

INTERACTIVE RELIGIOUS ACCOMMODATIONS

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This Article argues employers should be required to engage in the same interactive process with employees seeking religious accommodations as they are with employees seeking disability accommodations. The interactive process generally obligates the employer and employee to work together in good faith to determine whether the employee can be reasonably accommodated. Neither the Americans with Disability Act nor Title VII of the Civil Rights Act explicitly mandates the interactive process, yet courts routinely read this requirement into the former statute but not the latter. The practical effect of this distinction is that religious accommodations generally are more difficult to obtain, and employees seeking such accommodations have less control over the process and outcome. Consequently, employees may be forced to choose between their jobs and their religious beliefs—the very conundrum Title VII seeks to avoid.

The legal justification for mandating the interactive process for disability accommodations but not religious accommodations is unconvincing, prompting a handful of courts to require the interactive process for both types of accommodations. More courts should follow suit. There is considerable upside, and virtually no downside, to extending the interactive-process requirement to religious accommodations. It benefits employees and employers alike by increasing the odds of a mutually agreeable accommodation, which in turn reduces the risk of litigation. Moreover, good-faith participation in the interactive process better positions a party to prevail when litigation does ensue. The interactive process also benefits courts, not only by lightening dockets through reduced litigation but also by providing a straightforward, highly adaptable, and familiar framework through which to more effectively evaluate accommodation claims. As religious-accommodation requests increase, both in number and type, the interactive process can help reduce conflict by ensuring employers and employees work together to determine whether a reasonable accommodation is possible.

INTRODUCTION

Suppose two employees, Oliver and Daphne, work as line cooks at Sammy's Sandwiches. Oliver develops a chronic foot condition that prevents him from wearing closed-toe shoes. If Oliver asks Sammy's to accommodate his disability, he can rightfully expect his employer to consult with him about his job-related limitations and to work closely with him to identify potential accommodations. Oliver can also expect Sammy's to give due consideration to his preferred accommodation and for Sammy's to ultimately select the accommodation that is most suitable for both him and the company, provided Sammy's could accommodate him without significant difficulty or expense.

Meanwhile, Daphne converts to Islam and feels she can no longer handle pork because of her newfound religious beliefs. If Daphne requests a religious

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accommodation, she cannot expect Sammy's to work with her in the same way it would work with Oliver. Sammy's would have no duty to consult with Daphne about possible accommodations, it would not have to give due consideration to Daphne's preferred accommodation, nor would it be obliged to select the accommodation most appropriate for both parties. So long as Sammy's eliminates the conflict between Daphne's religion and her job, it will have fulfilled its duty—unless, of course, accommodating Daphne would be even minimally burdensome, in which case Sammy's would have no obligation to accommodate Daphne at all and could instead terminate her employment.

The difference in how Oliver and Daphne can expect Sammy's to treat them is somewhat counterintuitive, given that antidiscrimination laws require employers to accommodate both an employee's disability¹ and religious beliefs.² Perhaps the natural inclination would be to point to differences in the controlling statutes, the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Act of 1964, respectively. Although both statutes require an employer to provide an accommodation absent "undue hardship" to the employer's business,³ their definitions of undue hardship differ. The ADA defines undue hardship as "an action requiring significant difficulty or expense,"⁴ whereas Title VII does not define the term, but the Supreme Court has interpreted it to mean anything more than *de minimis* cost.⁵ But while this discrepancy in the statutes' undue-hardship standards helps illuminate why Oliver may be more likely than Daphne to receive an accommodation, it fails to explain why Oliver can expect to be more involved than Daphne in the accommodation process itself.

Oliver's involvement in the accommodation process will likely be greater because courts have long required employers to engage in an "interactive process" with employees seeking disability accommodations but not with employees seeking religious accommodations.⁶ What the interactive process entails varies somewhat across jurisdictions, but it generally requires an employer and an employee to work together in good faith to determine whether the employee

1. 42 U.S.C. § 12112(b)(5)(A) (2012) (requiring employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

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

3. *See id.* §§ 2000e(j), 12112(b)(5)(A).

4. *Id.* § 12111(10)(A).

5. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (declaring that to require the defendant "to bear more than a *de minimis* cost in order to [accommodate the plaintiff's religious beliefs] is an undue hardship").

6. *See infra* Parts I.D and I.C.

can be reasonably accommodated.⁷ According to the Equal Employment Opportunity Commission, the interactive process requires employers to: (1) analyze the particular job involved and determine its purpose and essential functions; (2) consult with the employee to ascertain the employee's precise job limitations and how those limitations could be overcome through accommodation; (3) in consultation with the employee, identify potential accommodations and assess their effectiveness; and (4) consider the employee's preference and select the accommodation that is most appropriate for both the employee and the employer.⁸

When an employee, like Oliver, is allowed to actively participate in the accommodation process, the odds of receiving a suitable accommodation increase. This is not because the interactive process lowers the undue-hardship standard (it doesn't), but because the employee can better discuss with the employer his precise job limitations and also suggest potential accommodations the employer may not have otherwise considered. Moreover, even when an employer determines an accommodation is not reasonable, the interactive process can provide the employee with greater confidence that the employer's decision was justified because the employer properly solicited and considered the employee's input.

Although the interactive process is often considered a primarily employee-friendly requirement, the benefits to employers should not be overlooked. The interactive process eases the pressure on employers to make accommodation decisions on their own by allowing employees to share in the decision-making process. It also helps employers make more informed accommodation decisions, thus decreasing the risk of litigation. And even when litigation ensues, an employer that has engaged with the employee in good faith to find a reasonable accommodation is better positioned to prevail.⁹ Furthermore, allowing employees to participate in the decision-making process can boost employee morale, and in turn, productivity.¹⁰

7. See, e.g., *McDonald v. UAW-GM Ctr. for Human Res.*, 783 F. App'x 848, 854 (6th Cir. 2018) (“[O]nce the employee requests an accommodation, the employer has a duty to engage in an interactive process to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”) (alteration in original) (quoting *Mosby-Meachem v. Memphis Light, Gas, & Water Div.*, 883 F.3d 595, 605 (6th Cir. 2018)); *McFarland v. City of Denver*, 744 F. App'x 583, 587 (10th Cir. 2018) (noting that the interactive process “requires ongoing participation from both parties” and that “[b]oth the employer and the employee have a responsibility to share relevant information in an attempt to craft a reasonable accommodation” (citing *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998)); *Snapp v. United Transp. Union*, 547 F. App'x 824, 825 (9th Cir. 2013) (explaining how employers must “engage in an informal interactive process ‘to clarify what the individual needs and identify the appropriate accommodation’” (quoting *Vinson v. Thomas*, 228 F.3d 1145, 1154 (9th Cir. 2002)).

8. 29 C.F.R. app. § 1630.9 (2019).

9. See *infra* Part IV.D.

10. See *id.*

Given the benefits of the interactive process to employees and employers alike, this Article argues that courts should extend the interactive-process requirement to religious accommodations. This is consistent with Title VII's aim of helping employees avoid having to choose between their jobs and their religious beliefs.¹¹ There is simply no reason Daphne—and Sammy's for that matter—should be denied the benefits of the interactive process simply because Daphne's request is for a religious, rather than a disability, accommodation. As will be shown, nothing in the law mandates this discrepancy. To the contrary, there are multiple openings in the law that easily justify, and arguably even compel, judicial application of the interactive process to religious accommodations. Indeed, a handful of courts have taken advantage of these openings to hold that employers must engage in the interactive process whenever an employee seeks an accommodation, whether based on disability or religion.¹²

The need for interactive religious accommodations has never been greater and will likely become even more urgent in coming years due to two key social developments. First, the United States is becoming more religiously diverse than ever,¹³ a trend that shows no signs of slowing down.¹⁴ Although the country remains predominantly Christian,¹⁵ non-Christian faiths, such as Buddhism, Islam, and Bahá'í, are making considerable gains.¹⁶ As the United States and, by

11. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) (“[A] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.”); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013) (explaining that “Title VII was designed to protect” employees from having to choose between their religious convictions and their jobs), *rev'd on other grounds*, 135 S. Ct. 2028 (2015); *Garcimonde-Fisher v. Area203 Mktg, LLC*, 105 F. Supp. 3d 825, 840 (E.D. Tenn. 2015) (explaining that “Title VII forbids employers from forcing employees” to choose between their religious beliefs and their jobs).

12. See *infra* Part II.C.

13. See PAUL D. NUMRICH, *THE FAITH NEXT DOOR: AMERICAN CHRISTIANS AND THEIR NEW RELIGIOUS NEIGHBORS* 6 (2009) (arguing that even skeptics of religious-affiliation data “admit that the United States is more religiously diverse today than ever before and will likely continue to diversify in the future”); Robert P. Jones & Daniel Cox, *America's Changing Religious Identity: Findings from the 2016 American Values Atlas*, PUB. RELIGION RES. INST. 10 (2017), <https://www.prii.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf> (“The American religious landscape has undergone dramatic changes in the last decade and is more diverse today than at any time since modern sociological measurements began.”).

14. Jones & Cox, *supra* note 13, at 7 (explaining that the religious groups in the United States with the highest percentage of adherents under age thirty are all non-Christian, including Muslims (42%), Hindus (36%), Buddhists (35%), and the religiously unaffiliated (34%)). Because immigration is largely driving the increase in religious diversification, both among and within religions, America's religious landscape should continue to diversify, so long as immigration rates remain steady. See DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION* 1–4 (2001) (explaining how immigration has contributed to greater internal diversity within established religious traditions); PEW RESEARCH CTR., *AMERICA'S CHANGING RELIGIOUS LANDSCAPE* 53 (2015), <http://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf> (noting that the vast majority of Hindus and Muslims in the United States are either immigrants or children of immigrants).

15. PEW RESEARCH CTR., *supra* note 14, at 3 (finding that over 70% of Americans identify as Christians).

16. See *id.* (finding that between 2007 and 2014, the percentage of Americans adhering to non-Christian faiths jumped from 4.7% to 5.9%).

extension, its labor force become more religiously diverse, employers are increasingly being called upon to accommodate a broader range of religious beliefs with which they may have little or no familiarity.¹⁷ The interactive process can be tremendously valuable in this regard, as it would allow employees with less familiar religious beliefs to discuss with their employers how their religious beliefs conflict with certain aspects of their jobs and to suggest accommodations that their employers may not have otherwise realized were possible. Second, at the same time American workers are becoming more religiously diverse, religious expression in the workplace is increasing.¹⁸ The wall of separation that once divided work and religion has eroded over time, a trend scholars attribute to a variety of demographic and cultural shifts, as well as to transformations within both religion and the workplace.¹⁹ As religious expression in the workplace becomes more prominent, some employees may feel more entitled to accommodation, prompting them to make demands without regard for the potential impact on their employer or fellow workers.²⁰ The interactive process can help defuse such a situation by providing space for an employee to be heard, while allowing an employer to communicate to the employee why the requested accommodation would impose undue hardship. Thus, even as the American workplace is increasingly becoming a tinderbox for religious conflict,²¹ the in-

17. See Sonia Ghumman et al., *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. PSYCHOL. 439, 449 (2013) (“[A]lthough most American workplaces may be secular in nature, the majority of work policies and procedures favor Christian practices and observances (i.e., no work on Sundays, Christmas is considered a federal holiday) As religious diversity increases, some of the religions gaining increasing representation in America (i.e., Muslims, Sikhs) may have certain religious-based obligations requiring expression and requests for religious accommodations such as religious holidays during regular workdays, time off for prayer/rituals, religious attire, and grooming practices will also inevitably increase.” (citations omitted)).

18. See *id.* (citing studies in support of the authors’ conclusion that “[a]s American organizations increasingly promote diverse workplaces in the belief that diversity adds value for their organizations, the number of organizations allowing workplace religious expression has expanded,” and “[a]s such, the number of employees who wish to express their religion at work has increased” (citations omitted)).

19. See Dallan F. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 707–08 (2015) [hereinafter *Image is Everything*] (explaining that increased religious expression in the workplace is attributable to demographic factors such as the aging baby-boomer generation, cultural factors such as workers’ expectation of being able to express their whole selves in the workplace, religious factors such as increased public evangelism, and reimagined workplaces in which employees are free to express themselves).

20. See Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 178–80 (2015) [hereinafter *Bearing Burdens*] (detailing how and why religious accommodations can harm coworker morale).

21. A 2013 survey of more than 2,000 American workers found that one-third of respondents had either witnessed or experienced religious bias in the workplace, and half of non-Christian employees reported that their employers were ignoring their religious needs. TANENBAUM CTR. FOR INTERRELIGIOUS UNDERSTANDING, WHAT AMERICAN WORKERS REALLY THINK ABOUT RELIGION: TANENBAUM’S 2013 SURVEY OF AMERICAN WORKERS AND RELIGION 5, 24 (2013), <https://tanenbaum.org/publications/2013-survey/>. These and other data points led Tanenbaum to conclude that “tensions around religion are occurring, and are increasingly likely to occur, in our ever more diverse global workplaces.” *Id.* at 5. Moreover, complaints of religious discrimination filed with the EEOC are also on the rise, both in terms of raw numbers

teractive process offers a simple yet effective mechanism to safeguard employees and employers alike and perhaps stem the tide of religious-discrimination litigation to come.

This Article proceeds in four Parts. Part I traces the origins and evolution of the interactive process under the ADA, analyzing why courts universally mandate the interactive process for disability claims even though the statute itself makes no mention of this requirement. Part II examines the development of religious-accommodation law under Title VII and considers why courts have been less enthusiastic about requiring the interactive process in this context. Part III demonstrates the utility of the interactive process by contrasting how courts analyze disability-accommodation claims with how they evaluate religious-accommodation claims. To further illustrate the value of the interactive process, it likewise discusses cases in which courts have broken with the norm and applied the interactive process to religious accommodations. Part IV addresses the feasibility of interactive religious accommodations, explaining why this is not some pipe dream but can in fact be easily implemented through existing legal channels. It also explores the potential impact of this proposal on employees and employers, as well as the courts.

I. THE ORIGINS AND EVOLUTION OF THE INTERACTIVE PROCESS

This Part examines how the interactive process became a requirement for disability accommodations, even though there is no mention of it in the ADA itself. The courts' universal adoption of the requirement appears to stem from a report from the Senate Committee on Labor and Human Resources preceding the ADA's enactment, parts of which the EEOC subsequently included in its regulations interpreting the Act. The courts have unanimously deferred to the EEOC's guidance requiring the interactive process for disability accommodations but tend to be less stringent than the EEOC in terms of what the interactive process actually entails.

A. *The ADA's Text*

The ADA's interactive-process requirement is not statutorily mandated. Nothing in the text of the statute compels, or even encourages, an interactive process. The statute simply requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified

and as a percentage of all employment discrimination claims. In 1997, the EEOC received 1,709 religious discrimination complaints, which constituted 2.1% of all discrimination charges received by the Commission. See *Charge Statistics (Charges Filed with EEOC): FY 1997 through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. By comparison, in 2017, the number of religious discrimination complaints more than doubled to 3,436, constituting 4.1% of all charges. *Id.*

individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”²² The statute does not define “reasonable accommodation” but supplies examples of what the term may include, such as modifications to work equipment and facilities, job restructuring, and the provision of qualified readers and interpreters.²³ The statute is silent on the process an employer should follow to determine whether and how to accommodate a disabled employee.²⁴

B. *The ADA’s Legislative History*

Notwithstanding the absence of an interactive-process requirement from the statute, courts have uniformly held that the ADA requires employers and employees to engage in the interactive process.²⁵ This requirement appears to have been born out of a 1989 Senate Committee report preceding the ADA’s enactment, in which the Committee expressed its belief that the accommodation requirement should be understood as a “process” and that a “problem-solving approach” should be used to identify a disabled employee’s job limitations and “possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.”²⁶ The Committee encouraged employers to “consult with and involve” the accommodation seeker because she “may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances” and would thus be best positioned to identify the precise type of accommodation needed.²⁷ It pointed out that the employee’s suggested accommodation is often simpler and less expensive than the accommodation the employer may have envisioned, resulting in a win-win situation for the employee and employer.²⁸

The Committee acknowledged that, in some cases, an appropriate accommodation may not be obvious to the employee or the employer.²⁹ This may be either because the employee does not have a detailed understanding of the job

22. 42 U.S.C. § 12112(b)(5)(A) (2012).

23. *Id.* § 12111(9).

24. *See id.*

25. *See, e.g.,* *Brown v. Milwaukee Bd. of Sch. Dirs.*, 855 F.3d 818, 821 (7th Cir. 2017) (“Identifying reasonable accommodations for a disabled employee requires both employer and employee to engage in a flexible, interactive process.”); *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 133 (1st Cir. 2017) (noting that an employee’s request for a disability accommodation “sometimes creates a duty on the part of the employer to engage in an interactive process,” depending on the circumstances of each case); *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1137 (9th Cir. 2001) (“Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.”).

26. S. REP. NO. 101–116, at 34 (1989).

27. *Id.*

28. *Id.*

29. *Id.*

in question or because the employer is not familiar enough with the employee's disability to identify the appropriate accommodation.³⁰ In such a situation, the Committee recommended "the employer should consider four informal steps to identify and provide an appropriate accommodation."³¹ First, the employer, "[w]ith the cooperation of the person with a disability," should identify the barriers to equal opportunity by distinguishing between essential and nonessential job tasks, identify the employee's abilities and limitations, and determine the job tasks that limit the employee's effectiveness.³² Second, the employer should identify possible accommodations—a process that "must begin with consulting the individual with a disability."³³ Third, the reasonableness of the potential accommodations should be assessed in terms of both effectiveness and equal opportunity.³⁴ Fourth, the employer should implement "the accommodation that is most appropriate for the employee and the employer."³⁵ The Committee emphasized that "[t]he expressed choice of the applicant or employee shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity or that the accommodation requested would pose an undue hardship."³⁶

It is apparent from the Senate Committee report that although the ADA's text does not reference the interactive process, the Committee read the statute as requiring employers and employees to work together at every stage of the accommodation process. The Committee did not interpret the statute as granting employees any direct control over the accommodation process, but it clearly contemplated employees would play a central role in determining if and how an accommodation should be provided.³⁷

C. *The Federal Regulations*

Following its 1990 enactment, the ADA's "vague language quickly became an obstacle to its enforcement," prompting Congress to authorize the EEOC to establish regulations further explaining the Act.³⁸ Two years later, the EEOC implemented regulations that introduced the interactive process:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should

30. *Id.* at 34–35.

31. *Id.* at 35.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* at 33–36.

38. Christine M. Harrington, *The Americans with Disabilities Act: The New Definition of Disability Post-Sutton v. United Air Lines, Inc.*, 84 MARQ. L. REV. 251, 255 (2000); *see also* 42 U.S.C. § 12116 (2012).

identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.³⁹

The regulation's use of the word "may" is somewhat ambiguous, leaving open the possibility that the interactive process is merely a suggestion rather than a requirement, or that it is required in some situations but not others.⁴⁰ The EEOC somewhat clarified its position in "interpretive guidance" affixed as an appendix to the Code of Federal Regulations, wherein it states that the interactive process may not be necessary if the appropriate accommodation is obvious.⁴¹ However, the EEOC further explains in the guidance that the interactive process "may be necessary" if neither the employer nor the employee can readily identify the appropriate accommodation.⁴² This again creates confusion over whether the interactive process is always required when an accommodation is unidentifiable, or if there are situations where the accommodation is unclear but the parties are nonetheless excused from the interactive process.

The EEOC declares in the interpretive guidance that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability."⁴³ The interactive process it outlines closely tracks the Senate Committee's four-step process but places even greater emphasis on the employee's role in the process by requiring the employer to:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.⁴⁴

39. 29 C.F.R. § 1630.2(o)(3) (2019).

40. Compare *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007) (explaining that "the interactive process is mandatory, and both parties have a duty to participate in good faith"), with *Barnett v. U.S. Air, Inc.*, 196 F.3d 979, 993 (9th Cir. 1998) (interpreting the interactive process as permissive rather than mandatory because the regulations "state only that an interactive process 'may be necessary'. . . [not] that it is necessary" (quoting 29 C.F.R. § 1630(o)(3))), *vacated on other grounds*, 201 F.3d 1256 (9th Cir. 2000).

41. 29 C.F.R. app. § 1630.9.

42. *Id.*

43. *Id.*

44. *Id.* The appendix includes an example involving a sack handler who requests an accommodation due to his back impairment to illustrate how the interactive process should work. *Id.* According to the EEOC, the employer should first determine the essential functions of the sack-handler position. *Id.* It should next meet with the employee "to ascertain precisely the barrier posed by the individual's specific disability." *Id.*

The EEOC's third step differs from the Senate Committee's by making clear the employer must consult with the individual not only to identify possible accommodations but also to assess their potential effectiveness.⁴⁵ Additionally, whereas the Senate Committee believed an employer did not have to consider an employee's preference when two equally effective accommodations are available,⁴⁶ the EEOC's position is that the employee's preference "should be given primary consideration" in such cases.⁴⁷ Though minor, these differences suggest the EEOC believes an employee should have an even greater role in the interactive process than what the Senate Committee envisioned.

D. *Judicial Application of the Interactive Process to ADA Claims*

The courts' uniform imposition of the interactive-process requirement for disability accommodations stems from the ADA's legislative history, as expressed in the Senate Committee report and the federal regulations.⁴⁸ This unanimity is impressive, considering that neither the legislative history nor the regulations are necessarily binding. When a statute is ambiguous, as is arguably the case here, courts can look to other sources, including committee reports, to discern the legislative intent.⁴⁹ But while legislative history may be indicative of

The employer and employee should then discuss possible accommodations, such as the provision of a dolly or hand truck that would allow the employee to transport the sacks without having to carry them. *Id.* If both the dolly and the hand truck appear to be viable options and the employee indicates his preference for the dolly, the employer should honor the employee's preference if, in consideration of the employee's expressed preference, the employer believes the dolly would allow the employee to move more sacks at a time and be more efficient than with the hand truck. *Id.*

45. Compare *id.*, with S. REP. NO. 101-116, at 35 (1989).

46. S. REP. NO. 101-116, at 35.

47. 29 C.F.R. app. § 1630.9.

48. See, e.g., *Arndt v. Ford Motor Co.*, 716 F. App'x 519, 528 (6th Cir. 2017) ("The ADA's regulations require an employer "'to initiate an informal, interactive process' when necessary . . ."); *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1315 (10th Cir. 2017) ("To facilitate the reasonable accommodation, '[t]he federal regulations implementing the ADA envision an interactive process that requires participation by both parties.'" (alteration in original) (quoting *Bartee v. Michelin N. Am. Inc.*, 374 F.3d 906, 916 (10th Cir. 2004))); *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 n.4 (6th Cir. 2007) (noting that although not described in the ADA's text, Congress "endorse[d] the interactive process in the ADA's legislative history" (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000), *vacated by U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002))); *Reed v. Kindercare Learning Ctrs., LLC*, No. C15-5634-BHS, 2016 WL 7231454, at *6 (W.D. Wash. Dec. 14, 2016) (noting that the ADA's legislative history "makes clear that employers are required to engage in an interactive process with employees" (quoting *Barnett*, 228 F.3d at 1111)); *Wiederhold v. Sears, Roebuck & Co.*, 888 F. Supp. 2d 1065, 1082 (D. Or. 2012) (relying on the ADA's legislative history for guidance as to what the interactive process requires).

49. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (Sotomayor, J. & Breyer, J., concurring) ("Committee reports . . . are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning." (citing *Garcia v. United States*, 469 U.S. 70, 76 (1994)); *Garcia*, 469 U.S. at 76 ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (alteration in original) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))); *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) ("If the [statutory] terms are ambiguous, we may look to other sources to determine congressional

legislative intent, this alone is not binding.⁵⁰ As the Supreme Court once famously declared, “legislative intention, without more, is not legislation.”⁵¹

The courts’ reliance on the regulations rests on firmer ground. The ADA grants the EEOC substantive rulemaking authority to promulgate regulations for carrying out the statute’s employment provisions.⁵² Though not binding, the regulations are entitled to *Chevron* deference, meaning courts must afford them “considerable weight” and should not disturb the EEOC’s interpretation unless it appears from the statute or legislative history that Congress intended otherwise.⁵³ Courts routinely defer to the EEOC’s interpretation of the ADA, as set forth in its regulations.⁵⁴ In fact, judicial enforcement of these regulations has been virtually automatic, as no court to date has rejected the EEOC’s regulations concerning the interactive process or any other aspect of the ADA’s employment provisions. This is true even of the interpretative guidance located in the appendix to the Code of Federal Regulations. In *Harris v. H&W Contracting Co.*, the Eleventh Circuit rejected an employer’s claim that the court should disregard certain EEOC guidance from the appendix.⁵⁵ The court refused to

intent, such as the canons of construction or the statute’s legislative history.” (citing *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)).

50. *See Lytle v. Capital Area Intermediate Unit*, 393 F. App’x 955, 958 (3d Cir. 2010) (“[W]e are, of course, bound not by legislative history but by plain statutory language.” (quoting *DIRECTV, Inc. v. Pepe*, 431 F.3d 162, 169 (3d Cir. 2005))); *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1085 (Fed. Cir. 2003) (explaining that “legislative history can be used as an interpretive guide,” but “itself is not binding on an agency and does not ‘ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating’” (alteration in original) (first citing *United States v. Dickerson*, 310 U.S. 554, 561 (1940); and then quoting *Am. Hosp. Ass’n v. Nat’l Labor Relations Bd.*, 499 U.S. 606, 616 (1990))).

51. *Train v. City of New York*, 420 U.S. 35, 45 (1975); *see also, e.g., UAW v. Donovan*, 746 F.2d 855, 860–61 (D.D.C. 1984) (explaining that the legislative history was not directly relevant because the issue was not how Congress expected or intended the Secretary of Labor to behave but how it required him to behave through legislation).

52. 42 U.S.C. § 12116 (2012).

53. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[When] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

54. *See, e.g., Francis v. City of Meriden*, 129 F.3d 281, 283 n.1 (2d Cir. 1997) (“We accord ‘great deference’ to the EEOC’s interpretation of the ADA, since it is charged with administering the statute.” (quoting *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 309 (2d Cir. 1996))); *EEOC v. St. Alexius Med. Ctr.*, No. 12-C-7646, 2014 WL 5023484, at *4 (N.D. Ill. Oct. 6, 2014) (“The ADA regulations provide that an employee and employer must engage in an interactive process . . .” (quoting *Mobley v. Allstate Ins.*, 531 F.3d 539, 545 (7th Cir. 2008))); *Barnes v. Cochran*, 944 F. Supp. 897, 904 (S.D. Fla. 1996) (noting that although the EEOC’s ADA regulations are “not binding on this Court, such administrative interpretations ‘do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’” (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986))).

55. 102 F.3d 516, 520–21 (11th Cir. 1996), *abrogated by Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

distinguish guidance in the appendix from guidance in the regulations themselves, holding that both were entitled to *Chevron* deference.⁵⁶ The court determined it was obligated to follow the EEOC's guidance because it was "firmly rooted" in the ADA's legislative history, as established through various congressional reports.⁵⁷ Although no court to date has faced a claim that it should not defer to the EEOC's interactive-process guidelines, such an argument would almost certainly fail. Like in *Harris*, the interactive-process guidance does not conflict with the ADA's text and is entirely consistent with the Act's legislative history. *Chevron* deference would prohibit a court from disturbing the EEOC's guidance because there is nothing in the ADA or its legislative history to indicate Congress did not intend for the interactive process to apply.

Although courts universally require the interactive process for disability accommodations, what this requirement entails can differ slightly across jurisdictions. For example, in the First Circuit, the interactive process varies depending on the circumstances of each case but "nevertheless requires both the employer and employee to engage in a meaningful dialogue, in good faith, for the purpose of discussing alternative reasonable accommodations."⁵⁸ In the Sixth Circuit, the interactive process "requires communication and good-faith exploration of possible accommodations."⁵⁹ In the Tenth Circuit, once the interactive process is triggered, "both parties have an obligation to proceed in a reasonably interactive manner" to determine whether the employee can be reasonably accommodated.⁶⁰ The circuits are mostly in agreement that the failure to engage in the interactive process does not create a standalone cause of action⁶¹ but simply constitutes evidence that the employer may have acted in bad faith.⁶²

56. *Id.* at 521.

57. *Id.*

58. *Ortiz-Martínez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599, 605 (1st Cir. 2017) (citing *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 132 (1st Cir. 2014)).

59. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007) (quoting *Barnett v. U.S. Air, Inc.* 228 F.3d 1105, 1114 (9th Cir. 2000), *vacated by* *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002)).

60. *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999)).

61. *See, e.g., Silva v. City of Hidalgo*, 575 F. App'x 419, 424 n.3 (5th Cir. 2014) (noting that an employer's failure "to engage in the interactive process is not a *per se* violation of the ADA" (citing *Picard v. St. Tammany Parish Hosp.*, 423 F. App'x 467, 470 (1st Cir. 2011)); *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) ("The ADA seeks to ensure that qualified individuals are accommodated in the workplace, not to punish employers who, despite their failure to engage in an interactive process, have made reasonable accommodations." (citing *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 2007))). *But see Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014) (recognizing that the failure to engage in the interactive process can constitute "an independent violation of the ADA if the plaintiff establishes a *prima facie* showing that he proposed a reasonable accommodation" or if a reasonable accommodation would have been possible (citing *Keith v. County of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013))).

62. *See, e.g., McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 101 (2d Cir. 2009) (acknowledging the possibility "that a failure to engage in a sufficient interactive process where accommodation was, in fact, possible constitutes *prima facie* evidence of discrimination on the basis of disability" (citing *Barnett*, 228 F.3d at 1116)); *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002) ("The mere failure of an employer to engage in the interactive process does not give rise to *per se* liability, although for summary judgment purposes

Courts generally eschew rigid requirements for what the interactive process must entail, opting instead to grant employers broad discretion and flexibility over how the process unfolds based on the unique circumstances of each case.⁶³ The Tenth Circuit, for example, explained that “[t]he exact shape of this interactive dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated.”⁶⁴ While this approach comports with the EEOC’s view that the interactive process should be “informal”⁶⁵ and “flexible,”⁶⁶ relatively few courts have applied the EEOC’s additional interpretative guidance, including its four-step approach, in deciding accommodation claims.⁶⁷ Thus, while courts have been quick to adopt the interactive-process requirement, they have been hesitant to articulate any specific steps the parties must take as part of the process.

In sum, the interactive process evolved from a Senate Committee aspiration to a court-imposed mandate in just a few short years. Although neither the legislative history nor the regulations are necessarily binding, the courts have enthusiastically embraced the interactive-process requirement for disability accommodations.

II. THE INTERACTIVE PROCESS AND TITLE VII

This Part examines why courts are less likely to require the interactive process for religious accommodations. Like the ADA, Title VII makes no mention of an interactive process. But unlike the ADA, Title VII’s legislative history is devoid of any reference to the interactive process. This difference notwithstanding, the EEOC has aggressively advocated for its application to religious

such failure is considered prima facie evidence that the employer may be acting in bad faith.” (citing *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999)).

63. See, e.g., *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135–36 (7th Cir. 1996) (refusing to apply a “hard and fast rule” regarding the interactive process); *Lockhart v. Chao*, No. 2:04-CV-00002, 2004 WL 2827018, at *2 (W.D. Va. Dec. 9, 2004) (“Instead of enforcing rigid guidelines regarding the interactive process, the goal of a court must be to look for evidence of a ‘failure to participate in good faith . . . by one of the parties . . .’” (quoting *Beck*, 75 F.3d at 1135)); *Sokol v. New United Mfg., Inc.*, No. C-97-4211-SI, 1999 WL 1136683, at *6 (N.D. Cal. Sept. 20, 1999) (“Undoubtedly, the circumstances of the interactive process will vary widely between employees with different disabilities and job functions.”).

64. *Bartee*, 374 F.3d at 916 (alteration in original) (quoting *Midland Brake*, 180 F.3d at 1173).

65. 29 C.F.R. § 1630.2(o)(3) (2019) (“[I]t may be necessary for the [employer] to initiate an informal, interactive process . . .”).

66. 29 C.F.R. app. § 1630.9 (“The appropriate reasonable accommodation is best determined through a flexible, interactive process . . .”).

67. Although no court has explicitly rejected the EEOC’s interpretive guidance on interactive accommodations, only a handful have included it in their analyses. See, e.g., *EEOC v. Kohl’s Dep’t. Stores, Inc.*, 774 F.3d 127, 131–34 (1st Cir. 2014); *Jiles v. Wright Med. Tech., Inc.*, 313 F. Supp. 3d 822, 841 (S.D. Tex. 2018); *Merrill v. McCarthy*, 184 F. Supp. 3d 221, 237 (E.D.N.C. 2016); *EEOC v. Yellow Freight Sys., Inc.*, No. 98-CIV-2270-THK, 2002 WL 31011859, at *23 (S.D.N.Y. Sept. 9, 2002); *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 737 (D. Md. 1996).

accommodations. Some courts have deferred to the EEOC in this regard, but the vast majority have not. This Part discusses possible reasons this is the case.

A. Title VII's Text and Legislative History

Like the ADA, Title VII requires employers to accommodate employees' religious beliefs.⁶⁸ The religious-accommodation requirement is found in the statute's definition of religion, as opposed to a standalone provision.⁶⁹ The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."⁷⁰ Thus, like the ADA, a religious accommodation must be reasonable and is only required if it would not cause the employer undue hardship. Also like the ADA, there is no mention in Title VII of an interactive-process requirement. In fact, the only difference between the two provisions is how they define undue hardship,⁷¹ with the ADA applying a "significant difficulty or expense standard,"⁷² and Title VII adopting a "*de minimis* cost" test.⁷³

Unlike the ADA, which included the accommodation requirement from the outset, the religious-accommodation requirement was not added to Title VII until 1972, eight years after its enactment.⁷⁴ Thus, there is no mention of religious accommodations, let alone the interactive process, in the legislative history preceding the statute.⁷⁵ In 1966, the EEOC adopted a guideline suggesting employers bore an affirmative obligation to accommodate an employee's "reasonable religious needs" unless doing so would create a "serious inconvenience to the conduct of [the] business."⁷⁶ The next year, the EEOC softened its stance somewhat, revising the regulation to require employers to provide "reasonable accommodations to the religious needs of employees and prospective

68. 42 U.S.C. § 2000e(j) (2012).

69. *Id.*

70. *Id.*

71. See Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1013 (1997) ("Although the statutory requirements of Title VII and the ADA have virtually identical wording, there is one significant difference between the provisions. The threshold for finding undue hardship is much lower under Title VII than under the ADA.").

72. 42 U.S.C. § 12111(10)(A).

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

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

75. See Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 10 (2002) (explaining that "Congress' overarching purpose in enacting the 1964 Civil Rights Act was to end racial discrimination in accommodations and employment; the legislative history contains few statements about ending religious discrimination"). See generally U.S. EQUAL EMP. OPPORTUNITY COMM'N, THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 (1997) (collecting the committee reports and floor debates on the Civil Rights Act).

76. 29 C.F.R. §§ 1605.1(a)(2), .1(b)(2) (2019).

employees where such accommodations c[ould] be made without undue hardship on the conduct of the employer's business."⁷⁷ In *Dewey v. Reynolds Metal*, the Sixth Circuit rejected this position⁷⁸—a decision the Supreme Court subsequently affirmed by an equally divided Court.⁷⁹ This prompted Congress, led by West Virginia Senator Jennings Randolph,⁸⁰ to respond by amending Title VII to codify the reasonable-accommodation requirement as part of the Equal Employment Opportunity Enforcement Act of 1972.⁸¹

The 1972 Act's legislative history is scant,⁸² which is somewhat surprising, considering it was the first time Congress had deliberated over an affirmative accommodation requirement for employers. What little legislative history there is focuses on whether employers should be required to offer accommodations at all; there is no discussion or debate over what the accommodation process would entail.⁸³ Thus, unlike the ADA, where aspirations of an interactive process predated the law's enactment, nothing in Title VII's legislative history indicates Congress contemplated an interactive process for religious accommodations. However, this hardly means Congress was opposed to an interactive process for religious accommodations. In advocating for the amendment before Congress, Senator Randolph expressed his hope that accommodations would be made with "flexibility" and "a desire to achieve an adjustment."⁸⁴ Neither he nor any other member of Congress raised the possibility of an interactive process, likely because it was not on anyone's radar in 1972—nearly two decades before the idea was first articulated in connection with the ADA. If the Title VII amendment had occurred in 1992 rather than 1972, Congress may very well have expressed the same desire for an interactive process for religious accommodations as it conveyed for disability accommodations.

77. *Id.* § 1605.1(b).

78. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334–35 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

79. *Dewey*, 402 U.S. at 689.

80. See James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1039 (2004).

81. 42 U.S.C. § 2000e(j) (2012).

82. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74–75 (1977); *id.* at 75 & n.9 (noting the "brief legislative history" of the 1972 Act, "consist[ing] chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record and consisting principally of the views of . . . Senator Jennings Randolph," who "expressed his general desire 'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law,' but he made no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied" (citation omitted) (quoting 118 CONG. REC. 705 (1972))).

83. 118 CONG. REC. 706–13 (1972).

84. *Id.*

B. EEOC Guidance

The absence of the interactive process from Title VII's text and legislative history has not deterred the EEOC from aggressively arguing that the requirement should apply with equal force to religious accommodations. Unlike the ADA, the EEOC's regulations interpreting Title VII make no reference to the interactive process.⁸⁵ The applicable regulation was implemented in 1966⁸⁶ but has not been amended since 1980—ten years before the interactive process was first articulated in conjunction with the ADA.⁸⁷ The regulation focuses primarily on the undue hardship aspect of religious accommodations, providing various examples of how an employer may be able to accommodate an employee with minimal cost.⁸⁸ Nothing in the regulation requires an employer to consult with an employee or to take the employee's preferred accommodation into account.⁸⁹ The regulation merely places the burden on the employee to request an accommodation and on the employer to then determine whether an accommodation is feasible.⁹⁰ No further interaction or cooperation between the employer and employee is mentioned.

The EEOC's omission of the interactive process from the regulations should not be mistaken as opposition to the interactive process for religious accommodations. Because the regulations were last updated a full decade before the ADA was enacted, the interactive process was not something the EEOC would have been likely to contemplate at that time. But in the years since the ADA's enactment, the EEOC has clearly endorsed the interactive-process requirement for religious accommodations. In its Compliance Manual, the EEOC counsels that even though Title VII does not obligate an employer to confer with an employee before denying an accommodation request, "as a practical matter it can be important to do so."⁹¹ The EEOC explains:

Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted. Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether an accommodation is available This typi-

85. 29 C.F.R. § 1605.2 (2019).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* § 1605.2(c)(1).

91. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, Directives Transmittal: EEOC Compl. Man., No. 915.003, at 48 (July 22, 2008), https://www.eeoc.gov/policy/docs/religion.html#_ftnref122 [hereinafter Compliance Manual].

cally involves the employer and employee mutually sharing information necessary to process the accommodation request. Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.

Failure to confer with the employee is not an independent violation of Title VII but, as a practical matter, such failure can have adverse legal consequences for both an employee and an employer.⁹²

Additionally, the Compliance Manual provides examples of how employers should work together with accommodation seekers, such as when an employer questions the sincerity of an employee's religious beliefs or when an employee's accommodation request is ambiguous or otherwise unclear.⁹³ It also points out that despite Title VII's and the ADA's differing definitions of undue hardship, "courts have endorsed a cooperative information-sharing process between employer and employee [for religious-accommodation requests], similar to the 'interactive process' used for disability accommodation requests under the ADA."⁹⁴

The EEOC's position is further evident in a variety of other agency materials. For instance, in a press release announcing its lawsuit against an aircraft-cleaning company, the EEOC publicly declared that Title VII "requires employers to engage in a good-faith interactive process with employees to provide workplace [religious] accommodation."⁹⁵ The EEOC has echoed this sentiment in several legal briefs as well, arguing that employers and employees "have a duty to cooperate with each other in an attempt to arrive at the [religious] accommodation, something akin to the duty to engage in an interactive process under the [ADA]"⁹⁶ and that "Title VII's reasonable accommodation provisions contemplate an interactive process, with cooperation between the employer and the employee."⁹⁷

92. *Id.* at 48-49.

93. *Id.* at 49.

94. *Id.* at 48 n.122.

95. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Jetstream Ground Serv. at Denver Airport for Religious Discrimination (Sept. 4, 2013), <https://www1.eeoc.gov/eeoc/newsroom/release/9-4-13.cfm?renderforprint=1>. Similarly, in public comments concerning a consent decree with Motorola, the EEOC's trial attorney observed, "While the EEOC is pleased that the victims of discrimination have been fairly compensated, more importantly, the EEOC is optimistic that the consent decree will ensure that Motorola engages in a more interactive process in the future when faced with a request to accommodate an employee's religious practices." *Religious Bias Suit Against Motorola Settled by EEOC Letter No. 686 Issue No. 1242*, Empl. Prac. Guide (CCH) 35595176, 2002 WL 35595176 (Mar. 2, 2002).

96. Plaintiff EEOC's Response in Opposition to Defendant's Motion for Summary Judgment at 48, *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018) (No. 10-cv-02103-PAB-KLM), 2014 WL 11171486.

97. Plaintiff EEOC's Response Brief in Opposition to Defendant's Motion for Summary Judgment at 10, *EEOC v. Aldi, Inc.*, No. 06-1210, 2009 WL 3183077 (W.D. Pa. Sept. 30, 2009), 2007 WL 2988860.

The EEOC has likewise imposed its position in administrative decisions and consent decrees. For instance, as part of a judgment against the U.S. Postal Service, the EEOC ordered the Service to “immediately engage in an interactive process with [the plaintiff] regarding religious accommodation.”⁹⁸ In another case, the EEOC affirmed an administrative judge’s determination that the Department of Homeland Security unlawfully discriminated by “fail[ing] to engage in an interactive process” with a religious-accommodation seeker.⁹⁹ As part of a consent decree with an auto dealership, the EEOC required the dealership to change its policies to “state that a reasonable accommodation determination will be made based on an individualized interactive process between [the employer] and the employee or applicant making the request.”¹⁰⁰ Similarly, a consent decree with McDonald’s required it to provide training to management “on the handling of an employee’s request for accommodation of his or her sincerely held religious beliefs, [and] on engaging in the interactive process.”¹⁰¹

Given the EEOC’s adamancy that the interactive process applies to religious accommodations, it is somewhat curious that the Commission has not amended its regulations accordingly. The EEOC has never articulated a reason for its inaction, but it may be because the EEOC has considerably less authority to interpret Title VII’s substantive provisions than it does the ADA’s. The ADA grants the EEOC substantive rulemaking authority,¹⁰² whereas Title VII has been construed as limiting the Commission’s authority to making procedural rules only.¹⁰³ Thus, if the EEOC were to amend its regulations to include an interactive-process requirement for religious accommodations, courts would only owe such a rule *Skidmore* instead of *Chevron* deference.¹⁰⁴ This means that

Likewise, in a recent brief to the Supreme Court, the EEOC highlighted the district court’s observation that Title VII seeks to “encourag[e] an interactive process in which employers and employees strive for mutually acceptable accommodations.” Brief for the Petitioner at 10, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (No. 14-86), 2014 WL 6845691.

98. Tangel H. Foster, EEOC Decision No. 0120100725, at *4 (2012), 2012 WL 3059996.

99. Cherie F., EEOC Decision No. 0120110730, at *2 (2014), 2014 WL 1653440.

100. Consent Decree at 4, *EEOC v. United Galaxy, Inc.*, No. 2:10-cv-04987(ES)(SCM), 2011 WL 4072039 (D.N.J. Sept. 13, 2011).

101. Consent Decree and Order at 9, *EEOC v. McDonald’s Rests. of Cal., Inc.*, No. 1:13-cv-02065-AWI-SAB (E.D. Cal. Dec. 20, 2013).

102. 42 U.S.C. § 12116 (2012) (“[T]he Commission shall issue regulations . . . to carry out [the ADA]”); see also Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 535 (2000) (“Congress granted the EEOC substantive rulemaking authority to promulgate regulations for carrying out the ADA’s employment provisions”).

103. 42 U.S.C. § 2000e-12(a) (“The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII].”); see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (explaining that because Congress “did not confer upon the EEOC authority to promulgate rules or regulations,” EEOC guidelines are only entitled to *Skidmore* deference (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140–46 (1976))).

104. See *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 122–23 (2002) (Thomas, J., concurring) (acknowledging the EEOC’s regulations interpreting substantive provisions of Title VII are entitled only to *Skidmore* deference but nonetheless arguing *Chevron* deference should apply to the regulation in question because it was procedural); *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007) (“[I]t does not appear that the EEOC’s Guidelines are entitled to great deference. While some early cases so held in interpreting Title VII,

rather than affording such regulation “considerable weight” and deferring to it unless it runs contrary to the statute or legislative history,¹⁰⁵ each court could accord it whatever deference the court deems appropriate, “depend[ing] upon ‘the thoroughness evident in [the EEOC’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade,’” if lacking power to control.¹⁰⁶ Because courts already owe *Skidmore* deference to the EEOC’s other materials, such as its Compliance Manual and internal directives,¹⁰⁷ amending the regulations would not give the EEOC’s position regarding interactive religious accommodations any greater weight than what courts presently afford it.

C. *Judicial Application of the Interactive Process to Title VII Claims*

While the interactive process has been a prominent feature of disability-accommodation jurisprudence for decades, its presence in religious-accommodation cases has been comparatively modest.¹⁰⁸ A handful of federal courts, including two courts of appeals, have referenced the interactive process in deciding religious-accommodation claims.¹⁰⁹ Their commitment to requiring the

more recent cases have held that the EEOC is entitled only to *Skidmore* deference.” (internal citation omitted)).

105. See *Chevron U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

106. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

107. See *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (“[EEOC’s] policy statements, embodied in its compliance manual and internal directives . . . reflect ‘a body of experience and informed judgment . . .’” As such, they are entitled to a ‘measure of respect’ under the less deferential *Skidmore* standard.” (first quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); then quoting *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004))).

108. In a November 2018 search of federal decisions reported on Westlaw, the term “interactive process” appeared at least two times in 27.6% of disability-accommodation cases, compared to in just 5.9% of religious-accommodation cases.

109. See, e.g., *EEOC v. AutoNation USA Corp.*, 52 F. App’x 327, 329 (9th Cir. 2002) (concluding the employee “short-circuited the interactive process required by Title VII”); *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (holding that Title VII contemplates an interactive process for religious accommodations); *Jamil v. Sessions*, No. 14-CV-2355-PKC-RLM, 2017 WL 913601, at *10 (E.D.N.Y. Mar. 6, 2017) (explaining that “[t]he process of finding a reasonable accommodation is ‘intended to be an interactive process in which both the employer and employee participate’” (quoting *Elmenayer v. ABF Freight Sys.*, No. 98-CV-4061-JG, 2001 WL 1152815, at *5 (E.D.N.Y. Sept. 20, 2001))); *Nichols v. Ill. Dep’t of Transp.*, 152 F. Supp. 3d 1106, 1124–25 (N.D. Ill. 2016) (noting the applicability of the ADA’s interactive-process requirement to religious accommodations); *Chandler v. Infinity Ins. Grp.*, No. 2:12-CV-2870-TMP, 2014 WL 2547826, at *8 (N.D. Ala. June 4, 2014) (describing the circumstances under which “the interactive religion-accommodation process” is triggered); *Rashad v. Wash. Metro. Area Transit Auth.*, 945 F. Supp. 2d 152, 163 (D.D.C. 2013) (finding the employer “engaged in an extensive interactive process to accommodate” the plaintiff’s religious beliefs); *Slater v. Douglas County.*, 743 F. Supp. 2d 1188, 1195 (D. Or. 2010) (holding that the plaintiff was not entitled to summary judgment merely because the employer failed to “engage in an interactive process”); *Kenner v. Domtar Indus., Inc.*, No. 04-CV-4021, 2006 WL 662466, at *1 (W.D. Ark. Mar. 13, 2006) (explaining that “Title VII’s reasonable accommodation provisions contemplate an interactive process”); *Filinovich v. Claar*, No. 04-C-7189, 2005 WL 2709284, at *4 (N.D. Ill. Oct. 19, 2005) (noting that a religious-discrimination plaintiff “must demonstrate that the breakdown of the interactive process led to the employer’s failure to” accommodate).

interactive process has ranged from certain to skeptical. The strongest endorsement comes from the Tenth Circuit, which declared that Title VII’s “statutory and regulatory framework, like the statutory and regulatory framework of the [ADA], involves an interactive process that requires participation by both the employer and the employee.”¹¹⁰ By contrast, a few courts have questioned whether the interactive process applies to religious accommodations, but none has explicitly rejected this notion.¹¹¹ Judicial uncertainty regarding the applicability of the interactive process prompted drafters of the Workplace Religious Freedom Act of 1994 to include in the proposed legislation—which was primarily intended to raise the undue-hardship standard—a provision that would have prohibited an employer from determining it cannot provide an accommodation until “after initiating and engaging in an affirmative and bona fide effort” to accommodate the employee.¹¹² Despite bipartisan support for the legislation,¹¹³ which has been introduced repeatedly,¹¹⁴ it has never come particularly close to passing.¹¹⁵

The courts’ tepidity toward interactive religious accommodations is perplexing. Nothing in Title VII’s text or legislative history runs contrary to the requirement, nor has any court held that religious-accommodation decisions are the employer’s exclusive domain. To the contrary, the Supreme Court sensed the value of employers and employees working together to determine religious accommodations as early as 1977, noting in *Trans World Airlines, Inc. v. Hardison*

110. *Thomas*, 225 F.3d at 1155 (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986)); *see also* *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1123 (10th Cir. 2013) (noting that the “concepts of religion and interactive accommodation—as they are given substance in the Title VII context” compelled its conclusion that the employee must initially notify the employer of the need for an accommodation), *rev’d on other grounds*, 135 S. Ct. 2028 (2015).

111. *See* *Miller v. Port Auth. of N.Y. & N.J.*, 351 F. Supp. 3d 762, 787 (D.N.J. 2018) (acknowledging courts “have not been consistent” in deciding whether the interactive process applies to religious accommodations); *EEOC v. Jetstream Ground Servs., Inc.*, No. 13-CV-02340-CMA-KMT, 2016 WL 879625, at *4 (D. Colo. Mar. 8, 2016) (observing that Title VII’s regulations, unlike the ADA’s, do not describe an interactive process); *Bolden v. Caravan Facilities Mgmt., LLC*, 112 F. Supp. 3d 785, 791 (N.D. Ind. 2015) (noting the absence of authority suggesting the interactive process applies to religious accommodations); *Dodd v. Se. Pa. Transp. Auth.*, No. Civ. A. 06-4213, 2008 WL 2902618, at *9 (E.D. Pa. July 24, 2008) (questioning whether the interactive process applies to religious accommodations where the plaintiff failed to “offer any legal authority for the proposition”).

112. H.R. 5233, 103d Cong. (1994).

113. *See*, for example, H.R. 1431, 110th Cong. (2007), which was introduced by an equal number of Republican and Democratic representatives. *See generally* LORRAINE C. MILLER, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, OFFICIAL LIST OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES AND THEIR PLACES OF RESIDENCE (2009), <http://clerk.house.gov/110/olm110.pdf> (showing the party affiliation of every member of the House of Representatives of the 110th Congress).

114. *See* S. 3686, 112th Cong. (2012); S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); H.R. 1445, 109th Cong. (2005); S. 677, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); H.R. 5233, 103d Cong. (1994).

115. The legislation died in committee the last time it was proposed. *See* Workplace Religious Freedom Act of 2013, S. 3686, 112th Cong. (2012).

that the employer “held several meetings with plaintiff at which it attempted to find a solution to plaintiff’s [request for Saturdays off],” accommodated his observance of religious holidays, authorized a union steward to search for someone who would swap shifts, and attempted to find him another job.¹¹⁶ The Court likewise acknowledged in *Ansonia Board of Education v. Philbrook* that, given Senator Randolph’s desire for a flexible accommodation process, “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.”¹¹⁷ Furthermore, the EEOC has aggressively pushed for the application of the interactive process to religious accommodations, just as it has for disability accommodations.¹¹⁸ While not bound by the EEOC guidance,¹¹⁹ it is peculiar that courts would so enthusiastically embrace the guidance on the interactive process for disability accommodations but largely ignore similar guidance for religious accommodations.

There are at least four possible explanations for this discrepancy. First, courts may consider the interactive process as less entrenched in Title VII, since, unlike the ADA, neither its legislative history nor its accompanying regulations reference it. Though neither source is binding,¹²⁰ they provide courts with at least some external basis for imposing the requirement. Second, perhaps the difference between the *Chevron* and *Skidmore* deference standards has had some influence. This seems unlikely, however, because even under *Skidmore* deference, there is no reason for a court to reject the EEOC’s position, as there is nothing about it that seems hasty, invalid, or inconsistent.¹²¹ Moreover, courts routinely defer to the EEOC’s guidance on a variety of Title VII issues, even though they are not required to do so.¹²² A third possibility is that because Title VII’s undue-hardship standard is so low, courts might consider the interactive process unnecessary because employers should be able to easily determine in most cases whether an accommodation would impose more than *de minimis*

116. 432 U.S. 63, 77 (1977) (quoting 375 F. Supp. 877, 890–91 (W.D. Mo. 1974)).

117. 479 U.S. 60, 69 (1986) (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145–46 (5th Cir. 1982)).

118. See *supra* Part II.B.

119. See *supra* notes 103–04 and accompanying text.

120. See *supra* notes 49–50 and accompanying text.

121. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

122. See, e.g., *EEOC v. MVM, Inc.*, No. CV-TDC-17-2864, 2018 WL 2197727, at *9 (D. Md. May 14, 2018) (finding persuasive the EEOC’s view, as expressed in its Enforcement Guidance, that Title VII prohibits discrimination based on a person’s perceived national origin); *EEOC v. Falls Vill. Ret. Cmty., Ltd.*, No. 5:05-CV-1973, 2007 WL 756803, at *4 (N.D. Ohio Mar. 7, 2007) (adopting the EEOC’s view, as set forth in its ICompliance Manual, that Title VII protects employees from retaliation for participation in employment discrimination proceedings against third-party employers); *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417–18 (S.D.N.Y. 2005) (agreeing with the EEOC’s view, as set forth in the federal regulations and Compliance Manual, regarding English-only rules in the workplace); *Sullivan v. Nat’l R.R. Passenger Corp.*, No. 95-0037-CIV-GRAHAM, 1996 WL 815394, at *2 (S.D. Fla. Nov. 14, 1996) (finding persuasive the view expressed in the EEOC’s Compliance Manual that sexual harassment is actionable even when the perpetrator and victim are of the same sex).

cost. Along these lines, perhaps courts feel that because Title VII's undue-hardship standard is tipped so far in favor of employers, it would be inconsistent to afford employees greater participation in the decision-making process. Finally, and perhaps most likely, it may be that courts are not opposed to requiring the interactive process for religious accommodations but that there simply is not much judicial momentum to do so. In surveying the disability-accommodation cases, it is striking how often courts cite other courts, rather than the legislative history or federal regulations, for the proposition that the ADA requires the interactive process.¹²³ If more courts required the interactive process for religious accommodations, this could create a snowball effect that would make it easier for other courts to follow suit. At any rate, because no court has explicitly rejected the interactive process for religious accommodations, it is unclear how much, or even if, the foregoing explains why the interactive process is so much less prevalent in the religious-accommodation context. In all likelihood, each of these explanations has played a part in this outcome.

In short, Title VII is like the ADA in that it requires reasonable accommodation absent undue hardship but makes no mention of an interactive-process requirement. It is also similar to the ADA in that the EEOC has interpreted the statute as imposing an interactive-process requirement. The only differences seem to be in the statutes' legislative history and in the level of deference courts owe the EEOC's interpretation of Title VII compared to the ADA. A few courts have overlooked these differences in holding that employers must engage in the interactive process with religious-accommodation seekers, and none have explicitly rejected this notion. More courts should follow suit because, as the next Part demonstrates, the interactive process benefits employees and employers alike, while also enhancing the quality and ease of judicial analysis of accommodation issues.

III. ACCOMMODATION CLAIMS IN THE COURTS

This Part illustrates the utility of the interactive process by comparing how cases are decided with and without the interactive process. The difference is stark. When the interactive process is required, as is the case with disability accommodations, both the employer and the employee have motivation to work together in good faith. While this does not always prevent lawsuits, the interactive process places both parties in a better position to prevail when litigation ensues. It also makes it easier for courts to determine whether the employer could have accommodated the employee without undue hardship. By contrast,

123. See, e.g., *Faulkner v. Douglas County*, 906 F.3d 728, 733 (8th Cir. 2018); *Exby-Stolley v. Bd. of Cty. Comm'rs*, 906 F.3d 900, 907 (10th Cir. 2018); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018).

when the interactive process does not apply, as is typically the case with religious accommodations, neither the employer nor the employee has a clear sense of their duties, and courts tend to be overly deferential to the employer's accommodation determination. Subpart A analyzes how the interactive process functions in disability-accommodation cases. Subpart B examines how religious-accommodation cases are decided without the interactive process. It also provides examples of cases where courts have applied the interactive-process requirement to religious-accommodation claims to further demonstrate its value to employees, employers, and courts alike.

A. *Disability-Accommodation Cases*

The interactive process requires the employer and the employee to work together in good faith to determine whether a reasonable accommodation is possible.¹²⁴ Although it does not guarantee an accommodation will be provided—or that a lawsuit will be avoided—the stakes are sufficiently high that both parties are ordinarily motivated to give their best efforts. Subpart A explores how the interactive process can affect employer behavior and a court's assessment thereof. Subpart B analyzes how the interactive process can impact employee behavior and how such behavior can, in turn, affect the outcome of a case. As the following cases illustrate, courts reward those who cooperate in the interactive process and punish those who do not.

1. *Impact on Employer Behavior*

Matos v. DeVos illustrates how the interactive process can encourage employers to diligently consider whether an employee can be accommodated.¹²⁵ Anamaria Matos alleged her employer, the U.S. Department of Education, failed to engage in the interactive process in good faith because it took the DOE two years to adequately accommodate her fragrance-sensitivity disability.¹²⁶ The DOE attempted to accommodate Matos by moving her from a cubicle to a private office, allowing her to temporarily telecommute, offering to transfer her to a different building, and creating a new, albeit lower-paying, position that would allow her to work entirely from home.¹²⁷ When none of the accommodations sufficed, either because they imposed undue hardship or because Matos

124. See *McDonald v. UAW-GM Ctr. for Human Res.*, 738 F. App'x 848, 854 (6th Cir. 2018) (“Both the employer and the employee must participate in the interactive process in good faith.” (citing *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007)); *Phillips v. Victor Cmty. Support Servs., Inc.*, 692 F. App'x 920, 921 (9th Cir. 2017) (“[T]he interactive process requires ‘direct communication between the employer and employee to explore in good faith the possible accommodations’” (quoting *EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010))).

125. See 317 F. Supp. 3d 489 (D.D.C. 2018).

126. *Id.* at 492.

127. *Id.* at 492–94.

rejected them, Matos proposed the DOE provide her with a custom filter for her office and a respirator mask that would allow her to leave her office for short periods of time.¹²⁸ The DOE provided her with the equipment, though it took several additional months to find the right configuration to alleviate Matos's symptoms.¹²⁹ In granting the DOE summary judgment, the court was not overly concerned that nearly two years transpired before Matos was fully accommodated. The court emphasized the DOE's efforts to keep Matos informed and noted the "back and forth" nature of the employer and employee's communications.¹³⁰ "Throughout the process," the court observed, "the Department proposed alternative accommodations, kept Matos informed, and responded relatively promptly to her questions and requests for information. No reasonable jury could conclude that it engaged in the interactive process in bad faith."¹³¹

Although the interactive process did not prevent a lawsuit in this instance, it functioned how it should have. This case exemplifies the "give-and-take" nature of the accommodation process,¹³² as neither party was granted their preferred accommodation, but through trial and error, offer and counteroffer, the parties ultimately agreed on a solution that neither had envisioned at the outset. Moreover, the DOE's good-faith efforts protected it from Matos's claim. Although Matos was undoubtedly frustrated with how long the process took, her claim failed as a matter of law because the DOE acted in good faith by routinely seeking her input, attempting a variety of accommodations, being upfront about its concerns with her proposals, allowing her to reject accommodation options that arguably would have satisfied the ADA, and keeping her apprised of developments in its efforts to find an accommodation.¹³³

Sharbono v. Northern States Power Co. further illustrates how courts reward employers that engage in the interactive process in good faith, even when they determine no reasonable accommodation is possible.¹³⁴ James Sharbono brought suit against his former employer, alleging it should have accommodated his disability, which prevented him from wearing steel-toed boots.¹³⁵ Northern States Power Company maintained it could not accommodate Sharbono because it required all employees facing hazardous work conditions to wear safety-toe footwear certified by the American National Standards Institute

128. *Id.* at 494.

129. *Id.* at 495.

130. *Id.* at 498.

131. *Id.*

132. *See* *Ward v. McDonald*, 762 F.3d 24, 32 (D.C. Cir. 2014) ("The process contemplated is a 'flexible give-and-take' between employer and employee 'so that together they can determine what accommodation would enable the employee to continue working.'" (quoting *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005))).

133. *Matos*, 317 F. Supp. 3d at 498.

134. *See* 902 F.3d 891 (8th Cir. 2018).

135. *Id.* at 891.

(ANSI).¹³⁶ In affirming summary judgment for Northern, the Eighth Circuit centered its analysis on the company's good-faith efforts to find a reasonable accommodation.¹³⁷ Northern met with Sharbono twice to discuss his need for an accommodation, explained that exempting him from its footwear policy would violate federal safety standards, and offered to find him another job within the company.¹³⁸ After he declined the transfer option, Northern offered him disability retirement benefits, which included pay at half his base rate and insurance benefits.¹³⁹ Even after Sharbono reluctantly agreed to this arrangement, Northern explored a final possibility by having Sharbono meet with a doctor and then, based on the doctor's recommendation, contacting an orthotics company about manufacturing an ANSI-compliant, modified boot.¹⁴⁰ Only after the orthotics company informed Northern that it was impossible to manufacture a custom boot that was compliant did the company end its quest to find an accommodation.¹⁴¹

Although the interactive process did not result in accommodation, it undoubtedly enhanced both the legitimacy of Northern's decision and the process by which the decision was reached. Instead of unilaterally and reflexively deciding Sharbono could not be accommodated and terminating his employment as a result, Northern ensured Sharbono understood why an exemption was not possible and went to great lengths to find an accommodation that was acceptable to him. The company may actually have been within its rights to require Sharbono to accept a transfer to another position that did not require him to wear safety-toe footwear.¹⁴² But through the interactive process, Sharbono was able to communicate his desire to not be transferred, prompting Northern to search for other solutions.

While *Matos* and *Sharbono* illustrate how engaging in the interactive process in good faith can protect employers from liability, examples abound where courts have punished employers who fail in this regard. In *Young v. Nicholson*, Marion Young, who is hearing impaired, sued her former employer, the Department of Veteran Affairs, for denying her request for additional interpreter services to help her understand complicated and lengthy operational manuals.¹⁴³ In its bench verdict in Young's favor, the court explained that "the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer

136. *Id.* at 892.

137. *Id.* at 894.

138. *Id.* at 893.

139. *Id.*

140. *Id.*

141. *Id.*

142. See 29 C.F.R. § 1630.2(o)(2)(ii) (2019) (explaining that "reassignment to a vacant position" may constitute a reasonable accommodation under the ADA).

143. No. CV-05-407-RHW, 2007 WL 128821, at *1-3 (E.D. Wash. Jan. 12, 2007).

is aware that the initial accommodation is failing and further accommodation is needed.”¹⁴⁴ The VA “utterly failed” in this regard.¹⁴⁵ Although Young met with her supervisor on various occasions to request additional interpreter services, her supervisor denied each request and insisted she read the manuals herself before any additional accommodation would be considered—a solution the court likened to a wheelchair-bound person being told there is a bathroom for disabled persons at the top of a flight of stairs.¹⁴⁶ The VA likewise acted in bad faith because it made no effort to educate its management about the needs of deaf employees in general or of Young in particular.¹⁴⁷ It was especially damning that the VA could have, but failed to, reach out to a state agency that would have conducted an individualized assessment of Young’s situation to pinpoint the barriers to job performance and identify resources available to design a reasonable accommodation.¹⁴⁸ Moreover, when Young took medical leave due to the stress and anxiety she experienced as a result of her supervisor’s actions, “rather than demanding that [she] submit medical justification, resign, or return to work in the same position,” the court observed, “Defendants should have discussed with Plaintiff the type of accommodations that would be required to allow her to be successful in the position. This is especially true when it became clear that the accommodations that Defendants were providing were not working.”¹⁴⁹

Young is instructive in several regards. It stands for the proposition that the interactive process extends beyond the initial accommodation when the employee requests a modification to the accommodation or the employer becomes aware that the accommodation is ineffective.¹⁵⁰ It also demonstrates that an employer cannot plead ignorance in how to interact with an accommodation seeker but must take the steps necessary to understand the employee’s job limitations and how they can be mitigated through accommodation. This may require the employer to tap available sources beyond the accommodation seeker herself. *Young* likewise illustrates how the interactive process can be subverted when an employer makes unreasonable, inflexible demands of the accommodation seeker. The supervisor’s insistence that Young read the manuals before receiving additional interpreter services not only demonstrated a fundamental misunderstanding of Young’s needs but also effectively shut down the interactive process altogether.

144. *Id.* at *8.

145. *Id.* at *9.

146. *Id.* at *2–4, *10.

147. *Id.* at *9.

148. *Id.*

149. *Id.* at *10 (citing *Humphrey v. Mem’l Hosp. Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001)).

150. *Id.* at *9.

Another way employers act in bad faith in the interactive process is by not adequately involving the employee before making an accommodation determination. In *Lafata v. Church of Christ Home for the Aged*, the Sixth Circuit held that a jury could reasonably conclude the employer failed to participate in the interactive process in good faith.¹⁵¹ The day before Eleanor Lafata, who had permanent lifting restrictions due to a shoulder injury, was scheduled to return from FMLA leave, her employer notified her it was reinstating her to a different position.¹⁵² When Lafata declined the position because it would require her to lift too much weight, her employer responded that “the job was ‘what’s being offered’ and that [Lafata] could ‘take it or leave it.’”¹⁵³ Lafata subsequently notified her employer that she was willing to accept an open nonsupervisory position, but the employer never responded.¹⁵⁴ In reversing summary judgment for the employer, the court decried the employer’s take-it-or-leave-it approach, explaining that “[b]y offering Plaintiff only one option with respect to the position despite knowing of her physical limitations, Defendant failed to discuss with Plaintiff the ‘potential reasonable accommodations that could overcome [her] limitations,’” as the interactive process requires.¹⁵⁵ Similarly, in *Mobley v. Miami Valley Hospital*, the Sixth Circuit again reversed a district court’s grant of summary judgment for the employer.¹⁵⁶ When Bryan Mobley, a mentally-impaired housekeeper, asked the hospital where he worked to reassign him to his old job after he experienced difficulty learning his new assignment, the hospital instead responded by pairing him with a trainer for a few shifts and placing him on a developmental plan.¹⁵⁷ The court found that because the hospital “rejected [Mobley’s] transfer request before dialogue truly began,” a jury could conclude it “did not in good faith consider Mobley’s proposed transfer and that further dialogue would have been necessary to reach an agreeable outcome.”¹⁵⁸

Sometimes employers refuse to engage in the interactive process altogether based on their initial assessment that no reasonable accommodation is possible. This mistake is understandable on some level because courts have held that an employer violates the interactive-process requirement only if the employee could have been reasonably accommodated.¹⁵⁹ The First Circuit has gone so far

151. 325 F. App’x 416, 423 (6th Cir. 2009).

152. *Id.* at 418.

153. *Id.* at 418–19.

154. *Id.* at 419.

155. *Id.* at 423 (second alteration in original) (quoting 29 C.F.R. § 1630.2(o)(3) (2019)).

156. 603 F. App’x 405 (6th Cir. 2015).

157. *Id.* at 407.

158. *Id.* at 414.

159. *See, e.g.,* *Denczak v. Ford Motor Co.*, 215 F. App’x 442, 446 (6th Cir. 2007) (“[A]n employer violates this requirement ‘only if, among other things, the employee can demonstrate that the employee could have been reasonably accommodated but for the employer’s lack of good faith.’” (quoting *Breitfelder v. Leis*, 151 F. App’x 379, 386 (6th Cir. 2005)); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (explaining that the ADA is not intended “to punish employers for behaving callously if, in fact, no accommodation for the employee’s disability could reasonably have been made”); *Kesecker v. Marin Cmty. Coll. Dist.*, No. C-11-

as to declare there is no need for an interactive process “unless the interaction could have led to the discovery of a reasonable accommodation that would have enabled the plaintiff to perform the essential functions of her position.”¹⁶⁰ This language is problematic because it overlooks the reality that oftentimes the interactive process is necessary to determine whether reasonable accommodation is possible.¹⁶¹ In rejecting an employer’s claim that it did not have to participate in the interactive process because it had determined there was no feasible accommodation, the Third Circuit explained that “if an employer fails to engage in the interactive process, it may not discover a way in which the employee’s disability could have been reasonably accommodated.”¹⁶² According to the court, “[T]he employer will almost always have to participate in the interactive process to some extent before it will be clear that it is impossible to find an accommodation that would allow the employee to perform the essential functions of a job.”¹⁶³ Thus, an employer cannot unilaterally decide a reasonable accommodation is not possible and refuse to participate in the interactive process on that basis. Instead, it must engage in the interactive process in good faith to get to the point where it becomes apparent the employee cannot be accommodated.

2. *Impact on Employee Behavior*

The prospect of receiving an accommodation is generally sufficient to motivate employees to participate in the interactive process in good faith. But to incentivize employees further, courts do not hesitate to dismiss an accommodation claim if an employee acts in bad faith or is otherwise responsible for a breakdown in the interactive process. Common ways employees subvert the interactive process include failing to adequately request an accommodation, not

4048-JSC, 2012 WL 6738759, at *11 (N.D. Cal. Dec. 31, 2012) (“[U]nder the ADA, an employer is not liable for failing to engage in the interactive process in good faith if a reasonable accommodation was not possible.”).

160. *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 82 (1st Cir. 2010) (citing *Kvorjak v. Maine*, 259 F.3d 48, 53 (1st Cir. 2001); *Soto-Ocasio v. Fed. Exp. Corp.*, 150 F.3d 14, 19 (1st Cir. 1998)).

161. *See Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999) (explaining that the federal regulations “set forth the predicate requirement that when the disabled individual requests accommodation, it becomes necessary to initiate the interactive process”); *Kelley v. Corr. Corp. of Am.*, 750 F. Supp. 2d 1132, 1140 (E.D. Cal. 2010) (“An employer is also not excused from participation in the interactive process if it unilaterally concludes that no accommodation is reasonably available.” (citing *Claudio v. Regents of the Univ. of Cal.*, 134 Cal. App. 4th 224, 245 (Cal. Ct. App. 2005); *Wysinger v. Auto. Club of S. Cal.*, 157 Cal. App. 4th 413, 424–25 (Cal. Ct. App. 2007))).

162. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) (quoting *Mengine v. Runyon*, 114 F.3d 415, 420–21 (3d Cir. 1997)).

163. *Id.*; *see also Wysinger*, 157 Cal. App. 4th at 424–25 (“An employer may claim there was no available reasonable accommodation. But if it did not engage in a good faith interactive process, ‘it cannot be known whether an alternate job would have been found.’ The interactive process determines which accommodation is required. Indeed, the interactive process could reveal solutions that neither party envisioned.” (internal citations omitted) (quoting *Claudio*, 134 Cal. App. 4th at 242)).

providing information requested by the employer, insisting on a particular accommodation to the exclusion of all others, and not allowing adequate time for the interactive process to play out.

An employee can cause the interactive process to fail before it gets started by not adequately requesting an accommodation. The interactive process is triggered only after an employee notifies her employer of her disability and need for an accommodation.¹⁶⁴ This requires certain action on the employee's part; "mere awareness that the employee is disabled" ordinarily does not trigger the interactive process.¹⁶⁵ The request "need not be formal, be in writing, or invoke any particular 'magic words,'"¹⁶⁶ but the employee must "provide[] the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation."¹⁶⁷ For example, in *Isley v. Aker Philadelphia Shipyard, Inc.*, the court granted the employer summary judgment upon determining the employee did not trigger the interactive process by merely notifying a supervisor and union steward that his absences were due to "heart issues" for which he had gone to the emergency room.¹⁶⁸ The court reasoned that the shipyard "had no knowledge [the employee] suffered from health problems that interfered with his work," had not "observed a decline in [his] job performance that might have [signaled] something was wrong," and "had no reason to assume [his] visit to the emergency room was for anything other than a one-time bout of chest pain."¹⁶⁹

The employee's responsibilities extend beyond merely triggering the interactive process. Additionally, the employee has a duty to cooperate with the employer throughout the interactive process. When employees fail in this regard, courts routinely dismiss their accommodation claims. This can happen, for example, when an employee neglects to submit medical information or other documentation that the employer has reasonably requested.¹⁷⁰ For example, in *Ali v. McCarthy*, Ghulam Ali sued his employer, the Environmental Protection

164. See *Snapp v. United Transp. Union*, 889 F.3d 1088, 1095 (9th Cir. 2018) (explaining that "notifying an employer of a need for an accommodation triggers a duty to engage in an 'interactive process'"); *Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 546 (7th Cir. 2008) (stating the same).

165. *Dinse v. Carlisle Foodservice Prod. Inc.*, 541 F. App'x 885, 890 (10th Cir. 2013); see also *Nunez v. Lifetime Prod., Inc.*, 725 F. App'x 628, 631 (10th Cir. 2018) ("[B]efore an employer's duty to provide reasonable accommodations—or even to participate in the 'interactive process'—is triggered under the ADA, the employee must make an adequate request, thereby putting the employer on notice." (alteration in original) (quoting *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011))).

166. *Sessoms v. Trs. of Univ. of Pa.*, 739 F. App'x 84, 88 (3d Cir. 2018) (quoting *Taylor*, 184 F.3d at 313).

167. *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 39 (3d Cir. 2018) (alteration in original) (quoting *Taylor*, 184 F.3d at 313).

168. 275 F. Supp. 3d 620, 623–24, 630–31 (E.D. Pa. 2017).

169. *Id.* at 630.

170. See *Jackson v. City of Chicago*, 414 F.3d 806, 813 (7th Cir. 2005) (explaining that when the parties are "missing information . . . that can only be provided by one of the parties, . . . the party withholding the information may be found to have obstructed the [interactive] process" (omissions in original) (quoting *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996))).

Agency, for failing to accommodate his environmental allergies.¹⁷¹ When Ali requested to be moved from a cubicle to a private office, the EPA asked him to provide additional information from his health care provider beyond the six-year-old doctor's note and the copy of a prescription he previously submitted.¹⁷² Ali refused, prompting the EPA to reject his request.¹⁷³ The court disagreed with Ali's claim that the EPA was responsible for the breakdown in the interactive process by asking for additional, unnecessary medical information.¹⁷⁴ To the contrary, the court concluded the request was highly reasonable and that it was Ali who abandoned the interactive process by refusing to cooperate.¹⁷⁵

Another way employees fail to cooperate, and thus risk having their claims dismissed, is by insisting on a particular accommodation to the exclusion of all others. According to the federal regulations, the final step in the interactive process requires the employer to “[c]onsider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.”¹⁷⁶ Thus, while the employer should consider the employee's preference, the employee is not necessarily entitled to her preferred accommodation.¹⁷⁷ In *Maubach v. City of Fairfax*, the court dismissed Stefanie Maubach's accommodation claim based on her insistence she be allowed to bring her dog to work to help her avoid panic attacks.¹⁷⁸ After permitting Maubach to bring her dog to the office on a trial basis, the City concluded this was not a feasible accommodation, in part because several employees were allergic to the dog.¹⁷⁹ The City offered to allow Maubach to bring a hypoallergenic dog to the office or to switch to the day shift, which would allow greater flexibility to miss work in the event she suffered a panic attack.¹⁸⁰ Maubach refused to consider either option, prompting the court to dismiss her claim because she failed to engage in the interactive process in good

171. 179 F. Supp. 3d 54, 60 (D.D.C. 2016).

172. *Id.* at 68–69.

173. *Id.* at 71–72.

174. *Id.* at 77–78.

175. *Id.* at 78–80.

176. 29 C.F.R. app. § 1630.9 (2019).

177. See *Faidley v. United Parcel Serv. of Am., Inc.*, 889 F.3d 933, 942–43 (8th Cir. 2018) (“[A]n employer only has to provide an accommodation that is reasonable,” not an accommodation the employee prefers.” (alteration in original) (quoting *Scruggs v. Pulaski County*, 817 F.3d 1087, 1093 (8th Cir. 2016); citing *Minniham v. Mediacom Commc'ns Corp.*, 779 F.3d 803, 814 (8th Cir. 2015))); *Credeur v. Louisiana*, 860 F.3d 785, 797 (5th Cir. 2017) (“The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation.” (quoting *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011))).

178. No. 1:17-cv-921, 2018 WL 2018552, at *6 (E.D. Va. Apr. 30, 2018).

179. *Id.* at *6.

180. *Id.* at *3–4.

faith.¹⁸¹ The court reasoned that when “an employee causes the interactive process to break down by insisting on a particular accommodation, an employer cannot be liable under the ADA.”¹⁸²

Courts also dismiss accommodation claims where an employee breaks off the interactive process prematurely, typically by taking legal action or by resigning. For example, in *Ward v. McDonald*, the D.C. Circuit affirmed summary judgment for the employer where “the interactive process broke down when [the employee] ‘walked away.’”¹⁸³ In conjunction with her accommodation request, Ella Ward supplied her employer with letters from her doctors that were unclear as to what accommodation she needed and whether she could even perform the essential functions of her job.¹⁸⁴ The employer set forth in writing the precise information it needed from Ward’s doctors, but rather than supply such information, Ward resigned six days later.¹⁸⁵ In affirming dismissal of Ward’s accommodation claim, the court explained, “Ward is the author of her misfortune—she and the [employer] parted ways not because the [employer] discriminated or retaliated against her based on her disability but because she acted precipitately.”¹⁸⁶

Lastly, some courts have held that an employee acts in bad faith by failing to work with the employer to identify potential accommodations.¹⁸⁷ The employee’s duty is unclear in this regard. According to the Sixth Circuit, the employee must propose an initial accommodation, and if she fails to do so, the employer is excused from further engaging in the interactive process.¹⁸⁸ The employer is not required to propose a counter accommodation, but doing so “may be additional evidence of good faith.”¹⁸⁹ At least two other circuits take a similar approach.¹⁹⁰ Although it has not been challenged in the courts to date, this burden-shifting scheme seems inconsistent with the interactive process set

181. *Id.* at *6–7.

182. *Id.* at *6.

183. 762 F.3d 24, 33 (D.C. Cir. 2014).

184. *Id.* at 32.

185. *Id.* at 33.

186. *Id.* at 35.

187. See, e.g., *Banks v. Bosch Rexroth Corp.*, 15 F. Supp. 3d 681, 692–93 (E.D. Ky. 2014) (granting summary judgment to the employer where the employee “did not make any attempt to help identify a reasonable accommodation”), *aff’d*, 610 F. App’x 519 (6th Cir. 2015).

188. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202–03 (6th Cir. 2010).

189. *Id.* at 203 (citing *Kleiber v. Honda of Am. Mfg. Inc.*, 485 F.3d 862, 872 (6th Cir. 2007)).

190. See *Dickerson v. Sec’y, Dep’t of Veterans Affairs Agency*, 489 F. App’x 358, 360 (11th Cir. 2012) (explaining that “[t]he plaintiff has the burden to identify an accommodation and establish that the accommodation is reasonable” and that “[t]he employee ‘does not satisfy her initial burden by simply naming a preferred accommodation’ because ‘she must show that the accommodation is “reasonable” given her situation’” (first citing *Willis v. Conopco, Inc.*, 108 F.3d 282, 283 (11th Cir. 1997); then quoting *Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998)); *Wells v. Shalala*, 228 F.3d 1137, 1145 (10th Cir. 2000) (explaining that the plaintiff bears “the initial burden of initiating an interactive process with [the employer] by proposing an accommodation and showing that the accommodation was objectively reasonable” (citing *Woodman v. Runyon*, 132 F.3d, 1330, 1344 (10th Cir. 1997))).

forth in the federal regulations, which neither obligates the employee to initially suggest an accommodation nor allows the employer to simply reject a proposed accommodation without at least exploring other possibilities.¹⁹¹

The foregoing cases illustrate the value of the interactive process. Requiring good-faith participation by both parties helps ensure employers thoughtfully and diligently consider different accommodations and that employees fully cooperate throughout the process. This framework allows courts to more easily decide accommodation claims by focusing on how the parties' actions leading up to the accommodation determination informed the employer's decision. When an employer participates in the interactive process in good faith, courts generally uphold the employer's decision. But when an employer refuses to engage in the interactive process or does so in bad faith, courts do not hesitate to hold the employer liable.

B. Religious-Accommodation Cases

The difference in how courts typically analyze religious-accommodation claims is stark. Without the interactive process, courts pay almost no attention to how the accommodation decision was reached and instead focus on whether the accommodation would have imposed more than a *de minimis* burden on the employer. Courts are highly deferential to employers in this regard, effectively granting employers carte blanche to determine whether and how to accommodate an employee's religious beliefs. By contrast, in the few cases where courts have applied the interactive process to religious-accommodation claims, courts place greater emphasis on the parties' actions leading up to the accommodation decision. For these courts, how the employer treated the employee throughout the decision-making process factors into whether the employer unlawfully discriminated.

1. Cases Without the Interactive Process

Christmon v. B&B Airparts, Inc. illustrates how the absence of the interactive process can negatively affect both the employer's and the employee's efforts to find a reasonable accommodation.¹⁹² Jerome Christmon, a Hebrew Israelite, asked his supervisor at B&B Airparts if he could work his mandatory overtime shifts on Sundays instead of Saturdays for religious reasons.¹⁹³ His supervisor did not request additional information but merely instructed Christmon to fill

191. See 29 C.F.R. app. § 1630.9 (explaining that the interactive process requires the employer to consult with the employee to "ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation," as well as to "identify potential accommodations and assess the effectiveness each would have").

192. See 735 F. App'x 510 (10th Cir. 2018).

193. *Id.* at 512.

out a time-off form.¹⁹⁴ Christmon never submitted the form, opting instead to simply stop showing up for his Saturday shifts.¹⁹⁵ B&B did not discuss Christmon's absences with him but nevertheless refrained from disciplining him.¹⁹⁶ Although Christmon was dissatisfied with this arrangement because he was not earning valuable overtime pay, he did not have any further conversations with B&B about his accommodation request.¹⁹⁷ Following his termination for unrelated reasons, Christmon sued B&B for religious discrimination.¹⁹⁸

It is worth pausing here to consider how the interactive process might have altered the parties' behavior. Christmon's request would have obligated the parties to work together in good faith to determine whether he could be accommodated. This means B&B could not have simply ordered Christmon to fill out a form and then ignore his request, nor could Christmon have disregarded his employer's instruction and then stop showing up for his Saturday shifts. Instead, the parties would have needed to meet together, discuss the precise job limitations Christmon's religious beliefs imposed, and explore possible accommodations. This process would have given Christmon the opportunity to express his dissatisfaction with being exempted from Saturday work but not being allowed to earn overtime, and B&B could have explained why allowing him to work overtime on Sunday was infeasible. The parties could have then examined whether other reasonable accommodations were possible, such as allowing Christmon to earn overtime pay by working extra hours at the end of each shift. Even if B&B could not have accommodated Christmon, at the very least the interactive process would have allowed Christmon to feel his voice was heard, which could have made it easier for him to understand and accept B&B's decision, perhaps obviating the need for litigation.

In affirming summary judgment for B&B, the appellate court focused solely on the fact that the company eliminated the conflict between Christmon's job and his religion by not firing him for his Saturday absences.¹⁹⁹ The court explained that "[a]ccommodat[ion] . . . means . . . allowing the plaintiff to engage in [his] religious practice despite the employer's normal rules to the contrary."²⁰⁰ Thus, because B&B refrained from firing Christmon, it satisfied its accommodation duties.²⁰¹ The court's analysis is problematic in light of the EEOC's determination, adopted by several courts, that "[e]liminating the conflict . . . means accommodating the employee without unnecessarily disadvantaging the

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 513–15.

200. *Id.* at 514 (omissions and third alteration in original) (citations omitted) (quoting *Tabura v. Kellogg USA*, 880 F.3d 544, 550 (10th Cir. 2018)).

201. *Id.*

employee's terms, conditions, or privileges of employment.”²⁰² Like B&B itself, the court gave no thought to how Christmon's accommodation impacted the conditions of his employment. The court explained that “a reasonable accommodation does not necessarily spare an employee from any resulting cost” and that “the accommodation may be reasonable even though it is not the one that the employee prefers,” but it provided no analysis of how Christmon was impacted by not being allowed to work overtime.²⁰³ The court's opinion also lacks any consideration of whether B&B acted in good faith or whether it could have accommodated Christmon in some other way that would have been satisfactory to both parties. Had the court applied the interactive-process framework, it almost certainly would have taken these issues into account.

In *Camara v. Epps Air Service, Inc.*, Aissatou Camara, a customer service representative for Epps Air Service, sued her employer for failing to accommodate her request to wear a hijab.²⁰⁴ Epps denied her request because the owner was concerned the accommodation ran counter to the image he sought for his company and could hurt his business because some customers might have negative reactions.²⁰⁵ Camara subsequently contacted the Council on American–Islamic Relations (CAIR), who sent Epps a letter urging it to reconsider its decision and enclosed an employers' guide for Islamic religious practices.²⁰⁶ Epps offered to allow Camara to transfer to the accounting department, where she could wear her headscarf because she would not interact with customers.²⁰⁷ Camara was open to the transfer until she discovered it would require her to work eight more hours per week and her job would be to “help” an accounts payable employee with less seniority.²⁰⁸ In Camara's view, such arrangement was inherently “unfair” and would constitute a demotion.²⁰⁹ CAIR then sent a second letter to

202. Compliance Manual, *supra* note 91, § 12-IV(A)(3); *see also* Kelly v. County of Orange, 101 F. App'x 206, 207 (9th Cir. 2004) (explaining that because the employer eliminated the conflict between the employee's religious beliefs and job, “our inquiry reduces to whether the accommodation reasonably preserved [the employee's] compensation, terms, conditions, and privileges of employment” (citing *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 711, 776–77 (9th Cir. 1986))); *Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002) (noting that an accommodation may be unreasonable if it causes “an inexplicable diminution in . . . employee status or benefits” or “imposes a significant work-related burden on the employee without justification”); *Am. Postal Workers Union*, 781 F.2d at 776 (“Title VII . . . requires an employer to accommodate the religious beliefs of an employee in a manner which will reasonably preserve that employee's employment status, *i.e.*, compensation, terms, conditions, or privileges of employment.”); *Farah v. A-1 Careers*, No. 12-2692-SAC, 2013 WL 6095118, at *6 (D. Kan. Nov. 20, 2013) (“Eliminating the conflict between a work rule and an employee's religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment.” (quoting Compliance Manual, *supra* note 91, § 12-IV(A)(3))).

203. *Christmon*, 735 F. App'x at 514 (citing *Pinsker v. Joint Dist. No. 28*], 735 F.2d 388, 390–91 (10th Cir. 1984)).

204. 292 F. Supp. 3d 1314, 1319 (N.D. Ga. 2017).

205. *Id.* at 1319, 1322.

206. *Id.* at 1322–23.

207. *Id.* at 1323.

208. *Id.* at 1323.

209. *Id.* at 1323, 1328 n.19.

Epps, this time requesting to meet “to discuss this in more detail with the hope of resolving this issue.”²¹⁰ Epps ignored the letter and told Camara she either needed to accept the transfer or resign.²¹¹ When Camara declined the transfer and insisted on wearing a hijab, Epps terminated her employment.²¹²

Similar to *Christmon*, the court had little sympathy for Camara’s plight. In the court’s view, Epps met its accommodation obligation by offering Camara the accounting position, and at that point, Camara “had a duty to accept Epps’s offer.”²¹³ The court noted that Camara’s preference for a different job was “immaterial” and that “[i]f she wanted to wear a hijab at work, plaintiff had a duty to accept the transfer offer.”²¹⁴ This reasoning stands in stark contrast to cases like *Lafata*, where the employer’s take-it-or-leave-it approach was evidence that the employer engaged in the interactive process in bad faith.²¹⁵ While Epps’s transfer offer would have eliminated the conflict between Camara’s job and her religious beliefs, neither the employer nor the court considered how the new position would otherwise affect the terms and conditions of Camara’s employment. Had the interactive-process requirement applied, perhaps Epps would have been more willing to meet with CAIR and Camara to determine whether there were other positions that would be more acceptable to Camara. While the interactive process would not have guaranteed Camara the accommodation of her choice, at the very least it would have ensured Epps took Camara’s views into account in determining whether it could accommodate her religious beliefs.

In *EEOC v. Red Robin Gourmet Burgers, Inc.*, the EEOC brought suit on behalf of Edward Rangel, who was terminated from his position as a server at Red Robin for refusing to cover his wrist tattoos in violation of the company’s dress code policy.²¹⁶ Rangel was initially allowed to work for six months with his tattoos displayed, but when he transferred to a different location, his new supervisor insisted Rangel cover them.²¹⁷ Rangel explained to the manager that his tattoos were part of his religious beliefs and that covering them would be a sin.²¹⁸ The manager again suggested Rangel could cover the tattoos with wristbands or bracelets, but when Rangel refused, he was escorted out of the building and fired.²¹⁹ In opposing summary judgment, the EEOC urged the court to consider Red Robin’s failure to engage in the interactive process.²²⁰ The restaurant made no effort to work with Rangel to determine whether he could be

210. *Id.* at 1323.

211. *Id.* at 1324.

212. *Id.*

213. *Id.* at 1329 (citing *Beadle v. Hillsborough Cty. Sheriff’s Dept.*, 29 F.3d 589, 593 (11th Cir. 1994)).

214. *Id.* at 1330.

215. *See Lafata v. Church of Christ Home for the Aged*, 325 F. App’x 416, 423 (6th Cir. 2009).

216. No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005).

217. *Id.*

218. *See id.*

219. *Id.*

220. *Id.* at *4 n.8.

accommodated in some other way, such as by moving him to a position where he would not interact with customers or perhaps by allowing him to transfer back to the restaurant where he had previously worked.²²¹ Had the interactive-process requirement applied, such inaction by Red Robin would have been evidence that the employer acted in bad faith.²²² The court concluded Red Robin had no duty to engage in the interactive process because Rangel had sought only one accommodation—a dress code exemption—which his employer refused to provide.²²³ Thus, rather than consider whether the interactive process might have led to a mutually agreeable solution that perhaps neither party had initially envisioned,²²⁴ the court instead focused solely on whether the accommodation Rangel requested would have more than a *de minimis* burden on the employer.²²⁵

2. Cases With the Interactive Process

Requiring the interactive process to religious accommodations begins to level the playing field between employers and employees by placing greater focus on whether the parties worked together in good faith to find a reasonable accommodation. In *EEOC v. Aldi, Inc.*, the EEOC brought suit on behalf of Kimberly Bloom, a cashier who was fired because she refused to work Sundays for religious reasons.²²⁶ Aldi moved for summary judgment, claiming it satisfied its accommodation duty by maintaining a neutral scheduling rotation that required all cashiers to take turns working on Sundays, coupled with a voluntary shift-swap policy.²²⁷ Aldi argued it had no obligation to consider Bloom's other proposals, even though it knew its shift-swap policy was inadequate to accommodate Bloom because she believed it was a sin to ask others to work on Sundays for her.²²⁸ In denying Aldi's summary judgment motion, the court explained that Title VII's reasonable-accommodation provisions contemplate an interactive process and that Aldi had failed in this regard because it made no specific effort to accommodate Bloom.²²⁹ The court contrasted Aldi's inaction

221. *Id.* at *4.

222. *See* *Faulkner v. Douglas County*, 906 F.3d 728, 734 (8th Cir. 2018) (noting that an employer's failure to engage in the interactive process is "prima facie evidence of bad faith at the summary judgment stage" (citing *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1121 (8th Cir. 2000))).

223. *Red Robin*, 2005 WL 2090677, at *4 & n.8.

224. *See, e.g.,* *Matos v. DeVos*, 317 F. Supp. 3d 489 (D.D.C. 2018).

225. *Red Robin*, 2005 WL 2090677, at *4.

226. No. 06-01210, 2008 WL 859249, at *1 (W.D. Pa. Mar. 28, 2008).

227. *Id.* at *8.

228. *See id.* at *12–13.

229. *Id.* at *12.

with how an employer in a factually similar case responded to an accommodation request.²³⁰ Like Aldi, the employer implemented a neutral scheduling rotation and shift-swap policy, but unlike Aldi, it took the additional steps of approving all of the plaintiff's requests for shift swaps, instructing and assisting her on numerous occasions to find someone with whom to trade shifts, and posting a master schedule of all employees' schedules so the plaintiff could more easily find someone with whom to swap shifts.²³¹ Through this comparison, the court made clear that the interactive process requires active, not passive, efforts by an employer to find a reasonable accommodation.

In *Nichols v. Illinois Department of Transportation*, DeMarco Nichols, a Muslim, sued his former employer for refusing to accommodate his request for a quiet place to pray at work.²³² Nichols filed an internal grievance explaining his prayer requirements and requesting arrangements "to practice [his] religion in the proper manner," which his employer denied without offering him any explanation.²³³ The Illinois Department of Transportation (IDOT) moved for summary judgment, claiming its denial was proper because the accommodation would have caused it undue hardship.²³⁴ The court denied the motion, in part because IDOT failed to engage in the interactive process.²³⁵ It questioned IDOT's assertion of undue hardship because the employer had never engaged in any dialogue with Nichols about his accommodation request.²³⁶ The court reasoned that when an employee requests an accommodation, the interactive process prohibits the employer from "simply reject[ing] it without offering other suggestions or at least expressing a willingness to continue discussing possible accommodations."²³⁷ According to the court, "[t]his reflects the give-and-take aspect of the interactive process. An employer cannot sit behind a closed door and reject the employee's requests for accommodation without explaining why the requests have been rejected or offering alternatives."²³⁸ Because IDOT was guilty of doing precisely what the interactive process prohibits, the court concluded a reasonable jury could find IDOT's refusal to accommodate Nichols was unreasonable.²³⁹

The interactive process protects not only employees but also employers who engage in good-faith efforts to reasonably accommodate an employee. In *Thomas v. National Ass'n of Letter Carriers*, Gerald Thomas brought suit against

230. *Id.* (citing *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322 (11th Cir. 2007)).

231. *Id.* (citing *Morrisette-Brown*, 506 F.3d at 1323).

232. 152 F. Supp. 3d 1106, 1111 (N.D. Ill. 2016).

233. *Id.* at 1113.

234. *Id.* at 1123.

235. *Id.* at 1124–25.

236. *Id.*

237. *Id.* at 1125 (emphasis omitted) (quoting *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 806 (7th Cir. 2005)).

238. *Id.* (quoting *Sears, Roebuck & Co.*, 417 F.3d at 806).

239. *Id.*

the U.S. Postal Service after he was terminated for refusing to work Saturdays in accordance with his religious beliefs.²⁴⁰ Under the applicable bargaining agreement, all letter carriers were placed on a rotating schedule that required them to work five out of six Saturdays.²⁴¹ The Postal Service had no authority to change the work schedule but nevertheless took a number of actions to try to accommodate Thomas as best it could, including permitting his use of leave on dozens of Saturdays, approving the use of substitutes for him on Saturdays when such substitutes could be found, seeking a waiver from the union to exempt him from working Saturdays, and suggesting he bid on a position that would not require him to work Saturdays.²⁴² In assessing each of the five accommodations Thomas proposed, the Tenth Circuit found that “[i]n the interactive process between employer and employee, the employer here considered every accommodation requested by Thomas and rightfully rejected each as unduly burdensome.”²⁴³ Although the Postal Service rejected each proposal, “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.”²⁴⁴ The court concluded, “This is all that Title VII reasonably requires the Postal Service to do.”²⁴⁵

Farah v. A-1 Careers involved a claim by Abdifatah Farah, a Muslim, against his former employer for failing to accommodate his need to engage in noontime prayers.²⁴⁶ Farah often performed his Friday prayers by combining his lunch and break times, which allowed him time to drive to a mosque approximately thirty minutes away.²⁴⁷ But the rest of the week Farah wanted to pray at work.²⁴⁸ Farah began praying in the glass lobby of the building where the employer rented space, but the landlord soon informed the employer that this was inappropriate.²⁴⁹ The human resource director and other management met with Farah about his situation on several occasions and asked if he could pray in his car, outside the building (a landscaped area with several places sheltered from the rain), or off-site.²⁵⁰ Farah rejected each possibility, while concealing that he drove to a mosque on Fridays to pray.²⁵¹ He asked to instead be allowed to pray in other parts of the workspace, including the human resource manager’s office,

240. 225 F.3d 1149, 1153–54 (10th Cir. 2000).

241. *Id.* at 1152.

242. *Id.* at 1152–53.

243. *Id.* at 1156.

244. *Id.*

245. *Id.* at 1156–57 (citing 29 C.F.R. § 1605.2(d)(1)(i) (2019)).

246. No. 12-2692-SAC, 2013 WL 6095118, at *1 (D. Kan. Nov. 20, 2013).

247. *Id.*

248. *Id.*

249. *Id.* at *2.

250. *Id.* at *2–4.

251. *Id.* at *3.

a hallway outside that office, and an office on another floor, but each of these accommodations proved infeasible.²⁵² The human resource director testified that had she known Farah traveled off-site on Fridays to pray, she would have allowed him to combine his lunch and break times every day for this purpose.²⁵³ The court granted the employer summary judgment, finding it sufficiently engaged in the interactive process because it met with Farah several times, thoroughly explored the alternatives and made specific suggestions, and on three occasions offered in good faith to permit Farah to go off-site for his noon prayers (which had proven a workable solution on Fridays).²⁵⁴ The court concluded that under these circumstances, the employer fulfilled its accommodation obligation as a matter of law.²⁵⁵

In the recent, high-profile case of *EEOC v. JBS USA, Inc.*, the employer's good-faith efforts to participate in the interactive process proved crucial to it securing a favorable bench verdict.²⁵⁶ The EEOC brought suit on behalf of a class of hundreds of Somali Muslim employees, who claimed JBS, the owner of the beef-processing facility where they worked, failed to reasonably accommodate their need to pray and occasionally break their fasts during working hours.²⁵⁷ The facts of the case are lengthy and convoluted but generally involve JBS's four-year-long efforts to accommodate the employees by making changes to the work schedule amid complaints and walkouts by non-Muslim employees who found these changes untenable.²⁵⁸ Despite the Muslim employees' dissatisfaction with these efforts, the court concluded JBS did not unlawfully discriminate.²⁵⁹ Key to the court's determination were JBS's efforts to involve the Muslim employees in its decision-making process.²⁶⁰ JBS asked the employees to select representatives to serve on a committee that would meet frequently with plant management to discuss their accommodation needs.²⁶¹ JBS reached out to Muslim leaders and community members to better understand the employees' concerns.²⁶² It also made various changes to the work schedule, revised its mealtime and break policies based on input from Muslim employees and community members, trained supervisors on the changes, and designated and furnished a prayer room in which it installed foot baths for employees to use as part of their prayer rituals.²⁶³ Even though there were occasions when JBS's

252. *Id.*

253. *Id.*

254. *Id.* at *6.

255. *Id.*

256. 339 F. Supp. 3d 1135 (D. Colo. 2018).

257. *Id.* at 1148–49.

258. *See generally id.* at 1149–71.

259. *Id.* at 1193.

260. *See id.* at 1180–84.

261. *Id.* at 1161.

262. *Id.* at 1169.

263. *Id.* at 1169–70.

actions were improper, the court was willing to overlook the company's shortcomings in light of its overall efforts.²⁶⁴

These cases highlight the difference the interactive process can make, not only in how employers and employees approach accommodations but also in how courts think about employers' duties toward accommodation seekers. The interactive-process requirement motivates employers and employees alike to make good-faith efforts to seek a mutually agreeable solution. It likewise enables courts to evaluate an employer's accommodation decision in the more illuminating context of the employer's and the employee's actions leading up to the decision. Without this requirement, employees are at risk of being shut out from the accommodation process altogether. Not only could an employee be prevented from providing input about what accommodations are appropriate in light of the employee's religious beliefs, but without the interactive process, an employee may also be kept in the dark regarding how the employer reached its accommodation decision.

IV. FEASIBILITY AND POTENTIAL IMPACT

An interactive-process requirement for religious accommodations is only worth pursuing if it is legally feasible to do so and if the benefits would sufficiently outweigh any drawbacks. This Part examines these issues. Subpart A considers what it would take from a legal perspective to implement an interactive-process requirement and concludes the answer is very little. Subpart B explores how interactive religious accommodations would impact employees and employers, as well as the courts. There is tremendous upside to this proposal and little, if any, downside.

A. Feasibility

Unlike some scholarly proposals that are criticized as unrealistic or out of touch,²⁶⁵ requiring the interactive process for religious accommodations is hardly a leap. Interactive religious accommodations pose no challenges from a legal standpoint. While a legislative amendment or Supreme Court mandate would be the most immediate and forceful option, neither is necessary. A few

264. See generally *id.* at 1178–87.

265. See Richard Thompson Ford, *Facts and Values in Pragmatism and Personhood*, 48 STAN. L. REV. 217, 218 (1995) (“The tension between values and tactics is especially pronounced in legal scholarship, which walks a tightrope between the intellectual purity of ideals and practice-oriented expediency. Some charge that academics propose ‘pie in the sky’ reform proposals; that they engage in unproductive ‘navel gazing’; or that they merely ‘spin their wheels.’”).

courts have already imposed this requirement, and none have seemed to encounter any pushback.²⁶⁶ Even courts that do not explicitly require the interactive process often read into Title VII a requirement that employers make good-faith efforts to accommodate²⁶⁷ and that employees cooperate throughout the process.²⁶⁸ For these courts, interactive religious accommodations seem directly in line with what they already require.

There are at least three openings in the law that allow courts to adopt this proposal while steering clear of accusations of judicial activism. First, enough courts—including two federal courts of appeals—have mandated the interactive process for religious accommodations that other courts can simply cite to those decisions in implementing the requirement themselves. This approach has worked well in the disability context.²⁶⁹ Second, courts can adopt the EEOC’s position that the interactive process applies to religious accommodations through *Skidmore* deference.²⁷⁰ As previously discussed, courts routinely use this tactic in accepting the EEOC’s guidance on a variety of Title VII issues.²⁷¹ Although courts owe administrative interpretations less deference under *Skidmore* than *Chevron*,²⁷² a court could easily justify deferring to the EEOC in this instance because the interactive-process requirement is consistent with Title VII’s requirement of reasonable accommodation.²⁷³ A third opening stems from the line of cases holding that Title VII and the ADA should be interpreted consistently whenever possible.²⁷⁴ Courts have observed that the two statutes’

266. See cases cited *supra* note 109.

267. See, e.g., *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 271 (3d Cir. 2010) (explaining that after a plaintiff establishes a prima facie case of religious discrimination, the burden shifts to the employer to demonstrate “it made a good-faith effort to reasonably accommodate the religious belief” or that such an accommodation would cause undue hardship (quoting *Webb v. City of Philadelphia*, 562 F.3d 256, 259 (3d Cir. 2010))); *Turpen v. Mo.-Kan.-Tex. R.R. Co.*, 736 F.2d 1022, 1028 (5th Cir. 1984) (“[Title VII] mandates that an employer make good faith efforts to accommodate an employee’s religious beliefs.”).

268. See, e.g., *Patterson v. Walgreen Co.*, 727 F. App’x 581, 586 (11th Cir. 2018) (explaining that “the employee has a ‘duty to make a good faith attempt to accommodate [his] religious needs through means offered by the employer’” (alteration in original) (quoting *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1294 (11th Cir. 2018))); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 131 (1st Cir. 2004) (“Although the employer is required under Title VII to accommodate an employee’s religious beliefs, the employee has a duty to cooperate with the employer’s good faith efforts to accommodate.” (quoting *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d 190, 198 (D. Mass. 2004))).

269. See cases cited *supra* note 109.

270. See *supra* notes 121–30 and accompanying text.

271. See cases cited *supra* note 122.

272. See *supra* notes 52–55 and 104–07 and accompanying text.

273. The interactive process promotes the “flexibility” Senator Randolph envisioned, 118 CONG. REC. 706–13 (1972), as well as the “bilateral cooperation” the Supreme Court acknowledged is necessary in accommodation decision-making. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 62–63, 69 (1986).

274. See, e.g., *Garity v. APWU Nat’l Labor Org.*, 828 F.3d 848, 859 n.9 (9th Cir. 2016) (explaining that “due to the similarities in language and purpose between the two statutes, courts around the country—unless they find a good reason to do otherwise—generally use Title VII precedent to interpret ADA claims” (citing *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 472–73 (9th Cir. 2015))); *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1038 n.11 (10th Cir. 2011) (“Due to the similarities between the ADA and Title VII, we generally interpret those statutes consistently.”); *Flowers v. S. Reg’l Physician Servs. Inc.*, 247 F.3d

accommodation provisions are nearly identical²⁷⁵ and have relied on judicial interpretation of one to decide issues arising under the other.²⁷⁶ The need for consistency between the ADA and Title VII is likewise expressed in the legislative history to the 1991 amendments to Title VII, wherein the House Judiciary Committee made clear its “inten[t] that these other laws modeled after Title VII [including the ADA] be interpreted consistently in a manner consistent with Title VII as amended by this Act.”²⁷⁷ Thus, a court could conclude this need for consistency mandates that the interactive process applies equally to disability and religious accommodations.

Normatively, this proposal is consistent with religious freedom values that have persisted for centuries in the United States,²⁷⁸ as reflected in the Constitution,²⁷⁹ Title VII,²⁸⁰ and a host of other laws.²⁸¹ Given this longstanding commitment to safeguarding individual religious expression, and comparatively much shorter history of protecting persons with disabilities,²⁸² the average American might be surprised to discover it is generally harder for an employee to obtain a religious accommodation than a disability accommodation. Thus, imposing an interactive-accommodation requirement seems unlikely to be very controversial from a normative standpoint. Indeed, many employees—and employers, for that matter—may assume this requirement already exists.

229, 233 (5th Cir. 2001) (“We conclude that the language of Title VII and the ADA dictates a consistent reading of the two statutes.”).

275. See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (explaining that “Title VII . . . imposes an identical obligation on employers with respect to accommodating religion” as the ADA does with accommodating disabilities (citing 42 U.S.C. § 2000e(j) (1994))); *Nawrot v. CPC Int’l*, 259 F. Supp. 2d 716, 724 n.4 (N.D. Ill. 2003) (“ADA reasonable accommodation claims are nearly identical to the corresponding Title VII section.”).

276. See, e.g., *Vetter v. Farmland Indus., Inc.*, No. C94-3008, 1996 WL 33423409, at *2 (N.D. Iowa Sept. 17, 1996) (relying on ADA case law, which the court characterized as “useful instruction,” to determine whether the failure to accommodate constitutes a form of intentional discrimination under Title VII).

277. H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 696–97 (Comm. on the Judiciary).

278. See Immanuel V. Chioco, *Looking Beyond the Veil*, 24 IND. J. GLOBAL LEGAL STUD. 547, 552–58 (2017) (tracing the development of religious freedom in the United States and arguing that commitment to religious liberty is a “central feature of the United States’ system of government”).

279. U.S. CONST. amend. I.

280. 42 U.S.C. § 2000e (2012).

281. See, e.g., *Religious Freedom Restoration Act*, 42 U.S.C. § 2000bb (2012) (mandating strict scrutiny analysis in determining Free Exercise Clause claims); *Fair Housing Act*, 42 U.S.C. § 3604(a) (2012) (prohibiting religious discrimination in the sale or rental of housing); see also Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 527 (2005) (noting there are “hundreds (if not thousands) of statutes that give special treatment to religious bodies and religious practices” (citing 26 U.S.C. § 1402(9)(1) (2000))).

282. The Rehabilitation Act, the first federal statute to offer limited protections to the disabled, was not enacted until 1973. See Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701–796 (2012)), *amended by* Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990) (observing that the Rehabilitation Act was the first significant federal statute to protect disabled persons).

B. Potential Impact

Employees who seek religious accommodations undoubtedly stand to benefit the most from an interactive-process requirement. This is not because the interactive process lowers Title VII's undue-hardship standard but rather because it mandates good-faith efforts by both parties to determine whether accommodation is feasible. Returning to the opening hypothetical, Daphne's odds of receiving an accommodation she considers satisfactory are higher if she is allowed to actively participate in her employer's decision whether to offer her an accommodation. This is because Daphne would be able to fully discuss with her employer how her religious beliefs limit her ability to perform certain job-related tasks. For instance, do Daphne's religious beliefs prevent her only from touching pork with her bare hands, or do they also restrict her from handling pork with gloves or cooking utensils? Does the prohibition apply equally to both raw and cooked pork? Are there some tasks Daphne could perform, such as cooking pork, placing it on sandwiches, handing it to customers, or cleaning tables or workstations where pork is present? Is Daphne only unable to touch pork, or is she also prohibited from smelling or seeing it? This discussion would not only be helpful to Sammy's but could also benefit Daphne by prompting her to reflect on and articulate precisely how her religious beliefs conflict with her job duties. As a new convert to Islam, Daphne may not yet know the answers to all of these questions and thus may need to consult with members of her religious community in order to provide Sammy's with complete information. Moreover, as Daphne's conversion evolves over time, her understanding of her job limitations may change accordingly. Because the interactive process is an ongoing obligation,²⁸³ the mechanism would already be in place for Daphne to communicate such changes to her employer.

Once Daphne and Sammy's fully discuss Daphne's job limitations, they will be in a better position to address if and how she can be accommodated. Requiring participation from both parties in this regard alleviates pressure a party would feel if forced to come up with an accommodation proposal on its own. While it is certainly possible one party will accept the other party's initial accommodation proposal, because the interactive process is a "flexible give and take" between the employer and employee,²⁸⁴ Daphne and Sammy's may settle

283. See *McFarland v. City of Denver*, 744 F. App'x 583, 587 (10th Cir. 2018) ("The interactive process, however, requires ongoing participation from both parties." (citing *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998))); *Dillard v. City of Austin*, 837 F.3d 557, 562–63 (5th Cir. 2016) (explaining that the interactive process "should be an ongoing, reciprocal process, not one that ends with 'the first attempt at accommodation,' but one that 'continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed'" (quoting *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001))).

284. See *Butler v. Wash. Metro. Area Transit Auth.*, 275 F. Supp. 3d 70, 85 (D.D.C. 2017) ("The interactive process typically involves "a flexible give and take" between the employer and employee "so that

on an accommodation that neither initially envisioned.²⁸⁵ If more than one accommodation is possible, Sammy's must give "primary consideration" to Daphne's preferred accommodation but is not necessarily required to provide her with the accommodation of her choice.²⁸⁶

Employees also stand to benefit from the interactive process by having a greater sense of their rights and responsibilities pertaining to their accommodation requests. Too often, employees are unaware of what is expected of them in the accommodation process, so they either fail to fully cooperate or are dissuaded from seeking an accommodation altogether. The interactive process would clarify the employee's responsibilities, such as notifying the employer of her need for an accommodation, articulating precisely how her religious beliefs limit her ability to perform her job, and cooperating with the employer in exploring accommodation options. The interactive process would also empower employees to take a more active role in the decision-making process rather than passively standing by while the employer makes the decision on its own.

Even when the interactive process does not produce the result the employee hoped for, it can still be beneficial to the employee in at least two ways. By requiring the parties to work together in good faith, the interactive process promotes transparency in employment decision-making, which in turn "creates a sense of procedural justice" so that [the] employee knows that the process was fair."²⁸⁷ Thus, if Daphne does not receive an accommodation she considers appropriate, she may nevertheless be more accepting of the decision because she has a greater understanding of how and why the decision was made. This not only decreases the odds of litigation²⁸⁸ but also encourages a host of "pro-social and cooperative workplace behavior[s]."²⁸⁹ Moreover, if the employee does file

together they can determine what accommodation would enable the employee to continue working" (quoting *Ward v. McDonald*, 762 F.3d 24, 32 (D.D.C. 2017)).

285. See, e.g., *Matos v. DeVos*, 317 F. Supp. 3d 489, 494–95 (D.D.C. 2018).

286. 29 C.F.R. app. § 1630.9 (2019).

287. Rebecca Knight, *How to Tell an Employee They Didn't Get a Promotion*, HARV. BUS. REV. (Jan. 24, 2018), <https://hbr.org/2018/01/how-to-tell-an-employee-they-didnt-get-a-promotion> (quoting social psychologist Heidi Grant).

288. Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 19–20 (2006) (explaining that employees are more likely to accept employment decisions when they are given a voice and opportunity to be heard and to participate in the decision-making process, which in turn boosts morale, preserves favorable employer–employee relations, and may prevent future employee lawsuits); Garth Glissman, Note, *Resolving the Ambiguity—A Post-Trosper Guidebook for Courts and Employers*, 87 NEB. L. REV. 270, 299 (2008) (arguing that "[t]o reduce litigation, employers should operate with a renewed commitment to opening dialogue between employees and management," as employees "are less likely to feel like their employers are 'out to get them' and presumably less likely to bring lawsuits against their employers").

289. Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 NEV. L.J. 882, 891–92 (2015) ("In business environments, imparting procedural justice promotes pro-social and cooperative workplace behavior. Procedural justice, moreover, affects commitment to organizations and institutions and diminishes workplace strife and conflict. Fair process enhances commitment to organizations and institutions, promotes extra-role citizenship behavior, elevates job performance, increases levels of job satisfaction, and promotes acceptance of supervisor directives and company policies. When procedural justice is withheld, employees often exit the workplace or refuse to cooperate

suit, she will be better positioned to prevail if she participated in the interactive process in good faith but the employer did not.²⁹⁰ Accordingly, when an employee does not receive the accommodation hoped for, the interactive process can be effective in helping the employee both avoid and prepare for litigation.

Although the interactive process is often considered a mostly employee-friendly requirement, it can have very real benefits to employers as well. The greatest benefit to employers is the reduced risk of costly and time-consuming litigation. Employees who participate in the interactive process are less likely to sue, both because they are more likely to receive an acceptable accommodation and because the interactive process may heighten their sense of procedural justice in the event the accommodation falls short of their expectations.²⁹¹ But even when litigation is inevitable, employers that engage in the interactive process are better positioned to defend themselves, as good-faith participation constitutes strong evidence that an employer's accommodation decision was reasonable.²⁹²

The interactive process also benefits employers by motivating employees to cooperate with employers in their efforts to find a reasonable accommodation. The interactive process makes it more likely employees will provide employers clear notice of their need for a religious accommodation and cooperate with employers throughout the process. While the requirement could embolden some accommodation seekers to be more aggressive in their requests than they would otherwise be, the good-faith requirement guards against unreasonable demands.

Some employers may oppose the interactive process, notwithstanding the foregoing benefits, out of fear it will increase both the frequency and types of religious accommodations they must offer. This fear is not unfounded, but it is misplaced. The interactive process would not change Title VII's undue hardship standard; an employer would remain free to deny any religious accommodation that imposes more than *de minimis* cost.²⁹³ Thus, the interactive process would not create any new accommodation obligation that did not already exist. It would instead enable an employer to identify accommodations the law requires

with supervisors, and workplace morale falls. Within procedurally unjust workplaces, employees exhibit workplace stress and may engage in antisocial behavior. Taken together, this research demonstrates that procedural justice powerfully affects the psychology of how individuals think, feel, and behave in particular contexts and the dynamics of how groups, organizations, and societies interact.”).

290. See *supra* Part III.A.

291. See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 316 n.6 (3d Cir. 1999) (explaining that the interactive process avoids or reduces litigation, as it “can be thought of as a less formal, less costly form of mediation”); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) (observing that the interactive process simultaneously furthers the goals of the ADA and meets the interests of both the employer and employee: the employee may lack access to resources or the ability to identify reasonable accommodations without the employer's participation, and the employer may be unaware of the type of work an employee is capable of performing).

292. See *supra* Part III.A.

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

but that it might have otherwise overlooked. Accordingly, the interactive process would not increase the number of accommodations the law requires employers to make but would merely ensure employers provide those accommodations to which employees are already entitled. And while the interactive process may result in employers offering types of accommodations they did not originally anticipate, this should not be considered a disadvantage since the *de minimis* burden standard would apply to any accommodation provided.

Unlike many legal requirements, mandating the interactive process for religious accommodations would impose almost no additional administrative burden on employers. Because courts have long required the interactive process for disability accommodations, employers are already familiar with what the process entails and therefore would need little, if any, additional training. In fact, the EEOC's Compliance Manual, which is designed to be a resource for employers,²⁹⁴ contains guidance on how employers should apply the interactive process to religious accommodations.²⁹⁵ Moreover, no vast overhaul of religious-accommodation policies and internal operating procedures would be necessary in most instances. Employers would simply need to update their policies and practices to bring them in line with their disability-accommodation guidelines.

From a judicial perspective, requiring the interactive process for religious accommodations would benefit the courts. It would clarify and simplify judicial analysis by enabling courts to evaluate an employer's accommodation decision in its full and proper context by considering the parties' good-faith efforts leading up to the determination. This analysis does not require courts to adopt a new or unfamiliar framework but rather to apply the same approach they have used for disability accommodations for almost three decades. This would lead to more consistency between disability and religious-accommodation claims, as courts could look to both types of cases in assessing the validity of any accommodation claim. Additionally, a nationwide interactive-process requirement would at once unify the federal courts with each other and also with the EEOC. This unification would allow the courts and the EEOC to work in tandem to develop clear, cohesive guidance that would leave no doubt as to what the religious-accommodation process requires.

In sum, requiring the interactive process for religious accommodations is not some pie-in-the-sky idea. A number of courts already impose this require-

294. Compliance Manual, *supra* note 91, § 12 (“This Section of the Compliance Manual is designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff on Title VII’s prohibition against religious discrimination.”); see also Jon D. Bible, *Tattoos and Body Piercings: New Terrain for Employers and Courts*, 61 LAB. L.J. 109, 121 (2010) (“The EEOC Compliance Manual contains a great deal of information that will benefit human resource managers, attorneys, and employers who must confront the issues of sincerely held religious belief, reasonable accommodation, and undue hardship, among others.”).

295. Compliance Manual, *supra* note 91, at § 12-IV(A)(2).

ment, and several others acknowledge the importance of good faith and bilateral cooperation in accommodation decision-making. Various channels exist for courts to easily apply the interactive process to religious-accommodation claims without the need for legislative or Supreme Court intervention. Moreover, this is one of the few legal proposals that carries tremendous upside and virtually no downside. The interactive process increases the odds of accommodation, boosts employee morale, decreases litigation, fosters cooperation, simplifies judicial analysis, and unifies the federal courts and EEOC. It does not require more burdensome accommodations, nor does it introduce an unfamiliar framework. Interactive religious accommodations are a win for employees, employers, and courts alike.

CONCLUSION

Conflicts over religious accommodations will almost certainly increase in the coming years, as American workers become more religiously diverse and religiously expressive. The risk of conflict can be reduced by requiring employers to engage in an interactive process with religious-accommodation seekers to determine whether a reasonable accommodation can be provided. Differences in Title VII's and the ADA's undue-hardship standards mean employers generally are less obligated to accommodate religious beliefs than disabilities. But this does not mean the process for obtaining either type of accommodation should differ. This would be a more controversial proposition if there were any downside to interactive religious accommodations, but as it stands, the interactive process is perhaps one of the least divisive features of employment discrimination law. It does not favor employees over employers (or vice versa), nor does it saddle courts with a clunky, unworkable legal framework. Instead, the interactive process benefits employees, employers, and courts alike. There is much to gain and nothing to lose by mandating the interactive process for religious accommodations, and courts should interpret Title VII accordingly.