



The Louis D. Brandeis Center, Inc. (LDB) is an independent, non-partisan institution for public interest advocacy, research and education. The Center's mission is to advance the civil and human rights of the Jewish people and to promote justice for all.

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Brandeis Center Urges Supreme Court to Right Its Wrong and Protect Employee Rights to Religious Observance in Groff Case

Washington, D.C. (February 28, 2023): The Louis D. Brandeis Center for Human Rights Under Law today submitted an [amicus brief](#) urging the U.S. Supreme Court to protect employee rights to religious observance in *Groff v. Dejoy*, a case about a U.S. Postal Service (USPS) worker who was forced to resign because his employer refused to accommodate his Sabbath observance. Today marks the deadline for organizations to file amicus briefs in support of the petitioner, and the Court will hear oral arguments on April 18.

The Brandeis Center advises the Court to reverse a 1977 decision that leaves religious employees more susceptible to employment discrimination than any other protected group and poses a particular threat to Jewish Americans. Arguing that the 1977 decision nullifies Title VII's promise of accommodation for religious employees and that religious workers should enjoy the same protections and accommodations as other workers, the Center urges the Court to eliminate a legal anomaly that shields employers from liability if they disguise anti-Semitic discrimination in facially neutral workplace rules.

The case before the Supreme Court involves religious liberty protections under Title VII of the 1964 Civil Rights Act. Gerald Groff began working for USPS in 2012 but left seven years later when USPS began requiring him to deliver packages for Amazon on Sundays, his Sabbath. After resigning, he sued USPS for religious discrimination. A federal district court and the 3rd Circuit Court of Appeals both ruled in favor of USPS, saying that arranging work schedules to accommodate Groff's desired time off would place "undue hardship" on the postal agency. The lower courts' decisions are based on a 1977 Supreme Court decision, *Trans World Airlines v. Hardison*, that, according to the Brandeis Center, dangerously misinterpreted Title VII's religious accommodation provision and needs immediate fixing, particularly with anti-Semitism on the rise.

Title VII ensures that religious employees do not have to choose between religion and their job unless "undue hardship" is created for the employer. But instead of giving "undue hardship" its plain meaning of significant difficulty or expense, the *Hardison* Court interpreted the phrase to mean anything that would "bear more than a de minimis cost." Since that decision, everything from minimal cost to negative impacts on the employer's operations to objections by the worker's colleagues have served as sufficient justification for not providing religious accommodation. The Center points out that relying on reactions of other employees to a colleague's accommodation allows anti-Semitic co-workers to block otherwise reasonable accommodations or even to keep observant Jewish workers out of the workplace altogether.

The Brandeis Center emphasized two main problems with the 1977 ruling. First, the de minimis standard has no grounding in the text of the law and is inconsistent with Congress' use of the term "undue hardship" in other accommodation statutes, including the Americans with Disabilities Act (ADA), the Uniformed Services Employment and Reemployment Rights Act, the Pregnant Workers Fairness Act, and the Affordable Care Act, and with judicial decisions interpreting identical language in other statutes. For example, under the ADA, an employer may be required to alter the snack break schedule for a diabetic employee because doing so would not pose an undue hardship yet it would be an undue hardship to require an employer to shift a meal break for Muslim employees during Ramadan. Federal law and the courts have consistently interpreted undue hardship to mean significant, rather than de minimis, hardship, leaving Title VII's religious accommodation provision the odd man out. "In other words, the de minimis standard is not only textually absurd, it effectively 'single[s] out the religious for disfavored

treatment’ – a practice this Court has repeatedly rejected as unconstitutional,” noted the Brandeis Center, citing a 2017 case, *Trinity Lutheran Church of Columbia, Inc. v. Comer*.

Second, the 1977 decision’s watered-down protection of religious employees harms religious minorities, especially Jewish Americans. As Justice Marshall noted at the time, the decision particularly harms “adherents of minority faiths who do not observe the holy days on which most businesses are closed—Sundays, Christmas, and Easter—but who need time off for their own days of religious observance.” In fact, Congress amended Title VII to require religious accommodations, in part, to specifically protect religious minorities from discrimination on the basis of their religious practice. Yet, the 1977 ruling effectively nullified that amendment and placed religious minorities at a disadvantage because their less-common practices seem more challenging to employers.

Jewish employees, who may have a range of religious needs, such as abstaining from work on the High Holidays, Passover and Shabbat, donning long sleeves and skirts for women, or wearing a beard or yarmulke for men, often bear the brunt of the 1977 decision. Unable to obtain an accommodation because of the Hardison standard, religiously observant individuals find themselves forced to choose between their faith and their employment. In addition, notes the Brandeis Center, the Hardison standard makes it easier to conceal anti-Semitic discrimination. It allows employers to discriminate against observant Jewish employees, while disguising their discrimination in workplace scheduling or attire requirements. And this is all the more concerning, warns the Brandeis Center, given the resurgence of anti-Semitism across the country and the serious rise in anti-Semitic discrimination and violence in the workplace.

Last year, an audit by the Anti-Defamation League found more anti-Semitic incidents in 2021 than in any other year since they began tracking in 1979. That year marked a 14% increase in vandalism, a 43% increase in harassment, and an astonishing 167% increase in assaults against Jewish Americans.

Around two percent of the U.S. population is Jewish, but eight to ten percent of religious discrimination claims the Equal Employment Opportunity Commission (EEOC) receives each year involve discrimination against Jewish employees. And the EEOC has recently acknowledged the “serious rise” in anti-Semitic violence in the workplace. Commissioner Andrea Lucas lamented the “rising tide of hatred” against Jews and noted that “instances of antisemitism in the workplace” often “go ignored, unreported or unaddressed.” The vice chair of the EEOC notes that “the commission has fielded a consistent series of allegations involving anti-Jewish discrimination over the years and she expects there was an uptick in the last two years.” Recent studies have borne out similar data. A 2022 study conducted by researchers at Rice University, University of Texas Health, and Wheaton College found that “more than half of the Jewish respondents [reported] experience[ing] discrimination at work.”

“Sadly, Hardison’s watered-down protection of religious Americans enables religious discrimination to persist in the workplace, particularly against Jewish employees,” writes the Brandeis Center in its brief. “If affirmed, that decision will further enshrine the second-class protections religious individuals receive under Title VII compared to other protected classes, at a time when anti-Semitism is on the rise.”

The Brandeis Center is represented on the brief by Thomas R. MacCarthy and Tiffany H. Bates of Consovoy McCarthy PLLC and the Antonin Scalia Law School Supreme Court Clinic and by Brandeis Center attorneys Kenneth L. Marcus, Alyza D. Lewin, L. Rachel Lerman, and Arthur Traldi.

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The Louis D. Brandeis Center is an independent, non-partisan institution for public interest advocacy, research and education. The Center’s mission is to advance the civil and human rights of the Jewish people and to promote justice for all. The Center’s education, research and advocacy focus, among other things, on the resurgent problem of anti-Semitism on college campuses, in the workplace and across the

nation. It is not affiliated with the Massachusetts university, the Kentucky law school, or any of the other institutions that share the name and honor the memory of the late U.S. Supreme Court justice.