determine whether the accommodation in this case was reasonable, but it did reiterate *Hardison's* holding that 701(j) "did not impose a duty on the employer to accommodate at all costs."⁹² The Court did suggest its opinion on the matter: permitting the employee to take unpaid leave to observe a holy day would be reasonable, except when paid leave is provided "for all purposes *except* religious ones."⁹³

Justice Marshall, as he did in *Hardison*, dissented from the majority.⁹⁴ Marshall argued that "if the accommodation offered by the employer does not completely resolve the employee's conflict, I would hold that the employer remains under an obligation to consider whatever *reasonable* proposals the employee may submit."⁹⁵ If the employee does make a reasonable, more effective proposal which does not result in undue hardship, Marshall would have required the employer to implement it.⁹⁶

The reasonable accommodation and undue hardship analysis created in *Hardison* and *Ansonia* survives to the present. The federal courts have closely followed that stance of minimizing employees' religious needs and deferring to employers' business interests.⁹⁷ There are a number of recurrent themes in these cases, some of which come from Supreme Court directives and some which are extensions of the same principles. Employers satisfy their duty to

88. *Id.* at 69.

89. *Ansonia*, 479 U.S. at 69.

90. *Id.* The Court of Appeals below held that the employer must accept the accommodation proposal preferred by the employee unless that proposal causes undue hardship. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985). The Court here expressly rejected that approach. *Ansonia*, 479 U.S. at 69.

91. *Ansonia*, 479 U.S. at 69.

92. *Id.* at 70-71. Justice Stevens concurred in the Court's decision to reject the appellate court's analysis, but dissented in the disposition. He was willing, on the record provided, to find that *Philbrook* had failed to state a claim of religious discrimination. *Id.* at 81 (Stevens, J., concurring in part and dissenting in part).

93. *Id.* at 71.

94. *Id.* at 71-75.

95. *Id.* at 73 (Marshall, J., dissenting).

96. *Ansonia*, 479 U.S. at 74 (Marshall, J., dissenting).

97. *See infra* notes 98-103 and accompanying text.

accommodate once they make any reasonable offer.⁹⁸ Though *Ansonia* held that bilateral cooperation was required to find reasonable accommodations, courts often do not seem to require much cooperation from employers; employers' offered accommodation need not be "the 'most' reasonable one (in the employee's view), it need not be the one the employee suggests or prefers, and it need not be the one that least burdens the employee."⁹⁹ Courts can also find that the accommodations requested by employees are excessive.¹⁰⁰

If the reasonable accommodation analysis favors employers, showing undue hardship is virtually certain. The *de minimis* standard has been interpreted to create a very low burden on employers.¹⁰¹ Though courts claim

98. *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322 (11th Cir. 2007) ("[T]he inquiry ends when an employer shows that a reasonable accommodation was afforded the employee, regardless of whether that accommodation is one which the employee suggested." (quoting *Beadle v. Hillsborough Cnty. Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994))); *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) ("[T]o avoid Title VII liability, the employer need not offer the accommodation the employee prefers. Instead, when any reasonable accommodation is provided, the statutory inquiry ends.").

99. *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 225 (3d Cir. 2000); *see also Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008) ("Bilateral cooperation . . . requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions."); *Creusere v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 88 F. App'x 813, 819 (6th Cir. 2003) ("An employer only needs to make reasonable accommodations for an employee's religion. This principle does not require the employer to accommodate the employee in the way the employee finds to be the most desirable."); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) ("Once the [employer] establishes that it offered [the employee] a reasonable accommodation, even if that alternative is not her preference, they have, as a matter of law, satisfied their obligation under Title VII."). *But see* *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1156 (10th Cir. 2000) ("Although an employer has a duty reasonably to accommodate an employee's religious beliefs or to show that reasonable accommodation cannot be made without undue hardship, this duty does not obligate the employer to consider and preclude an infinite number of possible accommodations. In the interactive process between employer and employee, the employer here considered every accommodation requested by Thomas and rightfully rejected each as unduly burdensome."); Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 466–67 (2010) (finding that while "courts agree that a religious employee has a duty to cooperate with his employer," the courts are divided on the extent of that duty; some circuits imply that an employee has a duty to compromise their religious beliefs to find an accommodation, while other circuits do not).

100. *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 319 (4th Cir. 2008).

101. One of the few cases to find that an employer could not meet its burden is *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996). There, the employee's religious beliefs required him to observe a Saturday Sabbath. *Id.* at 1464. Though the State did make a good faith effort to accommodate him, the negotiations for potential accommodations were not successful. *Id.* at 1468. The State claimed that the employee's proposed accommodations would impose undue hardship. *Id.* at 1469. Though the State argued that mandatory shift-swapping would

to be “somewhat skeptical of hypothetical hardships,” some nevertheless hold that “it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations.”¹⁰² Particularly relevant to this Note, courts recognize that definitions of “hardship” differ between paramilitary employers, such as police departments, and non-paramilitary employers. Police departments and other such paramilitary employers are given even more deference regarding the reasonableness of accommodations and the severity of hardships than their non-paramilitary counterparts; this premise is the foundation of the majority’s holding in *Webb*, which is in turn central to the outcome of *GEO Group*.¹⁰³

upset other employees, the court held that “hypothetical morale problems are clearly insufficient to establish undue hardship.” *Id.* at 1473. The mere possibility that other employees would “grumble” or that it may be impossible to fulfill others’ requests for similar accommodations did not establish hardship. *Id.* at 1473–74. “Far more concrete undue hardship [beyond hypotheticals] is required before an employer can be said to have met its burden,” and this must be supported by real evidence. *Id.* at 1474. Some commentators argue that courts’ reluctance to conduct a substantial sincerity review for employees’ religious beliefs has created our current weak undue hardship standard. Jamie Darin Prenkert & Julie Manning Magid, *A Hobson’s Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 489 & n.117 (2006). This permits employers to satisfy their burden by speculating about potential hardships and lets coworkers complain that the religious employees’ beliefs are being imposed upon them. *Id.* at 490.

102. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)); *see also Bruff*, 244 F.3d at 501. *But see Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) (“Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts.”); *Ali v. Se. Neighborhood House*, 519 F. Supp. 489, 494 (D.D.C. 1981) (“Despite this lack of direction [in 701(j)], some guideposts have been constructed by courts addressing the duty to make a reasonable accommodation [T]o satisfy the statutory requirement, the employer must show *present* undue hardship, as distinguished from anticipated or multiplied hardship.”).

103. *See infra* notes 152–164 and accompanying text; *see also Blair v. Graham Corr. Ctr.*, 782 F. Supp. 411, 414 (C.D. Ill. 1992) (holding that it is more difficult for paramilitary employers to accommodate employees’ beliefs and practices, especially in regards to sabbaths, religious holidays, and time off). *Endres v. Indiana State Police* supports deference to paramilitary employers in a slightly different context. 349 F.3d 922, 923 (7th Cir. 2003). In *Endres*, the court held that public safety agencies, such as fire and police departments, have virtually no burden to accommodate religious employees’ requests to avoid assignments that would conflict with their beliefs. *Id.* at 925. The dissent agreed that such employers should be given “a great deal of latitude in accommodating . . . their employees [requests] for exemptions from particular duties.” *Id.* at 929 (Ripple, J., dissenting). However, the dissent concluded that “Congress simply did not determine that these agencies ought to be given a blanket exemption from the mandate of [Title VII].” *Id.* at 929–30. It then addressed the deeper problem with the majority’s view: “[p]ublic safety and emergency personnel, whose contributions to our daily lives are so much more appreciated these days, have every right to ask why this court has singled them out as not deserving of a statutory protection guaranteed to every other person in the United States.” *Id.* at 930.

Congress was not completely idle while courts pulled the teeth of 701(j). In recent years, it has proposed a measure which would force the judiciary to comply with the spirit of Title VII's religious discrimination provisions: the Workplace Religious Freedom Act ("WRFA"). This Act was first proposed in 1994, and has been reintroduced in most years since.¹⁰⁴ Some of the most recent versions of the bill were introduced in the House and Senate in 2007 and 2008, respectively.¹⁰⁵ These bills are narrower in scope than previous versions of WRFA, but they still provide for important changes to current Title VII religious discrimination law.¹⁰⁶

Both bills drastically redefine the undue hardship standard created by the Supreme Court in *Hardison*. Instead of hardship becoming "undue" if it entails more than a *de minimis* cost, WRFA states that only if an accommodation "imposes significant difficulty or expense" will the hardship created be "undue."¹⁰⁷ Both also specifically include religious clothing, grooming, and taking time off for religious observance as practices within the envelope of 701(j)'s protection.¹⁰⁸

The House bill further explains the new undue hardship standard. The factors for determining such hardship include identifiable (as opposed to hypothetical) costs of the accommodation, the size and resources of the employer, and for employers with multiple facilities, the ability to run each facility separately.¹⁰⁹ The House bill also provides that reasonable accommodations must remove the conflict between work and the religious practice.¹¹⁰ An employer fails to reasonably accommodate when it refuses to allow an employee to take general leave under the employment contract, solely because the employer knows that employee will use the leave for religious observance.¹¹¹ WRFA is yet to be enacted, but its prospects for becoming law

104. Debbie N. Kaminer, *When Business and Employees' Religion Clash*, N.Y. L.J., July 21, 2000, at 1.

105. S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007).

106. These versions were narrowed so as to gain broader support for WRFA. Earlier versions were supported by a wide range of religious groups but opposed "by a virtually unbeatable coalition," including: the ACLU, the U.S. Chamber of Commerce, employers, and unions. Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 214 (2001). These opponents felt that the bill was overbroad and would impose religion into the workplace while burdening non-religious employees. See Lauren E. Bohn, *Workplace Religious Freedom Bill Finds Revived Interest*, HUFFINGTON POST (July, 3, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/05/03/workplace-religious-free_n_561560.html.

107. S. 3628, § 2(a)(1)(B). The House bill has nearly identical language. H.R. 1431, § 2(a)(4).

108. See S. 3628, § 2(a)(1)(B); H.R. 1431, § 2(a)(4).

109. H.R. 1431, § 2(a)(4).

110. *Id.* § 2(b).

111. *Id.*

are improving.¹¹² Until WRFA is passed, the judiciary's interpretation of 701(j) will continue to defer to employers' interests at the expense of employees' rights to observe their religions.

B. *Accommodating Muslim Religious Practices in the Workplace*

With the understanding that Title VII religious discrimination has been interpreted to favor the employer, it is not surprising that Muslims have faced great difficulty protecting their right to practice their faith in the workplace. This is particularly true because of general American antipathy towards Muslims in recent history, especially since the terrorist attacks of September 11, 2001.¹¹³ EEOC statistics show that the number of religious discrimination complaints by Muslims has increased dramatically since September 11.¹¹⁴ Still, there are relatively few court opinions produced from these disputes.¹¹⁵ There are certain beliefs and requirements for followers of Islam that most often conflict with employers' priorities and interests.¹¹⁶

Of course, Islam is not practiced identically across the country or the globe, so the following beliefs may be considered mandatory, or permissive and subject to interpretation, depending on the location and the individual's personal religious choices.¹¹⁷ Failure to accommodate prayer is the one of the most common complaints by Muslim employees.¹¹⁸ Muslims pray five times per day, for a few minutes each time.¹¹⁹ Muslim men also participate in special prayers held each Friday at a mosque.¹²⁰ Islamic grooming and dress standards also cause friction between employer and employee. Men are

112. See Bohn, *supra* note 106 (suggesting that the reintroduction of WRFA is "attracting renewed attention that could lead to [Congressional] action").

113. See *Broad Skepticism of Islam Marks Post-9/11 Sentiment*, ABC NEWS/WASHINGTON POST POLL: VIEWS OF ISLAM, http://abcnews.go.com/images/International/Islam_views.pdf (last visited Sept. 23, 2011); see also RITA J. SIMON & MOHAMED ALAA ABDEL-MONEIM, PUBLIC OPINION IN THE UNITED STATES: STUDIES OF RACE, RELIGION, GENDER, AND ISSUES THAT MATTER 29-39 (2010) (providing poll data from a national survey on American attitudes toward the Muslim-American community).

114. See Press Release, EEOC, EEOC Provides Answers About Workplace Rights of Muslims, Arabs, South Asians, and Sikhs (May 15, 2002), available at <http://www.eeoc.gov/press/5-15-02.html>. Muslims have complained of being called "terrorists" or "Osama" by their co-workers, among other ethnic and racial epithets, being refused prayer breaks, and, as in the *GEO Group* case, being barred from wearing head scarves. Steven Greenhouse, *Offended Muslims Speak Up*, N.Y. TIMES, Sept. 24, 2010, at B1.

115. Zaheer, *supra* note 69, at 504.

116. See *id.* at 502-04.

117. See ESPOSITO, *supra* note 27, at 39.

118. Zaheer, *supra* note 69, at 505.

119. ESPOSITO, *supra* note 27, at 18.

120. Zaheer, *supra* note 69, at 502.

encouraged to wear beards as a show of piety.¹²¹ Some interpretations of Islam hold that women should dress in body-covering clothing that hides the female form, including khimars, which cover the head and neck.¹²² Some Muslims, such as the Appellants in *GEO Group*, believe this dress style to be mandatory to protect women's modesty.¹²³

For Muslims' daily prayers, it can be difficult, though not impossible, for employees to convince courts that five short breaks each day do not impose undue hardship on their employers. In *Haliye v. Celestica Corp.*, the defendant employer was denied summary judgment on the employee plaintiffs' claim of a failure to accommodate their daily prayer needs.¹²⁴ The court noted that the

121. ESPOSITO, *supra* note 27, at 101. Religious facial hair is not limited to Islam. Some interpretations of Judaism, namely Orthodox and Hasidic Jews, also support the wearing of traditional beards. See 3 ENCYCLOPAEDIA JUDAICA, *Beard and Shaving* 235–36 (Fred Skolnik & Michael Berenbaum eds., 2d ed. 2007). Sikhism likely has the most stringent bearding requirement, believing that those who fail to follow its grooming and dress practices have renounced the faith. 2 THE ENCYCLOPAEDIA OF SIKHISM, *Kesadhari* 465–66 (Harbans Singh ed., 2d ed. 2001). Sarah Wolkinson, in analyzing the *Bhatia v. Chevron U.S.A.* case, finds that Sikh men's bearding practice, like female Muslim veiling, is vulnerable to "unwarranted [employer] policies that lead to discrimination." See Sarah Abigail Wolkinson, Comment, *A Critical Historical and Legal Reappraisal of Bhatia v. Chevron U.S.A., Inc.: Judicial Emasculation of the Duty of Accommodation*, 12 U. PA. J. BUS. L. 1185, 1199–1200 (2010). There, a Sikh man was suspended and later demoted for refusing to comply with a new policy requiring men to be clean-shaven so that respirators could fit cleanly on their faces. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984). As Wolkinson notes, despite the fact that the Chief of California's Division of Occupational Safety and Health found that the potential for an emergency requiring a respirator was remote, and that he was suspicious of Chevron's policy as being overly expansive, the court granted summary judgment against Bhatia. Wolkinson, *supra*, at 1197 (citing Letter from Art Carter, Chief, Cal. Div. of Occupational Safety and Health, to R.W. Davis, Chevron U.S.A., Inc. (June 17, 1982)); *Bhatia*, 734 F.2d at 1384. Wolkinson argues that it is "not only within the capacity of the courts to challenge and overturn discriminatory policies," but is in fact the court's duty to protect minority religious practices. Wolkinson, *supra*, 1199–1200.

122. See ESPOSITO, *supra* note 27, at 95.

123. See Report of Dr. Carol Harris-Shapiro at 5–6, *Webb v. City of Phila.*, 562 F.3d 256 (2009) (No. 05-CV-5238), 2006 WL 4585522 (explaining that the veiling and modesty requirements come from the Qur'an); Zaheer, *supra* note 69, at 504.

124. *Haliye v. Celestica Corp.*, 717 F. Supp. 2d 873, 881 (D. Minn. 2010); see also *Tyson v. Clarian Health Partners, Inc.*, No. 1:02-CV-01888-DFH-TA, 2004 WL 1629538 (S.D. Ind. June 17, 2004). In *Tyson*, the employer sought summary judgment on a Muslim employee's failure to accommodate claim. *Id.* at *5–6. Clarian had allowed Tyson to conduct her daily prayers, either in a non-denominational chapel or in the basement. *Id.* at *4. The court granted summary judgment on this issue, finding that this was a reasonable accommodation, though it did not necessarily satisfy "[Tyson's] every desire." *Id.* at *5. The court made a distinction between the prayers themselves, which Clarian had properly accommodated, and the ablution, or ritual washing, before the prayers. *Id.* Tyson had used the shower in an empty patient room to perform the ablution, and the court found that "a jury could easily find that the shower incident played a

defendant generally allowed employees to take unscheduled bathroom breaks, while forbidding plaintiffs from taking unscheduled prayer breaks.¹²⁵ The court specifically mentioned that it “has its doubts that plaintiffs are similarly situated to employees who take occasional breaks to use the bathroom.”¹²⁶ Still, because the defendants had “essentially ignored this aspect of plaintiffs’ claims,” the court could not grant summary judgment in their favor on this issue.¹²⁷ The court’s “doubts” about the similarity between unscheduled bathroom breaks and unscheduled prayer breaks illustrate that the court found bathroom breaks potentially more necessary or important than Muslim prayers.

Friday prayers are usually a more troublesome issue. Courts often find that it would cause undue hardship on employers to allow Muslim employees to take time off on Fridays to perform their required prayers.¹²⁸ In *McLaughlin v. New York City Board of Education*, the court found that a Muslim teacher was reasonably accommodated when he was allowed to leave work early on

prominent, even catalytic, role in Clarian’s decision to fire her.” *Id.* at *5–6. Thus, Clarian was denied summary judgment on the issue of reasonably accommodating Tyson’s ablution. *Id.* at *6.

125. *Haliye*, 717 F. Supp. 2d at 881.

126. *Id.*

127. *Id.*

128. See *Mohamed v. Pub. Health Trust of Miami-Dade Cnty.*, No. 09-21235-CIV, 2010 WL 2844616 (S.D. Fla. July 19, 2010). In that case, summary judgment was granted against a Muslim plaintiff who claimed that his employer failed to accommodate his religious practice. *Id.* at *12. Under a previous administration, plaintiff used saved vacation time to take off work early on Fridays to attend religious services. *Id.* at *1. When a new administration took over, plaintiff sought approval for this arrangement. *Id.* Though he was eventually given approval, it took a long time and he was made to go back and forth among supervisors. *Id.* at *1–2. His supervisor told him that “[t]his is a Christian country. If I give you time off to go to the mosque, I have to give everybody time off to go to church. We don’t kill people here. Your religion is your problem. Deal with it.” *Id.* at *2. Plaintiff felt that the new administration had no real intention of allowing him to take Friday off early, and thus he never attempted to. *Id.* at *5. The court rejected plaintiff’s contention that there was a failure to accommodate, because plaintiff asked the court to speculate as to his employer’s reaction to taking Fridays off, when plaintiff never actually did so. *Id.* at *6. But see *Ahad v. Nicholson*, No. 3:07-00414, 2008 WL 842458 (M.D. Tenn. Mar. 28, 2008) (summary judgment granted against plaintiff because he was allowed to attend Friday prayers; although he wanted this accommodation in writing and testified that “all efforts are being made to make if [sic] difficult for me to attend,” he produced no evidence of a failure to accommodate). Another important tenet of Islam which can create time-off problems is the pilgrimage to Mecca, or hajj, which should be made at least once in a person’s lifetime, and may be attempted more than once if the person has the means and ability to do so. *Hussein v. UPMC Mercy Hosp.*, No. 2:09-cv-00547, 2011 WL 13751, at *3 (W.D. Penn. Jan. 4, 2011); *ESPOSITO*, *supra* note 27, at 21. As with other Islamic practices, courts sometimes have difficulty finding that the hajj can be reasonably accommodated. In *Hussein*, a Muslim employee was denied his request for vacation time to take a second pilgrimage to Mecca. *Hussein*, 2011 WL 13751, at *4. Though the court recognized the importance of the hajj as a foundational element of his religious beliefs, it concluded that because he had already made one pilgrimage, the second was “a matter of personal preference” and did not have to be accommodated. *Id.* at *8–9.

Fridays, except for the second Friday of each month when faculty conferences were held.¹²⁹ Of course, this ruling ignores the fact that Islamic religious practice does not excuse men from Friday prayers on the second Friday of each month.

In *Elmenayer v. ABF Freight Systems*, the plaintiff sought to add an additional fifteen minutes to his hour-long lunch break so that he could attend Friday prayers.¹³⁰ His employer denied this request, claiming that it would adversely affect worker morale.¹³¹ The court held that the employer's offered accommodation—having Elmenayer bid for evening and night shifts—was reasonable, over Elmenayer's argument that his proposal was much less drastic.¹³² Elmenayer further argued that he may not even succeed in bidding for the night shifts, and so the conflict between his religious observance and employment requirements would remain.¹³³ This problem had not yet occurred, and so the court rejected the contention; but, if the conflict had occurred, the court found that the employer's obligation to accommodate "may well have required it to do more for him."¹³⁴ Though courts are willing to accept hypothetical hardships from employers, *Elmenayer* suggests that employees are unable to advance similar arguments.

Muslim grooming and dress practices are often challenged by employers as detrimental to professionalism, company image, or safety.¹³⁵ Two cases regarding men's beards are particularly relevant to *GEO Group: Valdes v. New Jersey* and *Wallace v. City of Philadelphia*. In *Valdes*, the plaintiff was discharged from correctional officer training for refusing to trim his beard.¹³⁶ After filing an EEOC complaint, his employer exempted him from a general prohibition against facial hair, but limited his beard's length to one-eighth of an inch.¹³⁷ The court noted that the plaintiff failed to abide by this agreed-upon limitation, but it did not discuss whether the plaintiff's genuine beliefs allowed him to trim his beard at all, much less to so short a length.¹³⁸

129. *McLaughlin v. N.Y.C. Bd. of Educ.*, No. 04 Civ. 1270(FM), 2008 WL 216308, at *14 (S.D.N.Y. Jan. 22, 2008). The employer took five months to approve even this accommodation. *Id.* at *15.

130. *Elmenayer v. ABF Freight Sys.*, No. 98-CV-4061 (JG), 2001 WL 1152815, at *2 (E.D.N.Y. Sept. 20, 2001).

131. *Id.* at *3.

132. *Id.* at *6.

133. *Id.*

134. *Id.* at *7.

135. See *Wallace v. City of Phila.*, No. 06-4236, 2010 WL 1730850, at *7 (E.D. Pa. Apr. 26, 2010); *Valdes v. New Jersey*, No. 05-3510 (GEB), 2007 WL 1657354, at *6 (D. N.J. June 6, 2007).

136. *Valdes*, 2007 WL 1657354, at *2.

137. *Id.* at *1.

138. See *id.* at *7.

The recent *Wallace* case also involved a limit on beard length, though in a police department rather than a prison.¹³⁹ There, the department allowed Wallace to wear a beard, but only to the extent allowed under the department's medical exception.¹⁴⁰ The court explicitly acknowledged the plaintiff's beliefs did not allow him to comply with the beard length limit.¹⁴¹ Still, the court ruled against him, because the police department complained that permitting plaintiff to wear a longer beard would "sacrific[e] the Department's commitment to a neutral appearances policy."¹⁴² The courts in these cases gave even greater deference to correctional and police departments than other employers, and found that accommodations which admittedly conflicted with the employees' beliefs were nonetheless reasonable.¹⁴³

Islamic beliefs about women's dress regularly conflict with employers' dress policies.¹⁴⁴ However, some courts will not accept employers' "professionalism" and "company image" arguments without solid evidence of undue hardship.¹⁴⁵ In the education context, a Muslim woman was not allowed

139. *Wallace*, 2010 WL 1730850, at *1.

140. *Id.* at *2.

141. *Id.* at *6.

142. *Id.* at *7.

143. The Third Circuit's *City of Newark* case, although not based on Title VII law, provides an interesting counterpoint to these two cases. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). Its reasoning will be discussed in relation to Title VII. *See infra* Part II.C.

144. Cases like *GEO Group* continue to emerge. In *United States v. New York City Transit Authority*, the Department of Justice brought an action alleging discrimination against Muslim and Sikh employees in regards to their religious headwear. *United States v. N.Y.C. Transit Auth.*, No. 04-CV-4237, 2010 WL 3855191, at *1 (E.D.N.Y. Sept. 28, 2010). The Transit Authority had a headgear policy which allowed only official caps to be worn. *Id.* However, this was loosely enforced, especially in the wake of the terrorist attacks of September 11, 2001, when employees began to wear fire and police department hats as a show of solidarity. *Id.* at *2. In 2002, the Transit Authority began to enforce the headgear policy against some Muslim bus drivers who wore khimars under their uniform caps. *Id.* at *3. Because the women refused to remove their khimars, they were moved to positions without public interaction. *Id.* at *3-4. The court refused to grant summary judgment in favor of the Transit Authority, finding that this change in position was not a reasonable accommodation as a matter of law; the women felt it was a demotion, while the Transit Authority contended it was in fact a better position. *Id.* at *17-18. The court also found that the Transit Authority could not establish undue hardship, in part because its uniform headgear requirement was not based on safety or legitimate business concerns. *Id.* at *21.

145. *See, e.g., EEOC v. White Lodging Servs. Corp.*, No. 3:06CV-353-S, 2010 WL 1416676 (W.D. Ky. Mar. 31, 2010) (Muslim women not given interviews for housekeeping jobs after telling interviewer that it would be "impossible" for them to remove their hijabs, where other applicants not wearing hijabs were allowed to interview); *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1016-17 (D. Ariz. 2006). In *Alamo*, Ms. Bilan Nur sought to wear her veil during Ramadan. *Id.* at 1008. Nur was permitted to wear it while working in the back office, but not while working at the rental counter. *Id.* at 1009. The court held that this was not a reasonable accommodation, because the company still expected Nur to work the front desk, and so she

to wear religious clothing because it would interfere with the public school's interest in religious neutrality.¹⁴⁶ Where the employer puts forward a safety concern, courts are reluctant to question it. The women in *Mohamed-Sheik v. Golden Foods/Golden Brands LLC* told their employer that they could not wear form-fitting, tucked-in shirts, because their beliefs did not allow them to dress like a man or reveal their female shape.¹⁴⁷ Golden Brands argued that allowing the plaintiffs to wear extra-long, untucked shirts would create an undue safety risk, as the clothing could become entangled in moving machinery.¹⁴⁸ The company testified that it "could" lose customers if it allowed this exception to the dress code, and further that the code is "fairly common" in the industry.¹⁴⁹ Ultimately, the court found that the undue hardship on Golden Brands "would seem to be clear," if not for other discrimination issues raised by the plaintiffs.¹⁵⁰ The court found this hardship

would be forced to remove her head covering. *Id.* at 1013. Additionally, the court did not accept Alamo's contention that "any deviation from [Alamo's] carefully cultivated image is a definite burden." *Id.* at 1015. The court found that this was no more than a hypothetical hardship; thus, "[a]lthough [Alamo] concluded that accommodating Ms. Nur's request to wear a head covering at the rental counter might have imposed a cost on Alamo because it would have opened the floodgates to others violating the uniform policy, Alamo has not supplied any basis for concluding that those opinions were anything other than pure speculation." *Id.* at 1016.

146. *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 885–86, 890 (3d Cir. 1990). Pennsylvania retained a "garb statute" from 1895 that banned religious attire in public schools. *Id.* at 885. The Third Circuit, in examining a very similar situation that appeared before the Oregon Supreme Court and later the U.S. Supreme Court, found that the results of those cases upheld the Oregon statutes (the Third Circuit went to great lengths to confirm that the U.S. Supreme Court's dismissal of the Oregon case "for want of a substantial federal question" constituted an affirmation that the Oregon statutes did not violate Title VII). *Id.* at 887–90. Thus, Pennsylvania's own statute did not violate Title VII, because forcing public schools "to sacrifice a compelling state interest [in religious neutrality] would undeniably constitute an undue hardship." *Id.* at 890. Because the "garb statute" was constitutional, allowing the Muslim woman to wear religious attire would be unlawful and would therefore impose undue hardship on the school. *Id.* at 889–90.

147. *Mohamed-Sheik v. Golden Foods/Golden Brands LLC*, No. Civ.A. 303CV737H, 2006 WL 709573, at *1 (W.D. Ky. Mar. 16, 2006).

148. *Id.* at *3.

149. *Id.*

150. *Id.* at *5. These other issues were related to increased hostility towards the plaintiffs after September 11, 2001. *Id.* The court noted:

Golden Brands became uncomfortable with Hersi and Mohamed because of their religion and exhibited this discomfort through [the HR manager's] arguably hostile comments to the Plaintiffs regarding praying at work, Head [sic] scarves, and speaking their native language. It was [the HR manager] who apparently made the decision to begin enforcing the tuck in policy at Golden Brands, and there is no evidence that the policy had been enforced, at least as to the Plaintiffs, prior to February 19, 2002.

Id. The court held that this raised issues of material fact as to "whether allowing an accommodation to the tuck in policy would in fact present an undue hardship to Golden Brands

to be undue, despite acknowledging that the tuck-in policy was not always enforced, and relying primarily on the testimony of Golden Brands's own consultant as to the extent of the safety risk.¹⁵¹

Many of the issues noted above involving Muslim religious practice in the workplace were present in *Webb v. City of Philadelphia*.¹⁵² This case, decided in 2009 in the Third Circuit, provided critical precedent for the majority opinion in *GEO Group*.¹⁵³ Kimberlie Webb, a female Muslim police officer and eight-year veteran of the Philadelphia police force, requested permission to wear her khimar while on duty.¹⁵⁴ Her request was denied, and she was later suspended for refusing to remove her khimar upon arriving at work.¹⁵⁵ The appellate court reiterated that in *Hardison*, the Supreme Court "strongly suggest[ed] that the undue hardship test is not a difficult threshold to pass."¹⁵⁶ The court also explained that courts must give substantial deference to law enforcement agencies in the area of uniforms and dress codes.¹⁵⁷

Finding that Webb's belief was sincere and that the City admittedly offered no accommodation, the court then analyzed whether any accommodation could be implemented with creating an undue hardship.¹⁵⁸ The City argued that strict enforcement of the uniform code promoted "the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference" that are necessary in properly-run police departments.¹⁵⁹ The Philadelphia police commissioner testified that it was "critically important to promote the image of a disciplined, identifiable and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias."¹⁶⁰ The court found that para-military organizations, like police departments, have an interest in uniformity amongst their employees, and sacrificing this interest created more than a *de minimis* cost.¹⁶¹ Ultimately, the court upheld summary judgment against Webb because "uniform requirements are crucial to the safety of officers (so that the public will be able to identify

where there is evidence that safety concerns may not have been the exclusive, or even the primary factor behind the enforcement of the policy." *Id.*

151. *Id.* at *3–5.

152. 562 F.3d 256 (3d Cir. 2009).

153. See *infra* Part II.B. The *Webb* case was dispositive for the district court's judgment in *GEO Group*. See *infra* Part II.A.

154. *Webb*, 562 F.3d at 258.

155. *Id.*

156. *Id.* at 260 (quoting *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 890 (3d Cir. 1990)).

157. *Id.* at 260–61.

158. *Id.* at 261.

159. *Webb*, 562 F.3d at 261.

160. *Id.*

161. *Id.* at 261–62.

officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police.”¹⁶²

The court took Philadelphia Police Commissioner Johnson’s testimony regarding the extent of the hardship as uncontroverted.¹⁶³ The court never addressed the expert testimony of Dr. Carol Harris-Shapiro, whose report indicated that Webb’s sincere belief about wearing her khimar came directly from the Qur’an.¹⁶⁴ Apparently, when the unstoppable force of an employer’s, and specifically para-military employer’s, interests meets the immovable object of an employee’s sincere and foundational religious belief, the belief must give way. Or, rather, the belief is considered movable and subject to interpretation, whereas the “facts” of the undue hardship are not. These issues will be discussed further in Part II.C in relation to the *GEO Group* decision.

II. *GEO GROUP*

Now we turn to the *GEO Group* case itself. First, this part will show how the district court’s disposition of *GEO Group* fits under the *Webb* precedent. Next, it will outline the appellate court’s majority position. Judge Tashima’s thorough dissent will also be discussed. Finally, this part critiques the majority’s decision in *GEO Group* as a misinterpretation of the facts and of the purpose of Title VII. Additionally, it suggests that the majority should be more willing to protect Muslim beliefs given their growing importance in American life, and given the current cultural, political, and social environment which is at times strongly anti-Muslim.

Recall that the dispute in *GEO Group* was between three female Muslim prison employees and their employer, a private company which runs prisons in the United States.¹⁶⁵ GEO had adopted a zero-tolerance headgear policy, citing safety, contraband and uniformity of appearance concerns.¹⁶⁶ The prison supervisors had refused the women’s requests to have their religious garb exempted from the headgear ban, and they brought suit claiming a violation of their Title VII right to be free of religious discrimination in the workplace.¹⁶⁷

162. *Id.* at 262.

163. *Id.* at 261.

164. Report of Dr. Carol Harris-Shapiro at 4, *Webb v. City of Phila.*, 562 F.3d 256 (2009) (No. 05-CV-5238-HB), 2006 WL 4585522.

165. *EEOC v. GEO Group, Inc.*, 616 F.3d 265, 267–68 (3d Cir. 2010).

166. *Id.* at 268.

167. *Id.* at 270.

A. *The District Court Decision*

Judge Fullam of the Eastern District of Pennsylvania wrote a brief memorandum on the disposition of this case.¹⁶⁸ Fullam cited *Webb* as the controlling precedent; in fact, the *GEO Group* case was stayed in anticipation of the Third Circuit's ruling in *Webb*.¹⁶⁹ The judge noted that in *Webb*, a police department could lawfully discharge a female Muslim officer for wearing the head covering required by her religion.¹⁷⁰ The officer in *Webb* had failed to adhere to the department's uniform regulations, which did not allow for such religious observance.¹⁷¹

Judge Fullam found no distinction between *Webb* and the instant case.¹⁷² He concluded that there was no meaningful distinction between prison guards and police officers.¹⁷³ Under the *Webb* precedent, GEO could properly refuse to permit a Muslim prison guard to wear their required head coverings while on duty.¹⁷⁴ He further noted that the justifications that GEO advanced for its dress policy could apply equally to other prison employees, such as those working in the medical department.¹⁷⁵ Thus, on cross-motions for summary judgment, Judge Fullam denied the EEOC's motion and granted GEO Group's motion.¹⁷⁶

B. *The Third Circuit's Analysis*

1. The Majority—GEO would suffer undue hardship if it accommodated Appellants' religious practice

The Third Circuit held that GEO made a sufficient showing that it could not reasonably accommodate Appellants' religious practice without suffering an undue hardship.¹⁷⁷ As a threshold matter, the court confirmed that Appellants stated a *prima facie* case of religious discrimination.¹⁷⁸ GEO first

168. EEOC v. GEO Group, Inc., No. 07-cv-04043-JF, 2009 WL 1382914, at *1 (E.D. Pa. May 18, 2009).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *GEO Group*, 2009 WL 1382914, at *1.

174. *Id.*

175. *Id.*

176. *Id.*

177. EEOC v. GEO Group, Inc., 616 F.3d 265, 275 (3d Cir. 2010).

178. They demonstrated the *prima facie* case by showing that their sincere belief in the necessity of their khimars conflicted with GEO's headgear policy, that they asked for exemption from it, and GEO responded by variously terminating or threatening to terminate the women. *Id.* at 268–69. However, GEO did not contend on appeal that the EEOC had failed to make its *prima facie* case. *Id.* at 271.

argued that it offered a reasonable accommodation to the Appellants, “by offering to permit [them] to wear a hairpiece in place of the khimar.”¹⁷⁹ While Appellants may not have preferred this accommodation, another female Muslim employee found it acceptable, and it reasonably “fulfills the stated religious requirement that the hair be covered.”¹⁸⁰ The court rejected GEO’s argument, as it was “unwilling to delve into any matters of theology . . . to decide on our own what might constitute a reasonable substitute for a khimar under the Islamic faith.”¹⁸¹

The court addressed GEO’s primary contention that it could not provide the accommodation Appellants sought without suffering undue hardship.¹⁸² In explaining the *de minimis* standard, the court noted that both economic and non-economic costs can impose undue hardship.¹⁸³ For example, an accommodation “that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison.”¹⁸⁴ The court cited *Webb*, which had interpreted the U.S. Supreme Court’s *Hardison* decision to “strongly suggest[] that the undue hardship test is not a difficult threshold to pass.”¹⁸⁵ Still, an undue hardship inquiry requires a court to examine the “specific context of each case” and determine the magnitude of the purported hardship.¹⁸⁶ The court stated its agreement with Appellants that “the *Webb* court did not purport to establish a per se rule of law about religious head coverings,” or their relationship to “paramilitary organization” cases.¹⁸⁷ However, the court still found *Webb* relevant, as “some security and uniformity interests held by the police force [in *Webb*] are also implicated in the prison context.”¹⁸⁸

The court explained GEO’s argument regarding the problems that would arise if Appellants were accommodated according to their wishes. First, uniform appearance is crucial in a prison environment to promote discipline and *esprit de corps*.¹⁸⁹ Allowing Appellants to wear khimars would undermine this legitimate interest.¹⁹⁰ Second, the procedures necessary to accommodate Muslim employees wearing their khimars would create delays and require

179. Brief of Defendant at 13, *EEOC v. GEO Group, Inc.*, 616 F.3d 265 (3d Cir. 2010) (No. 09-3093), 2009 WL 5635542 [hereinafter *GEO GEO Group Brief*].

180. *Id.* at 13–14.

181. *GEO Group*, 616 F.3d at 271.

182. *Id.* at 273.

183. *Id.*

184. *Id.*

185. *Id.* (quoting *Webb v. City of Phila.*, 562 F.3d 256, 260 (3d Cir. 2009)).

186. *GEO Group*, 616 F.3d at 273.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

additional resources from prison officials.¹⁹¹ Though the court was “not entirely convinced” of the seriousness of this issue, it “recognize[d] that adopting [GEO’s] proposed procedure would necessarily require some additional time and resources of prison officials.”¹⁹² Finally, the khimars themselves present a safety risk, because they could be used to smuggle contraband, conceal the identity of the wearer, or could be used by inmates to strangle guards.¹⁹³ GEO acknowledged that incidents of these types had not occurred in the relevant history of the prison facility.¹⁹⁴ The court nevertheless found that “[e]ven assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that GEO is entitled to attempt to prevent.”¹⁹⁵

The key fact that tipped this admittedly “close case” in GEO’s favor was the prison environment.¹⁹⁶ “A prison is not a summer camp,” the court found, and GEO “has an overriding responsibility to ensure the safety of its prisoners, its staff, and the visitors.”¹⁹⁷ This reasoning was based on the U.S. Supreme Court’s decision in *Bell v. Wolfish*.¹⁹⁸ There, the Court noted that prison “is a unique place fraught with serious security dangers.”¹⁹⁹ In *GEO*, the court found that *Wolfish* “cautioned the federal courts to make only limited inquiry into prison management because ‘[t]he wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.’”²⁰⁰ Thus, although federal courts can still uphold the constitutional rights of prison staff, deference must be given to prison officials’ determinations on how to run their prisons.²⁰¹

191. *GEO Group*, 616 F.3d at 274.

192. *Id.* The issue was one of identification of the women as they moved through numerous checkpoints in the prison while wearing their khimars. *Id.* GEO argued that having the women remove their khimars at each checkpoint would require locking down the prisoners in that area. *GEO GEO Group Brief*, *supra* note 179, at 18.

193. *GEO Group*, 616 F.3d at 274.

194. *GEO GEO Group Brief*, *supra* note 179, at 17.

195. *GEO Group*, 616 F.3d at 274.

196. *Id.* at 275.

197. *Id.*

198. *Id.*

199. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

200. *GEO Group*, 616 F.3d at 275 (citing *Wolfish*, 441 U.S. at 562).

201. *Id.* The Third Circuit has carried this deference to prison officials into other areas. In *Florence v. Board of Chosen Freeholders of Burlington*, the court held that in the interest of safety, a prison may strip search *all* incoming inmates, regardless of any reasonable suspicion that they might be carrying contraband. 621 F.3d 296, 310–11 (3d Cir. 2010). The court found that the prisons’ security interest outweighed the inmates’ Fourth Amendment privacy interest. *See id.* at 311. As was the case in *GEO*, prison officials were not required to produce any evidence that there actually existed a contraband problem, such as statistics on the discovery of contraband on incoming inmates. *Id.* at 309–10. The court also rejected the inmate’s suggestion that a body-scanning chair could be used instead of full-nudity body cavity searches. *Id.* at 310.

After discussing the reasoning behind its disposition of the case, the court went on to rebut Judge Tashima's dissenting opinion.²⁰² The court found that the dissent was "unfairly cynical" when criticizing the reasons for the no-headgear policy proffered by Deputy Warden Holm and Warden Nardolillo.²⁰³ The court reiterated that despite Judge Tashima's skepticism of the burden on GEO, allowing Appellants to wear their khimars at work would create undue hardship.²⁰⁴ The procedures for safe khimar-wearing suggested by Appellants were "facially implausible and time consuming."²⁰⁵ The court also addressed the dissent's claim that khimars are unlikely to be used as weapons.²⁰⁶ It noted that traditional khimars are large enough to be used for strangulation.²⁰⁷ Further, the dissent's argument that other employees are allowed to wear hats, such as kitchen employees, is in the court's opinion "just another red herring."²⁰⁸ Those employees must wear hats for sanitary purposes, and they cannot wear their hats outside of the kitchen.²⁰⁹ Finally, the court criticized the dissent for relying on the EEOC's expert testimony more than the testimony of experienced prison officials.²¹⁰ The court pointed to the Supreme Court's language in *Turner v. Safley*:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources Prison administration is, moreover, a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.²¹¹

The court also noted that "[a]s the en banc Ninth Circuit recently stated, its obligation is 'to comply with the Supreme Court's direction that we not substitute our judgment for that of corrections facility officials.'"²¹²

202. *GEO Group*, 616 F.3d at 275.

203. *Id.*

204. *Id.* at 276.

205. *Id.*

206. *Id.*

207. *GEO Group*, 616 F.3d at 276.

208. *Id.*

209. *Id.*

210. *Id.* at 276–77.

211. *Id.* at 277 (quoting *Turner v. Safley*, 482 U.S. 78, 84–85 (1987)).

212. *GEO Group*, 616 F.3d at 277 (quoting *Bull v. City and Cnty. of S.F.*, 595 F.3d 964, 978 (9th Cir. 2010)).

2. Judge Tashima's Dissent—The majority undermines the Circuit's religious accommodation jurisprudence

Judge A. Wallace Tashima, Senior Judge of the Ninth Circuit Court of Appeals, sat by designation in this case (thus the majority's above reference to a Ninth Circuit opinion).²¹³ Judge Tashima dissented in *GEO Group* because he felt that “the majority misapplies both longstanding Circuit law on how we review summary judgment and, in doing so, ignores our substantive Title VII law,”²¹⁴ and that the court's decision “makes a shambles of our Title VII religious accommodation jurisprudence.”²¹⁵ A full discussion of summary judgment law is beyond the scope of this note, but Judge Tashima raises an important point. Judge Tashima's summary judgment argument rests on his contention that Appellants have raised issues of material fact.²¹⁶ These issues, which should be decided by a jury, include the reasons for changing the headgear policy, the extent of the safety risk created by wearing khimars, and the magnitude of the burden on GEO if Appellants were accommodated.²¹⁷

All of these issues bear on the Title VII analysis in this case. Judge Tashima argued that the majority “allows an employer facing an asserted safety concern freely to discriminate on the basis of religion by merely inventing a *post-hoc* safety rationale.”²¹⁸ The employer cannot merely assert an important business interest as reason for denying accommodation, but must provide evidence that the accommodation would result in more than a *de minimis* cost for them.²¹⁹ The majority did not hold GEO to this burden,

213. *Id.* at 267.

214. *Id.* at 277 (Tashima, J., dissenting).

215. *Id.* at 292 (Tashima, J., dissenting).

216. *Id.* at 286 (Tashima, J., dissenting). In a related point, Judge Tashima also found that the majority failed to properly apply the summary judgment standard, which requires that the Appellants' evidence should be believed, and reasonable inferences be made in their favor. *Id.* at 277–78 (Tashima, J., dissenting). Instead, the majority chose to believe Warden Nardolillo and Deputy Warden Holm and disbelieve Appellants' expert and other evidence. *Id.* at 277 (Tashima, J., dissenting). Ironically, courts in the Third Circuit continue to cite the very summary judgment language in *GEO Group* that Judge Tashima felt was misapplied. See *Lora-Pena v. Denney*, 760 F. Supp. 2d 458, 464–65 (D. Del. 2011) (“At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. The judge must ask not whether the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The court must not engage in the making of ‘[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts’ as these ‘are jury functions, not those of a judge, [when] [] ruling on a motion for summary judgment.’”) (internal citations omitted); see also *Riley v. Shinseki*, No. 09-4345, 2011 WL 18760, at *3 (3d Cir. Jan. 5, 2011).

217. *GEO Group*, 616 F.3d at 286–89 (Tashima, J., dissenting).

218. *Id.* at 285 (Tashima, J., dissenting).

219. *Id.* (Tashima, J., dissenting).

however, because it failed to “perform the necessary inquiry into whether making a religious exception from the general headgear ban to accommodate khimars would, in fact, impose such an undue hardship on GEO.”²²⁰ Though the majority did consider this a “close case,” it “effectively exempts” GEO from the requirement that GEO prove undue hardship, and “concludes that this requirement is met merely because GEO has asserted that its hardship is safety.”²²¹ Judge Tashima found that the majority’s holding “establishes a *per se* rule that when an employer asserts that its rationale for denying a religious accommodation is safety, the employer need not adduce any evidence to prove the existence of, let alone the magnitude of, the burden it would suffer by accommodating the religious practice.”²²² Therefore, though GEO’s interest in safety is an important one, it does not relieve them of their burden to show undue hardship.²²³

Judge Tashima also argued that *Webb v. City of Philadelphia* did not control the disposition of *GEO Group*.²²⁴ As discussed earlier, the relevant issue in *Webb* was the police department’s interest in uniform appearance amongst its officers.²²⁵ The District Court openly rested on *Webb*, finding “no meaningful distinction between prison [employees] . . . and police officers.”²²⁶ The majority in *GEO Group* disclaimed that “[i]t is unnecessary for us to decide whether this interest alone would support summary judgment, as we decide the case on different grounds,”²²⁷ but Judge Tashima disputed whether any other grounds were available.²²⁸

Unlike the police department in *Webb*, which had an interest in “impartiality, religious neutrality, [and] uniformity,”²²⁹ GEO’s employees “do not serve as an impartial symbol of law enforcement authority to the general public.”²³⁰ The *Webb* police department was concerned about the “safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police.”²³¹ Judge Tashima found no evidence that any prisoners thought

220. *Id.* (Tashima, J., dissenting).

221. *Id.* (Tashima, J., dissenting).

222. *GEO Group*, 616 F.3d at 285 (Tashima, J., dissenting).

223. *Id.* (Tashima, J., dissenting).

224. *Id.* at 289–90 (Tashima, J., dissenting).

225. See *supra* notes 152–64 and accompanying text for a discussion of the uniform appearance interest in *Webb*.

226. *EEOC v. GEO Group, Inc.*, No. 07-cv-04043-JF, 2009 WL 1382914, at *1 (E.D. Pa. May 18, 2009).

227. *GEO Group*, 616 F.3d at 274.

228. *Id.* at 289–90 (Tashima, J., dissenting).

229. *Webb v. City of Phila.*, 562 F.3d 256, 261 (3d Cir. 2009).

230. *GEO Group*, 616 F.3d at 290 (Tashima, J., dissenting).

231. *Webb*, 562 F.3d at 262.

that a khimar-wearing GEO employee was not a genuine employee.²³² The judge also found no evidence that prisoners felt religious discrimination due to a GEO employee wearing a khimar, or that “being a prison guard requires the same level of cohesiveness and esprit de corps of a paramilitary organization such as the police.”²³³ Finally, Judge Tashima saw no indication in *Webb* that non-uniformed department employees, who rarely interacted with the public, were not allowed to wear khimars.²³⁴ In the present case, Sharpe-Allen and King worked as a prison nurse and intake officer, respectively.²³⁵ Because these positions “certainly do not share the same safety or morale concerns as sworn police officers,” Judge Tashima found it “disingenuous, at best, for GEO to argue that it would work an undue hardship to allow them to wear non-uniform attire.”²³⁶

Judge Tashima concluded that “GEO’s interest in uniformity only encompassed an aesthetic disapproval of employees starting a ‘fad or fashion statement’ by wearing khimars.”²³⁷ This interest, the judge noted, is not “of the greatest importance,” as was the uniformity interest in *Webb*.²³⁸ Though “GEO is free to ban its employees from wearing Yankees caps backwards and sideways” because of aesthetic disapproval, “they are not free to ban khimars for the same reason.”²³⁹

Judge Tashima was also not convinced that GEO made a good-faith attempt to accommodate the Appellants.²⁴⁰ The judge found that the only accommodation they offered was unreasonable as a matter of law.²⁴¹ *Ansonia* holds that proposed accommodations are only reasonable if they eliminate the conflict between job requirements and the employee’s ability to fully observe

232. *GEO Group*, 616 F.3d at 290 (Tashima, J., dissenting).

233. *Id.* (Tashima, J., dissenting). Judge Tashima noted that the very reason why the government would contract out prison administration to private companies like GEO is that unlike police departments, “a prison need not be run by an official, governmental, paramilitary organization.” *Id.* at 290 n.4 (Tashima, J., dissenting).

234. *Id.* at 290 (Tashima, J., dissenting).

235. *Id.* at 268–69.

236. *Id.* at 290 (Tashima, J., dissenting).

237. *GEO Group*, 616 F.3d at 290–91 (Tashima, J., dissenting). Moss testified that Warden Nardolillo did not want her to start a “fad or fashion statement” among other employees by wearing her khimar at the prison. *Id.* at 286 (Tashima, J., dissenting).

238. *Id.* at 291 (Tashima, J., dissenting).

239. *Id.* (Tashima, J., dissenting). Here, Judge Tashima referenced Deputy Warden Holm’s testimony about the reason for implementing the new headgear policy. Holm was unhappy with seeing “‘New York Yankees baseball hat inside the institution while in full uniform, [which was] not authorized’ as well as ‘hats being worn backwards and sideways.’” *Id.* at 283 (Tashima, J., dissenting).

240. *Id.* at 291.

241. *Id.*

their religious practice.²⁴² GEO had offered to allow Appellants to wear a hairpiece, most likely a wig, to cover their hair instead of a khimar.²⁴³ Judge Tashima and the majority agreed that Appellants' belief in the necessity of wearing the khimar was sincere.²⁴⁴ Appellants maintained that Qur'anic requirements would not be satisfied by wearing a wig.²⁴⁵ Judge Tashima noted that "[a]n employer is not entitled to interpret the employee's religion."²⁴⁶ "Just as it is not reasonable to ask a Christian employee to observe Christmas in July," Judge Tashima felt it was unreasonable to ask Appellants to accept an insufficient accommodation, and thereby display their hair in public against the tenets of their faith.²⁴⁷ Ultimately, "[i]t is neither the court's nor the employer's prerogative to dictate to an employee how she should comply with the requirements of her religion," and so if Appellants sincerely believe the hairpiece fails to satisfy their religious obligation, then it is by law an unreasonable accommodation.²⁴⁸

C. *Author's Analysis—The court should have found that GEO could have reasonably accommodated the Appellants without undue hardship, and the court should have defended Appellants from religious discrimination, given the current climate of fear and hate against Muslims*

As we have seen, the Third Circuit in *GEO Group* followed the general trend which gives great weight to employers' business interests and relatively little weight to employees' religious needs. For a number of reasons, the court should have abandoned this interpretation, finding instead that Appellants could be reasonably accommodated with causing undue hardship to GEO. The court's conclusions about safety risks and the feasibility of allowing Appellants to wear khimars in the prison were based on GEO's proffered hypotheticals, when the court should have conducted a more thorough hardship analysis. Appellants' religious beliefs also should have been valued more highly because religious freedom and tolerance is ensconced in our Constitution and case law.²⁴⁹ The court ought to have been particularly protective of Appellants' religious practice in light of the vulnerable position that Muslims occupy in modern American society.²⁵⁰ Finally, the court could

242. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

243. *GEO GEO Group* Brief, *supra* note 179, at 13.

244. *GEO Group*, 616 F.3d at 271, 291 (Tashima, J., dissenting).

245. *Id.* at 291 (Tashima, J., dissenting).

246. *Id.* (Tashima, J., dissenting).

247. *Id.* (Tashima, J., dissenting).

248. *Id.* (Tashima, J., dissenting).

249. *See, e.g.*, U.S. CONST. amend. I; U.S. CONST. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

250. *See infra* notes 270–74 and accompanying text.

have attempted to follow the weight of scholarship in this area of law, which advocates for greater protection of employees' right to practice their faiths.

The majority agrees with GEO's speculation that allowing employees to wear khimars in the prison facility would create a safety and contraband risk.²⁵¹ The court found that even if these purported risks were much less severe than GEO claimed, GEO would still have a right to attempt to prevent them.²⁵² There are a number of problems with this position. GEO claimed that contraband could be smuggled into the prison under a khimar.²⁵³ The court accepted this hypothetical burden on the prison even though GEO admitted that this had never happened before.²⁵⁴ Contraband always finds its way into prisons, no matter what security measures are put in place.²⁵⁵ Given enough time, any person, including an inmate, could probably devise a method to circumvent nearly any conceivable security system.²⁵⁶ Inmates can use visitors, incoming inmates, and other areas of contact with the outside world, including prison employees, to obtain contraband.²⁵⁷ Using a khimar to smuggle contraband in to the prison, given the plethora of tried-and-true smuggling options, seems unnecessary. Judge Tashima noted that contraband might more easily be smuggled in under a wig, which was GEO's offer of

251. *GEO Group*, 616 F.3d at 275.

252. *Id.* at 274.

253. *Id.*

254. *Id.*

255. See JOSEPH BOUCHARD, WAKE UP AND SMELL THE CONTRABAND: A GUIDE TO IMPROVING PRISON SAFETY vii, 3 (2002) (describing, from the view of a corrections employee, contraband as "an insidious monster lurking in every correctional facility" that moves with relative ease within and into prisons); DAVID B. KALINICH, THE INMATE ECONOMY 1 (1980) (addressing contraband and related issues in State Prison Southern Michigan); VERGIL L. WILLIAMS & MARY FISH, CONVICTS, CODES, AND CONTRABAND: THE PRISON LIFE OF MEN AND WOMEN 133 (1974) (comparing the sub rosa (illicit) economies in male and female prisons). With respect to the influx of contraband, men tend to bring in more material from outside the prison, while women are more likely to steal goods directly from the prison. *Id.* Prison guards have little effect on the enormous flow of contraband through prisons. *Id.* at 92. This may be due to corruption, ignorance, or sympathy for the prisoners. *Id.*; see also Matt Clarke, *Contraband Smuggling by Texas Prison Guards Rarely Punished Harshly*, PRISON LEGAL NEWS, Sept. 2009, at 32 (discussing minimal punishment for prison guards caught smuggling contraband); Tracy E. Barnhart, *Contraband Control in Prison*, CORRECTIONS.COM (Apr. 6, 2009), <http://www.corrections.com/news/article/21045> (discussing behaviors to look for in visitors who may be smuggling contraband).

256. See Brief of the States as *Amici Curiae* in Support of the Petition at 5–6, *Smith v. Al-Amin*, 129 S. Ct. 104 (2008) (No. 07-1485), 2008 WL 2676561 (noting the numerous ways that contraband has been smuggled into prisons, including mailing marijuana concealed within "legal papers," enclosing a hacksaw blade in the binding of a legal pad, and sending escape tools in a hollowed-out legal brief).

257. KALINICH, *supra* note 255, at 67; Barnhart, *supra* note 255.

accommodation, than under a khimar.²⁵⁸ Additionally, because GEO does not perform contraband checks on other employee clothing, such as socks or jackets, prohibiting khimars would probably do little to diminish the contraband problem.²⁵⁹

The other essential part of GEO's case was the claim that khimars posed a safety risk in the prison.²⁶⁰ The khimars at issue in this case presumably rest on the wearer's head and shoulders, and wrap around their neck.²⁶¹ Admittedly, this creates a risk that inmates might grab the khimar and pull on it to suffocate the employee wearing it. The problem is that such a risk may be ever-present, whether an employee is wearing a khimar or not. If an inmate had the opportunity, desire, and freedom of movement necessary to grab an employee's khimar and pull on it hard enough to choke, it seems just as likely that the inmate could have also put their arm around the employee's neck instead. As the majority notes, prisons are a dangerous place.²⁶² Wearing a khimar over one's head does not seem to drastically increase the level of danger.

The arguments above are not meant to completely refute the majority's reliance on GEO's testimony as to the hardship it may face in allowing Appellants to wear their khimars. It is meant instead to tip the balance of the "close case" in favor of Appellants. As shown above, there is a potential discrepancy between GEO's hypothetical hardships and those that would likely exist in reality. Given that this results in a much lower hardship burden on GEO than the majority anticipated, the court should have found for the

258. *GEO Group*, 616 F.3d at 291 n.5 (3d Cir. 2010) (Tashima, J., dissenting).

259. *Id.* at 289 (Tashima, J., dissenting). Judge Tashima found that there is little reason why Appellants would be forced to remove their khimars at each checkpoint in the prison; this forms the basis of GEO's assertion that accommodating would create administrative problems. *Id.* (Tashima, J., dissenting). GEO's reason to require removal of the khimars could not be to find contraband, because "they do not perform the same checks on socks or jackets—the only items of staff clothing ever to have been found to secrete contraband." *Id.* (Tashima, J., dissenting). Thus, it seems as though GEO must have some other, unstated reason for disallowing khimars. Additionally, Judge Tashima notes that Appellants' expert, George Camp, analyzed the contraband problem in the prison and found that "[c]omparing the types of serious contraband items reported prior to the change in the khimar policy on October 24, 2005, with a comparable length of time after it was changed, reveals that the number of contraband items found at the facility actually rose by 91 percent." *Id.* at 288 (Tashima, J., dissenting).

260. *Id.* at 267.

261. There are multiple styles of khimars, and the court itself notes that neither party described the particular style worn by the Appellants. *Id.* at 268 n.1. The complaint states that a khimar is "an Islamic religious head scarf, designed to cover the hair, forehead, sides of the head, neck, shoulders, and chest." Complaint at 3, *EEOC v. GEO Group, Inc.*, 2009 WL 1382914 (E.D. Pa. May 18, 2009) (No. 07-cv-04043) 2007 WL 4761084. It can also be defined as "a headscarf worn by observant Muslim women that hangs down to just above the waist." *Khimar*, DICTIONARY.COM, <http://dictionary.reference.com/browse/khimar> (last visited Feb. 17, 2011).

262. *GEO Group*, 616 F.3d at 275.

Appellants. The cause they bring before the court is of profound importance; Appellants seek to defend their right to freely practice their religion, as found in Title VII and reinforced time and again by Congress. Thus, in weighing the nature of the interests—safety and security against religious tolerance and freedom—along with the real burden on those interests—potentially very low against a total loss of the interest—the analysis clearly favors Appellants.

Some courts have recognized the true intent of Congress in enacting Title VII. The court in *Ali v. Southeast Neighborhood House* noted that:

The overriding concern of Congress in enacting Title VII was the elimination of discrimination in employment. Employees are sheltered from bigotry and discrimination emanating from the employer's actions towards that employee's most personal, most cherished religious beliefs and values. These considerations should be viewed by a Court with special sensitivity to their meaningful uniqueness.²⁶³

Though the *GEO Group* court does not question the sincerity of Appellants' beliefs, it does not seem to accord those beliefs with the high regard that Congress, through Title VII, contemplated.

The Third Circuit itself defended Muslims' right to religious observance in the context of the First Amendment. In *Fraternal Order of Police v. City of Newark*, the court found that a police department's policy banning religious beards did not survive the heightened scrutiny test under the First Amendment's Free Exercise Clause.²⁶⁴ It noted that, similar to *GEO*, the police department wanted to convey an image of a "monolithic, highly disciplined force" and that "[u]niformity [of appearance] not only benefits the men and women that risk their lives on a daily basis, but offers the public a sense of security in having readily identifiable and trusted public servants."²⁶⁵ The police department alleged that the public may not recognize a bearded Muslim man as genuine police officer, and that this would undermine public safety.²⁶⁶ In this case, unlike in *Webb* and *GEO Group*, the court did not accept the safety argument.²⁶⁷ Instead, it found that there was no distinction between the department's allowance of beards for medical purposes, and the prohibition on beards for religious ones.²⁶⁸ Though this was a constitutional case, Title VII's protection of religion can be seen as an extension of that important First Amendment principle.

263. *Ali v. Se. Neighborhood House*, 519 F. Supp. 489, 497 (D.D.C. 1981).

264. 170 F.3d 359 (3d Cir. 1999). The opinion was penned by Justice Alito prior to his appointment to the United States Supreme Court.

265. *Id.* at 366.

266. *Id.*

267. *Id.*

268. *Id.* at 366–67.

The majority in *GEO Group* rejected Judge Tashima's argument that other employees in GEO's prison are allowed to wear hats as a red herring.²⁶⁹ However, under GEO's morale and *esprit de corps* interests, the only distinction between Appellants and those other employees allowed to wear hats is a concern for food safety. The *GEO Group* majority may claim that this is a difference between wearing headgear for the benefit of others, as with the kitchen workers, and wearing headgear for a personal benefit, as with Appellants. Still, Appellants' need to follow their religion's precepts should be considered at least as important as food safety. Food safety is not a value expressly protected by our Constitution.

The *GEO Group* court's failure to protect Muslims' religious rights is especially harmful in the current climate of fear, intolerance, and ignorance toward Muslims. Particularly since the terrorist attacks of September 11, 2001, Muslims in the United States have been subjected to unwarranted bigotry.²⁷⁰

269. *GEO Group*, 616 F.3d at 276.

270. Public opinion polls demonstrate that American attitudes toward Muslims vary by, among other things, the respondents' level of fear of new terrorist attacks, personal religiosity, and party affiliation. SIMON & ABDEL-MONEIM, *supra* note 113, at 29. Forty percent of Republicans, thirty-seven percent of those who have a high fear of terrorist attacks, and forty-two percent of those who are highly religious, want Muslims to register with the government. *Id.* at 30–31. Similar percentages in those groups support close government monitoring of mosques. *Id.* Just over forty percent of all respondents indicated that they honestly had some feelings of prejudice against Muslims. *Id.* at 34. Still, U.S. public opinion toward Muslims is not the worst among Western nations. *Id.* at 36–39. As to whether Muslims are a threat to national security, and whether they have been subjected to unjustified criticism, the U.S. public runs about the middle of the pack among Great Britain, France, Italy, Spain and Germany. *Id.* An ABC News poll from 2006 found a much higher incidence of anti-Muslim attitudes since 2002. ABC News/Washington Post Poll *supra* note 113. In 2006, the percentage of Americans believing that Islam does not respect non-believers and that it encourages violence against them was double that of 2002. *Id.* Additionally, forty-six percent of respondents had a generally unfavorable view of Islam, which was again nearly double the percentage from 2002. *Id.* In a Pew Research Center study, a quarter of Muslim-Americans said they had experienced discrimination. PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 4 (2007) [hereinafter MIDDLE CLASS AND MOSTLY MAINSTREAM]. A majority also said that either discrimination, being viewed as a terrorist, ignorance about Islam, and stereotyping was their biggest concern. *Id.* at 36. Though many U.S. Muslims have gone to great lengths to display their patriotism and desire to combat extremism, some are exhausted by the constant struggle to prove themselves to a skeptical American society. See Jeff Karoub, *US Muslims Find Defending Themselves Exhausting*, HUFFINGTON POST (Mar. 12, 2011, 5:25 PM), <http://www.huffingtonpost.com/huffwires/20110312/us-muslims-terror-hearing-mood>; see also DAVID SCHANZER, CHARLES KURZMAN & EBRAHIM MOOSA, ANTI-TERROR LESSONS OF MUSLIM-AMERICANS 1 (2010) (finding that anti-Muslim bias has increased since September 11, 2001, and even so, radicalization of Muslim-Americans has been extremely limited); PEW FORUM ON RELIGION & PUBLIC LIFE, VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES: MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 1 (2009) (finding that many non-Muslim Americans feel that Islam

Nearly every week, national and local news media carry new stories of controversy regarding Muslims.²⁷¹ Studies show that the intolerant attitude

is very different from their own faith and nearly sixty percent believe that Muslims are subject to more discrimination than other major religious groups).

271. There are stories about Muslims in the United States generally, as well as about the feelings of and toward American Muslims. See, e.g., Stephen Collinson, *Obama Calls on Americans to Unite, Not Divide, Over Islam*, THE AGE (Sept. 11, 2010), <http://news.theage.com.au/breaking-news-world/obama-calls-on-americans-to-unite-not-divide-over-islam-20100911-155d3.html>; Mark Egan, *Fears Rise Over Growing Anti-Muslim Feeling in U.S.*, REUTERS (Sept. 12, 2010, 12:53 PM), <http://www.reuters.com/article/2010/09/12/us-usa-muslims-view-idUSTRE68B1O920100912>; Karin Zeitvogel, *US Ill-Prepared to Face Homegrown Terror Threat: Report*, AFP (Sept. 10, 2010), <http://www.google.com/hostednews/afp/article/ALeqM5jVDY22EZWni0vYIKlgMMMMUJjQw>; Cristina Silva, *Sharron Angle: Muslim Law Taking Hold in Parts of U.S.*, HUFFINGTON POST (Oct. 7, 2010, 8:03 PM), http://www.huffingtonpost.com/2010/10/08/sharron-angle-muslim-law-_n_755346.html. Even a decade after the attacks of September 11, U.S. Muslims still face discrimination. See *supra* note 270. Yet, with the death of Osama Bin Laden—who not only hijacked planes but also the identity of an entire religion—American Muslims are hopeful for a chance to show the country who they really are. See Liz Goodwin, *Muslim Americans Still Find Acceptance Elusive in the Wake of Bin Laden's Death*, THE LOOKOUT (May 11, 2011), <http://news.yahoo.com/blogs/look-out/muslim-americans-still-acceptance-elusive-wake-bin-laden-194318677.html>.

One of the most notorious controversies relating to Islam is the Islamic cultural center in New York City near the former location of the World Trade Center towers, known to some as the “Ground Zero” mosque. See, e.g., David B. Caruso, *On Paper, NY Islamic Center Looks Modern, Secular*, WASH. POST, Oct. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/02/AR2010100201683.html>; Toby Harnden, *Imam Blames Palin for Rise of ‘Islamophobia’*, DAILY TELEGRAPH, Sept. 13, 2010, at 13; *Imam Says NYC Mosque Site is not ‘Hallowed Ground’*, USA TODAY, Sept. 13, 2010, http://www.usatoday.com/news/religion/2010-09-13-nyc-mosque-imam_N.htm; Henrick Karoliszyn et al., *Protesters Reach Fevered Pitch*, N.Y. DAILY NEWS, Sept. 12, 2010, at 7; *‘US Mosque Row Feeds Radicals’*, AL JAZEERA (Sept. 13, 2010), <http://english.aljazeera.net/news/americas/2010/09/2010912212355219577.html>. For information about Islamic cultural centers like this one, see ESPOSITO, *supra* note 27, at 38.

Another contentious story is the plan to burn the Qur’an by pastors in Florida and Kansas. See, e.g., Antonio Gonzalez, *Anti-Koran Pastor Plans to Meet With NY Imam*, WASH. TIMES (Sept. 9, 2010), <http://www.washingtontimes.com/news/2010/sep/9/koran-burning-off-as-minister-claims-success/>; Brad Knickerbocker, *Florida Church May Not Burn Qurans, But Kansas Church Says it Will*, CHRISTIAN SCIENCE MONITOR, (Sept. 10, 2010, 4:50 PM) <http://www.csmonitor.com/USA/Society/2010/0910/Florida-church-may-not-burn-Qurans-but-Kansas-church-says-it-will>; Mitra Malek, *Muslims Relieved But Say Damage Has Been Done*, PALM BEACH POST, Sept. 9, 2010, at 1A; Antonio Gonzalez, *Pastor Cancels Quran-Burning, Then Reconsiders*, AJC (Sept. 9, 2010, 11:10 PM), <http://www.ajc.com/news/nation-world/pastor-cancels-quran-burning-609858.html>; *Muslim World Seethes; US ‘Cult’ Calls Off Plan to Burn Holy Book*, ARAB NEWS (Sept. 11, 2010, 6:04 PM), <http://arabnews.com/world/article133784.ece?comments=all>.

Even Congresspersons can be swept up in anti-Muslim sentiments. Representative Peter King, chairman of the House Homeland Security Committee, called hearings to discuss the “radicalization” of American Muslims. James Oliphant, *Rep. Peter King Defends Muslim ‘Radicalization’ Hearing*, L.A. TIMES (Mar. 10, 2011), <http://articles.latimes.com/2011/mar/10/na>

toward Muslims is unjustified.²⁷² Most American Muslims (and for that matter most Muslims worldwide) are not extremists; they are middle-class people who support their country and the opportunities it provides just as much as any other religious or ethnic group.²⁷³ Islam is projected to become the second-largest religious group in America behind Christianity during the first half of this century.²⁷⁴ Just as Catholicism began as a small, persecuted religion in the

tion/la-na-muslim-house-hearing-20110311. King defended the hearings as part of the committee's duty to protect the United States from terrorist attack, including protecting from internal sources, stating that "[t]o back down would be a craven surrender to political correctness," and that "there is nothing radical or un-American in holding these hearings." *Id.* Critics counter that these hearings are akin to Joseph McCarthy's anti-Communism hearings of the 1940s and 1950s. *Id.* Representative Keith Ellison, a Muslim Congressman from Minnesota, opposed the hearings as "stereotyping and scapegoating." *Id.* Muslim leaders in the United States expressed concern that these hearings would fail their express purpose—instead of rooting out extremists, they would only alienate the Muslim community and drive more to join terrorist groups. *See id.*; Karoub, *supra*; Chris Michaud, *Muslims, Supporters Protest Congressional Hearing*, REUTERS (Mar. 6, 2011, 6:53 PM), <http://www.reuters.com/article/2011/03/06/us-muslim-protest-idUSTRE7252VY20110306>.

There are even a few stories concerning Islamic dress, most notably the debate in France over a possible ban on Muslim women's veils. *See, e.g.*, Elaine Ganley, *French Senate Passes Ban on Full Muslims Veils*, (WASH. TIMES, Sept. 14, 2010) <http://www.washingtontimes.com/news/2010/sep/14/french-senate-passes-ban-full-muslim-veils/>; Sarkozy: *France Firm on Burqa Ban Despite Threat from Osama bin Laden*, CHI. TRIB. (Oct. 29, 2010, 8:45 AM) <http://www.chicagotribune.com/news/local/sns-ap-bin-laden-tape,0,326701.story>. Muslim women of all ages may potentially be subject to dress-based discrimination. *See* Cameron Smith, *Muslim Headscarf Forces Teen Girl to Bench in Hoops Game*, PREP RALLY (Jan. 21, 2011 12:41 PM), http://rivals.yahoo.com/highschool/blog/prep_rally/post/Muslim-headscarf-forces-teen-girl-to-bench-in-ho-urn=highschool-310716.

Some Muslim employees have successfully reached an accommodation on their religious garb. *See* Disney, *Muslim Worker Agree on Hijab Substitute*, USA TODAY (Sept. 29, 2010), http://www.usatoday.com/news/religion/2010-09-29-disney-muslim_N.htm.

Finally, some stories demonstrate that American Muslims can take steps beyond litigation to defend their rights and have in fact reached out to repair their faith's image in U.S. society. *See, e.g.*, Patrick Condon, *Muslims Take to Minn. State Fair to Repair Image*, WASH. TIMES, Sept. 4, 2010, <http://www.washingtontimes.com/news/2010/sep/4/muslims-take-minn-state-fair-repair-image/>.

272. *See* MIDDLE CLASS AND MOSTLY MAINSTREAM, *supra* note 270, at 1 (noting that most Muslim-Americans are average Americans).

273. *See id.*; Eboo Patel, *Discrimination Against Muslims*, WASH. POST: THE FAITH DIVIDE (Mar. 20, 2007, 9:41 AM), http://newsweek.washingtonpost.com/onfaith/eboo_patel/2007/03/discrimination_against_muslims.html.

274. ESPOSITO, *supra* note 27, at 169. The actual number of Muslims in the United States is difficult to determine. MIDDLE CLASS AND MOSTLY MAINSTREAM, *supra* note 270, at 9. Some projections stand at six to eight million. Zahid H. Bukhari, *Demography, Identity, Space: Defining American Muslims*, in MUSLIMS IN THE UNITED STATES 7, 7–8 (Philippa Strum & Danielle Tarantolo eds., 2003). Other estimates from 2007 and 2008 are that Muslims comprise about six-tenths of one percent of the American population, or around 1.35 million people. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY:

United States, and was gradually accepted,²⁷⁵ the same will likely occur with Islam.

Additionally, Muslims are mostly foreign-born immigrants.²⁷⁶ Like all minority and immigrant groups that have come to the United States throughout our country's history, Muslims will at first be feared and oppressed.²⁷⁷ Eventually, these former minorities became so numerous, and became such an essential part of American culture, that discrimination against them faded away, or at least became less pronounced.²⁷⁸ History will likely repeat itself with regards to the current Muslim minority, and there is no reason why the process of initial discrimination and later acceptance cannot be accelerated.

An analogy may be drawn between Muslims' situation today and the historical practice of prejudice against people of a particular nationality or ethnicity in a time of war against that nationality or ethnicity. Kristin Pruszyński makes the analogy between Muslims after September 11, 2001, and

SUMMARY REPORT 5 (2009). Judaism, currently the largest minority religion, stands at about 2.7 million. *Id.*

275. See JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT* 127–28 (1992) (giving an account of the emergence of Catholicism in the United States).

276. Bukhari, *supra* note 274, at 9; MIDDLE CLASS AND MOSTLY MAINSTREAM, *supra* note 270, at 1; Abdul Malik Mujahid, *Muslims In America: Profile*, ALLIED MEDIA CORP., <http://www.allied-media.com/AM/AM-profile.htm> (last visited Sept. 12, 2010).

277. This pattern has reoccurred from the earliest years of U.S. history. It began with the Alien and Sedition Acts of 1798, directed at potential American Jacobins, and continued with discrimination against many immigrant nationalities, such as the Irish, Italians, and various Asian ethnic groups in the mid to late nineteenth century. Karl E. Meyer, *Slouching Down Xenophobe Alley*, WORLD POL'Y J., Winter 2002/03, at 85, 85. The Red Scare of 1919–1920 saw Communists oppressed, and there was even a backlash against Jews fleeing Germany in the 1930s. *Id.* Unfortunately, this sad story is being repeated in modern times, most prominently with Hispanics. See Ricardo A. López, *Why are There so Many Americans Against Latino Immigration?*, LATINO OPINION (Apr. 23, 2009), <http://www.latinoopinion.com/2009/04/why-are-there-so-many-americans-against-latino-immigration/>.

278. See William Dvorak, *Editor's Introduction to The Challenge of Assimilation*, in IMMIGRATION IN THE UNITED STATES 81 (William Dvorak ed., 2009). Sociological studies show that immigrants have a number of options when entering the United States. Wallace E. Lambert et al., *Assimilation vs. Multiculturalism: Views from a Community in France*, 5 SOC. FORUM 387, 388 (1990). They can assimilate into an American lifestyle, giving up some or all of the culture of their home country. *Id.* Immigrants can also choose multiculturalism, keeping their own culture as best they can. *Id.* Alternatively, immigrants can take a middle path through biculturalism, balancing a need to establish themselves in the United States while remaining true to their traditions. *Id.* at 388–89. Kathleen Moore questions how pluralistic (synonymous with biculturalistic) Muslims can be in modern American society, given their internal struggles to define what it means to be Muslim, and external struggles against a society and government which is distrustful and even hateful. See Kathleen M. Moore, *Muslims in the United States: Pluralism under Exceptional Circumstances*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 116 (2007).

racially-motivated discrimination against Japanese-Americans after Pearl Harbor.²⁷⁹ The United States is fighting wars in two countries that are predominantly Muslim, in a region where most of the world's Muslims live. As we did with the Japanese in World War II, instead of attempting to differentiate between those who wish harm upon Americans and those who support the United States like any other citizens, we discriminate against all U.S. Muslims.²⁸⁰ Though the U.S. Muslim population is not subject to internment as the Japanese were, the discrimination they face in the public realm is nevertheless extremely harmful.²⁸¹ Recognizing these patterns from history means that we can attempt to stop them from reoccurring.

Some scholars have suggested solutions to the problem of religious accommodation in the workplace, specifically in relation to Muslims. Some have recommended changes to the courts' Title VII interpretation. Bilal Zaheer advocates for a reinterpretation of section 701(j) which adds a centrality aspect in assessing the employee's beliefs.²⁸² The need for accommodation would depend on how central the religious practice is to the employee's religion, would protect minority religions such as Islam, and would ensure that employees had the ability to remain true to the key tenets of their faith.²⁸³ Jamie Prenkert and Julie Magid argue that the weak undue hardship standard presents employees with a Hobson's choice: either violate their employer's rules or continue their religious practice.²⁸⁴ They find that courts maintain this hardship standard because the bar for what qualifies as religious belief is low, and courts do not want to force employers to accommodate any

279. Kristin Moyé Pruszyński, Comment, *Living in a Post 9/11 World: Religious Discrimination Against Muslims* 2 PHX L. REV. 361, 367–68 (2009).

280. The case of *Korematsu v. United States* shows that the Japanese were subject to “hysterical discrimination” as U.S. Muslims are today. See *id.* at 367–68. There, Toyosaburo “Fred” Korematsu, a Japanese-American, was convicted of violating President Roosevelt's internment order. *Id.* at 366. Korematsu's loyalty to the United States was never questioned, and he was even registered for the draft at the time of his arrest. *Id.* at 366–67. Even those who were “ready, willing and able” to fight for and support the United States, as Korematsu was, were discriminated against. See *id.* at 367.

281. See *supra* notes 270–71 and accompanying text for examples of this discrimination. The negative effects of discrimination can include harassment, threats, property damage, personal attacks, and, of course, employment discrimination. See N.Y.C. COMM'N ON HUMAN RIGHTS, DISCRIMINATION AGAINST MUSLIMS, ARABS, AND SOUTH ASIANS IN NEW YORK CITY SINCE 9/11 16 (2003).

282. Zaheer, *supra* note 69, at 522.

283. *Id.* at 522–24.

284. Prenkert & Magid, *supra* note 101, at 468. A “Hobson's choice” is a seemingly free choice between multiple options when “in fact there is no choice at all.” *Id.* at 468 n.5. More appropriate to an employee's choice under Title VII case law, this phrase also refers to “situations in which the choice involves two undesirable options.” *Id.*

and every religious practice.²⁸⁵ To combat this, Prenkert and Magid suggest creating a higher standard for sincerity of religious belief that requires objective evidence.²⁸⁶ This analysis would encourage employers to make reasonable, objective, generally-applicable work rules based on genuine business needs.²⁸⁷

Roberto Corrada proposes that the accommodation framework should be combined with a neutrality prong taken from disparate treatment cases.²⁸⁸ Corrada would require an employer to show that they are “neutral” to an employee’s religious belief or practice in the workplace, after the employee makes their prima facie case.²⁸⁹ If this is shown, the analysis continues as before to reasonability of accommodation and undue hardship.²⁹⁰ As has always been the case, Congress itself can act to shift the balance away from the employer and toward the employee. The latest version of WRFA (2010) is yet another attempt to force courts to adopt more employee-friendly tests.²⁹¹

Others have looked for ways to counteract the current trend of anti-Islamic sentiment in the United States. Amany Hacking notes that while some recent civil litigation by Muslims has gained a few victories for Muslim civil rights, the Muslim-American community still needs to be more proactive if it wants to end this wave of discrimination.²⁹² Aliah Abdo agrees that courts have failed to protect Muslim women’s rights to wear a hijab, deferring to the reasons that government and private parties give for requiring its removal.²⁹³ Only when courts stand up to defend their religious rights “will Muslim women able to fully participate in society.”²⁹⁴ Specifically in the employment context, Kristin Pruszyński suggests that employers and government agencies should help

285. *Id.* at 487–90.

286. *Id.* at 501.

287. *Id.* at 472.

288. Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1432–34 (2009).

289. *Id.* at 1433.

290. *Id.* at 1433–34.

291. S. 4046, 111th Cong. (2010). This bill, introduced by Senator John Kerry, specifically finds that the *Hardison* decision was “contrary to the intent of Congress.” *Id.* at § 2(3). It continues: “As a consequence of the *Hardison* decision and resulting appellate and trial court decisions, discrimination against employees on the basis of religion in employment continues to be an unfortunate and unacceptable reality.” *Id.* at § 2(4). The standard for undue hardship (“significant difficulty or expense”) remains the same as the 2007 House and 2008 Senate WRFA bills discussed earlier in Part I.A. *See id.* § 4(a)(3).

292. Amany R. Hacking, *A New Dawn for Muslims: Asserting Their Civil Rights in Post-9/11 America*, 54 ST. LOUIS U. L.J. 917, 940–41 (2010).

293. Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 505–06 (2008).

294. *Id.* at 507.

themselves and Muslims by conducting extensive religious tolerance and accommodation training.²⁹⁵

All of these solutions are appropriate to address this issue. What is most important is that something actually be done by courts, employers, and the government. They must protect Muslim rights, genuinely seek meaningful accommodations, and train employers on religious tolerance, respectively. Though some may argue that because some countries that are primarily Muslim do not accord wide religious freedom, the United States is free to respond in kind.²⁹⁶ This is irrelevant and improper. Our country's values and our Constitution protect religious freedom, and refusing to sacrifice this principle when others violate it is the very thing that sets us apart from less tolerant nations.

CONCLUSION

In *GEO Group*, the court followed the trend in Title VII religious accommodation law, which favors an employer's business interests over an employee's religious beliefs. This preferential treatment for employers, though widespread, is inappropriate. Congress has repeatedly declared its intent to prioritize employees' rights to freely practice their faith, through the addition of section 701(j) and in the proposed WRFA legislation. First Amendment case law demonstrates the appropriate level of deference and respect that should be accorded to an employee's sincere beliefs.²⁹⁷ The Third Circuit in *GEO Group* went against this statutory and Constitutional basis for the protection of religious freedom, and instead deferred to an employer's speculation as to harms it might suffer if it accommodated Appellants.

The court should also have taken special care to protect the rights of the three Muslim women who were the Appellants in *GEO Group*. Muslims are susceptible to unjustifiable prejudice in modern American society. Courts should be particularly sensitive to complaints of workplace discrimination from Muslims. There, employers and management may abuse their positions of power over Muslim employees to discriminate against them. The Third Circuit based its decision on precedent, which is admittedly the majority view.²⁹⁸ Still, judges are a part of society, and current trends and issues influence them, whether consciously or not.²⁹⁹ Judges must take special care

295. Pruszyński, *supra* note 279, at 378–80.

296. For examples of arguments questioning the inclusiveness and peacefulness of Islam, see *THE MYTH OF ISLAMIC TOLERANCE: HOW ISLAMIC LAW TREATS NON-MUSLIMS* (Robert Spencer ed., 2005).

297. See *supra* notes 264–68 and accompanying text.

298. See *supra* Part I.A.

299. Paul Secunda addresses this so-called “cognitive bias” of judges. Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010). He argues that in employment

to ensure they do not follow the riled, yet ignorant, or in fact hateful, masses towards the devaluation or destruction of employees' religious rights.

The lawmakers, including not only the legislative but also the judicial and executive branches, are the only bulwark against waves of popular sentiment which run counter to our country's core beliefs.³⁰⁰ The judicial branch must do its part in this scheme. While some may criticize the judiciary as sabotaging the will of the people,³⁰¹ they fail to understand its role. Congress acts for the majority of the people, and that body passed Title VII. Under Title VII, the will of the majority is to protect the minority, being those groups who may be subject to workplace discrimination. The courts must help enforce this law, interpreting it in favor of protecting minorities. Thus, no matter how popular discrimination against Muslims may become, it is the courts' role to stop it. Courts must remind the public where the primary source of religious freedom lies—in the Constitution—and why it was included there. Because the workplace is a public venue, and the one we spend most of our "public" time in, it is absolutely essential that the courts take a strong stance against religious discrimination in the work environment.

The Third Circuit had an opportunity to set original precedent on religious discrimination in the workplace involving Muslim dress. In *Webb*, the Circuit lost a chance to defend religious freedom while the country was gripped by a climate of fear and intolerance against Muslims. The *GEO Group* decision takes that Circuit further away from the basic principles of Title VII and the Constitution. It is hoped that the Third Circuit sees fit to distance itself from this precedent in future cases, or that other Circuits distinguish themselves from the Third.

NATHAN K. BADER*

and labor cases, the common view that a judge's political viewpoint will determine their decision on any contentious issue—that conservatives will side with employers and liberals will side with employees—is incorrect. *Id.* at 110. Rather, a judge's cultural background is more important. *Id.* at 109. Secunda contends that judicial humility and pluralistic opinion-writing can reduce the impact of this culture-based bias. *Id.* at 111.

300. Judge Patel, in overturning the 1942 conviction of a Japanese-American charged under racist motivation, described the principle eloquently: "[I]n times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984), *quoted in* Pruszyński, *supra* note 279, at 380.

301. Sarah Palin recently commented that the California district court decision striking down Prop. 8 as unconstitutional was "that third branch of government undoing the will of the people." John Diaz, *One Judge vs. 7 Million Voters?*, S.F. CHRON., Aug. 8, 2010, at E-2.

* I would like to thank Professor Marcia McCormick for her helpful critiques. I would also like to thank my mother, Carol, and my brother, Christopher, for their encouragement and support.