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Faith in Title VII: It's a Matter of Belief

Anna E. Reed

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Faith in Title VII: It's a Matter of Belief

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INTRODUCTION

Imagine that you are the manager of a business. Two employees knock on your office door and claim that their religion requires them to have sex with as many coworkers as possible.¹ Another employee informs you that she will receive the “Mark of the Beast” if she engages in a routine hand scan to enter the workplace.² A fourth employee, your truck driver, claims that she must use a hallucinogenic drug while driving because of her religious observances.³ Such is the strange interaction of employees and religion in the workplace.⁴ Title VII of the Civil Rights Act of 1964 (“Title VII”) imposes an affirmative duty on employers to accommodate employees’ religious beliefs and practices,⁵ but the unclear definition of religion leaves courts grappling with the question of which religious beliefs or practices are deserving of Title VII protection.⁶ Protection of religious beliefs in the workplace requires a delicate balance because the involved parties have distinct interests and needs—employees want to practice their religion freely, employers seek to run their businesses autonomously, and courts examine religious beliefs cautiously.⁷

Title VII requires reasonable accommodation of employees’ sincerely held religious beliefs, observances, and practices,⁸ unless accommodation

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1. *McCrary v. Rapides Reg’l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La. 1986), *aff’d*, 801 F.2d 396 (5th Cir. 1986).

2. *U.S. Equal Emp’t Opportunity Comm’n v. Consol Energy, Inc.*, 860 F.3d 131, 136–38 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018).

3. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1483 (10th Cir. 1989).

4. *McCrary*, 635 F. Supp. at 979; *Consol Energy, Inc.*, 860 F.3d at 136–38; *Toledo*, 892 F.2d at 1483.

5. 42 U.S.C. § 2000e–2(a) (2012); *EEOC Compliance Manual: Religious Discrimination*, EQUAL EMP. OPPORTUNITY COMM’N (July 22, 2008), https://www.eeoc.gov/policy/docs/religion.html#_Toc203359486 [<https://perma.cc/XQ A8-ETTJ>] [hereinafter *Compliance Manual*]. The employer’s duty to accommodate usually entails making an exception from, or adjustment to, a work or application requirement to allow the employee or applicant to practice her religion. *Compliance Manual*, *supra*. Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work. *Id.*

6. *McCrary*, 635 F. Supp. at 979; *Lambert v. Condor Mfg., Inc.*, 768 F. Supp. 600, 604 (E.D. Mich. 1991); *Consol Energy, Inc.*, 860 F.3d at 136–38; *Toledo*, 892 F.2d at 1483; *Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

7. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 485 (5th Cir. 2014) (citing *Tagore v. United States*, 735 F.3d 324, 329 (5th Cir. 2013)).

8. 29 C.F.R. § 1605.1 (2017).

would impose an undue hardship⁹ on the employer's business operations.¹⁰ The Equal Employment Opportunity Commission ("EEOC") defines religious practice as including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."¹¹ The definition of religion, in practice, is broad and problematic.¹² Rather than redefine "religion" and draw a line too broadly or narrowly,¹³ this Comment proposes that a court examining a Title VII religious discrimination issue should heighten its examination in the *sincerity* prong of the analysis.¹⁴ In so doing, a court should employ a greater level of scrutiny into the sincerity of each employee's particular belief on a case-by-case basis to determine if the employee sincerely holds the belief.¹⁵

9. 42 U.S.C. § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief," unless employer can show that accommodation of employee's religion would impose an "undue hardship on the . . . employer's business").

10. 29 C.F.R. § 1605.1; *see also Compliance Manual*, *supra* note 5; 42 U.S.C. § 2000e-2(a); Susannah P. Mroz, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145, 151 (2005).

11. 29 C.F.R. § 1605.1.

12. Bryan M. Likins, *Determining the Appropriate Definition of Religion and Obligation to Accommodate the Religious Employee Under Title VII: A Comparison of Religious Discrimination Protection in the United States and United Kingdom*, 21 IND. INT'L & COMP. L. REV. 111, 115 (2011) ("Determining Title VII's definition of religion is the problem underlying many religious discrimination cases brought under Title VII. Deriving an adequate solution to this complex inquiry is a daunting task."); Mroz, *supra* note 10 ("Although the courts have developed sophisticated rubrics to analyze each of the causes of action, the definition of the 'religion' that is to be protected remains murky."); Major Christopher D. Jones, *Redefining "Religious Beliefs" Under Title VII: The Conscience As the Gateway to Protection*, 72 A.F. L. REV. 1, 9 (2015) ("The word 'religion' applies equally to Title VII as it does in the First Amendment of the Constitution ('Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof') and the laws concerning conscientious objectors.").

13. Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 149 (2007).

14. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

15. *Patrick*, 745 F.2d at 157.

First, the court should determine if the observance or practice stemming from the employee's belief imposes an undue hardship on the employer.¹⁶ If the employee's religious practice causes an undue hardship, an employer need not accommodate the practice, and thus, the court will dismiss the claim.¹⁷ If the court finds that the practice does not impose an undue hardship, the court may proceed to the second phase of the analysis: whether the belief is sincerely held.¹⁸ To make a sincerity determination, the court should conduct a fact-intensive inquiry to determine the employee's good faith in the expression of her religious belief.¹⁹ If the employee's belief is not sincerely held, the court will dismiss the claim.²⁰ If the court finds that the employee's belief is sincere and does not cause an undue hardship, the court will turn to the third and most difficult inquiry: whether the belief, observance, or practice qualifies as religious within the meaning of Title VII.²¹ In this final phase of inquiry, a court must determine if the party holds the belief with the strength of traditional religious convictions or in a "parallel position" to an orthodox belief in God.²² Such an inquiry presents a court with the constitutionally challenging task of determining which beliefs qualify as "religion," a duty that a proper sincerity analysis limits.²³ A heightened sincerity analysis further precludes a court from delving into the realm of scriptural interpretation.²⁴ This Comment advocates that courts strike an effective balance by conducting a heightened sincerity analysis that: (1) ensures the protection of an employee's sincerely held beliefs;²⁵ (2) safeguards an employer from accommodating merely fraudulent, personal, or secular beliefs;²⁶ and (3) prevents a court from crossing its own boundary into determining verity of beliefs.²⁷

16. 42 U.S.C. § 2000e(j) (2012).

17. *Id.*

18. *United States v. Seeger*, 380 U.S. 163, 185 (1965).

19. *Patrick*, 745 F.2d at 157.

20. *See Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985).

21. *Id.*; 29 C.F.R. § 1605.1 (2017).

22. *Seeger*, 380 U.S. at 165–66; *Welsh v. United States*, 404 F.2d 1078, 1081 (9th Cir. 1968), *rev'd*, 398 U.S. 333 (1970).

23. *See Seeger*, 380 U.S. at 165–66; *Welsh*, 404 F.2d at 1081.

24. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *Davis v. Fort Bend Cty.*, 765 F.3d 480, 486 (5th Cir. 2014) (citing *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

25. *Davis*, 765 F.3d at 497–98.

26. *Philbrook*, 757 F.2d at 482.

27. *Id.* at 481; *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

Part I of this Comment discusses the First Amendment's protection of religion and explores legislation that hinges upon religion. Part I then addresses Title VII's protection against religious discrimination in the workplace and the difficulty in defining religion. Part II examines the hardship inherent in the protection of religious beliefs pursuant to Title VII through the lens of *United States Employment Commission v. Consol Energy, Inc.* and *McCrary v. Rapides Regional Medical Center*. Part III of this Comment explains the manner in which the court may conduct an accurate sincerity analysis and applies the analysis to *Consol Energy, Inc.* and *McCrary*. Finally, this Comment concludes by explaining the benefits of a proper sincerity analysis to the court, the employer, and the employee.

I. RELIGIOUS BELIEFS: PROTECTED IN THE WORKPLACE?

The Supreme Court has grappled with what constitutes religion and has ultimately protected non-religious beliefs held by one either with the strength of traditional religious convictions or in a "parallel position" to an orthodox belief in God.²⁸ Thus, courts *could* protect a wide array of beliefs, and the definition of religion is left ambiguous and problematic.²⁹ For example, courts have considered white supremacist ideals to be "religious belief[s],"³⁰ and commentators have noted that veganism could trigger Title VII protection as well.³¹ In another instance, a plaintiff claimed that ingestion of "Kozy Kitten Cat Food" was a personal religious creed, but the court rejected the creed.³² Many religious beliefs may be worthy of accommodation, in part because the protection of religion is enshrined in the United States Constitution and is therefore culturally significant.³³

28. *Seeger*, 380 U.S. at 165–66; *Welsh*, 404 F.2d at 1081.

29. 42 U.S.C. § 2000e(j) (2012). Title VII itself broadly defines "religion" to include "all aspects of religious observance and practice, as well as belief." *Id.* See sources cited *supra* note 12.

30. *Peterson v. Wilmur Commc'ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002); see also Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 TOURO L. REV. 751, 753 (2004).

31. Donna D. Page, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 404 (2005).

32. *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd without opinion*, 589 F.2d 1113 (5th Cir. 1979).

33. James M. Donovan, *God Is As God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 23, 26 (1995); Usman, *supra* note 13 (noting that the First Amendment was drafted and ratified after a period characterized by a lack of religious liberty in the American colonies, highlighting

A. From the First Amendment to Today's Legislation: The Problematic Definition of Religion

The First Amendment of the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" ³⁴ The Constitution, however, leaves "religion" undefined. ³⁵ The Supreme Court acknowledged the lack of definition in an 1878 case and turned to history to inform its interpretation of "religion." ³⁶ The Supreme Court quoted Thomas Jefferson who, upon learning that a clause respecting the freedom of religion would be added into the Constitution, stated:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. ³⁷

The Court acknowledged that Jefferson was an advocate for a religious freedom provision and thus accepted Jefferson's statement as "almost as an authoritative declaration of the scope and effect of the amendment thus secured." ³⁸ Accordingly, the court has afforded the freedom of religion great importance since its inception, exacerbating the difficulty courts face in applying religion-based legislation today. ³⁹

Scholars, legal commentators, and courts have struggled to define religion as a component of legislation and regulation. ⁴⁰ Examples of

its present importance). Additionally, "[i]n the mother country during the seventeenth century while British colonization of America was beginning, religious intolerance and oppression was omni-present." *Id.*

34. U.S. CONST. amend. I.

35. *Id.*; see also *Reynolds v. United States*, 98 U.S. 145, 162 (1878) ("The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning.").

36. *Reynolds*, 98 U.S. at 162–64.

37. *Id.* at 164.

38. *Id.*

39. *Id.*; *Usman*, *supra* note 13.

40. *Usman*, *supra* note 13.

legislation and regulations with a religious component include Title VII,⁴¹ the Religious Freedom Restoration Act of 1993 (“RFRA”),⁴² and military regulations.⁴³ RFRA and some military regulations are notably similar to Title VII as all require beliefs to be “sincere” to be protected.⁴⁴ RFRA prohibits the federal government from “taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.”⁴⁵ Under

41. 42 U.S.C. § 2000e–2(a) (2012). The Civil Rights Act of 1964 banned discrimination in places of employment, education, and public accommodation. As a result, parks, restaurants, sports arenas, hotels, and theaters were open to all, regardless of the skin color. The Department of Education was further given authority to aid in the desegregation of schools. Finally, employers and labor unions were prohibited from discriminating against employees based on race, religion, gender, or national origin. *Id.* See also Jacqueline A. Berrien, *Statement on 50th Anniversary of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (July 2, 2014), <https://www.eeoc.gov/eeoc/history/cra50th/index.cfm> [<https://perma.cc/AC7M-FLY3>]. The Civil Rights Act of 1964 was comprehensive legislation enacted to ensure justice for all after decades of resistance to discrimination and segregation. See also *The Civil Rights Act of 1964: A Long Struggle For Freedom*, LIBR. CONG., <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html> [<https://perma.cc/9UFC-MDCL>] (last visited Jan. 27, 2019) (explaining how President Johnson made the Civil Rights bill his first priority after President Kennedy’s death); see also *Civil Rights Act*, HISTORY.COM, <http://www.history.com/topics/black-history/civil-rights-act> [<https://perma.cc/G8BV-LEUR>] (last visited Jan. 27, 2019). President Johnson had one goal in mind: for the Eighty-Eighth Congress to be remembered “as the session which did more for civil rights than the last hundred sessions combined.” *Id.*

42. 42 U.S.C. § 2000bb–2000bb-4; see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014). In *City of Boerne v. Flores*, the United States Supreme Court held that RFRA was not a proper exercise of Congress’s enforcement power under § 5 of the Fourteenth Amendment to the United States Constitution because RFRA contradicts vital principles necessary to maintain separation of powers and the federal-state balance. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). *Boerne*, however, declared RFRA “unconstitutional only insofar as the Act applies to state and local governments. Nothing in *Boerne* requires courts to treat RFRA as unconstitutional as applied to the actions of federal government agencies and instrumentalities.” Rodney A. Smolla, *Congress’s power to enact the act—Congress’s reliance on § 5 of the fourteenth amendment—The continued vitality of RFRA as applied to federal laws*, 1 FED. CIVIL RIGHTS ACTS § 5:30 (3d ed.).

43. 32 C.F.R. § 75.3 (eliminated in 2007); see 72 Fed. Reg. 33677-01 (2007).

44. 32 C.F.R. § 75.3 (eliminated in 2007); see 72 Fed. Reg. 33677-01 (2007); 42 U.S.C. § 2000c–2; 42 U.S.C. § 2000bb-1.

45. *Burwell*, 134 S. Ct. at 2759.

RFRA, protection of “exercise of religion” *only* safeguards beliefs that one holds sincerely and are rooted in religion.⁴⁶ Similarly, military regulation permits the discharge of objectors whose anti-war beliefs are “sincere and deeply held.”⁴⁷

Under Title VII, RFRA, and military regulations, the definition of religion is broad and imprecise.⁴⁸ The Supreme Court has recognized this difficulty, stating: “The determination of what is ‘religious’ belief or practice is more often than not a difficult and delicate task.”⁴⁹ Redefining religion, however, inevitably causes courts to draw a line establishing a definition of religion that is either too narrow or too broad.⁵⁰ If Congress or the Supreme Court narrowed the definition of religion, courts could exclude minority religions and non-traditional faiths, stifling the natural progression of religious beliefs.⁵¹ Bias of the definers may color the definition of religion, as life experiences and cultural and religious perspectives may cause the definer to exclude other perspectives.⁵² The Supreme Court described the struggle to delineate religious practices, stating: “‘Religious experiences which are as real as life to some may be incomprehensible to others.’ Local boards and courts in this sense are not free to reject beliefs because they consider them ‘incomprehensible.’”⁵³ It is common for a person to view a religion that is not her own as nonsensical. Such a view, however, does not preclude the belief from being religious in nature.⁵⁴ Conversely, simply claiming a belief as religious does not make it so.⁵⁵

Although a narrow definition of religion may exclude minority religions, a broad definition of religion may render the protection meaningless.⁵⁶ Protection of such an extensive array of beliefs, religious or nonreligious, may weaken the safeguard sought in the enactment of the

46. *United States v. DeWitt*, 95 F.3d 1374 (8th Cir. 1996); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713 (1981).

47. 32 C.F.R. § 75.3 (eliminated in 2007); *see* 72 Fed. Reg. 33677-01 (2007).

48. *Donovan*, *supra* note 33 (“‘[R]eligion’ and ‘religious’ are words which appear in 574 sections of the United States Code and 1,490 of the Code of Federal Regulations. These legislative and administrative references are interpretable only if the category of ‘religion’ is appropriately and adequately defined.”).

49. *Thomas*, 450 U.S. at 714.

50. *Usman*, *supra* note 13.

51. *Id.*

52. *Id.*

53. *United States v. Seeger*, 380 U.S. 163, 184–85 (1965) (quoting *United States v. Ballard*, 322 U.S. 78, 86 (1944)).

54. *See* 29 C.F.R. § 1605.1 (2017).

55. *Id.*

56. *Usman*, *supra* note 13.

legislation.⁵⁷ Rather, the proper task for courts is to “decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.”⁵⁸ An inquiring court must place a greater emphasis upon determining whether a belief is sincere in order to limit examination regarding what constitutes religion.⁵⁹

B. United States Supreme Court Development of “Religious Practice” Standard

The U.S. Supreme Court has struggled to define religion in the application of legislation⁶⁰ involving religion.⁶¹ In two pivotal Supreme Court cases, *United States v. Seeger* and *Welsh v. United States*, the Court held that beliefs in “parallel” positions to the position of God are worthy of protection.⁶² Even if a claimant considers the belief non-religious, the Court may protect the belief if the party holds it with the strength of traditional religious views.⁶³ The Court’s examination of religious beliefs arose when men sought exemption from participation in military service⁶⁴ pursuant to Universal Military Training and Service Act (“UMTSA”).⁶⁵

57. *Id.*

58. *Seeger*, 380 U.S. at 185.

59. *See* 29 C.F.R. § 1605.1.

60. 42 U.S.C. § 2000bb–1 (2012) (“Religious Freedom Restoration Act” or “RFRA”); 50 U.S.C. App. § 456(j) (1958) (Universal Military Training and Service Act); 42 U.S.C. § 2000e–2(a) (Title VII of the Civil Rights Act of 1964).

61. 42 U.S.C. § 2000e(j).

62. *Seeger*, 380 U.S. at 166. The Court described its “parallel positions” test in the following manner:

The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

Id. at 176.

63. 29 C.F.R. § 1605.1; *see Seeger*, 380 U.S. at 163 (showing the development of this standard); *Welsh v. United States*, 398 U.S. 333, 341 (1970).

64. *Seeger*, 380 U.S. at 185; *Welsh v. United States*, 404 F.2d 1078, 1081 (9th Cir. 1968), *rev’d*, 398 U.S. 333 (1970).

65. 50 U.S.C. App. § 456(j) (1958).

The Court now uses the standard developed in *Seeger* and *Welsh* in Title VII cases to determine whether a belief is religious.⁶⁶

The Court first considered whether it should give conscientious objectors⁶⁷ the same protection as religious objectors in *United States v. Seeger*.⁶⁸ In *Seeger*, the Court heard a consolidated set of claims from conscientious objectors who were opposed to any form of war and refused to submit to induction into the armed forces.⁶⁹ In explaining his reasoning, the first objector claimed an ethical belief in intellectual moral integrity, citing Plato, Aristotle, and Spinoza.⁷⁰ The second objector claimed a belief in a “Supreme Reality,” in which his most important principle held that no man sacrifice another man’s life.⁷¹ The third objector claimed that it was a violation of his moral code to take human life.⁷² Further, the third objector considered his moral code greater than his obligation to the state but asserted that he was not a member of a religious sect or organization.⁷³

66. *Id.*

67. Claire Marblestone, *A Matter of Conscience: United States v. Seeger and the Supreme Court’s Historical Failure to Define Conscientious Objector Status Under the First Amendment*, 38 HASTINGS CONST. L.Q. 201, 231 (2010) (explaining that conscientious objections date back to the framers’ debates during the ratification process of the United States Constitution; “rights of conscience” were considered part of religious freedom by the framers themselves).

68. *Seeger*, 380 U.S. at 166–69. The constitutionality of a section of the UMTSA, which defines “religious training and belief,” was challenged under the First Amendment’s Establishment and Free Exercise clause. The conscientious objectors claimed that the section: (1) does not exempt nonreligious conscientious objectors; and (2) discriminates between forms of religious expression in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 164–65.

69. *Id.* at 166–69; see also *How the Draft Has Changed Since Vietnam*, SELECTIVE SERV. SYS., <https://www.sss.gov/About/History-And-Records/How-The-Draft-Has-Changed-Since-Vietnam> [<https://perma.cc/4LCW-PKMX>] (last visited Jan. 27, 2019) (explaining that the military draft, as used in the Vietnam War, was reformed in 1971). Before the 1971 reform, men between the ages of 18 and 26 were vulnerable to being drafted. During the Vietnam War, the draftee was not guaranteed the right to a personal appearance before his board to appeal his classification. Thus, decisions about whether a man was drafted were based on paperwork alone. *Id.*

70. *Seeger*, 380 U.S. at 166.

71. *Id.* at 168.

72. *Id.* at 169.

73. *Id.*

The conscientious objectors' claims⁷⁴ arose under the UMTSA,⁷⁵ which exempts persons from combatant training and service who are opposed to participation in war in any form because of the person's "religious training and belief."⁷⁶ The definition of "religious training and belief" as used in the Act refers to an individual's belief in relation to a "Supreme Being," "involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code."⁷⁷ The Supreme Court held that the test of belief in relation to a Supreme Being is "whether a given belief that is *sincere* and meaningful occupies a place in the life of its possessor *parallel to that filled by the orthodox belief in God*."⁷⁸ The Court noted that it could not distinguish between beliefs that relate to a Supreme Being and beliefs that do not when such beliefs have "parallel positions" in the lives of those claiming the religious belief.⁷⁹ Ultimately, the objectors' beliefs met the "parallel positions" criterion.⁸⁰

The Supreme Court expounded upon its "parallel positions" reasoning in *Welsh v. United States*.⁸¹ In *Welsh*, the plaintiff, Elliott Ashton Welsh, II—similar to the *Seeger* objectors—challenged his participation in the military draft⁸² because of his moral and ethical beliefs.⁸³ Mr. Welsh explicitly denied any religious nature to his objection to the draft.⁸⁴ Rather, Mr. Welsh claimed that history and sociology formed his objections.⁸⁵ The plaintiff explained in a letter to the board reviewing his appeal: "I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed [the Department of Justice hearing officer] was using the word

74. *Id.* at 165. The three *Seeger* objectors asserted constitutional violations based on the First Amendment's Establishment and Free Exercise clause, in which the objectors specifically referred to the lack of exemption for nonreligious conscientious objectors and discrimination between different forms of religious expression. *Id.*

75. 50 U.S.C. App. § 456(j) (1958).

76. *Seeger*, 380 U.S. at 164.

77. *Id.* at 165; 50 U.S.C. App. 456(j) (1958).

78. *Seeger*, 380 U.S. at 165–66 (emphasis added).

79. *Id.* at 166.

80. *Id.*

81. *Welsh v. United States*, 398 U.S. 333, 341 (1970); *Seeger*, 380 U.S. at 165–66.

82. *How the Draft Has Changed Since Vietnam*, *supra* note 69 (explaining that the military draft, as used in the Vietnam War, was reformed in 1971; before the 1971 reform, men between the ages of 18 and 26 were vulnerable to being drafted).

83. *Welsh*, 398 U.S. at 342.

84. *Id.* at 341.

85. *Id.*

'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious.'"⁸⁶ Upon reconsideration, however, Mr. Welsh claimed that his beliefs were "religious in the ethical sense of the word."⁸⁷ Mr. Welsh thus admitted that he characterized his beliefs as ethical rather than religious.⁸⁸

Considering the ethical nature of the beliefs, the Court found that Mr. Welsh's conscientious objections to war were "undeniably" based partly on perceptions of global politics.⁸⁹ Although the UMTSA explicitly excluded objectors whose views were "essentially political, sociological, or philosophical" or based on "merely personal moral code," the Court found that these exclusions did not "restrict the category of persons who are conscientious objectors by 'religious training and belief.'"⁹⁰ The Court determined Mr. Welsh to be a conscientious objector to the draft although he denied any "religious" aspect to his objection.⁹¹ In its decision, the Court recognized the lower court's determination that Mr. Welsh held his beliefs "with the strength of more traditional religious convictions"⁹² and thus, met the qualifications to be exempted.⁹³ The Court expanded protection of religious beliefs in *Seeger* and *Welsh*, offering protection to beliefs held with the strength of traditional religious convictions or beliefs in "parallel positions" to the orthodox belief in God, even if not religious in nature.⁹⁴ In other words, a litigant's belief does not need to stem from a classic or traditionally recognized religion so long as the belief mirrors in strength to one of the traditional religions.⁹⁵

C. Concerning Title VII: The Confusion in What Constitutes "Religion"

The EEOC utilizes the standard the Supreme Court developed in *Seeger*⁹⁶ and *Welsh*⁹⁷ when determining which beliefs it protects pursuant

86. *Id.* at 341-42.

87. *Id.* at 342.

88. *Id.* at 341-42.

89. *Id.* at 342.

90. *Id.* at 343.

91. *Id.* at 343-44.

92. *Welsh v. United States*, 404 F.2d 1078, 1081 (9th Cir. 1968), *rev'd*, 398 U.S. 333 (1970).

93. *Welsh*, 398 U.S. at 343-44.

94. *United States v. Seeger*, 380 U.S. 163, 165-66 (1965); *Welsh*, 404 F.2d at 1081, *rev'd*, 398 U.S. 333 (1970).

95. *See generally Seeger*, 380 U.S. at 165-66; *Welsh*, 404 F.2d at 1081, *rev'd*, 398 U.S. 333 (1970).

96. *Seeger*, 380 U.S. at 163.

97. *Welsh*, 404 F.2d at 1078, *rev'd*, 398 U.S. 333 (1970).

to Title VII.⁹⁸ Title VII⁹⁹ outlaws discrimination in the workplace on the basis of race, color, religion, national origin, or sex.¹⁰⁰ Pursuant to Title VII, a court protects religious beliefs so long as the employee sincerely holds the beliefs and they conflict with an employment requirement.¹⁰¹ An employer must reasonably accommodate its employees' religious observances unless an accommodation imposes an undue hardship on the employer's business.¹⁰² The term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."¹⁰³ Finally, in order for an employee to succeed in a religious discrimination claim,¹⁰⁴ the employee must show that she adheres to a religion Title VII protects.¹⁰⁵

Title VII lays out two broad prohibitions that bar discrimination against employees relating to specific aspects of employment.¹⁰⁶ First, an employer may not refuse to hire or discharge any individual, or otherwise discriminate against any individual because of the individual's race, color, religion, sex, or national origin, with respect to the following: (1) compensation; and (2) terms, conditions, or privileges of employment.¹⁰⁷

98. 29 C.F.R. § 1605.1 (2017); 42 U.S.C. § 2000e(j) (2012).

99. *Supra* note 41.

100. 42 U.S.C. § 2000e-2(a).

101. U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc., 860 F.3d 131, 143 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018).

102. Equal Emp't Opportunity Comm'n v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312 (4th Cir. 2008). In order for an employee to adequately show that her employer violated its duty to offer a reasonable accommodation, the employee must prove that she: (1) has a bona fide religious belief that conflicts with an employment requirement; (2) informed the employer of this belief; and (3) was disciplined for failure to comply with the conflicting employment requirement. *Id.* See also 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

103. 42 U.S.C. § 2000e(j).

104. *Id.* In order to prove discrimination, an employee must show: (1) disparate treatment; (2) disparate impact. *Id.* These are the only two causes of action under Title VII. *Id.*

105. Mroz, *supra* note 10.

106. 42 U.S.C. § 2000e-2(a); U.S. Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015).

107. 42 U.S.C. § 2000e-2(a).

Second, an employer may not limit, segregate, or classify its employees or employment applicants based on the individual's race, color, religion, sex, or national origin in any way that would deprive or tend to deprive employment opportunities to an individual, *or* otherwise adversely affect his status as an employee.¹⁰⁸

1. The Equal Employment Opportunity Commission's Enforcement Power

Title VII also created the EEOC to end workplace discrimination and ensure the promise of opportunity to all employees.¹⁰⁹ Title VII expressly authorizes the EEOC to file suit on behalf of employees facing discrimination in the workplace.¹¹⁰ An aggrieved employee, a person filing on behalf of an aggrieved employee, or a member of the Commission may file charges with the EEOC.¹¹¹ The EEOC then serves a notice of the charge on the employer and conducts an investigation.¹¹² The EEOC will

108. *Id.*

109. *35 Years of Ensuring the Promise of Opportunity*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/history/35th/history/index.html> [<https://perma.cc/VZE8-MSDY>] (last visited Jan. 27, 2019).

110. *Id. See also Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/> [<https://perma.cc/W7GS-TVBP>] (last visited Jan. 27, 2019). The EEOC has the authority to investigate allegations of discrimination. *Id.* The Equal Employment Opportunity Commission will then seek to either: (1) settle the claim; or (2) file a lawsuit in order to protect both individual's rights as well as the public interest. *Id. See also An Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo_1972.html [<https://perma.cc/5C96-S4BQ>] (last visited Jan. 27, 2019) (indicating that Congress amended Title VII in 1972 and empowered the EEOC to prevent unlawful employment practices); *Milestones: 1972*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/history/35th/milestones/1972.html> [<https://perma.cc/P8G9-ET8Y>] (last visited Jan. 27, 2019) (explaining that the 1972 amendments to Title VII "are designed to give EEOC the authority to 'back up' its administrative findings and to increase the jurisdiction and reach of the agency"); 42 U.S.C. § 2000e-5 (stating the enforcement provisions of Title VII); *What You Can Expect After You File A Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/process.cfm> [<https://perma.cc/2KPL-K2RF>] (last visited Jan. 27, 2019) (explaining that if the EEOC is not able to determine that the law was violated, it will send the claimant a Notice of Right to Sue which gives the claimant permission to file a lawsuit in court).

111. 42 U.S.C. § 2000e-2(b).

112. *Id.*

dismiss the charge if there is not reasonable cause¹¹³ to believe the charge sets out a violation of Title VII.¹¹⁴ If the Commission finds reasonable cause to believe that the charge alleges a Title VII violation, it may use informal methods such as conference, conciliation, or persuasion to end the alleged unlawful employment practice.¹¹⁵ If informal methods are ineffective, the EEOC may commence a civil action against the employer.¹¹⁶ Actions the EEOC brings highlight the struggle that Congress, the EEOC, and courts face in determining which religious beliefs or practices are deserving of Title VII protection.¹¹⁷

2. Title VII Religious Observances or Practices

In Title VII, Congress defines religion as “all aspects of religious observance and practice, as well as belief.”¹¹⁸ The EEOC further defines

113. *Definition of Terms*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm> [<https://perma.cc/E5EJ-ND8J>] (last visited Jan. 27, 2019). The EEOC defined “reasonable cause” as the following:

EEOC’s determination of reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. Reasonable cause determinations are generally followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge. NOTE: Some reasonable cause findings are resolved through negotiated settlements, withdrawals with benefits, and other types of resolutions, which are not characterized as either successful or unsuccessful conciliations.

Id. The EEOC defined “no reasonable cause” as the following: “EEOC’s determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.” *Id.*

114. *Id.*

115. *Id.*

116. 42 U.S.C. § 2000e–2(f)(1); *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/charge.cfm> [<https://perma.cc/LQY6-HWSB>] (last visited Jan. 27, 2019). An employee can file a Charge of Discrimination, which is “a signed statement asserting that an employer, union or labor organization engaged in employment discrimination. It requests EEOC to take remedial action.” *Id.* The EEOC then notifies the employer of the charge, and interviews the employee. *Id.* A Charge of Discrimination must be filed with the EEOC before the employee may file a job discrimination lawsuit against her employer. *Id.*

117. 42 U.S.C. § 2000e–2(a); 29 C.F.R. § 1605.1 (2017); *United States v. Seeger*, 380 U.S. 163, 163 (1965); *Welsh v. United States*, 398 U.S. 333, 341 (1970).

118. 42 U.S.C. § 2000e(j).

religious practices¹¹⁹ to include “moral or ethical beliefs” regarding right and wrong that are “sincerely held” with the strength of traditional religious views.¹²⁰ The EEOC Guidelines explicitly recognize that Title VII broadly defines religion.¹²¹ Religious beliefs, practices, and observances may be theistic or non-theistic and may include unique views that a few individuals hold or even one individual holds.¹²² The beliefs must be more than simply personal preference and *sincerely held*.¹²³ There is no requirement that a particular religious group espouse the beliefs that an employee or prospective employee holds in order for Title VII to protect the belief.¹²⁴ Furthermore, Title VII may protect a belief even if the religious group with which an individual identifies does not accept that particular belief.¹²⁵

The EEOC has explicitly recognized traditional religious groups—for example, Christianity, Islam, Judaism, Buddhism, and Hinduism.¹²⁶ The EEOC Compliance Manual also recognizes that religion may include religious beliefs that are uncommon, new, not part of a formal church or sect, to which only a small number of people adhere, or that seem illogical or unreasonable to others.¹²⁷ The EEOC, however, distinguishes political, social, or economic philosophies from religion altogether—Title VII does not protect such philosophies.¹²⁸

119. “Religious practice” as used in the EEOC’s guidelines may include: (1) religious observances; and (2) religious practices. 29 C.F.R. § 1605.1; 42 U.S.C. § 2000e(j).

120. 29 C.F.R. § 1605.1; *see Seeger*, 380 U.S. at 163 (showing the development of this standard); *Welsh*, 398 U.S. at 341.

121. *Compliance Manual*, *supra* note 5 (“Religion is very broadly defined under Title VII.”).

122. *Id.*

123. *Id.*

124. 29 C.F.R. § 1605.1.

125. *Id.*; *see Welsh*, U.S. at 343. In *Welsh*, the petitioner’s beliefs were religious in nature despite the fact that the church he attended did not adhere to his beliefs. *Id.*

126. *Compliance Manual*, *supra* note 5.

127. *Id.*

128. *Id.* (citing *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973), *aff’d*, 508 F.2d 504 (4th Cir. 1974); *Slater v. King Soopers*, 809 F. Supp. 809, 810 (D. Colo. 1992). *See also Compliance Manual*, *supra* note 5 (“For example, EEOC and courts have found that the Ku Klux Klan is not a religion within the meaning of Title VII because its philosophy has a narrow, temporal, and political character. In an analogous case, *Peterson v. Wilbur Communications, Inc.*, 205 F. Supp. 2d 1014, 1022 (E.D. Wis. 2002), the court held that an employee’s membership in the World Church of the Creator was a ‘religious’ belief, even

In addition to recognizing certain categories of religion, the EEOC provides examples regarding what constitutes religious observances or practices.¹²⁹ Examples include the following: (1) prayer; (2) attendance of worship services; (3) use of religious garb, symbols, or religious objects; (4) adherence to certain dietary rules; (5) abstention from particular actions; or (6) proselytizing.¹³⁰ The employee's motive is central in the determination of whether a practice is religious; the activity itself is not determinative.¹³¹ As a result, courts determine the inquiry into whether a practice or observance is "religious" on a case-by-case basis.¹³²

II. SINCERELY HELD BELIEFS: HOW FAR SHOULD COURTS GO?

As the definition of religion is expansive and ambiguous, a court can strike an advantageous balance by focusing its efforts on an inquiry regarding whether a belief is "sincere."¹³³ A factual inquiry into sincerity conducted on a case-by-case basis provides a less intrusive means of determining whether the belief is protected: by determining *sincerity* rather than validity of the belief itself.¹³⁴ As the U.S. Supreme Court stated in *Seeger*:

But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—

though the organization's central tenet is white supremacy, because 'it functions as religion in [plaintiff's] life' as evidenced by the fact that he has been a minister in it for more than three years, worked to put the church's teachings into practice, and actively proselytizes. However, the *Peterson* court might have reached a different conclusion had it considered whether the belief was merely one-dimensional and thus not religious, i.e., not part of a moral or ethical belief system concerning 'ultimate ideas' about 'life, purpose, and death.')

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*; compare *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998) (employer not liable for denying employee's request to miss work to attend religious pilgrimage when the dates of the pilgrimage were merely personal preference), with *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993) (employer liable for failing to accommodate employee's request to attend religious ceremony).

133. 29 C.F.R. § 1605.1 (2017); see also Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 62 (2014).

134. *United States v. Seeger*, 380 U.S. 163, 185 (1965).

a prime consideration to the validity of every claim for exemption as a conscientious objector.¹³⁵

The court must examine sincerity in each case to determine whether the belief is “truly held.”¹³⁶ If the belief is not sincere, the court can dispose of the claim at the outset.¹³⁷

A. *Marked by the Beast?*: United States Equal Employment Opportunity Commission v. Consol Energy, Inc.¹³⁸

The U.S. Court of Appeals for the Fourth Circuit was faced with determining sincerity of an employee’s belief when he feared receiving the “Mark of the Beast” in *United States Equal Employment Opportunity Commission v. Consol Energy, Inc.*¹³⁹ In June 2017, the court held that Title VII protects religious beliefs so long as sufficient evidence indicates the employee’s beliefs are *sincerely held* and the beliefs conflict with an employment requirement.¹⁴⁰ *Consol Energy* arose out of a coal miner’s religious objection to the use of a hand scanner out of fear of being marked by the “Mark of the Beast.”¹⁴¹ The Consol Energy employee, Beverly R. Butcher, Jr.,¹⁴² was a satisfactory employee of almost 40 years with no record of disciplinary issues or poor performance.¹⁴³ Mr. Butcher was also a life-long evangelical Christian, ordained minister, and associate pastor.¹⁴⁴ Over a span of 37 years, Mr. Butcher never experienced a conflict between his employment at the coal mine and his religious beliefs.¹⁴⁵

In 2012, however, Consol Energy began using a biometric hand-scanner system at the coal mine to check employees in and out of shifts.¹⁴⁶ Consol Energy required each employee to scan his right hand, which was then linked to the employee’s personnel number.¹⁴⁷ The hand scan system provided for efficient reporting of the employee’s worked hours, as

135. *Id.*

136. *Id.*

137. 29 C.F.R. § 1605.1.

138. U.S. Equal Emp’t Opportunity Comm’n v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018).

139. *Id.*

140. *Id.* at 143.

141. *Id.* at 136–38.

142. *Id.* at 136.

143. *Id.* at 137.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

opposed to the shift foreman manually recording each shift.¹⁴⁸ Mr. Butcher refused to scan his hand and raised a religious objection under the Bible's Book of Revelation.¹⁴⁹

According to Mr. Butcher, if he scanned either of his hands, the Antichrist would mark him, which would condemn him to "everlasting punishment."¹⁵⁰ Mr. Butcher testified that his religious beliefs were based on "authenticity . . . [and] authority of the scriptures."¹⁵¹ Furthermore, Mr. Butcher stated that he believed in an Antichrist that stood for "evil."¹⁵² If Mr. Butcher received the "Mark of the Beast," the Antichrist would have the ability to manipulate him, as he would be marked as a follower of the Antichrist.¹⁵³ Thus, participation in the hand scanner would have presented a threat under his core religious beliefs.¹⁵⁴

As a result, Mr. Butcher spoke to his union representative regarding his concerns.¹⁵⁵ Mr. Butcher's union representative subsequently brought his concerns to Consol Energy's Human Resources department.¹⁵⁶ Consol Energy instructed Mr. Butcher to request a letter from his pastor explaining Mr. Butcher's need for a religious accommodation.¹⁵⁷ Mr. Butcher's pastor did so, reiterating Mr. Butcher's "deep dedication to the Lord Jesus Christ" in his letter.¹⁵⁸ Mr. Butcher also wrote his own letter describing his perspective and reasoning why using the hand scanner system violated his religious beliefs.¹⁵⁹

At a meeting with his superiors, Mr. Butcher provided both his own letter and his pastor's letter to the superintendent and Human Resources supervisor.¹⁶⁰ The participants discussed Mr. Butcher's motivation

148. *Id.*

149. *Id.* at 137–38.

150. *Id.* ("Butcher's understanding of the biblical Book of Revelation is that the Mark of the Beast brands followers of the Antichrist, allowing the Antichrist to manipulate them. And use of Consol's hand-scanning system, Butcher feared, would result in being so 'marked,' for even without any physical or visible sign, his willingness to undergo the scan—whether with his right hand or his left—could lead to his identification with the Antichrist.").

151. *Id.* at 137.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 138.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

underlying his objection to the hand scanner system.¹⁶¹ Mr. Butcher explained that he could not and would not participate in the biometric scanner system but suggested that he check in with the shift supervisor upon arrival and departure in lieu of scanning his hand, as had been prior practice at the coal mine.¹⁶² Nevertheless, Consol Energy resisted Mr. Butcher's suggested accommodation.¹⁶³

The Human Resources supervisor provided Mr. Butcher with a letter from the manufacturer of the hand scanner, ensuring Mr. Butcher that he would not receive any sort of mark from the hand scanner.¹⁶⁴ In the letter, the manufacturer explained its own interpretation of the Scriptures: that the "Mark of the Beast" is associated only with the forehead or the right hand.¹⁶⁵ The manufacturer specifically referred to Revelation 13:16, which states: "He forced everyone, small and great, rich and poor, free and slave, to receive a mark on his *right hand* or on his *forehead*."¹⁶⁶ Using Scripture, the manufacturer sought to distinguish the left hand as impervious to the "Mark of the Beast."¹⁶⁷

Consol Energy further claimed that the option to scan the left hand *was* an accommodation because it precluded the imposition of the "Mark of the Beast" as Revelation 13:16 describes.¹⁶⁸ After Consol Energy gave Mr. Butcher the manufacturer's letter, the Human Resources supervisor requested that Mr. Butcher discuss the information with his pastor.¹⁶⁹ Finally, if Mr. Butcher continued to object, the Human Resources supervisor requested that Mr. Butcher write a letter describing his church's disapproval of the hand scanner.¹⁷⁰

Unbeknownst to Mr. Butcher, Consol Energy offered accommodations to employees with hand injuries but simultaneously denied an accommodation to Mr. Butcher, a religious objector.¹⁷¹ Other employees at

161. *Id.*

162. *Id.*

163. *Id.* at 139.

164. *Id.* at 138.

165. *Id.*

166. Reply Brief of Appellants and Response Brief as Cross-Appellees, U.S. Equal Emp't Opportunity Comm'n v. Consol Energy Inc., 860 F.3d 131 (4th Cir. 2017) (No. 16-1230, 16-1406), 2016 WL 4501896 at *3.

167. *Consol Energy, Inc.*, 860 F.3d at 142.

168. Reply Brief of Appellants and Response Brief as Cross-Appellees, U.S. Equal Emp't Opportunity Comm'n v. Consol Energy Inc., 860 F.3d 131 (4th Cir. 2017) (No. 16-1230, 16-1406), 2016 WL 4501896 at *3.

169. *Consol Energy, Inc.*, 860 F.3d at 138.

170. *Id.*

171. *Id.* at 139.

the coal mine were permitted to use a punch code to enter their personnel numbers rather than scan their hands because of hand injuries.¹⁷² Therefore, it would have been cost-free for Consol Energy to allow Mr. Butcher to enter his personnel number on a keypad instead of scanning his hand.¹⁷³ Consol Energy, however, sent an email in which it authorized the keypad accommodation for two injured employees and denied Mr. Butcher's religious objection.¹⁷⁴ In the email, Consol Energy wrote: "[L]et's make our religious objector use his left hand."¹⁷⁵

When Mr. Butcher refused to use the hand scanner system, Consol Energy presented Mr. Butcher with the company's disciplinary procedures in which: (1) the first and second missed scans would lead to a written warning; (2) the third missed scan would result in a suspension; and (3) the fourth missed scan would result in suspension with intent to discharge.¹⁷⁶ Mr. Butcher thus felt that Consol Energy's intent was to fire him if he did not scan his hand.¹⁷⁷ Consequently, after much discussion between Consol Energy and Mr. Butcher, the employee felt that he had no choice but to retire under protest from his employment at the coal mine.¹⁷⁸

The EEOC brought an enforcement action against Consol Energy on Mr. Butcher's behalf in the U.S. District Court for the Northern District of West Virginia.¹⁷⁹ A jury decided in favor of Mr. Butcher; Consol timely appealed, and the Fourth Circuit reviewed the case.¹⁸⁰ The EEOC alleged

172. *Id.* at 138.

173. *Id.* at 139.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 139–41; U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc., 151 F. Supp. 3d 699 (N.D. W. Va. 2015), *aff'd*, 860 F.3d 131 (4th Cir. 2017).

180. *Consol Energy, Inc.*, 860 F.3d at 139–41. In *Consol Energy*, which was tried before a jury in January of 2015, the jury returned a verdict in favor of the EEOC. *Id.* The jury found that: (1) Mr. Butcher had sincere religious beliefs in conflict with Consol Energy's requirement that he use the hand scanner; (2) Mr. Butcher informed Consol Energy of the conflict; and (3) Consol Energy constructively discharged Mr. Butcher for his refusal to participate in the hand scanner system. *Id.* The jury awarded Mr. Butcher \$150,000 before the calculation of lost wages. *Id.* Ultimately, the district court calculated back pay and lost benefits, and awarded Mr. Butcher \$436,860.74. *Id.* In addition, the district court required the employer to provide training on religious accommodations and required the employer to cease his violations of Title VII in the future. *Id.* Consol Energy then filed three post-verdict motions the district court denied. *Id.* The motions included a: (1) "renewed motion for judgment as a matter of law under

that Consol Energy violated Title VII because it failed to accommodate Mr. Butcher's religious beliefs and constructively discharged Mr. Butcher.¹⁸¹ At trial, Consol Energy quoted the same Scripture Mr. Butcher used to demonstrate that the "Mark of the Beast" can be imprinted only on the right hand or forehead but cannot be imprinted on the left hand.¹⁸²

Consol Energy's defense implied that Mr. Butcher misunderstood the Book of Revelation and the significance of the "Mark of the Beast."¹⁸³ Consol Energy attempted to use the Book of Revelation to indicate that the "Mark of the Beast" can be imprinted only on the right hand.¹⁸⁴ Consol Energy's core defense was that it did not fail to reasonably accommodate Mr. Butcher's religious beliefs because there was *no conflict* between Mr. Butcher's religion and Consol Energy's requirement that employees use the hand scanner.¹⁸⁵ Finally, Consol Energy argued that although Mr. Butcher's beliefs were *sincere*, no conflict existed because the employee was mistaken in his religious belief and practice.¹⁸⁶

On appeal, the Fourth Circuit, however, would not consider the allegedly "mistaken" nature of Mr. Butcher's beliefs.¹⁸⁷ In so doing, the Fourth Circuit held that it is neither for the employer, nor the court, to question the correctness of an employee's beliefs or religious understandings.¹⁸⁸ Once the "incorrectness" of Mr. Butcher's belief was removed from the analysis, there was "very little left" in support of Consol Energy's case.¹⁸⁹ The Fourth Circuit held that it would protect the employee's religious beliefs whether or not the employee's pastor or the hand scanner manufacturer agreed with Mr. Butcher's interpretation of the

Rule 50(b) of the Federal Rules of Civil Procedure"; (2) Rule 59 motion for new trial; and (3) "Rule 59 motion to amend the district court's findings and conclusions on equitable remedies." *Id.* From this decision, Consol Energy timely appealed. *Id.* The EEOC also filed a timely cross-appeal on the district court's ruling regarding punitive damages. *Id.* The U.S. Court of Appeals for the Fourth Circuit thus reviewed the case. *Id.*

181. *Id.* at 139; see 42 U.S.C. § 2000e-2000e-6 (2012).

182. *Consol Energy, Inc.*, 860 F.3d at 142.

183. *Id.* at 143.

184. *Id.* at 142.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.")).

189. *Id.* at 143.

Book of Revelation.¹⁹⁰ The Fourth Circuit found that ample evidence existed from which a jury could determine that Mr. Butcher *sincerely believed* that participation in the hand scanner would result in the imposition of the “Mark of the Beast.”¹⁹¹

*B. Required to Engage in Extra-Marital Affairs?: McCrory v. Rapides Regional Medical Center*¹⁹²

Although the Consol employee believed the beast would mark him by means of a hand scanner, two male hospital employees sought Title VII protection for their numerous sexual affairs with co-workers in *McCrory v. Rapides Regional Medical Center*.¹⁹³ The *Consol Energy* court and the *McCrory* court conducted contrasting sincerity analyses, presenting a relevant comparison.¹⁹⁴ In *McCrory*, the U.S. District Court for the Western District of Louisiana did not classify the employees’ extra-marital affairs as a religious belief subject to Title VII protection.¹⁹⁵ The U.S. Court of Appeals for the Fifth Circuit affirmed without opinion.¹⁹⁶

In *McCrory*, the employees were hospital workers who admitted to engaging in extra-marital affairs with as many co-workers as possible.¹⁹⁷ The employer was concerned about the disruptive effect of the affairs and, as a result, fired the employees.¹⁹⁸ After being fired, the employees filed charges with the EEOC, claiming that their employer had unlawfully discriminated against them because of their Baptist religion.¹⁹⁹ Additionally, the employees claimed that their extra-marital affairs conflicted with their supervisor’s religious beliefs, which forbade extra-marital affairs.²⁰⁰ The employees claimed that the employer: (1) discriminated against them because of their religious beliefs, which led to the Title VII claim; (2) imposed his own religious beliefs on plaintiffs, which violated the First

190. *Id.* at 142–43.

191. *Id.* at 142.

192. *McCrory v. Rapides Reg’l Med. Ctr.*, 635 F. Supp. 975 (W.D. La. 1986), *aff’d*, 801 F.2d 396 (5th Cir. 1986).

193. *Id.* at 977.

194. *Id.*; *Consol Energy, Inc.*, 860 F.3d at 142.

195. *McCrory*, 635 F. Supp. at 979.

196. *McCrory*, 801 F.2d 396.

197. *McCrory*, 635 F. Supp. at 977.

198. *Id.*

199. *Id.*

200. *Id.*

Amendment; and (3) interfered with their constitutional rights to privacy.²⁰¹ This Comment will focus on the discrimination claim.

The district court explained that Title VII does not protect employees from their employer's religious beliefs, but rather, prevents impositions on an employee's religious beliefs.²⁰² In *McCrory*, plaintiffs claimed to be discharged because their extra-marital affairs were in opposition to the employer's religious beliefs.²⁰³ Finding that plaintiffs' allegation did not align with Title VII, the court held that the employees' claims "translate[d] into a cause of action under Title VII if, and only if, *their* belief in their right to commit adultery [was] a 'religious belief' subject to protection."²⁰⁴

The court found that the right to commit adultery was not a religious belief worthy of protection.²⁰⁵ As the *McCrory* employees adhered to the Baptist religion, the court recognized that the Baptist faith embraces the Bible and the Ten Commandments, one of which states: "Thou shall not commit adultery."²⁰⁶ Under the reading of the Ten Commandments, the court found that it would be "more than absurd to find that the Baptist faith condones the commission of adultery."²⁰⁷ Thus, the court held that "plaintiffs could not assert such a thing with even the slightest hint of sincerity."²⁰⁸ EEOC's Compliance Manual, however, states that an employee's belief or practice may be religious under Title VII even if the religious group to which the employee belongs does not recognize the individual's belief or practice.²⁰⁹ EEOC guidance further provides that an employer should not assume that an employee is insincere solely because some of her practices deviate from commonly followed tenets of her religion.²¹⁰ The court did not seem to recognize the EEOC's guidance.²¹¹ Rather, using the same tools, the *McCrory* and *Consol* courts ruled in opposite manners.²¹²

201. *Id.*

202. *Id.* at 979.

203. *Id.*

204. *Id.* (emphasis added).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Compliance Manual*, *supra* note 5.

210. *Id.*

211. *See generally* *McCrory*, 635 F. Supp. at 977.

212. *Id.* at 975; U.S. Equal Emp't Opportunity Comm'n v. *Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018).

C. Comparison of Consol Energy and McCrory

In *Consol Energy*, the Fourth Circuit held that the interpretation of Scripture was immaterial so long as the employee's professed belief was sincerely held,²¹³ but in *McCrory*, the Fifth Circuit affirmed a decision that used Scripture to find the employees' beliefs insincere.²¹⁴ Both courts considered Scripture to reach diametrically different conclusions.²¹⁵ In *McCrory*, the court cited the Ten Commandments in the Bible, one of which states, "Thou shall not commit adultery."²¹⁶ As the Baptist faith adheres to the Bible, the court determined that it would be "absurd" to find that the Baptist religion condones extra-marital affairs.²¹⁷ In *Consol Energy*, antithetically, the court dismissed Consol Energy's attempt to use Scripture to indicate that the employee's interpretation of Scripture was incorrect.²¹⁸

The Fourth Circuit explained in *Consol Energy* that it is neither an employer's place nor a court's place "to question the correctness or even the plausibility of [an employee's] religious understandings."²¹⁹ Thus, although Scripture may have indicated the Consol Energy employee's belief was "incorrect," the Court would not consider such assertions and stated that the *sincerity* of the belief was of the utmost importance.²²⁰ In *McCrory*, the court similarly used the Scripture to which the plaintiff referred to show that the employee's belief was, in fact, "incorrect," and thus not worthy of protection, allowing Scripture to replace what should have been the court's analysis of *these particular employees'* sincerity towards their belief.²²¹ The disparity in both the application of Scripture as well as the manner in which the court sought to determine sincerity reflects the uncertainty with which courts grapple when addressing claims centered on religious questions.²²²

Courts need a uniform mechanism through which to assess sincerity, as *Consol Energy* and *McCrory* evince.²²³ If courts do not properly analyze sincerity, an employee is given the opportunity to claim nearly anything

213. *Consol Energy, Inc.*, 860 F.3d at 143.

214. *McCrory*, 635 F. Supp. at 979, *aff'd*, 801 F.2d 396 (5th Cir. 1986).

215. *Id.*; *Consol Energy, Inc.*, 860 F.3d at 142.

216. *McCrory*, 635 F. Supp. at 979, *aff'd*, 801 F.2d 396 (5th Cir. 1986).

217. *Id.*

218. *Consol Energy, Inc.*, 860 F.3d at 142.

219. *Id.*

220. *Id.*

221. *McCrory*, 635 F. Supp. at 979.

222. *Id.*; *Consol Energy, Inc.*, 860 F.3d at 142.

223. *Consol Energy, Inc.*, 860 F.3d at 142; *McCrory*, 635 F. Supp. at 979.

as a religious belief without bearing the burden of proving that her belief is sincere.²²⁴ Nonetheless, the court must impose the proper limits on its sincerity analysis to prevent the analysis from morphing into a decision rooted in the factfinder's own ideas regarding what religion should be.²²⁵ The court can strike a proper balance by conducting an inquiry into sincerity.²²⁶

III. HOW TO CONDUCT A SINCERITY ANALYSIS

A proper analysis of an employee's sincerity in her belief is the best gatekeeper of fraudulent or frivolous claims.²²⁷ As the Second Circuit stated, "[A] sincerity analysis is necessary in order to differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud."²²⁸ A heightened sincerity analysis allows the court to dispose of insincere claims at the outset of the case without delving into whether the beliefs are religious.²²⁹ A sincerity analysis, however, is one of three prongs of analysis that an inquiring court should conduct: (1) whether the practice imposes an undue hardship on the employer's business;²³⁰ (2) whether the belief is sincere;²³¹ and (3) if the belief is, in fact, sincere and the practice stemming from the belief does

224. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 726 (1981); *Davis v. Fort Bend Cty.*, 765 F.3d 480, 497–98. (5th Cir. 2014) (noting that, at trial, the employee bears the burden of proving that her belief is sincere); *Compliance Manual*, *supra* note 5 (noting that when an employee initially requests an accommodation from her employer, the employer may request that the employee provide additional information to indicate sincerity when circumstances cast doubt on the employee's sincerity).

225. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) ("This court has recently held that a sincerity analysis is necessary in order to "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud.").

226. 29 C.F.R. § 1605.1 (2017); *see also Adams & Barmore*, *supra* note 133.

227. *See Philbrook*, 757 F.2d at 482, *aff'd and remanded*, 479 U.S. 60 (1986).

228. *Id.* at 481.

229. *See* 29 C.F.R. § 1605.1 (2017).

230. 42 U.S.C. § 2000e(j) (2012).

231. *Id.*

not impose an undue hardship, whether the observance, practice, or belief qualifies as religious within the meaning of Title VII.²³²

If the practice stemming from the belief imposes an undue hardship on the employer's business, the court will not require the employer to offer an accommodation.²³³ If the belief does not cause an undue hardship, the court should determine if the employee's belief is sincere.²³⁴ If the belief is insincere, the claim is dismissed; Title VII does not protect insincere beliefs.²³⁵ Finally, if the belief is sincere and the practice does not cause an undue hardship, the court may be required to determine if the belief is of the kind that Title VII protects.²³⁶ Such a balancing test precludes a court from reaching the third prong of the inquiry, a rigorous analysis of whether the particular beliefs at issue are religious, which is the most difficult because of religion's First Amendment protection,²³⁷ cultural significance,²³⁸ and because of the inadequate definition of religion itself.²³⁹

A uniform sincerity analysis will result in consistent protection of religious beliefs, adding predictability for employers and employees.²⁴⁰ The appropriate sincerity analysis has the dual purpose of permitting the court to dispense of insincere beliefs at the forefront, but preventing the court from determining whether a belief fits the definition of religion.²⁴¹ Such an analysis is crucial given Title VII's requirement that employers reasonably accommodate religious beliefs and practices.²⁴² Title VII "does

232. *Id.*; 29 C.F.R. § 1605.1. *See* United States v. Seeger, 380 U.S. 163, 163 (1965) (showing the development of this standard); Welsh v. United States, 398 U.S. 333, 341 (1970).

233. 42 U.S.C. § 2000e(j).

234. *See* 29 C.F.R. § 1605.1

235. *See id.* (“[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”).

236. *See supra* note 12.

237. U.S. CONST. amend. I; Reynolds v. United States, 98 U.S. 145, 162–64 (1878).

238. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.1. *See* United States v. Seeger, 380 U.S. 163, 163 (1965) (showing the development of this standard); Welsh v. United States, 398 U.S. 333, 341 (1970).

239. Mroz, *supra* note 10 (“Although the courts have developed sophisticated rubrics to analyze each of the causes of action, the definition of the “religion” that is to be protected remains murky.”).

240. *See* 29 C.F.R. § 1605.1.

241. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 482 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986).

242. Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015).

not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers.”²⁴³ Religion is subject to special treatment not only because of an employer’s affirmative obligation to protect religious beliefs, but also because of the cultural significance of religion, rooted in the Constitution.²⁴⁴ Thus, the judicial resolution of Title VII religious discrimination claims can be best handled through the court’s inquiry into the *sincerity* of the employee’s belief.²⁴⁵ It is “entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone’s religious beliefs in the free exercise context, and the Title VII context.”²⁴⁶ All religious discrimination cases warrant a heightened sincerity assessment.²⁴⁷

A. *The Sincerity Analysis*

The purpose of a sincerity analysis is to determine the employee’s good faith in the expression of her religious belief.²⁴⁸ Rather than evaluating the objective accuracy of a religious observance or practice, a reviewing court must assess the sincerity of the claimed belief in order to determine if “there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.”²⁴⁹ To make a sincerity determination, the court must examine the employee’s motivation behind her claim for a reasonable accommodation.²⁵⁰ Such an examination requires intense fact-finding on a case-by-case basis.²⁵¹

For a sincerity analysis to be sufficient, the factfinder must have the ability to observe the demeanor of the employee—or the person claiming the belief—during both direct and cross-examination.²⁵² If the court conducted merely a “cursory evaluation,” the court would risk a determination of sincerity based on the factfinder’s perception of what a religion *should* resemble,²⁵³ which the Supreme Court has specifically

243. *Id.*

244. Donovan, *supra* note 33.

245. *See* United States v. Seeger, 380 U.S. 163, 185 (1965).

246. *Philbrook*, 757 F.2d at 481; United States v. Ballard, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

247. *See generally Philbrook*, 757 F.2d at 482; *Patrick*, 745 F.2d at 157.

248. *Patrick*, 745 F.2d at 157.

249. *Philbrook*, 757 F.2d at 482.

250. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 485 (5th Cir. 2014).

251. *Patrick*, 745 F.2d at 157.

252. *Id.*

253. *Id.*

precluded.²⁵⁴ To avoid subjective determinations, the factfinder must have the ability to observe the employee himself.²⁵⁵ If the belief is sincere from the court's examination, the court will protect the belief.²⁵⁶

1. Burden on the Employee

The plaintiff-employee must produce evidence that demonstrates her motivation behind the challenged practice, observance, or belief as religious in nature.²⁵⁷ Although the burden on the plaintiff to indicate her sincerity often goes "undisputed or [is] easily met," the plaintiff's burden is not absolved.²⁵⁸ The Fifth Circuit explained, "This is not an onerous or difficult task; testimony by the plaintiff describing her motivation in terms meeting the broad standard for what is 'religious' will usually suffice to survive summary judgment."²⁵⁹ Although it is not a heavy burden, the plaintiff must put on evidence as to the sincerity of her belief.²⁶⁰

2. Considerations to be Used to Determine Sincerity

No single set of considerations will likely be sufficient to encompass the court's examination in all sincerity analyses because of the vast array of beliefs. "The sincerity of a person's religious belief is a question of fact unique to each case," as it is primarily a question of employee motivation.²⁶¹ Facts that the court may consider in weighing sincerity, however, may include evidence such as Human Resources reports or answers to deposition questions indicating that the employee consistently requested accommodations from the employer.²⁶² The EEOC Guidelines on Religious Discrimination suggest evidence to consider in a dispute regarding a belief's sincerity, including oral statements, affidavits, witness testimony, or other documents describing an employee's beliefs and practices; when the employee embraced the belief; and when, where, and

254. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

255. *Patrick*, 745 F.2d at 157.

256. 29 C.F.R. § 1605.1 (2017).

257. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 497 (5th Cir. 2014).

258. *Id.* at 497–98.

259. *Id.* at 497.

260. *Id.*

261. *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013); *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012); *Davis*, 765 F.3d at 485.

262. Steven C. Kahn & Barbara B. Brown, *The Employer's Duty*, in LEGAL GUIDE TO HUMAN RESOURCES § 4:6 (Oct. 2017).

how the employee adhered to the belief or practice.²⁶³ Courts may consider such evidence in combination with the EEOC's examples of religious observances or practices themselves, which include: (1) prayer; (2) attendance of worship services; (3) display of religious objects; (4) adherence to certain dietary rules; (5) proselytizing;²⁶⁴ (6) use of religious garb or symbols; and (7) nonparticipation in particular actions.²⁶⁵ A showing of sincerity, however, does not necessarily require strict doctrinal adherence to the standards of organized religious hierarchies.²⁶⁶ Although EEOC guidelines present a viable set of considerations, courts may find other factors useful when a plaintiff raises a unique belief.²⁶⁷

Courts have attempted to determine sincerity in various situations.²⁶⁸ One court held that a plaintiff could have sincere religious beliefs even though she did not follow *all* of the teachings of her religion.²⁶⁹ Another court found that a Muslim woman's commitment to cover her whole body save her face and hands left "no doubt" as to the sincerity of her religious belief.²⁷⁰ The U.S. Court of Appeals for the Seventh Circuit examined an employee's sincerity when he requested leave to return to his home country and perform certain rites at his father's funeral.²⁷¹ The court explained that a sincerity analysis did not require a deep inquiry of the employee's reasons or motive for holding his beliefs, as such an inquiry would create a "slippery slope" that the court did not "desire to descend."²⁷² The Seventh Circuit found the employee's belief sincere based on deposition testimony, noting that the employee's willingness to

263. *Compliance Manual*, *supra* note 5.

264. *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/policy/docs/qanda_religion.html [<https://perma.cc/N86U-AXX6>] (last visited Jan. 27, 2019) ("Some employees may seek to display religious icons or messages at their work stations. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others. Still others may seek to engage in prayer at their work stations or to use other areas of the workplace for either individual or group prayer or study.").

265. *Id.*; *see infra* text accompanying note 289.

266. *Moussazadeh*, 703 F.3d at 790–92.

267. *Compliance Manual*, *supra* note 5.

268. *Id.*

269. *Equal Emp't Opportunity Comm'n v. Chemsico, Inc.*, 216 F. Supp. 2d 940, 950 (E.D. Mo. 2002).

270. *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 884, 990 (3d Cir. 1990) (indicating the wearing of religious garb indicates sincerity).

271. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 451–52 (7th Cir. 2013).

272. *Id.* at 452.

risk his job and put his car up as collateral for a loan to finance his trip to participate in burial rites was relevant evidence of sincerity.²⁷³

The U.S. Court of Appeals for the First Circuit found evidence showing that the employee acted contrary to tenets of his religion to be relevant when determining sincerity of an employee's belief.²⁷⁴ The court noted the following facts, which it considered contrary to the employee's professed religious belief: (1) the employee was divorced; (2) the employee took an oath before a notary; and (3) the employee worked five days a week as opposed to the six days required by his faith.²⁷⁵ Accordingly, the First Circuit found that an issue of fact precluded summary judgment, explaining that credibility determinations are to be made by the factfinder at trial.²⁷⁶

3. *Limits on Courts' Inquiries*

Although a court may conduct an analysis to determine sincerity and dismiss insincere claims, an inquiring court is limited in its religious inquiry.²⁷⁷ The Supreme Court stated, "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or [another practitioner] . . . more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."²⁷⁸ A court must conduct an inquiry into the sincerity of a person's religious belief with a "light touch, or judicial shyness."²⁷⁹ A court must conduct its sincerity analysis carefully because courts are forbidden to tread into the realm of religious inquiry.²⁸⁰ Religious inquiry presents a difficult task for courts because of the constraints of the First Amendment and courts' own limiting principles.²⁸¹

273. *Id.* at 452–54.

274. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56–57 (1st Cir. 2002).

275. *Id.*

276. *Id.* at 56–57.

277. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

278. *Id.*

279. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 486 (5th Cir. 2014) (citing *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

280. *Id.*

281. U.S. CONST. amend. I; *United States v. Seeger*, 380 U.S. 163, 163 (1965); *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (indicating that freedom of religion requires a wall of separation between church and state); *Davis*, 765 F.3d at 487 (noting that, due to the court's judicial shyness in regards to religious inquiry, courts have accepted plaintiffs' claims of sincere religious beliefs on little more than credible assertions).

Courts are not to gauge the objective accuracy of a religious observance or practice.²⁸² One court held that although the state may not assess the “objective accuracy” of a person’s beliefs, it may consider whether the beliefs are “sincerely held.”²⁸³ The preclusion of an assessment of objective accuracy contradicts the court’s holding in *McCrary*, which assessed the objective accuracy of whether the Baptist religion requires extra-marital affairs.²⁸⁴ The trouble lies in the fact that a “[s]incerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant’s most veiled motivations and vigilantly separate the issue of sincerity from the factfinder’s perception of the religious nature of the claimant’s beliefs.”²⁸⁵ Courts must strike a delicate balance when conducting an analysis of a religious belief.²⁸⁶

B. Separating the Sincerity Analysis from Whether the Belief is of the Kind Title VII Protects

Resolution of a Title VII religious discrimination claim requires the inquiring court to separate the question of whether a belief is sincere from the question of whether the belief is of the *kind* Title VII protects.²⁸⁷ The two inquiries are inherently different, and a court eases its burden by limiting the number of cases that charge the court with the constitutionally challenging task of determining what constitutes religion.²⁸⁸ In showing that a belief is of the kind Title VII protects, a plaintiff must assert that her belief is not merely a personal preference.²⁸⁹ Simply because the plaintiff claims a personal preference as a “personal religious creed” does not, in fact, make the activity religious.²⁹⁰ Rather, the plaintiff must hold the belief with the strength of traditional religious views²⁹¹ or in a “parallel

282. *Burns v. Warwick Valley Cent. Sch. Dist.*, 166 F. Supp. 2d 881, 889 (S.D.N.Y. 2001).

283. *Id.*

284. *McCrary v. Rapides Reg’l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La. 1986), *aff’d*, 801 F.2d 396 (5th Cir. 1986).

285. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

286. *Davis*, 765 F.3d at 485 (citing *Tagore v. United States*, 735 F.3d 324, 329 (5th Cir. 2013)).

287. 42 U.S.C. § 2000e(j) (2012); 29 C.F.R. § 1605.1 (2017); *see* *United States v. Seeger*, 380 U.S. 163, 163 (1965) (showing the development of this standard); *Welsh v. United States*, 398 U.S. 333, 341 (1970).

288. *See* *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017).

289. *Davis*, 765 F.3d at 497.

290. *Id.*

291. *See* 29 C.F.R. § 1605.1.

position” to an orthodox belief in God.²⁹² The Third Circuit acknowledged the difficulty in determining whether “a particular set of ideas constitutes a religion” and explained that “this task is particularly difficult when we have to determine whether a nontraditional faith requires the protection of the First Amendment and/or of Title VII.”²⁹³

The Third Circuit adopted a contemporary definition of religion to use when determining whether the belief is a religion Title VII protects.²⁹⁴ The definition is as follows:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.²⁹⁵

The Third Circuit’s definition excludes isolated moral teachings that are not a set of comprehensive beliefs regarding “fundamental or ultimate matters.”²⁹⁶ Finally, the third factor of formal and external signs are signified by acts such as “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions.”²⁹⁷

This third factor appears similar to other factors that courts may use to assess sincerity.²⁹⁸ Courts, however, *must* separate the two analyses.

292. *Seeger*, 380 U.S. at 165–66.

293. *Fallon*, 877 F.3d at 490 (citing *Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1031 (3d Cir. 1981)).

294. *Id.* at 491.

295. *Id.*

296. *Id.* at 492. In this December 2017 case, the Third Circuit examined a claim from a plaintiff who sued under Title VII, claiming his termination constituted religious discrimination. *Id.* The plaintiff worked for a medical center and refused to be inoculated against the flu, claiming that “the vaccine might do more harm than good.” *Id.* Examining the plaintiff’s belief against the Third Circuit’s modern definition of religion, the court found that the plaintiff’s belief that the flu vaccine was morally wrong was an “isolated moral teaching” and “not a comprehensive system of beliefs about fundamental or ultimate matters.” *Id.* Finally, the plaintiff’s beliefs were not manifested in formal and external signs. *Id.* at 488–93.

297. *Id.* at 492; *see supra* text accompanying note 258.

298. *See Compliance Manual, supra* note 5. The EEOC also suggested evidence to be considered in a dispute as to the sincerity of a religious belief: oral statements; affidavits; or other documents describing his beliefs and practices, including information regarding when the employee embraced the belief or

Courts must first analyze sincerity, using the factors listed above.²⁹⁹ A court's last step is to determine whether the belief is the kind of religion provided for in Title VII, and should analyze the factors the Third Circuit used.³⁰⁰ Only after a court determines that a reasonable accommodation does not impose an undue hardship and that the belief is sincere may the court make the final determination involving the religious nature of the belief.³⁰¹ By using similar factors at the outset in a sincerity analysis, courts avoid the problematic burden of defining religion,³⁰² reducing a risk of violating its own limiting principles³⁰³ and the constraints of the First Amendment.³⁰⁴

C. Heightened Sincerity Analysis Standard Applied to McCrory and Consol Energy

The holdings of *Consol Energy* and *McCrory* may be reexamined in the context of the proper sincerity analysis.³⁰⁵ The Fourth Circuit's holding in *Consol Energy* would likely be the same: Mr. Butcher sincerely held his belief.³⁰⁶ In conducting its sincerity analysis, the Fourth Circuit examined many facts that favored a finding of sincerity.³⁰⁷ First, the court referred to Mr. Butcher's meetings with his union representative in which he made his

practice, as well as when, where, and how the employee adhered to the belief or practice. *Id.* The EEOC also suggested that an EEOC investigator hear evidence from witnesses the employee identifies with knowledge of whether the employee adheres to the belief or practice. *Id.* Examples of religious practices or observances include prayer, attendance of worship services, display of religious objects, adherence to certain dietary rules, proselytizing, use of religious garb or symbols, and nonparticipation in particular actions. *Id.*; *see supra* text accompanying note 258.

299. *Compliance Manual*, *supra* note 5; *see supra* text accompanying notes 254–60.

300. *Fallon*, 877 F.3d at 492.

301. *See supra* text accompanying notes 224–27.

302. 42 U.S.C. § 2000e(j) (2012). Title VII itself broadly defines “religion” to include “all aspects of religious observance and practice, as well as belief.” *Id.* *See also supra* note 12.

303. *See supra* Part III.A.3.

304. *See supra* Part I.A.

305. *U.S. Equal Emp’t Opportunity Comm’n v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018); *McCrory v. Rapides Reg’l Med. Ctr.*, 635 F. Supp. 975 (W.D. La. 1986), *aff’d*, 801 F.2d 396 (5th Cir. 1986).

306. *Consol Energy, Inc.*, 860 F.3d at 143.

307. *Id.* at 138.

concerns known.³⁰⁸ Second, the court examined Mr. Butcher's meetings with his Human Resources supervisor and coal mine superintendent, in which he requested an accommodation.³⁰⁹ Third, the court referred to both Mr. Butcher's letter and Mr. Butcher's pastor's letter to the employer, in which both individuals described the reasoning and motivation for Mr. Butcher's religious belief.³¹⁰ Fourth, Mr. Butcher requested and suggested a feasible, cost-free alternative to the hand scanner system.³¹¹ Finally, the Fourth Circuit acknowledged that Mr. Butcher retired under protest after many discussions with his employer regarding Mr. Butcher's religious objections, seeming to dispel any idea of ulterior motivations.³¹² The Fourth Circuit then removed any implication of the scriptural "incorrectness" of Mr. Butcher's belief from its analysis, which left little in favor of the employer.³¹³ As a result, the Fourth Circuit held that sufficient evidence indicated the sincerity of Mr. Butcher's belief.³¹⁴ The facts that the court examined in *Consol Energy* can be distilled into the following objective factors: (1) proactivity of the employee in requesting an accommodation and voicing concerns; (2) ability to corroborate sincerity with other members of the religion; (3) willingness to participate in an alternative solution; and (4) resistance to quitting the job.³¹⁵ The court adequately conducted a fact-specific sincerity analysis.

In *McCrary*, however, the district court found and the Fifth Circuit affirmed that the *McCrary* employees' beliefs could *not* be sincere because of their conflict with Scripture.³¹⁶ As opposed to *Consol Energy*, the court looked at few facts to assess sincerity.³¹⁷ The court merely introduced the Ten Commandments—namely, "Thou shall not commit adultery"—in order to indicate that the *McCrary* employees' beliefs could not be sincere when the belief contradicted Scripture.³¹⁸

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 143.

313. *Id.* at 139.

314. *Id.* at 142.

315. *See generally id.* at 138–43.

316. *McCrary v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 977 (W.D. La. 1986), *aff'd*, 801 F.2d 396 (5th Cir. 1986).

317. *Id.* at 977–79.

318. *Id.* at 979.

Rather than affirming the decision without opinion, the Fifth Circuit should have conducted a true sincerity analysis.³¹⁹ In so doing, the court could have examined the employees' testimony itself, subjecting the employees to both direct and cross-examination.³²⁰ The court could have then probed the employees' true motive³²¹ in the employees' extra-marital affairs: whether it was truly a sincerely held belief, or whether the employees claimed religious belief to veil the extra-marital affairs in religious doctrine, subjecting them to Title VII protection.³²² Notably, the fact-intensive nature of the sincerity analysis may preclude summary judgment.

The court would have been apt to assess the employees' oral statements, affidavits, or other documents describing their beliefs and practices.³²³ While not dispositive, the court could have considered factors suggested by the EEOC, such as whether the employees requested a desirable accommodation for secular reasons; whether the employer had reason to believe that the purpose of the accommodation was not religious; or whether the employees behaved inconsistently with their professed belief.³²⁴ In addition, the court could have determined whether the affairs had to be carried out in this manner, and at this time, or whether the affairs were merely a personal preference.³²⁵ Finally, the court could have determined if the employees requested prior accommodation.³²⁶ Although the factors listed are not exhaustive, the factors will certainly aid the court in its determination of sincerity—a safer inquiry than into the religious inquiry itself.³²⁷

As the EEOC Guidelines explain, an employee's belief may constitute a religious belief regardless of whether the religious group with which an individual identifies accepts the belief.³²⁸ Thus, even though the Baptist religion does not condone the commission of adultery, as the *McCrary* court stated, a belief in affairs may still constitute the employees' beliefs

319. *See id.*; *see also* *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *United States v. Seeger*, 380 U.S. 163, 163 (1965).

320. *Patrick*, 745 F.2d at 157.

321. *Compliance Manual*, *supra* note 5.

322. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986).

323. *Compliance Manual*, *supra* note 5.

324. *Id.*

325. *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998); *see also Compliance Manual*, *supra* note 5.

326. *Kahn & Brown*, *supra* note 262.

327. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

328. 29 C.F.R. § 1605.1 (2017).

if the beliefs are sincerely held, do not cause an undue hardship, and are considered a religious belief or practice under Title VII.³²⁹ The *McCrorry* court's analysis is more akin to an examination of whether a belief is religious, an area in which the court is "forbidden to tread,"³³⁰ as it equated a lack of sincerity with the "incorrectness" of the belief.³³¹

If the court had conducted a proper sincerity analysis by hearing testimony from the employees,³³² conducting direct and cross-examinations,³³³ and assessing the suggested factors,³³⁴ then the court could have properly determined if the beliefs were sincere.³³⁵ If the beliefs were not sincere, then the court would have been correct in refusing to extend Title VII protection to the beliefs.³³⁶ A proper sincerity analysis ultimately protects an employee's religious beliefs, protects the employer's interests, aids the court, and safeguards the First Amendment.³³⁷

D. Bringing It All Together: Properly Conducted Sincerity Analysis

In practice, a court could conduct a proper sincerity analysis, easing its own burden, and ensuring protection to both the employee and employer in the following manner. First, the court must determine whether the employee's practice or belief imposes an undue hardship on the employer.³³⁸ If the accommodation constitutes an undue hardship, the employer does not have to accommodate the employee's belief.³³⁹ If the employer is not required to accommodate the employee's religious belief or practice, then the court may dismiss the claim.³⁴⁰ The undue hardship inquiry is likely the most objective, allowing the court to dispose of claims that Title VII does not protect at the outset.³⁴¹ If the court finds, however,

329. *Id.*; 42 U.S.C. § 2000e(j) (2012).

330. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 486 (5th Cir. 2014) (citing *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

331. *McCrorry v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La. 1986), *aff'd*, 801 F.2d 396 (5th Cir. 1986).

332. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

333. *Id.*

334. *Compliance Manual*, *supra* note 5.

335. *Patrick*, 745 F.2d at 157.

336. 29 C.F.R. § 1605.1 (2017).

337. *Id.*; U.S. CONST. amend. I; 42 U.S.C. § 2000e(j) (2012); *Patrick*, 745 F.2d at 157.

338. 42 U.S.C. § 2000e(j).

339. *Id.*

340. *Id.*

341. *See generally id.*

that the requested accommodation does not impose an undue hardship on the employer, the court may proceed to the second phase of the inquiry.

Second, the court must determine whether an employee's belief is sincerely held.³⁴² To determine sincerity, a court is not limited to any one set of factors, as each case is fact-specific depending on the belief at issue.³⁴³ Suggestions for the court to consider, however, include: (1) proactivity of the employee in requesting an accommodation and voicing concerns; (2) ability to corroborate sincerity with other members of the religion; (3) willingness to participate in an alternative solution; and (4) resistance to quitting the job.³⁴⁴ In considering such factors, the court may consider the following evidence: oral statements, affidavits, witness testimony, or other documents describing an employee's beliefs and practices; when the employee embraced the belief; and when, where, and how the employee adhered to the belief or practice.³⁴⁵ After conducting its sincerity analysis, if the court determines that the belief is sincere, then it may proceed, carefully, to the third phase of the inquiry.

Finally, the court must determine whether the belief is of the kind that Title VII protects.³⁴⁶ For Title VII to protect the employee's religious belief or practice, the employee must hold the belief with the strength of traditional religious views³⁴⁷ or in a "parallel position" to an orthodox belief in God.³⁴⁸ To aid the court in this difficult inquiry, the court can use the test articulated by the Third Circuit: (1) does the religious belief or practice address a fundamental and ultimate question regarding deep and imponderable matters?; (2) is the religious belief or practice comprehensive in nature, meaning that it is part of a broader belief-system as opposed to an isolated teaching?; and (3) is the religious belief or practice part of a larger religion that can be recognized by the presence of certain formal and external signs?³⁴⁹ Examples of formal and external signs of religion include formal services, ceremonial functions, the

342. *United States v. Seeger*, 380 U.S. 163, 185 (1965).

343. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

344. *See generally* U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc., 860 F.3d 131, 138–43 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018).

345. *Compliance Manual*, *supra* note 5.

346. *See Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017).

347. *See* 29 C.F.R. § 1605.1 (2017) ("But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact.").

348. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

349. *Fallon*, 877 F.3d 487, 4901.

existence of clergy, structure and organization, efforts at propagation, observation of holidays, and other similar manifestations associated with traditional religions.³⁵⁰ The inquiry is strictly limited by the First Amendment, requiring a wall between church and state,³⁵¹ and the court's principles, which prevents courts from determining the verity of beliefs.³⁵²

The first two phases of the inquiry will limit the instances in which a court must determine whether a belief is religious in nature, which too easily strays into a determination of a religious belief or practice's accuracy.³⁵³ Thus, a sincerity analysis protects the court from delving into scriptural interpretation, religious inquiry, and from the determination of what constitutes religion.

CONCLUSION

A heightened sincerity analysis ensures that a court does not delve too deeply into the "correctness" or "incorrectness" of a religious belief.³⁵⁴ Such a sincerity analysis focuses on the individual at hand, seeking to determine if the *individual* truly believes what she claims.³⁵⁵ A heightened sincerity analysis affords an employee the opportunity to indicate the sincerity of her belief, and thus, receive protection of her sincerely held belief.³⁵⁶ Likewise, employers are protected from safeguarding secular or personal beliefs merely veiled in religious doctrine.³⁵⁷ Finally, an inquiring court can refrain from straying where it is forbidden: intrusive religious inquiry.³⁵⁸ As such, the appropriate sincerity analysis is less likely to run afoul of the First Amendment.³⁵⁹ A court can strike a balance that is

350. *Id.* at 492; *see supra* text accompanying note 258.

351. U.S. CONST. amend. I; *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

352. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

353. *See generally* *Burns v. Warwick Valley Cent. Sch. Dist.*, 166 F. Supp. 2d 881, 889 (S.D.N.Y. 2001).

354. *U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 142 (4th Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 976 (2018) (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.")).

355. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 485 (5th Cir. 2014).

356. *Id.* at 497–98.

357. *Philbrook*, 757 F.2d at 482, *aff'd and remanded*, 479 U.S. 60 (1986).

358. *Davis*, 765 F.3d at 486 (citing *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

359. U.S. CONST. amend. I.

effective and beneficial for itself, the employee, and the employer by ensuring the protection of an employee's sincerely held beliefs,³⁶⁰ precluding an employer from protecting counterfeit beliefs,³⁶¹ and preventing the court itself from crossing its boundary into determining verity of beliefs when determining if a belief fits the definition of "religion."³⁶²

*Anna E. Reed**

360. *Davis*, 765 F.3d at 497–98.

361. *Philbrook*, 757 F.2d at 482 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986).

362. *Id.* at 481; *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

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