UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

Gerald M. THOMAS, Plaintiff–Appellant,
v.
NATIONAL ASSOCIATION OF LETTER CARRIERS, Defendants–Appellees.

EBEL, Circuit Judge.

Before us is an appeal of the district court's order granting summary judgment to the United States Postal Service ("Postal Service") on Thomas's religious discrimination claim. We affirm.

I. BACKGROUND

Thomas was employed by the Postal Service from February 28, 1987 to May 31, 1996. From February 1987 to November 1988, Thomas worked in a part-time flex position; from November 1988 to December 1990, Thomas worked as a regular mail carrier at the Wassall post office in Wichita, Kansas; and from December 1990 until his termination on May 31, 1996, Thomas worked a bid route at the Corporate Hills Station in Wichita.

The National Collective Bargaining Agreement (CBA) between the Postal Service and the NALC requires the Local Union to regulate employees' days off pursuant to the Local Memorandum of Understanding (LMOU). By virtue of the LMOU, Thomas, along with the other 400–plus regular residential letter carriers, was placed on a rotating schedule that required him to work five Saturdays out of six. The rotating schedule was determined by a vote of the letter carriers, and Postal Service management had no authority to change the work schedule without union approval because doing so would violate the contractual commitment in the LMOU.

Toward the end of 1993, Thomas became a member of the Church of God. One of the central tenets of the Church of God is strict observance of the Sabbath, which, for that religion, falls on Saturdays. In January 1994, Thomas informed station manager Mark Kerschen of his religious beliefs and asked if something could be done to allow him to receive all Saturdays off from work. Thomas also brought the matter up with Roy Martin, the postmaster, and Tom Brasser, the labor relations specialist at the Postal Service. In addition, Thomas spoke with Union stewards David Willits and Larry Gunkel about the matter.

In response to Thomas's request, the Postal Service approved twenty-five of Thomas's twenty-nine requests to take annual leave on Saturdays in 1994. In 1995, the Postal Service approved twenty of Thomas's twenty-two requests to take annual leave on Saturdays. Postal Service management also allowed Thomas to trade with other letter carriers who voluntarily agreed to work for him on Saturdays. The Postal Service suggested to Thomas that he change crafts and bid on a position that would not require him to work on Saturdays, as another letter carrier who had requested accommodation due to similar religious beliefs had done.[FN2] The Postal Service, however, also told Thomas that because of the seniority system which gives the most senior employees first choice for job assignments, Thomas's lack of seniority would likely prevent him from successfully bidding for such a position. Thomas never bid for a position that would not require him to work on Saturdays. Roy Martin and Tom Brasser approached Gunkel, the President of the Local Union, to ask the Union to issue a waiver excusing Thomas from the LMOU-established Saturday work schedule. The Local Union refused to grant such a waiver.

FN2. The other letter carrier who had requested accommodation was Mark Metz. The Union refused to allow management to assign Metz, as a letter carrier, to Saturday as a permanent day off from work. Metz transferred to the maintenance craft so he would not have to work on Saturdays.

Thomas suggested the following accommodation alternatives to enable him to observe his religious beliefs: (1) maintain his route as a letter carrier and receive Saturdays and Sundays off from work; (2) maintain his route as a letter carrier and have a substitute carry his route on Saturdays; (3) maintain his route as a letter carrier and have a part-time flexible or unassigned regular employee carry his route on Saturdays; (4) maintain his route as a letter carrier with all Saturdays off from work and be available to work on Sunday; and (5) maintain his route as a letter carrier, but only work four days a week.

The Local Union would not agree to any of Thomas's suggested accommodations on the theory that each would have permanently excused Thomas from working on Saturdays, thus each violated the LMOU. The Postal Service could not alter the LMOU on its own. Gunkel informed Thomas directly that it was not possible to grant him an exemption from the rotating schedule established by the LMOU so that he would not have to work on Saturdays.

Thomas refused to work on Saturdays, and was absent without leave several times when he was unable to use his leave. As a result, he received the following progressive discipline: (1) a seven-day suspension on 11/2/94 that was subsequently reduced to a letter of warning; (2) a fourteen-day suspension on 11/23/94 that was subsequently reduced to a seven-day suspension; (3) a fourteen-day suspension on 12/6/94; (4) a Notice of Removal on 1/9/95 that was held in abeyance provided Thomas was not absent without leave again; (5) a Notice of Removal on 6/16/95 which resulted in Thomas being removed; however his work assignment was held pending further grievance/arbitration procedures, which ultimately resulted in a pre-arbitration settlement on 1/5/96 that allowed Thomas to return to work with the understanding that he would work his bid assignment as posted; and (6) removal from the Postal Service on 4/26/96 after Thomas was absent without leave again.

Thomas filed suit against Marvin Runyon, the Postmaster General of the Postal Service, in federal district court in July, 1997, alleging that he was unlawfully discharged because of his religious beliefs.The district court granted the Postal Service's motion for summary judgment on the religious discrimination claim on January 5, 1999. *Thomas v. Runyon,* 36 F.Supp.2d 1284, 1289 (D.Kan.1999). Thomas now appeals that ruling.

II. DISCUSSION

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law.

Title VII makes it "an unlawful employment practice for an employer ... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e–2(a)(1). "Religion" is defined to include only those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate ... without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Title VII imposes an obligation on the employer "to reasonably accommodate the religious practices of an employee or prospective employee, unless

the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b)(1), (2) (1999) (citing *TWA v. Hardison,* 432 U.S. 63, 74, 97 S.Ct. 2264, 2271–72, 53 L.Ed.2d 113 (1977)).

This statutory and regulatory framework, like the statutory and regulatory framework of the Americans with Disabilities Act (ADA), involves an interactive process that requires participation by both the employer and the employee. *See Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69 107 S.Ct. 367, 372, 93 L.Ed.2d 305 (stating that, consistent with the goals expressed in the legislative history of the religious accommodation provision, "courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (internal quotations and citations omitted); *Smith v. Pyro Mining Co.,* 827 F.2d 1081, 1085 (6th Cir.1987) ("Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperate with an employer's attempt at accommodation."); *cf. Smith v. Midland Brake, Inc.,* 180 F.3d 1154, 1171–72 (10th Cir.1999) (en banc) (discussing the interactive process between an employer and an employee under the ADA).[FN5]

> FN5. A claim of religious discrimination under Title VII is similar to a claim under the ADA because, in both situations, the employer has an affirmative obligation to make a reasonable accommodation. *Compare* 42 U.S.C. § 2000e(j), *and* 29 C.F.R. § 1605.2(b)(2), *with* 42 U.S.C. § 12112(b)(5)(A), *and* 29 C.F.R. § August 10, 20001630.9. We stated in *Smith* that "[t]he obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee." *Smith,* 180 F.3d at 1172. The "interactive process" rationale is equally applicable to the obligation to offer a reasonable accommodation to an individual whose religious beliefs conflict with an employment requirement.

To survive summary judgment on a religious discrimination claim of failure to accommodate, the employee must show that (1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired for failure to comply with the conflicting employment requirement. *See Toledo v. Nobel–Sysco, Inc.,* 892 F.2d 1481, 1486 (10th Cir.1989) (citation omitted). Here, there is no dispute that Thomas established a prima facie case.

The burden then shifts to the employer to (1) conclusively rebut one or more elements of the plaintiff's prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship. *See id.*

The Postal Service took the following steps to try to accommodate Thomas' religious beliefs: it approved Thomas' use of leave on Saturdays, it approved the use of substitutes for him on Saturdays when such substitutes could be found; it sought a waiver from the union of the requirement that all letter carriers work five out of six Saturdays; and it recommended that Thomas bid for a position that would not require him to work on Saturdays, even though it also told him he was unlikely to succeed in getting such a position because of the governing seniority agreement and Thomas's lack of seniority.

Against this backdrop, we consider the five accommodation requests made by Thomas. The district court found that all five of Thomas's requests would have violated the LMOU. *See Thomas,* 36 F.Supp.2d at 1287–88. Thomas has not argued that this finding was incorrect. Under *Hardison,* the duty to accommodate Thomas's beliefs does not require the Postal Service to violate the LMOU. *See Hardison,* 432 U.S. at 79, 97 S.Ct. 2264 ("[W]e do not believe that the duty to accommodate requires [the company] to take steps inconsistent with the otherwise valid [collective bargaining] agreement."); *Lee v. ABF Freight Sys., Inc.,* 22 F.3d 1019, 1023 (10th Cir.1994) ("Nor does Title VII

require an employer to violate a valid labor agreement to accommodate an employee."). Requiring such a violation through any of Thomas's suggested accommodations would result in an undue hardship on the conduct of the employer's business.

Thomas argues that the Postal Service should have provided more active assistance in helping him locate a "voluntary permanent swap" for Saturdays, and that such assistance would not have violated the LMOU. The record does not indicate that Thomas ever made such a request at the time that the reasonable accommodation was being sought. Although an employer has a duty reasonably to accommodate an employee's religious beliefs or to show that reasonable accommodation cannot be made without undue hardship, this duty does not obligate the employer to consider and preclude an infinite number of possible accommodations. In the interactive process between employer and employee, the employer here considered every accommodation requested by Thomas and rightfully rejected each as unduly burdensome. In addition, it remained sympathetic to Thomas's religious requirements, approved all voluntary schedule swaps that Thomas was able to arrange, and imposed no restrictions or impediments on Thomas's ability to attempt to arrange further voluntary schedule swaps with other employees. This is all that Title VII reasonably requires the Postal Service to do. 29 C.F.R. § 1605.2(d)(1)(i).

We have, in a closely analogous case, held that actions similar to those of the Postal Service here constitute all that is reasonably required of an employer to accommodate the employee's religion. In *United States v. Albuquerque,* 545 F.2d 110 (10th Cir.1976), we held that an employer had done all that was reasonably required under 42 U.S.C. § 2000e–2 once it had encouraged the employee to try to find another employee to swap shifts with him so that he could avoid working on Saturdays in violation of his religious beliefs. We held that it would have been unreasonable to require the employer to go further and attempt to arrange a schedule swap for the plaintiff. We recognized the interactive and reciprocal duties inherent in a reasonableness analysis, and concluded that the employer had done all that was reasonably required of it when it was amenable to, and receptive to, efforts that the employee could have conducted for himself to arrange his own schedule swap. We believe the holding of that case is controlling here. *See also Pyro Mining Co.,* 827 F.2d at 1088 (holding that so long as the plaintiff had no religious constraints against arranging his own schedule swap with other employees, it would be a sufficient reasonable accommodation for the employer simply to be amenable to such a swap without requiring the employer itself actively to solicit other employees to make such a swap); *Lee,* 22 F.3d at 1022–23 ("The defendant's efforts to reach a reasonable accommodation triggered [the plaintiff's] duty to cooperate."); *Brener v. Diagnostic Ctr. Hosp.,* 671 F.2d 141, 144–46 (5th Cir.1982).[FN8]

> FN8. We note that each case has to be looked at on its own facts, and that we are not attempting to impose a universal rule. Other factors, not present in this case, could require an employer to take a more active role in securing a voluntary swap for the employee. *Pyro Mining* suggests one factor—the plaintiff-employee's religious constraints against asking others to work in his place on Sunday; and we do not preclude the possibility of other factors, nonburdensome to the employer, which might require an employer's active participation in the process. However, no such factors are raised here.

Finally, at no time did Thomas ever prove that further voluntary swaps were possible or even likely. As such, he failed to prove that further efforts by the Postal Service to arrange voluntary schedule swaps were even a possible reasonable accommodation. *See Smith,* 180 F.3d at 1174.

We conclude that the employer has met its burden under Title VII, and that Thomas has not shown that there is a genuine issue remaining for trial. Summary judgment on Thomas's religious discrimination claim was appropriate.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order granting the Postal Service's motion for summary judgment.

United States Court of Appeals
for the Third Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Appellant
v.
The GEO GROUP, INC.

SLOVITER, Circuit Judge.

I.

The Equal Employment Opportunity Commission ("EEOC") appeals from the decision of the District Court granting the summary judgment motion of defendant, the GEO Group, Inc. ("GEO"). GEO is a private company that was contracted to run the George W. Hill Correctional Facility (the "Hill Facility"), which is the prison for Delaware County, Pennsylvania. The EEOC filed its complaint pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.,* on behalf of a class of Muslim women employees, alleging that GEO violated Title VII's prohibitions on religious discrimination when it failed to accommodate the class members by providing them an exception to the prison's dress policy that otherwise precluded them from wearing Muslim head coverings called khimars at work. GEO moved for summary judgment, arguing in part that a deviation from its policy would cause it an undue hardship by compromising its institutional interests in security and safety. Although the EEOC had filed a cross motion for summary judgment, on appeal it argues that the District Court erred because questions of material fact exist about whether accommodating the class would in fact constitute an undue hardship for GEO.

GEO is a private, international corporation that, among other related things, runs federal and state prisons in the United States. The Hill Facility in Thornton, Pennsylvania holds "pretrial detainees and persons serving a county sentence of two years less one day or a state sentence of five years less one day." Appellant's Brief at 3 (quotation omitted). During the relevant period Raymond Nardolillo was the warden at the Hill Facility and Matthew Holm, who was hired in August 2004, was the deputy warden. In about February 2008, Holm became warden of the Hill Facility.

In April 2005, the Hill Facility instituted a dress policy that provided that "[n]o hats or caps will be permitted to be worn in the facility unless issued with the uniform." App. at 207. The new policy also stated that "[s]carves and hooded jackets or sweatshirts will not be permitted past the Front Security Desk." App. at 207. These directives were interpreted to prohibit the wearing of a khimar, which the complaint defined as an "Islamic religious head scarf, designed to cover the hair, forehead, sides of the neck, shoulders, and chest," which was until then worn by some female Muslim employees inside of the Hill Facility. App. at 15.

To reinforce the April 2005 prohibitions on hats, head scarves and hoods, Holm issued a memorandum entitled "UNIFORM POLICY," that stated:

> Reminder! All employees, while on duty, will if required, wear only an official GEO uniform, which adheres to the dress code and standards, described in Policy 300.19. This includes, but [is] not limited to the length of your hair, scarves, hooded jackets, sweatshirts and specifically hats. The following are excerpts form [sic] the policy:
>
> > "No hats or caps will be permitted to be worn in the facility unless issued with the uniform."
> > "The Uniform described below is not to be altered, modified, or embellished upon. Only items approved by the Warden will be authorized."

> Those employees not subjected to the uniform policy will adhere to the Facility dress code, which is posted at the Front Entrance Security Post/ION Scan.
>
> This means that all hats, caps or religious attire will not be permitted to be worn with your uniform or by non-uniformed employees unless specifically authorized by the Warden. At this time there are no authorized hats, caps or attire, which can be worn inside the jail and there are no exceptions to this policy.

After the October 2005 memorandum was issued, Holm and Nardolillo adopted and enforced a "zero tolerance headgear policy...." Appellant's Br. at 6. According to GEO, the no-headgear policy was adopted for safety and security reasons to prevent the introduction of contraband into the prison facility and to avoid misidentification.

Three Muslim women employees of the Hill Facility, Carmen Sharpe–Allen, Marquita King, and Rashemma Moss, protested, claiming that wearing of the khimar was required by the Islamic religion. They sought an exception to the policy, arguing that before the April 2005 dress code, they had all been wearing some style of khimar or head covering at work. After the April 2005 dress code was instituted, they were all prevented from doing so.

Sharpe–Allen was hired as a medication nurse at the Hill Facility in 2004. During her interview for that position she explained that her faith required her to wear a khimar, and that she "wasn't willing to compromise" concerning the wearing of her khimar at work. App. at 43. According to Sharpe–Allen, the interviewer told her that "[h]e didn't see it being a problem." App. at 44. Part of Sharpe–Allen's initial job at the Hill Facility was to "go from cell block to cell block" to "dispense medication" accompanied by a prison "officer." App. at 45.

In early 2005, Sharpe–Allen became the chronic infectious disease nurse, a position in which she worked "closely with the doctor" in the infirmary "with the inmates who had infectious diseases, such as hepatitis, [and] HIV ... [to] ma[k]e sure that they got their medication, [and] made sure it was ordered.... [and in which she] did all of the PPDs, which is the tuberculosis test, for the entire prison." App. at 49. "From November 2004 through mid-July 2005, when Sharpe–Allen went out on medical leave, she wore her khimar to work daily at" the Hill Facility. Appellant's Br. at 8. When Sharpe–Allen was preparing to return to work from that medical leave, colleagues called to tell her that she could not "wear [her] khimar when [she] c[a]me back to work." App. at 52. Sharpe–Allen then spoke with someone in human resources at the Hill Facility who told her that "the khimar would be an issue." App. at 54. As a result, Sharpe–Allen asked to speak with Warden Nardolillo.

According to Sharpe–Allen, when she and Nardolillo spoke,[FN2] the warden told her that the policy would be enforced against her but asked if she would be willing to "wear a headpiece [or] hairpiece...." App. at 58. He also told Sharpe–Allen that her "job was there, if [she] wanted it, [she] just couldn't wear [her] khimar," but that if she refused to work without the khimar or resign, the prison would have to fire her. App. at 59. Sharpe–Allen told Nardolillo that she enjoyed her job and that the khimar had never presented any problem in the past, but also that she would not compromise about wearing the khimar to work. In December 2005, Allen was fired on the ground that "she had 'effectively abandoned her job' by 'refus[ing] to comply with [the] directive to return to work without the wearing of her' " khimar. Appellant's Br. at 10 (quoting App. at 216–17).

> FN2. Sharpe–Allen testified that she had two meetings with the warden, but she could not remember exactly what transpired at either of them. According to Sharpe–Allen's testimony, Nardolillo took the consistent position at both meetings that she would not receive an exception to the no khimar rule.

Marquita King is a Muslim woman who was hired at the Hill Facility in July 2000 as an "intake specialist" at

the prison: the person who does the paperwork to process new prisoners into the facility. King's job entailed such duties as performing a "bench warrant check" on new prisoners. App. at 129. She would also have corrections officers bring individual prisoners to her so that she could ask them questions and input their answers into a computer. Unlike the corrections officers, she had no keys to the facility. At her interview for the job, King wore her khimar and a veil. The interviewer asked King if she would take her veil off at work, and King agreed that would be acceptable. There was no discussion of King's khimar at the interview, and she wore it to work for the first five years of her employment.

In October 2005, King was told by a fellow employee that she and other Muslim women were no longer allowed to wear their khimars at work. King then called Warden Nardolillo who, according to King, told her that she "will be fired if [she] ha[s] a khimar on [her] head" at work. App. at 131. Stressed by this new situation, King took leave for the next four to six weeks. When she returned, King took off her khimar at work.

Rashemma Moss began working as a correctional officer at the Hill Facility in March 2002, a job which sometimes required her to be close to inmates and sometimes even to come into physical contact with them. In July 2005, after Moss took her Shahada—"the Muslim confession of faith," Appellant's Br. at 6 n.2—at work she began to wear underneath her hat a triangle shaped underscarf that she would tie around her head. In a meeting in October 2005, Nardolillo told Moss that she could no longer wear her head scarf, and that she would be suspended without pay if she did. Thereafter, Moss stopped wearing her head scarf to work.

In September 2007, the EEOC as plaintiff, with Sharpe–Allen as the charging party, filed a complaint alleging that GEO violated Title VII's prohibitions on religious discrimination when GEO failed to accommodate the religious beliefs of Sharpe–Allen and other female Muslim GEO employees by refusing their requests for an exception to the Hill Facility's dress policy that would have allowed them to wear khimars at work.

GEO moved for summary judgment, in part asserting the affirmative defense that it would be an undue hardship as a matter of law for the prison to allow its Muslim employees a complete exception to the non-headgear policy because such an accommodation would compromise the prison's interest in safety and security and/or would result in more than de minimis cost. The EEOC opposed that motion on the ground that these interests were insufficiently founded, relying heavily on the report of its expert, George Camp (the "Camp Report"), which generally concluded that: "(1) GEO's professed reasons for denying any of its female employees the ability to wear a khimar lack merit and substance; (2) GEO made no genuine attempt to, nor reasonable offer of, an alternative method (of which several exist) for accommodating the wearing of the khimar; and (3) [t]here is no sound legitimate correctional reason for GEO to deny its female employees to wear a khimar within the secure perimeter of the facility." App. at 219.

The District Court granted GEO's motion, finding dispositive this court's reasoning in *Webb v. City of Phila.,* 562 F.3d 256, 258 (3d Cir.2009). In *Webb* this court held that the dress code adopted by the Philadelphia police, which did not "authorize[ ] the wearing of religious symbols or garb as part of the uniform" and therefore precluded Muslim women from wearing khimars on the job, was not a violation of Title VII. *Id.* In granting GEO's motion for summary judgment, the District Court concluded that there was "no meaningful distinction between prison guards and similar personnel, on the one hand, and police officers," who were at issue in *Webb. EEOC v. GEO Group, Inc.,* No. 07–cv–04043–JF, 2009 WL 1382914, at *1 (E.D.Pa. May 18, 2009). The Court also stated that the "same considerations advanced to justify the regulation in question apply equally to prison guards and employees working in the medical department." *Id.*

II.

[1] Our review of the District Court's grant of summary judgment is plenary. *Jackson v. Danberg,* 594 F.3d 210,

215 (3d Cir.2010). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

Title VII of the Civil Rights Act of 1964 reads, in relevant part:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion ...; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... religion....

42 U.S.C. § 2000e–2(a). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

This court has recently stated: "To establish a prima facie case of religious discrimination, the employee must show: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) her employer was informed of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement." *Webb,* 562 F.3d at 259. "[T]he burden [then] shifts to the employer to show either [1] it made a good-faith effort to reasonably accommodate the religious belief, or [2] such an accommodation would work an undue hardship upon the employer and its business." *Id.* (citation omitted).

GEO does not argue that the EEOC failed to present a prima facie case. Instead, GEO argues that it offered plaintiffs "a reasonable accommodation, by offering to permit the Muslim women employees to wear a hairpiece in place of the khimar" because "it fulfills the stated religious requirement that the hair be covered." Appellee's Br. at 13–14; *see Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986) (noting that there is "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation."). GEO notes that one female Muslim employee found that a hairpiece was sufficient to fulfill the religious requirement to cover her hair. We are not persuaded by this argument. There is no evidence about the proposed hairpiece nor any details about the Muslim employee who found it acceptable. We are unwilling to delve into any matters of theology, and will therefore decline GEO's invitation to decide on our own what might constitute a reasonable substitute for a khimar under the Islamic faith. GEO does not challenge the assertion of the three Muslim employees that they believe wearing the khimar is integral to their religion, and we proceed on the basis that this is their sincere religious belief.

In response to the EEOC's motion for summary judgment, which relied primarily on the Camp Report and the deposition testimony of the three female employees, GEO proffered the testimony of the two GEO wardens. Warden Holm testified that before he became deputy warden at the Hill Facility, he had previously worked as the lead investigator for GEO at the Taft Correctional Institution in Taft, California. In that position, he was responsible for "initial criminal investigation on new crimes committed by inmates, all serious crimes committed by inmates." App. at 169. His "personal focus" was on "internal affairs, violations of the rules by staff." App. at 169. He investigated GEO

staff for, among other things, having introduced contraband to prisons, and for "actually selling and distributing controlled substances to inmates." App. at 169. Holm was also the lead investigator of "a fairly large disturbance at the Taft Correctional Facility that involved approximately 900 to 1,000 inmates," an incident that he described as "more or less a riot...." App. at 169. According to Holm, that investigation involved "issues about identification of inmate and video surveillance." App. at 169. Before working with the GEO Group, Holm was a California police officer for 18 years.

In the year after Holm was hired at the Hill Facility, he and Nardolillo made numerous changes to the prison's policies to address what they perceived as the prison's "need[ ] to ... improve the performance of the facility and the staff and to enhance security and tighten a few things up." App. at 171. One thing that Holm had noticed was that despite a long-standing, apparently unspoken ban on prison employees wearing unauthorized hats, that ban was not well-enforced. Although the only hats that were authorized were a black baseball hat with the GEO logo on and a knit cap that could be used outdoors, Holm had observed employees wearing unauthorized hats with "different logos, different things that weren't appropriate to the uniform of the GEO Group," App. at 184, and wearing hats "backwards and sideways," App. at 183. During his deposition, Holm also recalled one incident of an employee wearing a "New York Yankees baseball hat inside the institution while in full uniform." App. at 183.

This concerned Holm in part because of his view that "the band inside of a baseball cap is an excellent place to hide small amount[s] of narcotics and small amounts of contraband. A wire, a small knife, anything can go in there." App. at 183. "[A]nother issue" he had with employees wearing hats was "based on [his] personal experience": the "identification of an individual wearing a hat when they would be inside [the] secure portion [of the prison] ... where we rely heavily on video surveillance ... [because a hat] distorts the identity of the individual wearing the cap, which to me is an overall safety and security issue for the prison because it would be entirely possible for an inmate to get a uniform shirt, put a hat on, pull it real close ... [so that] it distorts the view of their face and you can't tell who they are when they walk out." App. at 183.

Holm's experience was that "during the riot in Taft Correctional Facility based on the review of video surveillance, which is what [GEO] based most of [its] investigation on.... there were probably better than 300 or 400 inmates that [GEO] couldn't identify ... simply because they had a baseball cap on." App. at 184. Moreover, one "inmate put a hat on ... change[d] [his] shirt ... pulled [a] hat over his face and walked out the front door." App. at 203. As a result, Holm approached Nardolillo to crack down on employees wearing unauthorized hats and other "headgear."

When asked for additional reasons for why this no-khimar policy was adopted, Holm opined that a head scarf could be "taken away from an individual and used against them, in any form of a choking movement.... [i]t could be used as a restraint device ... [and it] provides unwanted material for inmates to grab ahold of and/or use against [the] staff." App. at 201. Asked to distinguish the safety difference presented by a "head covering" and that presented by "someone's shirt or someone's pants," Holm answered that a khimar, if "grabbed from the behind by the sides of it, ... immediately becomes a choking instrument," App. at 201, as would a man's tie, an item of clothing also generally forbidden for anyone who "has direct contact with inmates on a daily basis....," App. at 202. Holm also noted that because a "khimar [has] [a] band right across the forehead and ... it has the two pieces of material that come down the side of [the] face, anything that casts a shadow on the face, be it from above or the side ... it casts a shadow," making identification difficult. App. at 202.

Warden Nardolillo also explained that the justification for the new zero-tolerance headgear policy was instituted because "[w]e have had some security issues that were becoming extremely problematic. One primarily being the increased introduction of contraband, specifically drugs, into the institution." App. at 75.

The EEOC characterizes Holm's testimony as "utterly speculative and conclusory." EEOC Br. at 39. However, Holm had significant prior experience in prison administration, and that practical experience adds weight to the concerns that he expressed as the basis for the no-headgear policy. We must therefore decide whether GEO made the necessary showing of the undue hardship defense.

An "undue hardship" is one that results in more than a de minimis cost to the employer. *Webb,* 562 F.3d at 260 (citing *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977)). "Both economic and non-economic costs can pose an undue hardship upon employers...." *Id.* (citations omitted). In deciding whether undue hardship exists, "[w]e focus on the specific context of each case, looking to both the fact as well as the magnitude of the alleged undue hardship." *Id.* In *Webb,* we stated that the Supreme Court's decision in *Trans World Airlines,* "strongly suggests that the undue hardship test is not a difficult threshold to pass." *Webb,* 562 F.3d at 260. A religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison. As noted above, the specific safety and security risks that GEO asserts regarding the wearing of head coverings in prison are the "smuggling of contraband, misidentification and the use of [a] khimar as a strangulation weapon in a conflict with an inmate." Appellee's Br. at 17.

We agree with the EEOC that the *Webb* court did not purport to establish a per se rule of law about religious head coverings or safety "that would govern in all religious discrimination cases, all 'paramilitary organization' cases, or even all police department cases." Appellant's Br. at 31–32. GEO does not disagree. Nonetheless, *Webb* is relevant to this case by analogy, as some security and uniformity interests held by the police force are also implicated in the prison context.

GEO also argues that the costs that it would incur were it to adopt the accommodation requested by the Muslim employees of allowing them to wear khimars would "cause an undue burden with respect to prison resources." Appellee's Br. at 18. According to GEO, this is because "Muslim female employees can move freely throughout [the prison]" and "[w]hen doing so ... must pass through numerous checkpoints to pass between secured portions of the facility" including "approximately [sixteen] different entry/exit doors that are monitored by closed-circuit video cameras at which visual identification/recognition is required prior to the door being electronically opened." Appellee's Br. at 18. Although GEO has not entirely convinced us that adopting the proposed accommodations of allowing female Muslim employees to wear khimars but removing them at each checkpoint would require locking down the prisoners in each such location, we recognize that adopting the proposed procedure would necessarily require some additional time and resources of prison officials.

In the last analysis, GEO's no headgear policy must stand on the testimony of Holm and Nardolillo that (1) khimars, like hats, could be used to smuggle contraband into and around the Hill Facility, (2) that khimars can be used to conceal the identity of the wearer, which creates problems of misidentification, and (3) that khimars could be used against a prison employee in an attack. To be sure, GEO acknowledges that "there were no reports of these types of incidents at [the Hill Facility] during Warden Nardolillo's and Warden Holm's tenure[s] at the facility," but we agree with GEO that a prison "should not have to wait for a khimar to actually be used in an unsafe or risky manner, risking harm to employees or inmates, before this foreseeable risk is considered in determining undue hardship." Appellee's Br. at 17. In other words, because "[i]n a prison setting, the safety of the employees and inmates is of top priority.... [GEO] should not be prevent[ed] from countering, through appropriate policies, the risks which might be posed by the plaintiff[s'] preferred accommodation." Appellee's Br. at 17.

Even assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that GEO is entitled to attempt to prevent. To GEO, the fact that inmates have other clothes that could also be used to strangle a guard "does not mean that the facility would be out of line in banning something else

which can also be used as such a weapon," especially given that a khimar does not have a legitimate penological justification. Appellee's Br. at 36. It argues that unlike other clothing, "the khimar is already located about the guard's head, virtually around the neck already." Appellee's Br. at 36.

The arguments presented by the parties make this a close case. The EEOC has an enviable history of taking steps to enforce the prohibition against religious discrimination in many forms and its sincerity in support of its arguments against the application of the no headgear policy to Muslim employees wearing khimars is evident. On the other hand, the prison has an overriding responsibility to ensure the safety of its prisoners, its staff, and the visitors. A prison is not a summer camp and prison officials have the unenviable task of preserving order in difficult circumstances.

In *Bell v. Wolfish,* the Supreme Court, albeit faced with different prison regulations that were challenged under the Fourth Amendment, noted that "[t]he Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained." 441 U.S. 520, 540, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The Court also noted that prisons are "unique place[s] fraught with serious security dangers" and therefore the effective management of a detention facility is a valid objective that may justify imposition of various conditions. *Id.* at 559, 99 S.Ct. 1861. In that case, the Court cautioned the federal courts to make only limited inquiry into prison management because "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government." *Id.* at 562, 99 S.Ct. 1861. Although we do not take those remarks to deter federal courts from upholding the constitutional rights of prisoners and prison staff alike, they must be considered in making the kind of delicate balance called for in this case.

This court's recent opinion in *Webb* held that notwithstanding the sincere religious beliefs of the plaintiff police officer of the need to wear a khimar, that belief was subordinate to the police department's policy prohibiting the wearing of a khimar because " 'safety is undoubtedly an interest of the greatest importance.' " *Webb,* 562 F.3d at 262 (quoting *Fraternal Order of Police,* 170 F.3d at 366). The District Court did not err by relying on *Webb* in granting summary judgment to GEO. We reach the same result in balancing the respective considerations here.

Accordingly, we will affirm the District Court's order granting summary judgment to GEO.

United States Court of Appeals
for the Tenth Circuit

Wilbur TOLEDO, Plaintiff-Appellant/Cross-Appellee,
v.
NOBEL-SYSCO, INC., Defendant-Appellee/Cross-Appellant.

SEYMOUR, Circuit Judge.

Wilbur Toledo brought suit under 42 U.S.C. § 1981 (1982) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982), charging that Nobel-Sysco, Inc. discriminated on the basis of religion when it refused to hire him as a truck driver due to his religious use of peyote. The district courtafter a bench trial, dismissed his religious discrimination claim. The court held that although Nobel's failure to hire Toledo was religious discrimination, offers Nobel made during subsequent administrative proceedings constituted reasonable accommodation of Toledo's religious practices and thus cured the discriminatory act. *See Toledo v. Nobel-Sysco, Inc.,* 651 F.Supp. 483 (D.N.M.1986). We reverse because settlement offers made during administrative proceedings do not qualify as "reasonable accommodation" under the religious discrimination provision of Title VII.

I.

FACTS

A. Toledo's Employment Application

In March 1984, Toledo applied for a position as a truck driver for Nobel-Sysco, Inc.. Nobel is a restaurant supply corporation that distributes food, equipment, and other supplies to customers in Wyoming, Colorado, Arizona, and New Mexico. Toledo applied for a job as a delivery driver domiciled in Farmington, New Mexico, where he lived. Had Toledo been hired, he would have made deliveries to customers in northern New Mexico and southern Colorado, a responsibility which included considerable driving over mountain roads. He also would have been required to work Monday through Saturday, and to be available for occasional Sunday deliveries. He would have worked without day-to-day supervision from Nobel, whose nearest office is in Albuquerque.

Nobel responded to Toledo's application by inviting him to interview at its Albuquerque office. Nobel's office manager, Rodney Plagmann, conducted the interview. After the interview, Plagmann told Toledo he had the necessary experience for the job and would be hired if he passed four tests routinely given to all of Nobel's driver applicants. One of these tests was a polygraph to determine an applicant's truthfulness in responding to questions about past illegal drug use. It was a Nobel policy not to hire applicants who had used illegal drugs in the two years preceding their job application. This policy was stated in both the newspaper advertisement to which Toledo had responded and in information sent to Toledo before his interview. After being told of the polygraph requirement, Toledo informed Plagmann that he was a member of the Native American Church, and had used peyote as part of church ceremonies. Toledo described the purpose of the ceremonies, and indicated he had used peyote twice in the previous six months.

Plagmann did not attempt at that time to obtain more specific information regarding Toledo's use of peyote, but he did say that Nobel probably could not hire Toledo. After the interview Plagmann sought advice from James Etherton, Nobel's director of personnel. Etherton in turn called Nobel's labor relations advisor, Jack Moore of Mountain States Employers Council, and related the details of Toledo's interview. Moore told Etherton that although religious use of peyote was legal, hiring a known user would expose Nobel to potential liability if he were ever involved in an accident while driving for Nobel. Etherton then told Plagmann not to hire Toledo, and Plagmann in turn in-

formed Toledo that Nobel could not hire him because of his use of peyote. Neither Etherton nor Plagmann discussed or attempted accommodation of Toledo's religious practices at that time.

B. The Native American Church and Use of Peyote

Toledo has been a member of the Native American Church since 1983. The role of peyote in church ceremonies was well documented at trial, and has been the subject of considerable attention in judicial opinions. Our discussion of church ceremonies reflects Toledo's description at trial of ceremonies in which he took part, and the trial court's findings based on those descriptions.

Peyote is a small spineless cactus that contains quantities of the hallucinogen mescaline. Native American religious use of peyote was first noticed by Spanish explorers in the 1600's, and efforts to prohibit ***1485** it date from the same century. Peyote use is the central and most sacred practice of the Native American Church. Its believers consider peyote to be not only a healer, a teacher, and a way of communicating with God, but also a deity itself. The Native American Church is an incorporated religion which combines elements of Christianity with traditional Native American beliefs and the use of peyote.

Peyote ceremonies are held at the request of any member for healing purposes or special occasions. Although the ceremonies may be conducted on any night of the week, they are generally held on Friday or Saturday night. The ceremonies that Toledo attends are conducted by a "Road Man," and take place in a hogan or tepee. A ceremony begins in the late evening, and passes through a series of rituals and prayers, culminating in the ingestion of peyote around midnight. The peyote is prepared by floating "buttons," or small slices, of the cactus in water. It is served in cups which are passed among the participants who both drink the water and chew and swallow the pieces of peyote. Toledo testified that the cups are always passed once, and often twice. He usually only drinks on the first pass, but occasionally drinks on the second. The ceremony continues until dawn. Toledo stays awake until four or five in the afternoon after a ceremony, and then sleeps until the next morning.

Toledo testified that he normally feels the effects of peyote only for approximately four hours after ingesting it. Experts testified for both sides, and presented considerable scientific descriptions of the effects of peyote. The trial court concluded that the doses Toledo takes at the ceremony are from 1.6 to 6.4 milligrams per kilogram of body weight. Both experts agreed that a person should not drive a truck for 24 hours after ingesting more than 1 milligram per kilogram of body weight.

C. Procedural History

Shortly after he was refused the Nobel job, Toledo filed an employment discrimination claim with the New Mexico Human Rights Commission (HRC) charging Nobel with religious discrimination. He subsequently amended his HRC complaint to charge discrimination based on race and national origin as well. In May 1984, Nobel made Toledo the first of the two offers that are the focus of this dispute on appeal. Nobel indicated it would hire Toledo on three conditions: 1) that he take the polygraph test and it show no illegal drug use other than peyote twice a year; 2) that he take a week of regular vacation after each ceremony; and 3) that he drop his HRC complaint if Nobel hired him *or* if he failed the polygraph test or physical examination. Toledo rejected the offer and did not make a counter-offer.

On May 24, HRC found probable cause that religious discrimination had occurred. The parties continued their negotiations, and on July 10 Nobel improved its initial offer. Nobel indicated that if Toledo would give one week's notice before taking part in a ceremony, he would be required to take only one day off after each ceremony. Nobel also offered $500 in back pay, but still required the polygraph test, the physical examination, a limit of two ceremonies a year, and that Toledo drop his claim. Toledo rejected the offer because the back pay amount was insuffi-

cient and because he felt the restrictions on his peyote use were unjustified. He also thought that Nobel would use the polygraph test and physical examination as an excuse to disqualify him, thereby getting rid of both him and his discrimination claim. Toledo did not make a counter-offer.

In January 1985, the EEOC issued Toledo a right to sue notice. Toledo filed this suit, charging religious discrimination in violation of Title VII, and race and national origin discrimination in violation of Title VII and 42 U.S.C. § 1981. The district court granted Nobel summary judgment on Toledo's race and national origin claims. After a bench trial, the court also held for Nobel on the issue of religious discrimination. The court determined that although Toledo had made out a prima facie case of religious discrimination, the July 10 offer made in the course of the HRC proceedings constituted reasonable accommodation of Toledo's religious practices. The court also refused to award Toledo back pay for the four months between the discriminatory act and the accommodation offer because Toledo had not proven the appropriate amount at trial. Finally, the court awarded Nobel costs.

Toledo appeals the court's holding that the settlement offers absolved Nobel of liability and ended its backpay obligations, the award of costs, and the dismissal of his race and national origin claims. Nobel cross-appeals the court's holding that Nobel could have accommodated Toledo without undue hardship.

II.
LIABILITY

Title VII makes it "an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual ... because of such individual's ... religion." 42 U.S.C. § 2000e-2. Religion is defined by the Act as follows:

"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."

42 U.S.C. § 2000e(j) (1982). As the Supreme Court has noted, "[t]he reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion." *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 63 n. 1, 107 S.Ct. 367, 369 n. 1, 93 L.Ed.2d 305 (1986). "The Supreme Court has held that the intent and effect of this definition of 'religion' is to make it a violation of § 2000e-2(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practice of employees and prospective employees."

Although the Supreme Court has never ruled on the issue, lower courts have implemented a two-step procedure for evaluating claims and allocating burdens of proof under these provisions. First, the plaintiff has the burden of establishing a prima facie case:

> "A plaintiff ... makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) the employer was informed of this belief; (3) he or she was [not hired] for failure to comply with the conflicting employment requirement."

Once a plaintiff has made out a prima facie case, "the burden shifts to the employer to show that it was unable to reasonably accommodate the plaintiff's religious needs without undue hardship."

The district court in this case found that Toledo met his burden of establishing a prima facie case, and Nobel does not contest this finding on appeal. It was undisputed at trial that the Native American Church is a bona fide religion, Toledo is a member of the Church, Toledo's beliefs in its teachings are sincere, Toledo uses peyote only as part of church ceremonies, and Nobel refused to hire Toledo because of his peyote use. *See Toledo,* 651 F.Supp. at 488. The dispute at trial and in this appeal centers on the district court's findings with respect to reasonable accommodation and undue hardship. The court held that Nobel could rebut the prima facie case by showing either actual efforts at reasonable accommodation or that it could not accommodate Toledo's practices without undue hardship. The court rejected Nobel's argument that it could not have accommodated Toledo's peyote use without undue hardship, but held that the July 10 offer constituted an attempt at reasonable accommodation.

Nobel argues on appeal that the district court erred in holding that it could have accommodated Toledo's religious practices without undue hardship, but was correct in finding that the July 10 offer was an effort at reasonable accommodation. Nobel also argues that by adopting an intractable bargaining position, Toledo breached his duty to cooperate with Nobel's accommodation efforts. Toledo argues that the July offer was a settlement offer, and not an accommodation offer. He also claims that although the court was correct in holding that Nobel could have accommodated his practices without undue hardship, the court should not have reached this issue because Nobel failed to prove any effort at accommodation.

We address in turn whether either settlement offer qualifies as a reasonable accommodation under 42 U.S.C. § 2000e(j), whether Toledo breached any duty to cooperate by refusing these offers, and, finally, whether the district court was correct in addressing the issue of undue hardship and finding in Toledo's favor.

A. Accommodation

Whether a settlement offer made in the context of an administrative proceeding on a claim of religious discrimination qualifies as reasonable accommodation under section 2000e(j) appears to be a question of first impression. Rather than relying on precedent, therefore, the parties focus their arguments on the policies behind this provision of Title VII. Nobel correctly points out that Title VII strongly encourages cooperative settlements as the primary means for resolving claims of discrimination. Nobel argues that including settlement offers made in the course of administrative proceedings as efforts at reasonable accommodation will encourage the making of such offers, thus furthering the important statutory policy favoring voluntary reconciliation. Toledo contends in response that this approach would encourage employers to adopt a wait-and-see attitude towards employees with problematic religious practices. He suggests that when an employee or applicant presents an employer with a religious practice that conflicts with an employment requirement, under Nobel's approach the employer would have every incentive to discriminate against the employee, knowing that if the employee files a complaint it can absolve itself of liability by attempting accommodation at that time.

We believe that Toledo's position represents the better view. It finds initial support in the language and structure of the statute, which makes illegal any adverse employment action grounded in discrimination on the basis of religion. Religion is defined as any practice, belief, or observance which an employer can reasonably accommodate without undue hardship. These provisions of the statute together imply that acting to the detriment of an applicant or employee because of his religion *before* attempting accommodation is illegal. This reading comports with the Supreme Court's conclusion that the effect of the accommodation requirement "was to make it an unlawful employment practice ... for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airways,* 432 U.S. at 74.

When Nobel rejected Toledo based solely on his religious practices without an attempt to accommodate him, assuming it could have done so without undue hardship, it committed an illegal act. The settlement offer made in

response to the administrative charge could not undo the completed act.[FN2] Indeed, the effect in the Title VII context of offers of employment is well defined and narrow. The Supreme Court has held that after an employee brings a Title VII claim, an offer of employment may toll backpay liability if the offer is not conditioned on dropping the discrimination charges. *See Ford Motor Co. v. EEOC,* 458 U.S. 219, 232-34 & n. 18, 102 S.Ct. 3057, 3065-66 & n. 18, 73 L.Ed.2d 721 (1982). Nobel's offer to Toledo was conditioned on Toledo dropping the charges, as well as his passing a number of tests. We see no reason to give this offer the new power of "curing the discriminatory act," when under *Ford* it would not even toll Nobel's liability for backpay.

> FN2. This approach accords with that taken by the court in *Boomsma v. Greyhound Food Management, Inc.,* 639 F.Supp. 1448 (W.D.Mich.1986), *appeal dismissed,* 815 F.2d 76 (6th Cir.1987). The employer there suspended an employee for his religiously-motivated refusal to work on Sundays, and only then considered shift-trading arrangements that might accommodate the employee's religious practices. The court refused to consider these efforts because the "defendant failed to engage in efforts to accommodate reasonably plaintiff's religious belief against working on Sundays until after plaintiff had suffered adversely for adhering to such belief." *Id.* at 1454.

In addition, Toledo's policy arguments are more persuasive. Under the rule advocated by Nobel, an employer could absolve itself from liability for religious discrimination after it had disadvantaged an employee. When conflicts with religious practices first arise, an employer's conduct and the manner in which it deals with such conflicts would be virtually unregulated. Title VII would provide employees no protection until after the fact, an important consideration given the impact a suspension, termination, or rejection may have on an individual's life. We conclude that the trial court erred in considering Nobel's settlement offers as reasonable accommodation which cured Nobel's illegal discriminatory act.

B. Toledo's Duty to Cooperate

Nobel correctly points out that an employee or applicant has a duty to cooperate with an employer's efforts to accommodate his religious practices. The Supreme Court has recently endorsed this idea:

> "To the extent it provides any indication of congressional intent, ... we think that the [legislative] history [of section 2000e(j)] supports our conclusion. Senator Randolph, the sponsor of the amendment that became [section 2000e(j)], expressed his hope that accommodation would be made with 'flexibility' and 'a desire to achieve an adjustment.' 118 Cong.Rec. 706 (1972). Consistent with these goals, courts have noted that 'bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.' "

Ansonia Bd. of Educ., 479 U.S. at 69, 107 S.Ct. at 372. Nobel argues that Toledo breached this duty by rejecting its offers and, without offering a counter-proposal, taking the position that the proposed limitations on his religious practices were unacceptable. This breach, the argument continues, should absolve Nobel from any liability under Title VII.

We disagree. In *Ansonia Bd. of Educ.* the employee's duty to cooperate was triggered by the employer's initial efforts at accommodation. Here, to the contrary, Nobel did not attempt to accommodate Toledo's beliefs before it refused to hire him. "[T]he statutory burden to accommodate rests with the employer," *Brener v. Diagnostic Center Hospital,* 671 F.2d 141, 146 (5th Cir.1982), and the employee's "duty to make a good faith attempt to satisfy his needs through means offered by the employer," is irrelevant until the employer satisfies its initial obligation under the statute. *Id.; see also Anderson v. General Dynamics Convair Aerospace Div.,* 589 F.2d 397, 401 (9th Cir.1978)

("The burden was upon the [employer], not [the employee], to undertake initial steps toward accommodation. [The employer] cannot excuse [its] failure to accommodate by pointing to deficiencies ... in [the employee's] suggested accommodation."), *cert. denied,* 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979). Because the accommodation offer came after the initial unlawful refusal to hire, we conclude that Toledo did not breach his duty to cooperate with Nobel in reaching a reasonable accommodation.

C. Undue Hardship

The court below held that Nobel could accommodate Toledo's religious use of peyote without undue hardship. Toledo argues that any claim of undue hardship should not be considered by a court when the employer has not met its burden of coming forward with evidence of attempts at reasonable accommodation.

Nobel's position is in line with that taken explicitly by the Sixth Circuit, which held that "it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations, and we must determine whether the [employer] has made such showing in this case." *Draper v. United States Pipe & Foundry Co.,* 527 F.2d 515, 520 (6th Cir.1975). We believe this is the more reasonable approach, for it is certainly conceivable that particular jobs may be completely incompatible with particular religious practices. It would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them. Employers faced with such conflicts should be able to meet their burden by showing that no accommodation is possible.

Although conceivable, such situations will also be rare. We therefore will be "skeptical of hypothetical hardships." *Draper,* 527 F.2d at 520. "The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." *Id.* Indeed, deciding the issue of undue hardship without some background of attempted or proposed accommodation is best resolved by examining the specific hardships imposed by specific accommodation proposals. We recognize that the determination whether a particular accommodation works an undue hardship on either an employer or union must be made by considering the particular factual context of each case.

Accordingly, we hold that an employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship. Absent this showing, failure to attempt some reasonable accommodation would breach the employer's duty to initiate accommodation of religious practices.

On appeal, Nobel asserts three arguments supporting the claim that no accommodation is possible in this case. First, it claims that hiring an active member of the Native American Church would place it in violation of Federal Department of Transportation (DOT) regulations regarding drug use by truck drivers. Second, it claims that any use of peyote is illegal, and that hiring a user of an illegal drug would violate its own policies and its truck lease agreement. Finally, it claims that knowingly hiring a peyote user would expose it to unacceptable liability risks. We address each argument in turn.

Nobel claims here, as it did at trial, that DOT regulations made hiring Toledo illegal. The relevant regulation in effect at the time of Toledo's application stated:

> "(a) No person shall operate, or be in physical control of, a motor vehicle if he possesses, is under the influence of, or is using, any of the following substances:
>
> (1) A narcotic drug or any derivative thereof; (2) An amphetamine or any formulation thereof

> (including, but not limited to, 'pep pills' and 'bennies'); (3) Any other substance, to a degree which renders him incapable of safely operating a motor vehicle."

49 C.F.R. § 392.4 (1983). The district court correctly noted that although peyote is neither a narcotic nor an amphetamine, it could render a driver "incapable of safely operating a motor vehicle" and thus falls under subsection (3) of the regulation. The court also correctly "interpret[ed] the regulation to prohibit possession, driving under the influence of, or use (consumption) of peyote while operating or physically controlling a truck. It does not prohibit use or possession while off duty." *Toledo,* 651 F.Supp. at 489. The court found that Toledo never used peyote outside of religious ceremonies, and that Nobel could have ensured compliance with the regulation by requiring Toledo to take a day off after each ceremony. The district court did not err in this regard.

Nobel argues next that peyote is an illegal drug, and that hiring a user of an illegal drug would violate its own policies and its truck lease agreement with Ryder Trucks. The district court rejected this argument by noting that although peyote is a Schedule I illegal drug under the Controlled Substance Act of 1970, 21 U.S.C. § 812(c) Schedule I(c)(12) (1982), religious use of peyote by members of the Native American Church has been made legal by regulation. *See* 21 C.F.R. § 1307.31 (1988) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church...."); *see generally Employment Div., Dep't. of Human Resources v. Smith,* 485 U.S. 660, 108 S.Ct. 1444, 1451 n. 15, 99 L.Ed.2d 753 (1988); *Peyote Way Church of God,* 742 F.2d at 197-98; *Native American Church of New York,* 468 F.Supp. at 1248. Bona fide religious use of peyote is also explicitly made legal by statute in New Mexico and Colorado, the two states in which Toledo would have driven. *See* N.M.Stat.Ann. § 30-31-6(D) (1987); Colo.Rev.Stat. § 12-22-317(3) (1985).

The district court disposed of Nobel's argument as follows:

> "Nobel's lease with Ryder, from whom it leased all its trucks, provided that Ryder could remove any driver, cancel its lease or cancel its insurance if any driver used drugs or operated trucks under the influence of drugs which impair the driver's ability to operate the truck. The Ryder Safety Manual also prohibited 'drug abuse'. As indicated above, Toledo's use of peyote was not an illegal use, so did not violate Nobel policy. By requiring Toledo to take a day off after each use of peyote, Nobel would have been complying with the Ryder lease terms on use or being under the influence of drugs while on the job. Toledo's religious use was not drug abuse. Therefore, neither Nobel nor Ryder policies prevented Nobel from hiring Toledo with the reasonable restriction of requiring Toledo to take a day off after each use."

Toledo, 651 F.Supp. at 491. The meaning of the federal regulation and New Mexico statutory exemption are evident and undisputed. A review of the record has convinced us that the district court's findings regarding the Ryder lease and Nobel policy are correct.

Nobel's final claim of undue hardship is that hiring a known user of peyote would expose Nobel to the risk of increased tort liability should Toledo cause an accident while in its employ. The district court rejected this argument on two grounds: that Toledo's known peyote use would not expose Nobel to new lawsuits, but only to additional liability in suits that already could be brought against it under the doctrine of *respondeat superior;* and that the legality of peyote and restrictions on Toledo's work after ceremonies would virtually eliminate this risk. *See Toledo,* 651 F.Supp. at 491. Nobel responds that this holding does not adequately consider all the nuances of the tort of negligent entrustment and Nobel's potential exposure to punitive damages.

An accommodation that requires an employer to bear more than a "de minimis" burden imposes undue hardship. *See Trans World Airways,* 432 U.S. at 84, 97 S.Ct. at 2276. Any proffered hardship, however, must be actual; "[a]n employer ... cannot rely merely on speculation." *Pyro Mining,* 827 F.2d at 1086; *see also Tooley v. Martin-Marietta Corp.,* 648 F.2d 1239, 1243 (9th Cir.) ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships.... The *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case."), *cert. denied,* 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981).

We are convinced that the risks of increased liability created by hiring Toledo are too speculative to qualify as undue hardship. As the district court found, accommodating Toledo's practices by requiring him to take a day off after each ceremony would virtually eliminate the risk that the influences of peyote would cause an accident or be a factor in subsequent litigation. This finding in turn depends on the district court's previous factual determinations that the doses of peyote Toledo ingested at ceremonies would have dissipated after a day's rest. *See Toledo,* 651 F.Supp. at 487, 489, 491. These findings are all well supported by the record and are not clearly erroneous.

Nobel failed to show that accommodation of Toledo's practices without undue hardship was impossible. Its refusal to hire him therefore constituted a violation of Title VII's prohibition against employment discrimination based on religion.

CONCLUSION

We reverse the holding of the district court relieving Nobel of liability for its discriminatory failure to hire Toledo. By failing to accommodate Toledo's religious practices before refusing to hire him, Nobel violated Title VII.

REVERSED AND REMANDED.