

## Note

### Pharmacist Refusals: Dispensing (With) Religious Accommodation Under Title VII

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On Saturday, July 6, 2002, Amanda Renz, a student at the University of Wisconsin-Stout,<sup>1</sup> entered the K-Mart pharmacy in Menomonie, Wisconsin, to refill her prescription for Loestrin FE 1/20, an oral contraceptive.<sup>2</sup> Renz planned to take the first dose of the refill the next day,<sup>3</sup> and if she were to miss this dose, she would need to use a substitute form of birth control for an entire month.<sup>4</sup> Neil Noesen, a Roman Catholic, was the only pharmacist on duty at the pharmacy that weekend.<sup>5</sup> He told her that he would not refill her prescription because he objected to contraceptives on religious grounds.<sup>6</sup> Renz asked Noesen where she could go to have her prescription refilled, but he refused to tell her because he did not want to participate in her

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1. See Stacy Forster, *Pharmacist Rebuked: He Refused to Refill Birth Control Prescription*, MILWAUKEE J. SENTINEL, Apr. 14, 2005, at 1 (referring to Renz by her married name, Amanda Phiede). This story is also described in Holly Teliska, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER, L. & JUST. 229, 229 (2005).

2. See *In re Disciplinary Proceedings Against Noesen*, No. 01 PHM 080, paras. 21–22 (Wis. Pharmacy Examining Bd. Apr. 13, 2005), <https://drl.wi.gov/dept/decisions/docs/0405070.htm>. The court documents refer to the woman as “AR.” See *id.* para. 21.

3. See *id.* para. 24.

4. See *id.* paras. 42, 44–45.

5. See *id.* paras. 21, 32.

6. *Id.* paras. 25–26.

efforts to receive contraceptives.<sup>7</sup> She went to another pharmacy and the pharmacist there attempted to have the prescription transferred by telephone, but Noesen refused to provide the necessary information.<sup>8</sup> Renz went home and telephoned the assistant store manager, who reported that the store had been having many problems that day because women were unable to fill their prescriptions.<sup>9</sup> The pharmacy did not fill Renz's prescription until Monday, July 8.<sup>10</sup>

Reported incidents of pharmacists refusing to dispense contraceptives or other prescription medication on religious grounds are escalating;<sup>11</sup> according to one estimate there were 180 refusals nationwide in a six-month period in 2004.<sup>12</sup> These refusals have sparked a national debate about healthcare access, professional ethics, and the definition of abortion.<sup>13</sup> Yet commentators have devoted little attention to the employment law governing pharmacist refusals.<sup>14</sup>

As private employers, pharmacies may elect to accommodate the religious beliefs of pharmacists, and a variety of factors may influence this decision. The acute shortage of pharmacists<sup>15</sup> may provide an incentive for employers to defer to

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7. *See id.* para. 28.

8. *See id.* paras. 29–31, 33.

9. *See id.* para. 34.

10. *Id.* para. 43.

11. *See* Rene Sanchez, *New Arena for Birth-Control Battle*, STAR TRIB. (Minneapolis), May 3, 2005, at A1; Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A1.

12. *See* Editorial, *Moralists at the Pharmacy*, N.Y. TIMES, Apr. 3, 2005, § 4, at 12.

13. *See, e.g.*, Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER REP. ON PUB. POL'Y, May 2005, at 7, 10 (reporting that the debate has drawn renewed attention to the issue of when pregnancy begins and what constitutes an abortion); Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2005, at 7, 7 (observing that issues at stake include pharmacists' rights, legal and ethical obligations, and discrimination in health care access).

14. Scholars have focused on health care access issues and state refusal clauses. *See, e.g.*, Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 89 (2002) (noting briefly the "employment ramifications" of pharmacist refusals); Teliska, *supra* note 1, at 240–41 (criticizing pharmacist refusal clauses for their effect on access to health care).

15. *See Shortage of Pharmacists Takes a Turn for the Worse*, CHAIN DRUG REV. (N.Y.), June 6, 2005, at 246 [hereinafter *Shortage of Pharmacists*] (dis-

employees' religious accommodation requests.<sup>16</sup> Some religious organizations may encourage and support pharmacists who refuse to dispense contraceptives and the pharmacies that accommodate them.<sup>17</sup> Facing steep competition from mail-order drug providers,<sup>18</sup> retail pharmacies seek to emphasize their ability to provide comprehensive customer service and demonstrate their superiority over more impersonal alternatives.<sup>19</sup> Independent retail pharmacies, which depend heavily on walk-in business,<sup>20</sup> may encounter intense economic pressure to ensure that pharmacists fill every prescription without delay.<sup>21</sup>

Some major drug store chains insist that Title VII of the Civil Rights Act obliges them to accommodate pharmacists who refuse to dispense on religious grounds.<sup>22</sup> In spite of these

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cussing a sharp rise in pharmacist vacancies in retail pharmacies).

16. See *The Early Show: Karen Brauer, Fired Pharmacist and Gloria Feldt of Planned Parenthood, Discuss Their Beliefs on Pharmacies Filling Prescriptions for Birth Control Pills* (CBS television broadcast Apr. 23, 2001), available at 2006 LEXIS ALLNWS (“[I]t would be helpful [for pharmacies] to be practical. There’s now a shortage of pharmacists. . . . There seem to be not enough pro-choice medical professionals to fulfill the needs or demands of certain women . . . .” (statement of Karen Brauer, chapter leader of Ohio Pharmacists for Life)).

17. See Teliska, *supra* note 1, at 246 (observing that religious groups are organizing efforts to monitor and support pharmacist refusals); *Moralists at the Pharmacy*, *supra* note 12 (“[I]f this movement picks up steam, right-to-life groups in some areas may pressure one pharmacy after another to refuse service . . . .”); cf. Florence A. Ruderman, Editorial, *Prescription for Injustice*, N.Y. TIMES, Sept. 1, 2005, at A23 (“[O]ther pharmacists may be unwilling to fill contested prescriptions, out of fear of becoming targets for boycotts or other hostile actions.”).

18. See Milt Freudenheim, *Drugstores Fret as Insurers Demand Pills by Mail*, N.Y. TIMES, Jan. 1, 2005, at A1 (discussing the effects of insurers requiring consumers to fill their prescriptions by mail).

19. See Michael Johnsen, *Can Pharmacists Dispense Morality?*, DRUG STORE NEWS (N.Y.), Mar. 21, 2005, at 1 (“[T]he chain drug operator . . . has a vested interest in establishing and maintaining a customer-friendly policy in what has become an extremely competitive environment.”); *Prevent the Switch in the First Place*, CHAIN DRUG REV. (N.Y.), May 2, 2005, at 226 (reporting that customers prefer retail pharmacies over mail-order suppliers “because of the convenience and the personal relationship they can build with their local pharmacist”).

20. See *Prevent the Switch in the First Place*, *supra* note 19, at 226.

21. See Joan E. Allen, *New Battleground*, CHI. TRIB., May 28, 1997, at 7 (“As an independent pharmacist, you do things above and beyond what a chain would do.” (quoting Richard E. Kane, the owner of an independent pharmacy)).

22. See, e.g., *CVS Sees Its Job as Filling Every Script*, CHAIN DRUG REV. (N.Y.), Aug. 29, 2005, at 1 (noting that CVS senior vice president of store operations made reference to the Civil Rights Act of 1964 in describing the company’s policy, which allows pharmacists to refuse to fill contraceptive prescrip-

claims, the only prominent case in which a pharmacist challenged her termination for refusing to dispense birth control was dismissed after the employer went bankrupt,<sup>23</sup> and courts have issued “no significant verdicts or appellate decisions on the subject so far.”<sup>24</sup> In 2004 and 2005, several employers reportedly fired pharmacists for refusing to fill prescriptions.<sup>25</sup> As those former employees consider suing,<sup>26</sup> and as pharmacists more frequently refuse to fill prescriptions on religious grounds,<sup>27</sup> it is imperative to determine the extent to which Title VII protects pharmacist refusals.<sup>28</sup> May a pharmacy terminate a refusing pharmacist? Could K-Mart dismiss Noesen for his refusal to fill Renz’s prescription, or would that termination violate Title VII?

Women are using emergency contraception more frequently,<sup>29</sup> and therefore the issue of pharmacist refusals takes

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tions “as long as they make certain the customer can receive the medication when another pharmacist is on duty or at another CVS store”); Planned Parenthood Fed’n of Am., *What’s the Matter with Target’s Response*, <http://www.saveroe.com/target/response> (last visited Mar. 5, 2006 (quoting a Nov. 14, 2005 e-mail from Target suggesting that the company’s policy of allowing objecting pharmacists to transfer Plan B emergency contraception prescriptions to a different pharmacy is required by Title VII).

23. See *Brauer v. K-Mart Corp.*, Civ. Action No. C-1-99-618 (S.D. Ohio Sept. 30, 2004) (order to close case administratively); see also *Morning After’ Misery*, NAT’L L.J., Sept. 6, 1999, at B2 (reporting the pharmacist’s reasons for filing the lawsuit).

24. Correy E. Stephenson, *Coming Soon to a Court Near You: Conscience Clauses*, LAW. WKLY., Apr. 25, 2005, at 1.

25. See Steve Barnes, *Pharmacists Fired*, N.Y. TIMES, Feb. 13, 2004, at A18 (reporting that Eckerd Corporation fired three Texas pharmacists for refusing to fill a prescription); Sanchez, *supra* note 11 (observing that Neil Noesen was fired from a Snyders drug store for allegedly refusing to fill birth control prescriptions).

26. According to one source, “[l]egal action [regarding pharmacist refusals] is still in the formative stages, with several cases pending.” Stephenson, *supra* note 24; see also Jo Mannies, *‘Pill’ Dispute Costs Pharmacist Her Job*, ST. LOUIS POST-DISPATCH, Jan. 27, 2006, at A1 (reporting that in January 2006, one attorney initiated an EEOC complaint and a civil suit on behalf of four terminated pharmacists).

27. See Sanchez, *supra* note 11 (indicating that incidents of pharmacists declining to fill contraceptive prescriptions are on the rise); see also Stein, *supra* note 11 (quoting a representative of the Christian Legal Society’s Center for Law and Religious Freedom who stated that the issue is “just beginning to surface” and that the organization is “on the very front edge of a wave that’s going to break not too far down the line”).

28. See Johnsen, *supra* note 19 (noting that the issue “represents a potential legal powder keg for pharmacy employers”).

29. See Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Hav-*

on greater urgency. Because some pharmacists consider emergency contraception to be an abortifacient, they are more likely to refuse to fill prescriptions for the drug.<sup>30</sup> Moreover, the time-sensitive nature of the drug<sup>31</sup> means that pharmacist refusals may directly harm consumers.<sup>32</sup> The FDA's continued and controversial denial of drug manufacturers' requests to make emergency contraception available without a prescription<sup>33</sup> ensures that women will continue to depend on pharmacists to obtain those drugs quickly and easily.<sup>34</sup>

This Note demonstrates that pharmacies are required to make only minimal accommodations for pharmacists who refuse to dispense certain drugs on religious grounds. Part I outlines the statutory requirements of religious accommodation under Title VII, and then describes the landmark Supreme Court cases interpreting those statutory requirements. Part II argues that nearly any attempt to accommodate refusing pharmacists would either be unreasonable or constitute an undue hardship on employers. Pharmacist refusals differ from other employment contexts warranting religious accommodation because refusals frequently deny service to customers and therefore cause employers to lose business. Congress did not envision, and court precedents do not interpret, Title VII to ob-

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*ing Abortions in 2000–2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 294, 300 (2002).

30. See Teliska, *supra* note 1, at 235; Carol Ukens, *Conscience vs. Patient Rights: R.Ph.'s Refusal to Dispense Stirs Up Controversy*, DRUG TOPICS, May 19, 1997, at 38.

31. See Task Force on Postovulatory Methods of Fertility Regulation, World Health Org., *Randomised Controlled Trial of Levonorgestrel Versus the Yuzpe Regimen of Combined Oral Contraceptives for Emergency Contraception*, 352 LANCET 428, 432 (1998) (discussing the inverse relationship between pregnancy rates and the time from unprotected intercourse to treatment with emergency contraceptives).

32. See Heather Boonstra, *Emergency Contraception: Steps Being Taken to Improve Access*, GUTTMACHER REP. ON PUB. POL'Y, Dec. 2002, at 10, 10–11.

33. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-109, FOOD AND DRUG ADMINISTRATION: DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL 19–30 (2005), available at <http://www.gao.gov/new.items/d06109.pdf>.

34. See Herbe, *supra* note 14, at 81–82 (observing that FDA approval of over-the-counter status for emergency contraception is “not likely in today's political climate”); see also James Trussel et al., *Access to Emergency Contraception*, 95 OBSTETRICS & GYNECOLOGY 267, 269 (concluding that the need for prompt treatment “presents a great challenge for women, who must find providers who will prescribe the pills and do so immediately”).

ligate pharmacies to accommodate pharmacists who refuse to perform essential job duties. This Note concludes that although pharmacies are not required to make significant accommodations for refusing pharmacists, labor-market forces may compel employers to make generous accommodations and then to use Title VII as a pretense to justify those accommodations when customers complain that they are denied access to prescription drugs.

## I. TITLE VII AND RELIGIOUS DISCRIMINATION

Absent legislation, the federal government has little influence over employment policies relating to religion. The First Amendment constrains government employers,<sup>35</sup> but it has a negligible effect on the policies of private employers.<sup>36</sup> As demonstrated below, Title VII of the Civil Rights Act restricts both private and public employers' right to terminate, discipline, or refuse to hire employees on religious grounds.<sup>37</sup>

### A. LEGISLATIVE HISTORY OF TITLE VII

Congress enacted Title VII of the Civil Rights Act of 1964<sup>38</sup> to combat discriminatory employment practices.<sup>39</sup> The initial legislation prohibited employment discrimination on the basis of religion.<sup>40</sup> Section 701(j) of the 1972 amendments to the Civil

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35. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948) (extending First Amendment prohibitions on laws inhibiting free exercise of religion to acts of state governments). *But see* James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525 (2004) (arguing that Title VII is vulnerable to challenge on First Amendment and state sovereign immunity grounds).

36. See Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 COLUM. J.L. & SOC. PROBS. 39, 52 n.93 (1997) ("Private employers do not have the same First Amendment concerns as their government counterparts.").

37. See also Ken Nakasu Davison, Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 165–66 (2005) (noting that Title VII regulates both public and private employers).

38. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified at 42 U.S.C. §§ 2000e–2000e-15 (2000)).

39. H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401.

40. § 703(a), 78 Stat. at 255, ("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 . . .

Rights Act<sup>41</sup> responded to judicial interpretation of the 1964 provision<sup>42</sup> and incorporated guidelines developed by the Equal Employment Opportunity Commission (EEOC).<sup>43</sup> Section 701(j) clarified that 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.”<sup>44</sup>

The legislative history of section 701(j) is sparse.<sup>45</sup> West Virginia Senator Jennings Randolph, a Seventh-Day Baptist,<sup>46</sup> proposed the measure, expressing the need “to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.”<sup>47</sup> Senator Randolph’s advocacy of the amendment on the Senate floor focused on the religious needs of individuals who “believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday.”<sup>48</sup> He included in the record reprints of two court decisions interpreting EEOC guidelines regarding employers’ obligations to accommodate the religious beliefs and practices of employees.<sup>49</sup> In fielding brief questions from two senators about the extent of the burden imposed on employers under the amendment, Senator Randolph agreed

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privileges of employment, because of such individual’s . . . religion . . .”).

41. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 701(j), 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e(j)).

42. See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330–31 (1970), *aff’d by an equally divided court*, 402 U.S. 689 (1971); *Riley v. Bendix Corp.*, 330 F. Supp. 583, 584 (M.D. Fla. 1971); LEX K. LARSON, 3 EMPLOYMENT DISCRIMINATION § 56.01 (2d ed. 2005).

43. See 29 C.F.R. § 1605.1 (1968); 29 C.F.R. § 1605.1 (1967).

44. § 701(j), 86 Stat at 103.

45. See 118 CONG. REC. 705–31 (1972); see also *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977) (“The brief legislative history of § 701(j) is likewise of little assistance in [determining the degree of accommodation that is required of an employer].”). Of the twenty-seven pages in the Congressional Record devoted to the amendment, only the first two involve floor debate of the proposal; the remainder consists of “the cases and regulations which are applicable to th[e] issue.” 118 CONG. REC. 706.

46. 118 CONG. REC. 705.

47. *Id.*

48. *Id.*

49. *Id.* at 706–13 (reprinting *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), and *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971)).

that the provisions would not require an employer to “close down” its operations in order to accommodate the needs of an employee to observe a Sabbath, and noted that there would perhaps be “a very, very small percentage of cases” in which an employer and employee could not reach a voluntary arrangement.<sup>50</sup>

The Senate adopted the Randolph amendment with a 55–0 vote.<sup>51</sup> The Supreme Court later noted that the language of the amendment and the legislative record demonstrate that Congress intended to require employers to make some effort at accommodation, but the Court also observed that Congress failed to provide guidance with respect to “how much an employer must do to satisfy its statutory obligation.”<sup>52</sup>

#### B. SUPREME COURT INTERPRETATIONS OF TITLE VII

The Supreme Court has articulated two prongs of analysis for an employer’s defense against allegations of religious discrimination.<sup>53</sup> First, an employer may attempt to provide a reasonable accommodation to an employee’s religious needs.<sup>54</sup> At this stage, the analysis hinges on whether the accommodation is reasonable to the employee.<sup>55</sup> If the employer offers an accommodation that is reasonable, it has fulfilled its obligations under section 701(j), and no further examination is necessary.<sup>56</sup> If, however, the employer asserts that it is unable to offer any reasonable accommodation, the second prong of analysis requires an employer to demonstrate that any reasonable accommodation would present an undue hardship.<sup>57</sup> If the employer can prove undue hardship for every reasonable accommodation, it does not need to accommodate an employee.<sup>58</sup> Two Supreme Court cases piece together this analysis.

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50. *Id.* at 706.

51. *Id.* at 730–31. There is no record of abstentions; evidently many senators were absent at the time of the vote. *See id.*

52. *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 n.9 (1977); *see also* *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (per curiam) (“The ‘reach’ of the obligation has simply never been spelled out by Congress or the EEOC.”).

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

54. *See id.* at 68, 70.

55. *See id.*

56. *See id.*

57. *See id.* at 68–69.

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

The Supreme Court first interpreted section 701(j) in *Trans World Airlines, Inc. v. Hardison*.<sup>59</sup> Trans World Airlines (TWA) employee Larry Hardison worked at a site that was open twenty-four hours a day, and a collective-bargaining agreement governed his employment.<sup>60</sup> Pursuant to that agreement, Hardison's union implemented a seniority system for assigning shifts.<sup>61</sup> During his employment with TWA, Hardison converted to a religious sect prohibiting work from sunset on Friday to sunset on Saturday and informed his manager of his beliefs.<sup>62</sup> Hardison lacked seniority to bid successfully for a shift that would correspond with his religious needs.<sup>63</sup> Rejecting the first prong of analysis, TWA argued that it was unable to provide any reasonable accommodation; all of the accommodations that Hardison proposed constituted an undue hardship.<sup>64</sup> The union refused to violate seniority provisions and TWA rejected Hardison's proposal that he work only four days a week.<sup>65</sup> The Court outlined the burdens imposed by Hardison's three proposed accommodations:

Hardison's job was essential and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.<sup>66</sup>

TWA ultimately discharged Hardison on grounds of insubordination for refusing to work his Saturday shifts, and Hardison responded by filing suit against TWA and the union, alleging that his discharge violated Title VII.<sup>67</sup>

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59. *See id.* at 74. The events at issue occurred prior to enactment of the 1972 amendments, but the Court acknowledged that the EEOC regulations that were then in place included the same requirement for "reasonable accommodations" unless they would cause "undue hardship" for an employer. *Id.* at 66. The Court granted deference to the EEOC regulations because Congress had ratified the EEOC religious accommodation provisions in the 1972 amendments. *See id.* at 76 n.11.

60. *See id.* at 66-67.

61. *See id.* at 67.

62. *See id.* at 67-68.

63. *See id.* at 68.

64. *See id.* at 68-69; *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) ("The employer in *Hardison* simply argued that all conceivable accommodations would result in undue hardship . . .").

65. *See Hardison*, 432 U.S. at 68-69.

66. *Id.*

67. *See id.* at 69.

The Supreme Court focused on the second prong of the section 701(j) analysis.<sup>68</sup> It examined the three proposed accommodations (leaving the position empty, having a supervisor or coworker from another area fill in, and hiring an additional person to work Saturdays) and determined that each would have been an undue hardship.<sup>69</sup> The Court noted that because the employer needed some employees to be on duty on weekends, there were two alternatives to determine who would be required to work weekend shifts:

[A]dopt a neutral system, such as seniority, . . . or allocate days off in accordance with the religious needs of [TWA's] employees . . . . There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Title VII does not contemplate such unequal treatment . . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.<sup>70</sup>

The Court determined that the proposed accommodations "would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages" and held that because those accommodations would "require TWA to bear more than a *de minimis* cost," they would constitute an undue hardship.<sup>71</sup>

In *Ansonia Board of Education v. Philbrook*,<sup>72</sup> the Supreme Court examined an employer's obligations under section 701(j) to accommodate a high school teacher who sought leave for religious observances.<sup>73</sup> The Court focused primarily on the first prong of analysis: the reasonableness of the proposed accommodations.<sup>74</sup> The teacher proposed two accommodations,<sup>75</sup> and the employer offered an accommodation of its own.<sup>76</sup> The Court

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68. See *id.* at 78–81 (noting that TWA was not required to violate its collective-bargaining agreement to effect a shift swap and that the other accommodations would impose an undue hardship on the employer).

69. See *id.* at 81–85.

70. *Id.* at 80–81.

71. See *id.* at 84–85.

72. 479 U.S. 60 (1986).

73. See *id.* at 63.

74. See *id.* at 67–71.

75. See *id.* at 64–65.

76. See *id.* at 70 ("We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded

held that the employer was not obligated to accept the employee's proposed accommodations because "[b]y its very terms the statute directs that *any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation."<sup>77</sup> Therefore, as long as an employer proposes at least one reasonable accommodation, it fulfills its obligations under section 701(j).<sup>78</sup> Courts must consider the extent of the hardship only if an employer "claims that it is unable to offer any reasonable accommodation without [undue] hardship,"<sup>79</sup> as in *Hardison*.

The Court then examined the employer's accommodation to determine whether it was reasonable.<sup>80</sup> It found that the school board policy requiring the teacher to take unpaid leave for religious observances was likely reasonable.<sup>81</sup> But the Court warned that such an accommodation would be unreasonable if "paid leave is provided for all purposes *except* religious ones," arguing that this arrangement would constitute discrimination against religious practices.<sup>82</sup>

The Supreme Court has therefore articulated two prongs of analysis for an employer's defense against charges of religious discrimination under section 701(j). *Hardison* examines situations in which any accommodation would present an undue hardship, emphasizing the second prong of the analysis and holding that anything more than a "*de minimis cost*" would constitute an undue hardship.<sup>83</sup> *Ansonia* sketches out the remainder of the analysis. First, it articulates the relationship between section 701(j)'s reasonable accommodation and undue hardship clauses, noting that if an employer offers one reasonable accommodation, courts need not examine the hardship of alternative accommodations.<sup>84</sup> Additionally, it clarifies the first prong's standard for reasonableness, suggesting that an accommodation may be reasonable even if it requires an employee to incur financial costs, but not if it allows more flexibility for

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the amount allowed by the collective-bargaining agreement, would generally be a reasonable one.").

77. *Id.* at 68 (emphasis added).

78. *See id.* at 68–69.

79. *See id.*

80. *See id.* at 70–71.

81. *See id.* at 70.

82. *See id.* at 71 (remanding for a factual determination of the reasonableness of the accommodation).

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

84. *See Ansonia*, 479 U.S. at 68–69.

nonreligious accommodations than for religious accommodations.<sup>85</sup> Both cases implicitly support the conclusion that the reasonable accommodation analysis properly focuses on the employee, rather than on the employer; the undue hardship prong examines considerations of fairness to the employer.<sup>86</sup> The following analysis will consider these two prongs in sequence.

## II. PHARMACIST REFUSALS UNDER TITLE VII

Demonstrating a violation of Title VII's religious accommodation provision is a two-step process.<sup>87</sup> First, the employee must establish a prima facie case of discrimination.<sup>88</sup> To do this, the employee must demonstrate a sincerely held religious belief which interferes with an employment requirement, and then must show that the employer discharged or disciplined the employee<sup>89</sup> for failure to comply with the requirement.<sup>90</sup> This Note presumes that a refusing pharmacist who is terminated or disciplined is able to establish a prima facie case of discrimination and focuses on the two-prong analysis articulated in *Hardison* and *Ansonia* to determine whether Title VII is violated.

Once the employee establishes a prima facie case of religious discrimination, the employer must demonstrate that it has met its burdens under Title VII by making a good faith effort to provide a reasonable accommodation, or by demonstrat-

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85. See *id.* at 70–71.

86. See Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 606–09 (2000) (concluding that an employee may be required to bear certain costs as part of a reasonable accommodation); *id.* at 610–22 (surveying employer burdens that have been found to constitute undue hardships).

87. See *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772, 775–76 (9th Cir. 1986) (per curiam).

88. Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth the elements of a prima facie case of racial discrimination under Title VII).

89. Threat of discharge or discipline is generally sufficient to meet this requirement. See *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975).

90. See, e.g., *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987); *Am. Postal Workers Union*, 781 F.2d at 775; *Turpen v. Mo.–Kan.–Tex. R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978). The employee must inform the employer of the need for religious accommodation. See 29 C.F.R. § 1605.2(c)(1) (2000).

ing that any reasonable accommodation would result in undue hardship.<sup>91</sup> Careful application of section 701(j) must distinguish between the reasonable accommodation analysis and examination of undue hardship.<sup>92</sup> Part A of this section explores possible employer accommodations for pharmacists who refuse to dispense certain drugs on religious grounds and discusses whether they would be considered reasonable from the employee's perspective. Part B examines the accommodations that would likely be considered reasonable and determines that they would usually impose more than *de minimis* costs on the employer. Part C addresses the unresolved question of whether an employer must always make a good faith effort to accommodate under section 701(j).

#### A. POTENTIAL REASONABLE ACCOMMODATIONS

Commentators have divided religious accommodation jurisprudence into several categories.<sup>93</sup> "Work schedule" cases comprise by far the largest category.<sup>94</sup> Illustrative examples in this category include *Hardison* and *Ansonia*, where employees requested not to work on their Sabbath or on particular holy days. A second category relates to the payment of union dues,<sup>95</sup> and a third category addresses rules governing employee appearance.<sup>96</sup> Relatively few employees raise section 701(j) challenges when they face negative consequences for refusing to perform particular job duties on religious grounds.<sup>97</sup> Pharma-

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91. See, e.g., *Am. Postal Workers Union*, 781 F.2d at 775–76; *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986).

92. See *Endres v. Ind. State Police*, 349 F.3d 922, 925 (7th Cir. 2003) ("Reasonableness and the avoidance of undue hardship are distinct.").

93. See, e.g., VERN E. HAUCK, *ARBITRATING RACE, RELIGION, AND NATIONAL ORIGIN DISCRIMINATION GRIEVANCES* 119–46 (1997); Douglas Massengill & Donald J. Petersen, *Job Requirements and Religious Practices: Conflict and Accommodation*, 39 LAB. L.J. 402, 407–09 (1988).

94. See 29 C.F.R. § 1605.2(d)(1) (2000); HAUCK, *supra* note 93, at 119–28; LARSON, *supra* note 42, § 56.06; Debbie N. Kaminer, *When Business and Employees' Religion Clash*, N.Y. L.J., July 21, 2000, at 1.

95. See § 1605.2(d)(2); HAUCK, *supra* note 93, at 146; LARSON, *supra* note 42, § 56.07; KENNETH L. SOVEREIGN, *PERSONNEL LAW* 75–76 (4th ed. 1999).

96. See HAUCK, *supra* note 93, at 138–40; LARSON, *supra* note 42, § 56.10.

97. See *Tramm v. Porter Mem'l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391, at \*11 (N.D. Ind. Dec. 22, 1989) (mag. j. order) ("Past cases involving religious discrimination in the context of Title VII usually have addressed the issue of accommodating persons whose religious beliefs prevented them from working on their Sabbath or from supporting unions."); Massengill & Petersen, *supra* note 93, at 408 (stating that work duty conflicts have "sur-

cists refusing to fill prescriptions on religious grounds fall into this last category. Examining accommodations for such employees, the Fifth Circuit observed that, “[a]ccommodation can take place in two fundamental ways: (1) an employee can be accommodated in his or her current position by changing the working conditions, or (2) the employer can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to arise.”<sup>98</sup> When an employee refuses to perform a job duty on religious grounds, courts frequently consider the accommodations of transferring either the employee or the job duty.<sup>99</sup>

Even though section 701(j) does not explicitly say what degree of accommodation is required, the legislative history suggests that Congress did not consider the possibility of employees refusing categorically to perform certain essential job duties.<sup>100</sup> Courts typically require accommodations for employees seeking to observe their Sabbath,<sup>101</sup> but similar generosity for employees refusing to perform job duties may violate the spirit and intent of the statute.

Regulations for the Americans with Disabilities Act (ADA) provide a useful analogy<sup>102</sup> for determining what constitutes a reasonable accommodation when an employee cannot perform certain job duties.<sup>103</sup> Applying the EEOC regulations related to the ADA to the question of whether filling birth control prescriptions is an essential function of a pharmacist requires an-

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faced on occasion”).

98. *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 500 (5th Cir. 2001); *see also* 29 C.F.R. § 1605.2(d)(1)(iii) (2004) (“When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers . . . should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.”).

99. *See, e.g.*, 29 C.F.R. § 1605.2 (d)(1)(iii).

100. *See* 118 CONG. REC. 705–31 (1972).

101. *See, e.g.*, *Opuku-Boateng v. California*, 95 F.3d 1461, 1470 (9th Cir. 1996).

102. *See Barth v. Gelb*, 2 F.3d 1180, 1184 (D.C. Cir. 1993) (noting that discrimination on the basis of religion is “the closest analogy to discrimination on the basis of handicap”).

103. *See Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001) (recognizing that if an employee is unable to perform essential job functions even after reasonable accommodation, the employer has no duty to accommodate); 29 C.F.R. § 1630.2(o) (2004) (requiring modifications that enable an employee “to perform the essential functions” of a position). “Essential functions” include “the fundamental job duties” of the position and exclude those functions which are “marginal.” *See* § 1630.2(n)(1).

swering three questions. First, does the employer actually require pharmacists to fill birth control prescriptions? Second, would removing the function fundamentally alter the position? Third, is the position of pharmacist a highly skilled profession in which the individual is hired for his expertise or his ability to fill birth control prescriptions?<sup>104</sup> An employer can readily answer the first and third questions in the affirmative. To assist an employer in answering the second question, the EEOC suggests two factors that an employer may consider. First, is the reason the position exists to perform that function? Second, are there few employees available to perform that function?<sup>105</sup> Employers hire pharmacists to fill a variety of prescriptions, and they typically expect each pharmacist to be able to fill all requested prescriptions.<sup>106</sup> Moreover, a pharmacist may only be replaced by similarly licensed personnel to perform the job duty of dispensing prescriptions.<sup>107</sup> Therefore, filling birth control prescriptions is an essential function for pharmacists. Thus, even under the stricter reasonable accommodations of the ADA, an employer would not need to accommodate a pharmacist who is unable (or unwilling) to fill birth control prescriptions.<sup>108</sup> Because accommodation of refusing pharmacists would require many employers to excuse employees from performing essential

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104. See 29 C.F.R. § 1630.2(n).

105. See *id.*

106. See MICKEY C. SMITH & DAVID A. KNAPP, PHARMACY, DRUGS AND MEDICAL CARE 146–47 (5th ed. 1992) (observing that the occupation of pharmacist is generally not specialized, with limited exceptions not applicable to the retail context); see, e.g., Pharmacist.com, Employment Center Job Detail: Staff Pharmacist/Graduate Intern <http://aphanet.jobcontrolcenter.com/jobdetail.cfm?job=2276467> (last visited Mar. 6, 2006) (stating that “major responsibilities” for Supervalu pharmacists include supervising the dispensing of all prescriptions).

107. See RICHARD R. ABOOD & DAVID B. BRUSHWOOD, PHARMACY PRACTICE AND THE LAW 190 (3d ed. 2001) (noting that federal law prohibits a person from dispensing certain drugs if the person is not authorized to do so under state law); Harry P. Hagel, *Staffing Modifications for Pharmaceutical Care*, in A PRACTICAL GUIDE TO PHARMACEUTICAL CARE 253, 254–55 (John P. Rovers et al. eds., 2d ed. 2003) (noting that pharmacists are exclusively responsible for conducting the final check of prescriptions, counseling patients, and conducting a warning assessment); see also Carol Ukens, *Medco Faces Federal Fraud Charges*, DRUG TOPICS, Oct. 20, 2003, at 14 (reporting that a pharmacy faced federal fraud charges for using non-pharmacist personnel to dispense prescriptions without review by a pharmacist).

108. See SOVEREIGN, *supra* note 95, at 69 (noting that under the ADA, undue hardship must be greater than *de minimis* to excuse an employer from accommodating an employee with a disability).

job duties, the EEOC interpretation of the ADA suggests that no accommodation may be necessary.

The facts and circumstances of each particular employment relationship guide courts in ascertaining the reasonableness of any accommodation.<sup>109</sup> An employer might make one of several accommodations for objecting pharmacists.

#### 1. Permit Prescription Transfer to Another Pharmacist

Employers are likely to accommodate pharmacists by allowing another pharmacist to fill the objectionable prescription.<sup>110</sup> In *American Postal Workers Union, San Francisco Local v. Postmaster General*,<sup>111</sup> the Ninth Circuit considered the obligations of the U.S. Postal Service to accommodate window clerks who objected on religious grounds to processing selective service registration forms.<sup>112</sup> The first accommodation allowed employees to refer registrants to other window clerks who were willing to process the forms.<sup>113</sup> Likewise, an employment policy allowing a pharmacist to hand off the objectionable prescription to another pharmacist is likely a reasonable accommodation. This accommodation may require shift swapping to ensure that a second pharmacist is on duty to handle the objectionable prescription.<sup>114</sup> Similar accommodations may be implemented by creating separate lines for objectionable and nonobjectionable prescriptions, or posting hours when objectionable prescriptions will not be filled. In the alternative, an objecting pharmacist might be required to transfer the prescription to a different pharmacy.<sup>115</sup>

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109. See *Redmond v. GAF Corp.*, 574 F.2d 897, 902–03 (7th Cir. 1978).

110. See *Teliska*, *supra* note 1, at 239–40 (surveying the refusal policies of major pharmacy chains and noting that both Walgreens and CVS have policies requiring pharmacists to refer prescriptions to another pharmacist on duty or to another pharmacy).

111. 781 F.2d 772, 774 (9th Cir. 1986) (per curiam).

112. See *id.*

113. See *id.* The U.S. Postal Service later revised its accommodation policy and withdrew this accommodation. See *id.*

114. Cf. *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143 (5th Cir. 1982) (considering a similar accommodation within a team of three employment counselors).

115. See *Teliska*, *supra* note 1, at 239–40 (noting that Walgreens and CVS pharmacies allow the refusing pharmacist to refer the prescription to another pharmacy).

Employees are required to cooperate and to be flexible in achieving their requested accommodation,<sup>116</sup> but sometimes an employee refuses on religious grounds to participate in a proposed accommodation. For example, in *EEOC v. J.P. Stevens & Co.*,<sup>117</sup> employees argued that the employer's accommodation requiring them to recruit coworkers to swap Sabbath shifts *itself* violated their religious beliefs.<sup>118</sup> The court determined that the accommodation was unreasonable, particularly because the employer could have easily taken measures to recruit coworkers to swap shifts.<sup>119</sup> As Neil Noesen's manager learned on July 6, 2002, some pharmacists object on religious grounds to playing any role in the transfer of an objectionable prescription.<sup>120</sup> For such individuals, courts may find that only employer-initiated accommodations creating separate lines or posting schedules are reasonable, and that requiring a pharmacist to transfer an objectionable prescription to another pharmacist, whether at the same work site or at another pharmacy, is an unreasonable accommodation, and therefore is not required under Title VII.<sup>121</sup>

## 2. Facilitate Transfer to a Different Position at the Same Work Location

*American Postal Workers Union* evaluated a second accommodation offered by the Postal Service. The Postal Service revised its regulations to require all window clerks to process selective service registration forms; the regulations directed those clerks with religious objections to transfer to other positions.<sup>122</sup> The Ninth Circuit determined that the Postal Service's

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116. See *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 503 (5th Cir. 2001) ("An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end.").

117. 740 F. Supp. 1135 (M.D.N.C. 1990) (mem.).

118. See *id.* at 1136.

119. *Id.* at 1139; accord *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088 (6th Cir. 1987).

120. See *In re Disciplinary Proceedings Against Noesen*, No. 01 PHM 080, paras. 26, 34 (Wis. Pharmacy Examining Bd. Apr. 13, 2005), <https://drl.wi.gov/dept/decisions/docs/0405070.htm>; Herbe, *supra* note 14, at 89 ("For many pharmacists, a referral would be no more than passive participation in the activity they initially refused to actively assist.").

121. Cf. *Pyro Mining Co.*, 827 F.2d at 1088–89 (concluding that requiring an employee to violate his religious beliefs by recruiting his own Sabbath replacements was not a reasonable accommodation, and that requiring the employer to recruit replacements did not constitute an undue hardship).

122. See *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781

proposed accommodation of allowing job transfer was potentially reasonable.<sup>123</sup> The court noted that the workers' objections to the accommodation were grounded in the belief that "the accommodation would place them in a less attractive employment status."<sup>124</sup> Acknowledging this objection, the court held that "[w]here an employer proposes an accommodation which effectively eliminates the religious conflict faced by a particular employee . . . the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee's employment status."<sup>125</sup> Therefore, courts are to determine whether transfer to a less attractive position is reasonable under the circumstances.<sup>126</sup>

At least one other court has explored the reasonableness of job transfer as an accommodation. In *Bruff v. North Mississippi Health Services, Inc.*,<sup>127</sup> the Fifth Circuit entertained a Title VII claim brought by a counselor who refused on religious grounds to provide certain counseling assistance.<sup>128</sup> Sandra Bruff worked for a medical center as one of three employee assistance counselors providing counseling to employees of several regional businesses.<sup>129</sup> Typically, only one counselor would travel to a work site to conduct sessions.<sup>130</sup> Bruff's employer suggested that she request a transfer to another position or department in which such conflicts would be minimized.<sup>131</sup> Bruff chose not to apply for another available counselor position and was eventually terminated.<sup>132</sup> The court held that the employer's offer of employment counseling to identify another position at the center and the thirty-day extension to find another position constituted a reasonable accommodation.<sup>133</sup> The court

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F.2d 772, 774 (9th Cir. 1986) (per curiam).

123. *See id.* at 776–77.

124. *Id.* at 776.

125. *Id.* at 776–77.

126. *See id.*

127. 244 F.3d 495 (5th Cir. 2001).

128. *See id.* at 497. Bruff specifically requested to "be excused from . . . actively helping people involved in the homosexual lifestyle to have a better relationship with their homosexual partners. This would also include helping persons who have a sexual relationship outside of marriage have a better sexual relationship." *Id.*

129. *See id.*

130. *See id.*

131. *See id.* at 498.

132. *See id.* at 498–99.

133. *See id.* at 501.

found that a transfer to a noncounseling position resulting in more than a fifty-percent reduction in pay would not necessarily constitute an unreasonable accommodation.<sup>134</sup>

Based on these cases, courts may find that requiring a pharmacist to transfer to another position that would not require the pharmacist to dispense objectionable medications is a reasonable accommodation. However, a retail establishment with a pharmacy is unlikely to have comparable positions for which a pharmacist is qualified.<sup>135</sup> According to one report, “[p]harmacists are among the most highly compensated employees in a retail environment,”<sup>136</sup> and the average annual pharmacist salary in a chain drugstore is over \$92,000.<sup>137</sup> In light of *Bruff*, an employer might encourage an objecting pharmacist to apply for available managerial positions, even if the pharmacist would face a substantial pay cut.<sup>138</sup> All positions the employer encouraged Bruff to pursue made use of her counseling and social work background.<sup>139</sup> A similar job transfer accommodation for pharmacists would probably not make use of the employee’s technical training, and therefore might not “reasonably preserve[] the affected employee’s employment status,” as required by *American Postal Workers Union*.<sup>140</sup>

### 3. Facilitate Transfer to a Different Work Location

Transfer to a similar job assignment at a different work site may also be a reasonable accommodation.<sup>141</sup> The Seventh

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134. *See id.* at 498 n.5 (noting that the available noncounseling positions paid between \$7 and \$8 per hour, while Bruff was earning over \$16 per hour in her counseling position); *id.* at 502 n.23 (“As previously noted, these non-counselor positions would have required Bruff to take a significant reduction in salary. This alone, however, does not make the accommodation unreasonable.”).

135. *See SMITH & KNAPP, supra* note 106, at 138 (noting that there are limited opportunities for nonadministrative professional advancement in chain pharmacies).

136. Mike Troy, *Wal-Mart Rewrites Prescription for Competition*, DSN RETAILING TODAY, Aug. 16, 2004, at 4, 42.

137. *See* Julie Schmit, *Help Wanted at Your Drugstore: Pharmacist Shortage Makes Grads Highly Sought After*, USA TODAY, Aug. 17, 2005, at 3B.

138. *Cf. Bruff*, 244 F.3d at 502 n.23.

139. *See id.* at 502–03.

140. *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772, 776–77 (9th Cir. 1986) (per curiam).

141. *Cf. 4 Pharmacists Sue over Contraceptive Dispute*, WASH. POST, Jan. 29, 2006, at A15 (quoting a Walgreens spokesperson who confirmed that several refusing pharmacists in Illinois were offered the opportunity to transfer to

Circuit in *Rodriguez v. City of Chicago*<sup>142</sup> examined a police officer's religious objection to protecting abortion clinics.<sup>143</sup> The court determined that the police department's offer to transfer the officer to a district with no abortion clinic constituted a reasonable accommodation.<sup>144</sup>

Drawing on *Rodriguez*, an employer might offer an objecting pharmacist the opportunity to transfer to another facility that does not dispense objectionable medications.<sup>145</sup> Some employers may provide pharmacy services at nursing homes or other extended-care facilities where objectionable medications are not dispensed; in those situations, a transfer may be a reasonable accommodation. However, independent and chain pharmacies are unlikely to have such facilities. In other situations, a national chain could assist an objecting pharmacist in a rural pharmacy with few shift options to transfer to a different site with more pharmacists on staff. In these cases, however, a lengthy commute or employee relocation may be unreasonable,<sup>146</sup> and an employer does not need to give preference to objecting pharmacists when hiring for what might be more desirable positions in more populated areas.<sup>147</sup>

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jobs in states with less stringent pharmacy regulations).

142. 156 F.3d 771 (7th Cir. 1998).

143. *Id.* at 773–74.

144. *Id.* at 775. Chief Judge Richard A. Posner, concurring with the judgment of the court, advocated a broader ruling that persons employed in governmental protective services “have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons.” *Id.* at 779 (Posner, C.J., concurring). Posner's views were later incorporated into the Seventh Circuit's opinion in *Endres v. Indiana State Police*, 349 F.3d 922, 926–27 (7th Cir. 2003).

145. See Marilyn Gardner, *Pharmacists' Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11 (noting that some pharmacists objecting to contraceptives have found jobs in nursing homes); *Shortage of Pharmacists*, *supra* note 15, at 246 (reporting “the growing role of pharmacists in medication therapy management, immunizations and other patient care services”).

146. See Ukens, *supra* note 30, at 40 (“Be ready to move all over the country to find a job . . . .” (quoting a pharmacist who was terminated for refusing to dispense birth control)).

147. Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977) (holding that Title VII does not require employers to deny the job and shift preferences of some employees in order to accommodate the religious needs of others); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 502 (5th Cir. 2001) (holding that Title VII does not obligate employers to give an employee seeking religious accommodation preference over other employees applying for the same transfer position).

In summary, employers have three primary means to accommodate objecting pharmacists: facilitate the transfer of the prescription, facilitate the transfer of the pharmacist to different job duties, or facilitate the transfer of the pharmacist to a different site that will not require the pharmacist to engage in objectionable activities. *Ansonia* requires the pharmacy either to offer at least one of these reasonable accommodations or to demonstrate that every reasonable accommodation imposes an undue hardship.<sup>148</sup>

#### B. THE *DE MINIMIS* COST RESTRICTION

An employer may object to any of the three reasonable accommodations examined above by arguing that the accommodation constitutes an undue hardship, imposing more than a *de minimis* cost on its business.<sup>149</sup> The following sections consider each accommodation under *Hardison's de minimis* cost standard.

##### 1. Permit Prescription Transfer to Another Pharmacist

Permitting the pharmacist to transfer the prescription to another pharmacist may impose significant costs on a pharmacy. For some employers, another pharmacist might normally always be on duty, and the accommodation could be fairly smooth.<sup>150</sup> Yet even under these seemingly ideal conditions, a court may find an undue hardship. An arbitrator considered the complaint of a grocery store cashier who refused to sell lottery tickets on religious grounds in the case of *In re Lucky Stores, Inc.*<sup>151</sup> The arbitrator determined that the sale of lottery tickets was “a reasonable and appropriate task” for the position of cashier, and found that “it was not operationally feasible” for the store to establish one check-out register as a “no lottery

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

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

150. See Gardner, *supra* note 145 (“In the great majority of cases, the pharmacist’s right to conscience is exercised appropriately and seamlessly . . .” [American Pharmacists Association spokesperson Michael] Stewart says, “A pharmacist can say, “Let me get Bob for you, ma’am,” and that’s the end of that.”).

151. 88 L.A. 841, 841–42 (1987). Courts “may properly afford . . . great weight” to an arbitral decision that thoroughly considers the factual issues surrounding an employee’s Title VII rights. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974).

ticket stand.”<sup>152</sup> The arbitrator noted that this accommodation “would cause scheduling problems as well as the operational, customer flow problems” and concluded that these challenges imposed a “more than *de minimis*” burden on the employer.<sup>153</sup>

Because pharmacists working on the same shift typically work in the same area and serve the same queue of customers, accommodation involving handing a prescription over to another on-duty pharmacist is likely to impose only a *de minimis* cost on an employer.<sup>154</sup> When a pharmacist objects to transferring a prescription to another pharmacist on duty, however, *Lucky Stores* suggests that section 701(j) does not require a pharmacy either to implement a separate queuing system for nonobjectionable prescriptions or to require customers to seek out the nonobjecting pharmacist.<sup>155</sup>

These same-pharmacy transfer accommodations may be impractical for pharmacies that do not always have two pharmacists on duty.<sup>156</sup> Many chain drug stores now offer twenty-four-hour pharmacy services, and only one pharmacist may be on duty during evening and late-night hours and on the weekends (as was the case at the K-Mart where Neil Noesen worked).<sup>157</sup> Under those circumstances, an employer could implement four different accommodations. First, an employer could ensure that an objecting pharmacist never works a solo shift, so that a nonobjecting pharmacist would always be available to fill an objectionable prescription.<sup>158</sup> Second, an employer

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152. *Lucky Stores*, 88 L.A. at 844, 846.

153. *Id.* at 846.

154. *Cf.* *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772, 774 (9th Cir. 1986) (per curiam) (noting a similar accommodation allowing objecting postal clerks to refer selective service registrants to other window clerks).

155. *See Lucky Stores*, 88 L.A. at 846.

156. *See Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143 (5th Cir. 1982) (describing an employer’s shift system with a solo pharmacist on duty for 56 of the 101 hours of every week that the pharmacy was open).

157. *See In re Disciplinary Proceedings Against Noesen*, No. 01 PHM 080, para. 21 (Wis. Pharmacy Examining Bd. Apr. 13, 2005), <https://drl.wi.gov/dept/decisions/docs/0405070.htm>; *cf. Brener*, 671 F.2d at 143 (observing that the hospital pharmacy was staffed by a solo pharmacist on weekends).

158. *Cf.* Press Release, Am. Life League, Canada Safeway—Preparing to Sell Euthanasia Drugs? (Apr. 4, 2000) 2006 LEXIS iINTERNATIONAL NEWS (noting that the policy of Canada Safeway is that if an objecting pharmacist cannot comply with the duty to fill all prescriptions, “the pharmacist will not be scheduled to work in any store during any period of time when he or she would be the sole pharmacist on duty”).

could ensure that another pharmacist is always on call to fill an objectionable prescription. Third, an employer could require an objecting pharmacist to transfer the prescription to a different pharmacy. Fourth, an employer could post a sign listing the days and hours when objectionable prescriptions will not be filled. As demonstrated below, each of these accommodations imposes a more than *de minimis* cost on the employer, and therefore is not required under section 701(j).

An employer may attempt to accommodate the objecting pharmacist by structuring shift assignments so that an objecting pharmacist will never be the only pharmacist on duty. Many pharmacies, however, may not be able to provide this accommodation because they never have more than one pharmacist on duty.<sup>159</sup> In larger pharmacies with some solo shifts and some shifts staffed by more than one pharmacist, the solo shifts are more likely to involve undesirable hours, such as evenings and weekends.<sup>160</sup> Other pharmacists might volunteer for these solo shifts, but *Hardison* expressly held that an employer is not required to force other employees to take undesirable shifts in order to accommodate a religious objector.<sup>161</sup>

This accommodation is similar to voluntary shift swapping that some employers have used to accommodate Saturday Sabbath observers.<sup>162</sup> An employer may be required to attempt such voluntary shift swapping,<sup>163</sup> but courts sometimes reject these accommodations for imposing an undue hardship on employers.<sup>164</sup> Moreover, one circuit determined that an employer's obligation to facilitate shift swapping would constitute an undue hardship if it involved more than ninety minutes of effort.<sup>165</sup>

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159. See, e.g., Katie Fairbank, *Waging a Moral Battle from Behind the Counter: Pharmacists' Refusal to Fill Contraception Prescriptions Prompts the Question: Whose Choice Is It to Make?*, DALLAS MORNING NEWS, Apr. 24, 2005, at 1A (reporting that many Texas pharmacies have only one pharmacist).

160. See, e.g., *Brener*, 671 F.2d at 143. Under the work schedule described in *Brener*, an objecting pharmacist would have to work either the 8 a.m. to 4 p.m. or the 9 a.m. to 5 p.m. weekday shift in order to avoid working any solo hours. See *id.* The pharmacist would not be able to work the 7 a.m. to 3 p.m. or the 2 p.m. to 10 p.m. weekday shifts, or either of the weekend shifts. See *id.*

161. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977).

162. See, e.g., *id.*

163. See *EEOC v. J.P. Stevens & Co.*, 740 F. Supp. 1135, 1139 (M.D.N.C. 1990) (mem.).

164. See, e.g., *Hardison*, 432 U.S. at 81.

165. See *Turpen v. Mo.-Kan.-Tex. R.R.*, 736 F.2d 1022, 1025, 1028 (5th

Pharmacists seeking shift swaps impose an even greater hardship on employers than Saturday Sabbatharians seeking shift swaps; the former are likely *never* to be able to work an undesirable shift, while the latter are willing to work all but one or two undesirable shifts. Therefore, a Saturday Sabbath observer is able to swap shifts with someone working late nights or Sundays, and such swaps may be easily facilitated.<sup>166</sup> An objecting pharmacist, on the other hand, would be asking coworkers to take evening, late night, and weekend shifts and give up regular weekday shifts. Coworker complaints about shift changes or the absence of volunteers could constitute evidence that this accommodation imposes a more than *de minimis* cost on the business by creating work schedules that are impossible to fill without hiring additional pharmacists or undermining employee morale.<sup>167</sup>

The second option is to ensure that another pharmacist is always on call. K-Mart attempted to provide this accommodation for Neil Noesen.<sup>168</sup> When Amanda Renz contacted the store manager, the manager called Noesen's supervisor, who was the head pharmacist.<sup>169</sup> Even if a supervisor is available, or another pharmacist is on call, this accommodation could constitute an undue hardship on an employer under the terms of *Hardison* because it might require an employer to pay premium wages to the fill-in pharmacist, or it could detract from a supervisor's other work duties.<sup>170</sup> Furthermore, in light of the critical shortage of pharmacists,<sup>171</sup> many employers may be unable to ensure that a back-up pharmacist is on call.<sup>172</sup>

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Cir. 1984).

166. See *Opuku-Boateng v. California*, 95 F.3d 1461, 1470 (9th Cir. 1996) (holding that as long as the Saturday Sabbatarian worked an "equal number of undesirable shifts," there would be no undue hardship on other employees).

167. See *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146-47 (5th Cir. 1982) (concluding that complaints of coworkers and disrupted work routines resulting from shift swapping could constitute an undue hardship); cf. *Hardison*, 432 U.S. at 81 (concluding that the employer did not need to compel other employees to work *Hardison's* shifts after no coworkers volunteered to swap).

168. See *In re Disciplinary Proceedings Against Noesen*, No. 01 PHM 080, para. 16 (Wis. Pharmacy Examining Bd. Apr. 13, 2005), <https://drl.wi.gov/dept/decisions/docs/0405070.htm>.

169. See *id.* para. 36.

170. See *Hardison*, 432 U.S. at 68-69.

171. See *Shortage of Pharmacists*, *supra* note 15, at 246. As argued below, this shortage may also encourage employers to accommodate objecting pharmacists beyond the requirements of Title VII.

172. See *Schmit*, *supra* note 137 (noting that in rural areas it may take two

The third option is to require an objecting pharmacist to transfer the prescription to a different pharmacy. As noted above, some pharmacists will object on religious grounds to their own participation in this accommodation, and therefore the accommodation is unreasonable for them.<sup>173</sup> For pharmacists who do not object to transferring a prescription, this accommodation imposes greater than *de minimis* costs by sacrificing customer business.<sup>174</sup> If the objectionable prescription is for oral contraceptives, the pharmacy is likely to lose the profits from an entire year of dispensing that medication to the customer.<sup>175</sup> Moreover, because most consumers prefer to fill all of their regular prescriptions in the same pharmacy, the employer will likely forego all of that customer's business.<sup>176</sup> Additionally, transfers may alienate customers who find the process humiliating and discriminatory.<sup>177</sup> In some cases, store policies allowing pharmacists to transfer prescriptions to other pharmacies have generated negative publicity and even protests,<sup>178</sup> and in some jurisdictions pharmacies can be sanctioned for failing to fill customer prescriptions.<sup>179</sup> All of these business costs

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to three hours to fill an emergency vacancy).

173. See *EEOC v. J.P. Stevens & Co.*, 740 F. Supp. 1135, 1139 (M.D.N.C. 1990) (mem.).

174. *Cf.*, e.g., Fairbank, *supra* note 159 (reporting that a pharmacy in a Texas small town "had been filling about five or six prescriptions [for oral contraceptives] a day" and that ceasing to fill those prescriptions "had a financial consequence").

175. See Kara Platoni, *Free the Pill!*, E. BAY EXPRESS (, June 22, 2005, at 14, 14, available at <http://www.eastbayexpress.com/issues/2005-06-22/news/feature.html> (observing that prescriptions for oral contraception typically provide a one-year supply).

176. *Cf.*, e.g., Fairbank, *supra* note 159 ("It made a huge difference because they would get their other prescriptions somewhere else too. I assumed that would happen, and it did." (quoting a pharmacy owner who decided to stop carrying oral contraceptives)).

177. See *Freedom of Conscience for Small Pharmacies: Hearing Before the H. Small Bus. Comm.*, 109th Cong. 13–14 (2005) (statement of oral contraception consumer Megan Kelly). These customer concerns are equally relevant for the separate-queue accommodation.

178. See Josephine Marcotty, *Birth-Control Battle at Target*, STAR TRIB. (Minneapolis), Nov. 11, 2005, at D1 (describing Planned Parenthood protests at Target headquarters to draw attention to the retailer's policy of allowing pharmacists to turn away customers requesting emergency contraceptives).

179. See, e.g., CAL. BUS. & PROF. CODE §§ 733, 4314–15 (West 2005); see also Complaint for Declaratory and Injunctive Relief paras. 28–30, *Menges v. Blagojevich*, No. 3:05-cv-03307 (C.D. Ill. Dec. 21, 2005) (stating that after Illinois initiated disciplinary actions against several Walgreens stores for failure to comply with the state law, the chain established a new employment policy

constitute an undue hardship on an employer,<sup>180</sup> and therefore this accommodation is not required under Title VII.

A final option is to post a sign listing the days and hours when objectionable prescriptions will not be filled. A pharmacist who objects to participating in the transfer of a prescription may consider this accommodation reasonable,<sup>181</sup> but the pharmacy still incurs most of the business costs involved with the previous accommodation. Customers who approach the pharmacy with an objectionable prescription at a time when the objecting pharmacist is on duty will have an incentive to turn to a competitor, if one is available.<sup>182</sup> This accommodation provides customers with additional information and options, and therefore it may not drive away as much business as a policy of outright transfer to other pharmacies. Some consumers, however, will need or want their prescriptions filled before a nonobjecting pharmacist is available. Moreover, this accommodation encumbers customers such as Amanda Renz, who already have their yearly prescriptions on file and would depend on the pharmacist to participate in the transfer of the refill.<sup>183</sup>

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requiring all pharmacists to dispense emergency contraception and subsequently suspended several pharmacists who refused to comply with the policy). For discussion of the Illinois rule, see Sarah Vokes, Note, "*Just Fill the Prescription*": *Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 *LAW & INEQ.* (forthcoming 2006). Other states have enacted legislation protecting pharmacists who refuse to dispense certain medications on religious grounds. See, e.g., ARK. CODE ANN. § 20-16-304(4) (2000); see also Rob Stein, *Health Workers' Choice Debated: Proposals Back Right Not to Treat*, WASH. POST, Jan. 30, 2006, at A1 (reporting that several state legislatures are considering similar legislation). Because *Hardison's de minimis* standard for undue hardship arguably draws the boundary between constitutional government protections against religion-based discrimination and unconstitutional government establishment of religion, see *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting), these state laws may be unconstitutional if they are found to impose a greater than *de minimis* burden on employers.

180. Cf. *Hardison*, 432 U.S. at 84–85 (1977) (noting that accommodations imposing financial costs on the employer in the form of reduced efficiency or payment of higher wages for replacement workers constituted an undue hardship); *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J., concurring) ("It is undue hardship in spades when the necessary accommodation would strike a body blow to the employer's business.").

181. See Herbe, *supra* note 14, at 101.

182. But see Teliska, *supra* note 1, at 244 (arguing that pharmacist refusals impose a heavy burden on rural and low-income women, who may lack convenient access to back-up pharmacies).

183. See *In re Disciplinary Proceedings Against Noesen*, No. 01 PHM 080, paras. 21–22 (Wis. Pharmacy Examining Bd. Apr. 13, 2005), <https://drl.wi.gov/dept/decisions/docs/0405070.htm>.

The D.C. District Court examined a similar accommodation in which objectionable work duties were set aside until other employees were available. In *Haring v. Blumenthal*,<sup>184</sup> Paul Haring alleged that the IRS discriminated against him with respect to promotions because he objected on religious grounds to processing certain tax-exemption applications.<sup>185</sup> The IRS accommodated Haring by not assigning him to process such applications,<sup>186</sup> but determined that promoting Haring to a reviewer position would create operational difficulties.<sup>187</sup> The court found that the IRS had failed to demonstrate an undue hardship, noting that Haring objected to a very small percentage of applications that the division processed, and observing that delays incurred as a result of the accommodation would be inconsequential because processing delays were normal within the division.<sup>188</sup>

Pharmacist refusals differ from Harding's refusal to process IRS forms in several ways. First, objectionable prescriptions may not be a very small percentage of the prescriptions processed by a pharmacy,<sup>189</sup> and therefore asking customers to return when another pharmacist is available may disrupt work flow. Second, while delays in processing IRS forms may be typical and inconsequential, pharmacy customers generally expect their prescriptions to be filled quickly.<sup>190</sup> Third, the IRS does not need to compete with other service providers in processing tax-exempt applications; pharmacies are participants in a competitive marketplace which places a premium on efficiency and customer service.<sup>191</sup> Fourth, the financial success of the IRS is

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184. 471 F. Supp. 1172 (D.D.C. 1979).

185. He objected to tax exemptions for organizations involved with or promoting a variety of activities which he determined violated "God's Natural Law," including abortions, homosexuality, euthanasia, atheism, legalization of marijuana, and artificial contraception. *See id.* at 1175 n.4, 1176.

186. *Id.* at 1180 n.21.

187. *See id.* at 1180.

188. *See id.*

189. *See* Terri Madden et al., *2000 in Review: Growth Slows, but Goes On*, MED. MKTG. & MEDIA, May 2001, at 74, 78 (reporting that oral contraceptives constituted the seventh-largest class of therapeutic prescription drugs dispensed in 2000, accounting for over 79 million prescriptions nationwide).

190. *See Assessing HIPAA: How Federal Medicaid Record Privacy Regulations Can Be Improved: Hearing Before the Subcomm. on Health of the H. Energy & Commerce Comm.*, 107th Cong. 53 (2001) (statement of CVS director of government relations Carlos R. Ortiz).

191. *See Ritzman Counts on Service for Competitive Edge*, CHAIN DRUG REV. (N.Y.), Apr. 26, 2004, at 200.

not contingent on processing tax-exempt status applications. A pharmacy, on the other hand, may lose profits when an accommodation pushes customers to seek the services of a competitor.<sup>192</sup>

Courts have yet to resolve the question of whether the scope of an employer's obligation to accommodate under Title VII may ever be limited by an employer's extrapolation that accommodating one employee would potentially result in an undue hardship if other employees were to assert similar rights.<sup>193</sup> Some of the above accommodations might not pose an undue hardship if only one pharmacist requested accommodation. In the case of shift swapping or schedule posting, accommodating a second or third pharmacist could constitute an undue hardship, where the first accommodation may not.<sup>194</sup> If only one employee requests accommodation, courts may look unfavorably on an extrapolation argument; an employer will have stronger grounds for termination if it can demonstrate that accommodating even the first pharmacist would result in more than *de minimis* costs.<sup>195</sup>

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192. See, e.g., Ruderman, *supra* note 17 (recalling that when a neighborhood pharmacy refused to fill her father's morphine prescription, she sought out a larger competitor and "for years afterward" returned there "to buy items [she] could have bought more conveniently elsewhere"); Sanchez, *supra* note 11 (reporting that after a pharmacist told Adriane Gilbert on the telephone that he could not help her because he opposed birth control, she "decided to find another drugstore" even though the pharmacy called back minutes later to apologize).

193. See Haring v. Blumenthal, 471 F. Supp. 1172, 1181 (D.D.C. 1979). Compare Brown v. Gen. Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979) (arguing that "undue hardship" excludes the employer's speculations regarding the future behavior of the employee's coworkers) and Burns v. S. Pac. Transp. Co., 589 F.2d 403, 406-07 (9th Cir. 1978) (same) with Endres v. Ind. State Police, 349 F.3d 922, 927 (7th Cir. 2003) (arguing that allowing a police officer to refuse a work assignment would undermine discipline and prompt other public service officers to refuse assignments on religious grounds). EEOC regulations state: "A mere assumption that many more people . . . may also need accommodation is not evidence of undue hardship." See 29 C.F.R. § 1605.2(c)(1) (2004).

194. For example, an employer using the shift schedule used in *Brener* could not accommodate more than one pharmacist out of five and still ensure that all prescriptions would be filled. See *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143 (5th Cir. 1982).

195. See *Brown*, 601 F.2d at 961 (holding that undue hardship is limited to the hardship imposed by the specific accommodation at issue and may not include consideration of "anticipated or multiplied hardship" that may result if other employees make similar requests for accommodation).

## 2. Facilitate Transfer to a Different Position at the Same Work Location

If an employer has a suitable open position, this accommodation is likely to create no more than *de minimis* costs for the employer. Even in *Bruff v. North Mississippi Health Services, Inc.*, the court did not require the employer to create a new position for the objecting employee.<sup>196</sup> Instead, the employer made a reasonable accommodation by providing job counseling to assist the employee in applying for positions as they became available within the company.<sup>197</sup> As the Supreme Court held in *Hardison*, an employee is not entitled to any preferential status when the company considers applications for vacancies; interfering with standard hiring decisions would constitute an undue hardship.<sup>198</sup> Therefore, if an objecting pharmacist would find employment in a different position at the same location reasonable, then the employer must assist the pharmacist in applying for such a position when it becomes available.

## 3. Facilitate Transfer to a Different Work Location

This accommodation is probably not available to many retail pharmacies. Most pharmacy chains have unfilled pharmacist positions in many locations,<sup>199</sup> but each pharmacist presumably is responsible for filling objectionable prescriptions. In the rare instance when an employer has certain work sites where a pharmacist would not need to process objectionable prescriptions, the employer would need to provide some assistance to the employee to apply for vacancies in those locations.<sup>200</sup> As with the previous accommodation, the employer would not be obligated to hire the employee for the position, because any interference with standard hiring practices would impose more than *de minimis* costs.<sup>201</sup>

### C. DOES SECTION 701(J) REQUIRE A GOOD FAITH EFFORT TO ACCOMMODATE?

There may be many pharmacies that are unable to make any reasonable accommodation without undue hardship. For

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196. See 244 F.3d 495, 501 (5th Cir. 2001).

197. See *id.*

198. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977).

199. See *Schmit*, *supra* note 137.

200. Cf. *Bruff*, 244 F.3d at 501.

201. See *Hardison*, 432 U.S. at 81.

example, a pharmacy may have only one pharmacist on duty most or all of the time,<sup>202</sup> and may have no other positions to which a pharmacist could attempt to transfer. Under those circumstances, does the pharmacy need to make a good faith effort to accommodate the pharmacist, or may the employer terminate the pharmacist immediately? While some observers contend that an employer must consider some accommodations,<sup>203</sup> the case law is unsettled on this point.

In *Tramm v. Porter Memorial Hospital*,<sup>204</sup> a court considered whether a hospital was required to accommodate a workroom instrument aide who objected on religious grounds to cleaning and preparing instruments used in performing abortions.<sup>205</sup> The court found that the hospital violated section 701(j) of Title VII because it “made no effort whatsoever to accommodate [the employee]’s religious beliefs.”<sup>206</sup> The court observed that the hospital failed to “show that an accommodation . . . would cause significant difficulties or costs.”<sup>207</sup> Although the court appeared to articulate a more rigorous standard than the *de minimis* burden established under *Hardison*,<sup>208</sup> the hospital’s failure to make a good faith effort to accommodate was dispositive.<sup>209</sup>

The Seventh Circuit addressed an employer’s obligation to make a good faith effort to accommodate in *Ryan v. United States Department of Justice*.<sup>210</sup> John Ryan, an FBI agent, refused on religious grounds to be involved with investigation of vandalism at military recruiting facilities.<sup>211</sup> Ryan was termi-

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202. See Fairbank, *supra* note 159 (noting that many Texas pharmacies have only one pharmacist).

203. See Massengill & Petersen, *supra* note 93, at 403 (“An employer’s consideration of some type of accommodation is the minimum legal requirement”).

204. No. H 87-355, 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 22, 1989) (mag. j. order).

205. See *id.* at \*1–2.

206. *Id.* at \*12.

207. *Id.* at \*13.

208. Black’s Law Dictionary defines *de minimis* as “[t]rifling; minimal” or “so insignificant that a court may overlook it in deciding an issue or case.” BLACK’S LAW DICTIONARY 464 (8th ed. 2004). The magistrate judge’s reference to “significant difficulties or costs,” *Tramm*, 1989 U.S. Dist. LEXIS 16391, at \*13 (emphasis added), reflects a higher than *de minimis* standard. If the hospital had made a good faith effort, the court would have had to apply the *Hardison* standard more carefully.

209. See *Tramm*, 1989 U.S. Dist. LEXIS 16391, at \*12.

210. 950 F.2d 458 (7th Cir. 1991).

211. *Id.* at 459. According to Ryan, the Roman Catholic Church required all

nated for refusing to carry out a lawful direct order.<sup>212</sup> The court held that Title VII did not compel the FBI to attempt to reassign cases, and therefore termination was appropriate:

It is difficult for any organization to accommodate employees who are choosy about assignments; for a paramilitary organization the tension is even greater . . . . Compelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it.<sup>213</sup>

In *Ryan*, the court did not require the employer to make a good faith effort to accommodate the employee's religious beliefs.<sup>214</sup> The employee's refusal to accept a swap of assignments initiated by a coworker and his failure to propose any means of accommodation throughout the disciplinary process may have spurred the court's reluctance to impose an affirmative burden on the employer to propose accommodations.<sup>215</sup>

*Endres v. Indiana State Police*<sup>216</sup> presented the Seventh Circuit with a narrower set of facts than *Ryan*. Benjamin Endres refused on religious grounds a work assignment to serve as a Gaming Commission Agent at a casino and was subsequently terminated.<sup>217</sup> Importantly, the police force offered Endres no accommodation, and the Seventh Circuit held that no such offer was required under Title VII.<sup>218</sup> The court noted the unique role of public safety officers in upholding all laws and protecting all persons from harm.<sup>219</sup>

Based on these precedents, it is difficult to ascertain whether a pharmacy must make a good faith effort to accommodate when it has every reason to believe that each possible accommodation either will be unreasonable, and therefore will be rejected by the employee, or will incur more than *de minimis*

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members to be peacemakers, thereby making it improper for him to investigate "groups that destroy governmental property to express their opposition to violence." *Id.* at 460.

212. *See id.* at 459–60.

213. *Id.* at 462.

214. *See id.*

215. *See id.* at 461 (describing employer acceptance of Ryan's rigid position as "capitulation rather than accommodation").

216. 349 F.3d 922 (7th Cir. 2003).

217. *See id.* at 923.

218. *See id.* at 926–27 ("Certainly nothing in *Ryan* or *Rodriguez* implies that there *must* be such an offer . . . . [W]e hold that [section 701(j)] does not [require an offer of accommodation]. Endres has made a demand that it would be unreasonable to require any police or fire department to tolerate.").

219. *See id.* at 927.

costs. If a pharmacist requests certain accommodations, as in *Tramm*, courts may expect a good faith effort to explore those possibilities.<sup>220</sup> If a pharmacist refuses initial efforts to accommodate, as in *Ryan*, courts might not impose any further burden on the employer.<sup>221</sup> While pharmacists do not play the unique societal role of public safety officers, they do provide an important public service in providing access to health care,<sup>222</sup> and as a profession they enjoy a monopoly on the right to provide the public with access to certain drugs.<sup>223</sup> Nonetheless, absence of a public safety imperative suggests that an employer terminating a pharmacist without first making a good faith effort to accommodate will not receive the favored treatment afforded to government employers in *Endres* and *Ryan*.<sup>224</sup> If an employee dismisses the proposed accommodations as unreasonable, then the employer should be prepared to demonstrate that any other accommodations will impose greater than *de minimis* costs. In such cases, the employer will not violate Title VII by terminating the refusing pharmacist.

#### CONCLUSION

Many pharmacies currently go beyond the legal requirements of Title VII to accommodate pharmacists who refuse to dispense certain medications on religious grounds, and some employers mistakenly assert that these accommodations are required under Title VII.<sup>225</sup> This Note demonstrates that nearly every available reasonable accommodation imposes more than *de minimis* costs on a pharmacy's business. An employer confronted with a pharmacist, such as Neil Noesen, who refuses to

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220. See *Tramm v. Porter Mem'l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391, at \*12 (N.D. Ind. Dec. 22, 1989) (mag. j. order); SOVEREIGN, *supra* note 95, at 75.

221. Cf. *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 459-60 (7th Cir. 1991).

222. See *Teliska*, *supra* note 1, at 233.

223. See Frank M. Archer, *Emergency Contraceptives and Professional Ethics: A Critical Review*, CAN. PHARM. J., May 2000, at 22, 23.

224. See *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993) ("[T]he employer must establish that it initiated good faith efforts to accommodate the employee's religious practices.").

225. See, e.g., Barbara Polichetti, *Pharmacist Refuses to Fill Contraceptive Prescription*, PROVIDENCE J. (R.I.), Aug. 11, 2005, at A1 ("As an employer . . . we must accommodate a sincerely held religious conviction that may prevent a pharmacist from dispensing a certain prescription." (quoting Eileen Howard Dunn, vice president of corporate communications and community relations for CVS)).

dispense drugs on religious grounds should make a good faith effort to accommodate the pharmacist's objections. Such efforts may include offering career counseling to assist the pharmacist in applying for other positions, or initiating a voluntary shift-swapping program. A pharmacy need not allow pharmacists to transfer prescriptions to other businesses and has no obligation to have another pharmacist on call to take over the objecting pharmacist's job duties. Such accommodations would alienate customers such as Amanda Renz and impose greater than *de minimis* costs on the business.

The pharmaceutical industry will continue to create drugs to which some pharmacists object on religious grounds. Employers must anticipate that some pharmacists will object not only to birth control, but also to Ritalin,<sup>226</sup> Viagra for unmarried men,<sup>227</sup> or drugs to treat AIDS;<sup>228</sup> some pharmacists may even object on religious grounds to serving particular customers.<sup>229</sup>

The religious discrimination provisions of the Civil Rights Act allow most employers to dispense with the majority of possible religious accommodations for pharmacists who refuse to fill prescriptions on religious grounds. Those provisions are meaningless, however, if employers are reluctant to assert Title VII's protections against accommodations imposing an undue hardship on the pharmacy's business operations. As pharmacies negotiate the tensions between consumers demanding prompt access to prescription drugs, a tight labor market for pharmacists, pressure from certain religious groups to discourage the use of birth control, vocal national groups advocating expanded access to contraception, and their own economic bot-

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226. See Fairbank, *supra* note 159 ("Last year, a Dallas pharmacist refused to fill a child's prescription for Ritalin.").

227. See *Talk of the Nation: Pharmacists and Contraceptive Prescriptions* (National Public Radio broadcast Apr. 7, 2005) (quoting a listener e-mail).

228. See Sanchez, *supra* note 11 ("[Sarah] Stoesz, [president] of Planned Parenthood [of Minnesota, North Dakota and South Dakota] said she fears that sentiment could prompt pharmacists to deny other prescription medications, such as AIDS drugs.").

229. See Ams. United for Separation of Church & State, *Faith-Based Pharmacies?: Religious Right Backs Prescription Exemptions*, CHURCH & ST., May 2005, at 18, 18, available at <http://www.au.org/site/News2?page=NewsArticle&id=7369&abbr=cs> ("Pharmacists for Life International . . . advocates refusing to fill prescriptions for people whose lifestyles offend fundamentalist religious proclivities."); see also Stein, *supra* note 179 (noting that some states are considering legislation to shield health workers from repercussions for refusing to treat gay and lesbian clients).

tom line, Title VII can serve either as an answer or as an excuse. Employers may use Title VII as a pretense to justify unnecessary accommodations for objecting pharmacists; pharmacies may attempt to use federal law to shield themselves from customer and activist criticism by asserting that they have no choice but to accommodate. On the other hand, pharmacies can utilize Title VII as a tool to define the outer limits of their pharmacist accommodation policies. A clear understanding of the parameters of Title VII's religious accommodation requirements will help guide and monitor the behavior and legal justifications presented by employers, employees, and customers when pharmacists refuse to dispense certain drugs on religious grounds.