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Tennessee's Unique Religious Protections in Employment: Do They Mean What They Say?

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TENNESSEE’S UNIQUE RELIGIOUS
PROTECTIONS IN EMPLOYMENT:
DO THEY MEAN WHAT THEY SAY?

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&
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INTRODUCTION

Tennessee has a long history of strongly held and diverse religious beliefs and practices.¹ Equally firmly established is its “at-will” employment rule that allows businesses to create and control their workforces to maximize operations and profits to the benefit of employers and employees. When an employee’s religious beliefs conflict with his obligations to his employer, state and federal laws resolve the tension.

Employees who experience this tension and feel they have been discriminated against based on their religion generally have the choice to bring their claims of discrimination under federal law, state law, or both. Because claims under federal law may be removed to federal court,² and because state courts are generally perceived to be more favorable to employees,³ some employees strategically elect to pursue only selected state law claims. An employee might also be forced to bring a claim only under state law if she works for a small employer, since the federal law’s reach is limited to employers with at least fifteen employees.⁴

This Article examines whether a Tennessee employee who brings claims only under Tennessee’s statutory protection against religious discrimination in employment has the same protections as he would if he proceeded under federal law. Part I discusses employers’ obligations under the Tennessee Human Rights Act (“THRA”), the primary Tennessee religious anti-discrimination statute, and Title VII of the Civil Rights Act of 1964 (“Title VII”), the primary federal religious anti-discrimination law. Part II discusses the background of both the THRA and Title VII and how it informs the analysis. Part III proposes that the THRA not be interpreted to import the reasonable accommodation requirement from Title VII. This interpretation is consistent with the textual language of the statute, courts’ interpretation of the Tennessee Disability Act, existing case law, and Tennessee’s history of limiting exceptions to the at-will employment doctrine. The Article proposes that this different interpretation is more consistent with the THRA as it is currently written and invites discussion of whether this interpretation is ultimately better for employees and employers.

1. See Joe Jarret, *Snakebit: Poisonous Serpents and Religious Expression in Tennessee*, 50 Tenn. Bar J. 14, 16 (2014).

2. 28 U.S.C. § 1441(a) (2006).

3. See, e.g., MERRICK T. ROSSEIN, 2 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 23:1 (2013) (“However, people with disabilities often found the federal courts, including the Supreme Court inhospitable to an expansive reading of the [Americans with Disabilities Act of 1990]. Many advocates for people with disabilities abandoned the federal courts and sought protection from disability discrimination in some state courts where both the law and the judicial interpretations were more favorable.”).

4. 42 U.S.C. § 2000e(b) (2012).

I. “AT-WILL” EMPLOYMENT AND AN EMPLOYER’S AFFIRMATIVE DUTY TO ACCOMMODATE

A. Tennessee’s “At-Will” Employment Rule

The employment-at-will doctrine has roots stretching as far back as 1877, when New York attorney and professor H.G. Wood wrote in his employment law treatise:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . [I]t is an indefinite hiring and is determinable at the will of either party.⁵

Tennessee became the first state to formally adopt the doctrine through its courts in 1884, when the Supreme Court wrote in *Payne v. Western & Atlantic Railroad Company* that “[m]en must be left without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.”⁶ In the nearly one hundred twenty years since this formal adoption, this general rule has subsequently been adopted in varying degrees by forty-nine of the fifty states.⁷ The federal government has carved out certain exceptions to the general rule, and each state has likewise implemented its own.⁸ Where those exceptions exist and an employee is terminated on the basis of a protected characteristic or activity, the employee may file a lawsuit against her employer for wrongful discharge.⁹

In Tennessee, there is a judicially created public policy exception to the at-will doctrine, but the vast majority of exceptions are created by statute.¹⁰ Generally, unless a statute clearly indicates that it intends to establish a public policy exception to employment-at-will, courts are reluctant to create additional exceptions.¹¹ This reluctance to create additional judicial exceptions to the general rule underlines Tennessee’s commitment to a strong at-will employment policy.¹²

5. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 at 272 (1877).

6. 81 Tenn. 507, 518 (1884).

7. Montana is the lone exception to this rule. See MONT. CODE ANN. § 39-2-904 (1987).

8. See, e.g., 42 U.S.C. §§ 2000e-2–2000e-3 (2012).

9. 42 U.S.C. § 2000e-2 (2012).

10. *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 822–23 (Tenn. 1994).

11. See *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 540–41 (Tenn. 1989).

12. See *Chism v. Mid-South Milling Co., Inc.*, 762 S.W.2d 552, 556 (Tenn. 1988) (finding that the at-will doctrine cannot be overcome in the absence of “clear public policy,” and that the “exception cannot be permitted to consume or eliminate the general rule”).

B. Restrictive and Affirmative Anti-Discrimination Protections

Anti-discrimination statutes can generally be divided into two categories: restrictive and affirmative. Restrictive statutes are the familiar anti-discrimination statutes that prohibit discriminatory treatment by banning unequal treatment and requiring that individuals within and outside of the protected category be treated equally. One example of a restrictive theory of anti-discrimination is Title VII's treatment of discrimination based on race.¹³ Title VII attempts to remove consideration of race from all employment decisions, such that it becomes a non-factor and substantive job performance or related job qualifications become determinative in the workplace.¹⁴

The other category of anti-discrimination statutes consists of those statutes that require an employer to make affirmative accommodations to level the opportunities for employees in the workplace. An example of this type of affirmative anti-discrimination statute is the Americans with Disabilities Act of 1990 ("ADA").¹⁵ The ADA has its roots in the Rehabilitation Act of 1973, which provides that federal employers and federal contractors may not discriminate in employment opportunities against those with disabilities.¹⁶ Under the Rehabilitation Act, covered employers are "required to take reasonable steps to accommodate [one's] disability unless it would cause the employer undue hardship."¹⁷

Similarly, under the ADA, employers who employ disabled individuals must engage in an accommodation process that requires the employer and employee to work together to reach a reasonable accommodation.¹⁸ For example, an employer whose employee's hearing is permanently impaired must discuss with the employee in an interactive exchange whether there are any accommodations, such as providing a teletypewriter device, that allow the employee to perform the essential functions of her job.¹⁹ Thus, the ADA not only prohibits treating disabled

13. 42 U.S.C. §§ 2000e–2000e-17 (2012).

14. 42 U.S.C. § 2000e-2.

15. 42 U.S.C. §§ 12101–03, 12111–17 (2013).

16. 29 U.S.C. § 794 (2008).

17. U.S. DEP'T OF HEALTH AND HUMAN SERV., YOUR RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT (2006), available at <http://www.hhs.gov/ocr/civilrights/resources/factsheets/504.pdf>.

18. See 42 U.S.C.A. § 12112 (2013).

19. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171–72 (10th Cir. 1999) ("The federal regulations implementing the ADA envision an interactive process that requires participation by both parties.") (citations and quotation marks omitted); see also 29 C.F.R. § 1630.1(c), App. (2011) (explaining that "[t]he ADA and the EEOC's regulations also make clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, not whether the individual meets the definition of disability. This means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a 'reasonable accommodation' to an

individuals less favorably than other employees but also imposes an affirmative obligation to accommodate whatever disability the individual may have.²⁰

II. LEGAL BACKGROUND: TITLE VII AND THE TENNESSEE HUMAN RIGHTS ACT PROTECTIONS AGAINST RELIGIOUS DISCRIMINATION

In addition to prohibiting other forms of discrimination, both federal and Tennessee law prohibit discrimination based on religion.²¹ Courts frequently recite the notion that “claims under the THRA are analyzed in the same manner as Title VII claims.”²² But there is good reason for treating claims that an employer has failed to accommodate an individual’s religious practices and beliefs differently under the two statutes.

A. Title VII: Restrictive and Affirmative Anti-Discrimination?

Title VII, as amended, contains provisions that are both restrictive and affirmative.²³ For example, employers are prohibited from “fail[ing] or refus[ing] to hire or discharg[ing] any person or otherwise [discriminating] against an individual with respect to compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁴ This portion of the statute clearly falls within the restrictive category of anti-discrimination laws. It does not require an employer to take any affirmative action to ensure that any member of a particular “race, color, religion, sex, or national origin” is treated differently than any other employee.²⁵ Rather, it prevents the employer from taking an adverse employment action because of a protected characteristic. With respect to religion, however, an affirmative approach has developed that places obligations on the employer to accommodate employees’ religious beliefs and practices.

individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation ‘interactive process.’”) (citations omitted).

20. See 42 U.S.C.A. § 12112 (2013).

21. See 42 U.S.C. § 2000e-2 (2012); TENN. CODE ANN. § 4-21-101 (2013).

22. *Mehr v. Starwood Hotels & Resorts Worldwide, Inc.*, 72 F. App’x 276, 281 (6th Cir. 2003); see *Frizzell v. Sw. Motor Freight*, 154 F.3d 641, 646 (6th Cir. 1998); *Marpaka v. Hefner*, 289 S.W.3d 308, 313 (Tenn. Ct. App. 2008) (“THRA claims are analyzed in the same manner as claims brought under Title VII of the Civil Rights Act of 1964.”).

23. See 42 U.S.C. § 2000e-2(a)(1) (2012) (restrictive); 42 U.S.C. § 2000e-2(b) (2012) (affirmative).

24. 42 U.S.C. § 2000e-2(a)(1) (2012).

25. *Id.*

Historically, Title VII contained no reference to any requirement that an employer accommodate an employee's religious belief or practice.²⁶ The Equal Employment Opportunity Commission ("EEOC") quickly issued guidance in 1967 requiring a "reasonable accommodation" of the employee's beliefs when they conflicted with the essential functions of the employee's job.²⁷ The question of how far an employer had to go to make a "reasonable" accommodation reached the Supreme Court in 1971, when an equally divided court affirmed an employer's right to discharge an employee for not reporting to work on his Sabbath because the employer treated all employees who refused to report to work similarly, regardless of the reason.²⁸ Essentially, as long as the employer did not take religion into account and applied a neutral policy, the employer had not violated Title VII.²⁹

Congress appears to have responded to the EEOC's guidance and the Supreme Court's interpretation of those regulations in *Dewey v. Reynolds Metal Co.* when it amended Title VII to include a definition of "religion."³⁰ The term "religion," as now defined by the statute, means "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."³¹ With this definition, Congress for the first time placed an affirmative duty on employers to "reasonably accommodate" employees within a protected category, rather than simply preventing adverse employment actions because of the protected characteristic. By clarifying the definition, Congress implicitly acknowledged that the wording of the statute alone did not incorporate a requirement to accommodate religious beliefs. Still, even the new definition did not clarify the boundaries of a "reasonable" accommodation or an "undue" hardship. Thus, the issue again reached the Supreme Court in 1977.³² In *Trans World Airlines*, the Supreme Court held that employers are required to provide reasonable accommodations, but that it would constitute undue hardship to require an employer to pay premium overtime to other employees to cover the functions the accommodated employee could not perform, to violate a collective bargaining agreement, or to cause its work functions to suffer.³³

26. See Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII §§ 701, 703, 78 Stat. 241, 255 (1964).

27. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977) (citing 29 C.F.R. § 1605.1 (1968)).

28. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 689 (1971) (per curiam).

29. *Id.*

30. 118 Cong. Rec. 706 (1972) (remarks of Sen. Randolph).

31. 42 U.S.C. § 2000e(j) (2012) (emphasis added).

32. *Trans World Airlines*, 432 U.S. at 73.

33. *Id.* at 76-77.

Although the need for religious accommodations can arise in any context, both *Dewey* and *Trans World* demonstrate that one of the most frequent conflicts between religious beliefs and an employer's needs arises in scheduling, particularly for employers who operate seven days a week.³⁴ Employees who adhere to a religion that prohibits working on the Sabbath, whether it is observed on Friday, Saturday, or Sunday, will frequently request a work schedule change that permits them to be off duty on those days.³⁵ If the employee is not accommodated, the employee typically refuses to report to work, and the employer will typically discharge the employee for failure to report.

The analysis to determine whether an employer has made a reasonable effort to accommodate an employee's scheduling request demonstrates the affirmative efforts required from a diligent employer to comply with the reasonable accommodation obligation under Title VII. After an employee discloses his sincerely held religious belief that conflicts with his work schedule, the burden shifts to the employer to engage in an exchange with the employee to brainstorm about alternatives to avoid the work schedule conflict.³⁶ This exchange may identify options such as switching shifts with another employee, modifying the work schedule, utilizing paid days off, considering time off from work without pay, or transferring the employee to another job position.³⁷ After this brainstorming session, the employer identifies whether any accommodation is feasible and consistent with business operations, work rules, or collective bargaining agreement, if any.³⁸ The employer is required to identify an accommodation unless doing so will impose an undue hardship because it will involve more than de minimis costs to the employer.³⁹ Courts frequently find violating a collective bargaining agreement,⁴⁰ incurring unnecessary overtime costs,⁴¹ or requiring other employees to pick up additional duties⁴² to be undue hardships.

The employer need not provide the employee with his preferred accommodation, so long as the accommodation reasonably allows the employee to observe his religious beliefs.⁴³ Courts frequently say that the

34. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 327 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971); *Trans World Airlines*, 432 U.S. at 69.

35. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122 (10th Cir. 2013).

36. *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

37. *Crider v. University of Tenn., Knoxville*, 492 F. App'x 609, 612 (6th Cir. 2012).

38. *Trans World Airlines*, 432 U.S. at 84.

39. *Id.*

40. *Creusere v. Board of Educ. of the City Sch. Dist. of Cincinnati*, 88 F. App'x 813 (6th Cir. 2003).

41. *Trans World Airlines*, 432 U.S. at 84; *Loftus v. BlueCross BlueShield of Michigan*, No. 08-13397, 2010 WL 1139338, *6 (E.D. Mich. Mar. 24, 2010).

42. *Harrell v. Donahue*, 638 F.3d 975, 980 (8th Cir. 2011).

43. *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986).

requirement that an employer accommodate an employee's religious beliefs and practices comes down to reasonableness and is not absolute.⁴⁴ However, Title VII still clearly imposes an affirmative obligation on an employer, after being put on notice, to attempt to find a reasonable accommodation that fits both the employer's and the employee's needs prior to disciplining or terminating the employee.

B. Tennessee Human Rights Act: Restrictive Discrimination Protections?

In 1978, fourteen years after the federal government enacted Title VII, Tennessee adopted its own law prohibiting discrimination in employment. With respect to religion, the THRA, like Title VII, prohibits "fail[ing] or refus[ing] to hire or discharg[ing] any person or otherwise [discriminating] against an individual with respect to compensation, terms, conditions or privileges of employment because of" an individual's religion.⁴⁵ Unlike the amendments to Title VII, however, the THRA does not include a definition for religion.⁴⁶ Nor does the THRA contain any provisions elsewhere explicitly requiring employers to accommodate religious beliefs and practices, despite the active debate over whether Title VII required such affirmative accommodations over the prior ten years, including two trips to the Supreme Court.⁴⁷ This noticeable absence triggers some doubt over whether Tennessee's legislature in fact intended its statute to impose such obligations.

At the same time, the THRA also includes statutory language setting forth its purpose, which is:⁴⁸

To [p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, codified in 42 U.S.C. § 2000e(k), and the Age Discrimination in Employment Act of 1967, compiled in 29 U.S.C. § 621 et seq.⁴⁹

With respect to religion, the question is whether this policy declaration language is sufficient to overcome the statutory construction principles⁵⁰ drawn from the THRA's silence with respect to affirmative accommodation of religious practices and beliefs.

44. *E.g.*, *Porter v. Chicago*, 700 F.3d 944, 951 (7th Cir. 2012).

45. TENN. CODE ANN. § 4-21-401 (2011).

46. TENN. CODE ANN. § 4-21-102 (2011).

47. TENN. CODE ANN. §§ 4-21-401–408 (2011).

48. TENN. CODE ANN. § 4-21-101 (2011).

49. *Id.*

50. *See, e.g.*, *Northland Ins. Co. v. Tenn.*, 33 S.W.3d, 727, 730 (Tenn. 2000).

Both state and federal courts in Tennessee have interpreted the policy declaration of the THRA to mean that “[c]laims under the Tennessee law are analyzed according to the same standards as those under Title VII.”⁵¹ However, none of the cases specifically indicate that claims that an employer has failed to accommodate an employee’s religious beliefs and practices are analyzed under the same standards as Title VII.⁵² Indeed, courts have had little occasion to consider the matter, as it is rare that an employee brings a failure to accommodate claim under the THRA and not Title VII.⁵³ Because the stricter standard will apply to employers, courts typically engage only in the Title VII analysis when claims are brought under both laws.⁵⁴

III. CLAIMS OF RELIGIOUS DISCRIMINATION SHOULD BE TREATED DIFFERENTLY UNDER THE THRA THAN TITLE VII

Although the THRA contains similar wording to that in Title VII and protections for employees based on the same characteristics as Title VII, the THRA, as it currently stands, should not be read to include an obligation that employers accommodate religious beliefs of their employees for four reasons: (1) the statutes are written differently; (2) Tennessee’s failure to adopt a reasonable accommodation requirement for disabled employees supports the same conclusion for its religious discrimination protections; (3) case law relying on the federal policy execution language does not require that the THRA be exactly coextensive in every respect with Title VII’s religious protections; and (4) Tennessee’s strong “at-will” employment doctrine favors limiting exceptions to instances of clear legislative creation.

A. The Text of the THRA Does Not Adopt Title VII Verbatim

It is a basic principle of statutory construction that when legislators use different words in different statutes, the statutes should be interpreted

51. *Dobbs-Weinstein v. Vanderbilt Univ.*, 1 F. Supp. 2d 783, 791 n.10 (M.D. Tenn. 1998).

52. *See id.*

53. GARY A. COOPER, *TENNESSEE FORMS FOR TRIAL PRACTICE: DAMAGES* § 11:17 (2013).

54. *See Knox v. SunTrust Banks, Inc.*, 1:09-CV-115, 2010 WL 4628012, at *3 (E.D. Tenn. Nov. 5, 2010) (“The Title VII and THRA employment discrimination claims must be analyzed together applying the same standards. The Court’s disposition of the Title VII claims applies with equal force to the companion THRA claims.”); *see also* *Norman v. Rolling Hills Hosp., LLC*, 820 F. Supp. 2d 814, 820–21 (M.D. Tenn. 2011) (analyzing Title VII, § 1981, and THRA hostile work environment claims with Title VII elements alone). These provide examples of courts opting for Title VII over THRA when both are at play.

differently.⁵⁵ As discussed in Part II, the THRA is clearly based on Title VII. However, rather than adopt the exact language of Title VII with respect to religion, the drafters of the THRA chose not to include a definition of “religion” anywhere in the statute.⁵⁶ Nor did the statute’s drafters include an explicit reference to the accommodation of religious practices that conflict with an employee’s job functions.⁵⁷

This decision was made in the context of the Supreme Court having recently determined in *Dewey* that an employee who refused to work because of religious reasons could be terminated pursuant to a facially neutral policy and in the context of Congress having specifically added the requirement that employers reasonably accommodate employees’ religious practices.⁵⁸ It was also made in the context of the early versions of the Rehabilitation Act and the Tennessee Handicap Act, both of which *did* require affirmative accommodation for individuals with disabilities. The decision not to include such a requirement in the Tennessee law—when the issue was clearly being debated nationally with respect to Title VII, and when the Tennessee legislature could see how to, and indeed had demonstrated its ability to, incorporate such a requirement into its legislation—should not be held without meaning.

Indeed, the best indication that the drafters intended to import Title VII wholesale into the Tennessee law books, and the one that courts have relied on, is the federal policy execution language in its purpose and intent declaration.⁵⁹ However, even that does not adopt Title VII wholesale. Instead, the clause states that the purpose is to “provide for execution” of the “policies embodied” in the federal anti-discrimination acts.⁶⁰ One could argue that the policies of treating everyone equally, regardless of their race, religion, sex, or other protected status, is fully executed (if not to a further extent than Title VII itself) by prohibiting disparate treatment because of an employee’s religion without requiring an employer to affirmatively accommodate religious practices and beliefs. By weighing the burden on the employer, such an accommodation process implicitly acknowledges that some religious beliefs—i.e., those that can be accommodated with minimal cost—are more protected than others.

Furthermore, Title VII itself “provides no guidance for determining the degree of accommodation that is required of an employer,” in the sense that it does not define what it means to be “reasonable” or to be an “undue burden.”⁶¹ The Supreme Court acknowledged that “the brief legislative

55. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *Russello v. U.S.*, 464 U.S. 16, 23 (1983); *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003); *but see Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 825–26 (2013).

56. See TENN. CODE ANN. § 4-21-102 (2011).

57. See TENN. CODE ANN. §§ 4-12-101–905 (2011).

58. See *supra* Part II(A).

59. TENN. CODE ANN. § 4-21-101 (2011).

60. *Id.*

61. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

history of § 701(j) [defining ‘religion’] is likewise of little assistance”⁶² in interpreting how an employer should accommodate religious beliefs. Thus, the argument that Title VII sets forth a clear policy requiring a specific degree of accommodation is built on a foundation of federal courts interpreting the federal law, rather than the actual text of the statute or its legislative history.

However, Title VII does not cover all employers. Even on the federal level, policymakers have weighed the importance of non-discrimination and the needs of small employers and determined that Title VII’s protections should not extend to employees of employers with fewer than fifteen workers.⁶³ The THRA, on the other hand, applies to employers with at least eight employees.⁶⁴ The drafters presumably knew that larger employers would be covered concurrently by Title VII and can be said to have weighed the balance for smaller employers when drafting the THRA. Thus, it is reasonable to consider that the balance between employers’ and employees’ rights is different when crafting a statute that applies to smaller employers and the impact and importance of each employee and their duties.

B. Tennessee’s Protections for Disabled Employees Support the Same Approach for Religious Protections

Although the Rehabilitation Act and the ADA set forth a clear process an employer must undertake to accommodate individuals with disabilities, Tennessee has taken a different approach in balancing the at-will employment doctrine with those individuals’ need for protection.⁶⁵ Tennessee passed the Tennessee Handicap Act (“THA”) in 1976, just three years after the passing of the federal Rehabilitation Act.⁶⁶ The THA prohibited discrimination in public employment against individuals with handicaps, but did not require the State to take any affirmative steps to accommodate such individuals.⁶⁷ The THA was extended to private employers in 1987, but still did not require accommodation.⁶⁸ In 2008, eighteen years after the ADA was enacted, and after eighteen years of experience with the federal law requiring employers to engage in an interactive process to reasonably accommodate individuals with disabilities, Tennessee rewrote the THA to remove references to “handicaps” and instead use the term “disabilities,” including renaming it the Tennessee

62. *Id.* at 74–75.

63. 42 U.S.C. § 2000e(b) (2012).

64. TENN. CODE ANN. § 4-21-102(5) (2011).

65. TENN. CODE ANN. § 8-50-103 (2011).

66. 1976 Tenn. Pub. Acts ch. 157.

67. *Id.*

68. 1987 Tenn. Pub. Acts ch. 18.

Disability Act (“TDA”).⁶⁹ However, the 2008 amendment still did not impose any specific affirmative accommodation obligations upon Tennessee employers.⁷⁰

Even though the terms of the TDA do not require any accommodation process, Tennessee courts have confronted the issue of whether the accommodation requirements of the ADA should be read into the TDA. They have consistently held that they should not.⁷¹ Courts routinely rely on the difference in statutory language as support for the proposition that the Tennessee legislature must have meant to impose different obligations than the comparable federal acts, the Rehabilitation Act and the ADA.⁷² This is consistent with the well-established canon of statutory construction that a legislature chooses its words purposefully and means different things when it uses different words.⁷³

Tennessee, with the benefit of forty years of observing the Rehabilitation Act’s and the ADA’s requirements that employers affirmatively accommodate individuals with disabilities, has nevertheless determined that it should not create an exception to the at-will employment rule when it comes to employees whose disability prevents them from

69. 2008 Tenn. Pub. Acts, ch. 706, §§ 3, 5; TENN. CODE ANN. § 8-50-103 (2008).

70. 2008 Tenn. Pub. Acts, ch. 706, §§ 1–6.

71. *See* *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 468 n.9 (6th Cir. 1999) (noting that “[t]his is one of the key differences between the state law claim decided before trial and an ADA claim. A determination that an accommodation is required for the employee to perform the functions of the job ends the inquiry under Tennessee law, but does not do so under the ADA.”); *see also* *Hall v. Wal-Mart Stores East, LP*, 637 F. Supp. 2d 588, 603 (M.D. Tenn. 2009) (finding that “[a]s a matter of law, an employer is not required to provide a reasonable accommodation under the THA.”).

72. *Bennett v. Nissan North America, Inc.*, 315 S.W.3d 832, 841 (Tenn. Ct. App. 2009) (“When interpreting Tennessee’s anti-discrimination laws, such as the TDA and the THRA, the Tennessee Supreme Court has stated that the courts are neither bound by nor restricted by the federal law, however, the Court also noted that the legislature’s stated purpose in codifying the THRA was to prohibit discrimination in a manner consistent with the federal Civil Rights Act of 1964, 1968, and 1972, and, as such, courts may look to federal law for guidance in enforcing our own anti-discrimination laws.”) (quoting *Barnes v. Goodyear Tire and Rubber Co.*, 48 S.W.3d, 698, 705 (Tenn. 2000) (internal quotation marks omitted) (citing TENN. CODE ANN. § 4-21-101(a)(1)–(2); *Forbes v. Wilson Cty. Emergency*, 966 S.W.2d 417, 420 (Tenn. 1998); *Sasser v. Quebecor Printing (USA) Corp.*, 159 S.W.3d 579 (Tenn. Ct. App. 2004); *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir. 2008)). In fact, the TDA elements are very similar to those of the ADA, but do not include a “reasonable accommodation” component. *Roberson v. Cendant Travel Services, Inc.*, 252 F. Supp. 2d 573, 583 (M.D. Tenn. 2002).

73. *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (noting that “when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended”) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06 at 194 (6th rev. ed. 2000)) (internal quotation marks omitted); *Russello v. U.S.*, 464 U.S. 16, 23 (1983); *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003); *but see* *Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 825–26 (2013) (“But the interpretive guide just identified, like other canons of construction, is no more than [a] rul[e] of thumb that can tip the scales when a statute could be read in multiple ways.”) (internal quotation marks omitted).

performing the essential functions of their job. This conscious decision to not implement an affirmative type of non-discrimination policy should inform our reading of the Tennessee Human Rights Act's treatment of religious discrimination.

C. Tennessee Case Law Does Not Explicitly Require Employers to Accommodate Religious Beliefs

Reading the THRA to not require accommodation of religious beliefs would not require explicit overturning of any existing case law. The Tennessee Supreme Court has specifically held that, although courts “may look to federal interpretation of Title VII for guidance in enforcing our own anti-discrimination statute,” they “are neither bound by nor limited by federal law when interpreting the THRA.”⁷⁴ Indeed, the Tennessee Court of Appeals, Western Division, has limited the reach of the THRA to exclude the public accommodation provisions of Title VII.⁷⁵

Neither would an interpretation that does not require employers to affirmatively accommodate religious practices and beliefs directly overturn the state case law holding that the THRA is coextensive with Title VII. None of those cases actually address the issue of the state law on religious accommodation head on.⁷⁶ Rather, each case simply states the proposition that the laws are analyzed the same way but then applies the principle to discrimination based on race⁷⁷ or sex.⁷⁸

Interpreting the THRA in a similar way to the TDA—that is, not importing an obligation to accommodate religious beliefs—should not result in widespread discrimination based on religion. Title VII still requires accommodation unless an employer demonstrates an undue hardship.⁷⁹ Employees who feel their Title VII-covered employer has failed to accommodate them always have the option of bringing a claim under the federal statute, although doing so subjects them to a limitation of damages.⁸⁰ Those who fear widespread discrimination need look no further than the TDA to observe that interpreting state law differently than federal law has not left employees without protection under the ADA.⁸¹ Employers are still obliged to offer the same terms and conditions of employment to all

74. *Phillips v. Interstate Hotels Corp.*, 974 S.W.2d 680, 684 (Tenn. 1998).

75. *Arnett v. Domino's Pizza I, LLC*, 124 S.W.3d 529, 538–39 (Tenn. Ct. App. 2003).

76. *See id.*; *Phillips*, 974 S.W.2d at 684.

77. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31–32 (Tenn. 1996) (analyzing claim of racially and sexually motivated hostile work environment under Title VII and the THRA).

78. *Allen v. McPhee*, 240 S.W.3d 803, 812 (Tenn. 2007), *abrogated on other grounds* by *Gossett v. Tractor Supply Co., Inc.*, 320 S.W.3d 777 (Tenn. 2010).

79. 42 U.S.C. § 2000e(j); *see also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73–74 (1977).

80. 42 U.S.C. § 1981a(b)(3).

81. *See* TENN. CODE ANN. § 8-50-103.

employees, regardless of their religious beliefs or practices, so employees who are harassed or terminated simply because of their religious beliefs may still state a claim for relief under the THRA.

Of course, courts' interpretations of the THRA to not require accommodation of religious beliefs would not be the last word on the subject. The Tennessee legislature has the opportunity either before or after a court has made such a ruling to clarify the reach of the law by amending the THRA. In fact, it may be well served to make such a clarification without prompting by the courts to make clear whether an accommodation is or is not part of the THRA. Until the meaning of the difference in language between the THRA and Title VII on the issue of religion is resolved, it leaves Tennessee in the restrictive non-discrimination camp.

D. Tennessee's "At-Will" Employment Doctrine Discourages Implying New Exceptions

As detailed above, the "at-will" employment doctrine is embedded into the Tennessee legal landscape and exceptions have been rare and narrow. In fact, Tennessee has explicitly rejected exceptions that have been recognized in other jurisdictions because they lack statutory support.⁸² Any importing of additional or expanded protections for at-will employees based on any characteristic, including religion, necessarily compromises an employers' historic ability to make employment decisions for good cause or no cause. Such additional protections come with further restrictions on how an employer chooses to operate its business to maximize return and expand operations. This balancing of employers' interests in setting workplace rules and employees' rights to work free from discrimination is no different than the courts' evaluation of whether to create other new exceptions to the doctrine and should be treated similarly. The lack of textual support, the determination that disabled employees' protections are different under state and federal laws, and the lack of clear case law supporting a new exception should be signals to courts to exercise caution and not unilaterally interpret the THRA to impose further limits on the at-will doctrine.

E. The Practical Impact of Applying the THRA Religious Discrimination Prohibition as Written

Without legislative action and with judicial deference and restraint to the textual differences between the THRA and Title VII, the practical impact may benefit employees and employers. Applying the THRA

82. See Chad E. Wallace, *Tennessee's Employment-at-Will Doctrine and the Need for Change When Telling the Truth Costs You Your Job*, Tenn. B.J., April 2003, at 18, 19 (noting that Tennessee recognizes few exceptions to the employment at will rule and discussing the lack of an exception for employer retaliation against an employee who testified at an unemployment compensation hearing).

religious anti-discrimination provision would result in religion, like race, gender, color and national origin, becoming a non-factor in the workplace. Employees know that they are required to meet essential job duties without regard to their religious beliefs and practices. Employers can use the same policies and procedures that make other protected individual characteristics irrelevant and off-limits in the workplace.

The existing statutory language in the THRA would require that religion be eliminated from any consideration in making employment decisions in the workplace. Employers would avoid the awkward and sensitive discussion of recognizing employees' different religions with different practices and beliefs that is inherent in the interactive religious accommodation process. Instead, the focus would be on whether the employee, regardless of religious beliefs and practices, is satisfying facially neutral job requirements required of all employees, such as attendance, production, and performance goals. It removes from the workplace the need to explore how the employee's religion impacts job duties and requirements. It avoids the subjective opinions of managers and supervisors when addressing how the religious beliefs or practices may or may not impact the work duties. Instead, the employer can apply the same legal standard that it is already familiar with when dealing with issues of race, gender, color, or national origin. This should result in more consistent application of workplace standards and hopefully fair and equal treatment.

The current language on religious discrimination in the THRA will also allow employees to make the decision without disclosure or input from others on whether they can meet essential job requirements. The employee has more control and can make the decision on the front end whether he or she wants to engage in the employment relationship. Critically, it allows the employee to decide how to meet facially neutral job requirements when the employee adopts a religious belief or practice during the employment relationship. Employees are empowered to control their own fate protected by the THRA anti-discrimination prohibition that makes religion as irrelevant in the workplace as race, gender, color or national origin.

Overall, the practical impact of applying the THRA religious discrimination provisions as written may benefit employers and employees. This outcome is not only consistent with the national policy to eradicate discrimination in the workplace, but it advances the modern trend to empower employees and create predictability for employers. Without a legislative change in the THRA religious discrimination provisions and with respect from the courts to the language adopted by the legislature, Tennessee may become a model for other states toward making an individual's religion as irrelevant as race, gender, color and national origin in the workplace.

CONCLUSION

Tennessee's strong policies of religious tolerance and diversity and its strong at-will employment rule collide when an employee's religious beliefs prevent her from performing functions of her job. While federal law requires employers to make reasonable accommodations for their employees' beliefs and practices, federalism dictates that each state be allowed to weigh the rights and obligations of employees and employers as it sees fit. The Tennessee General Assembly has seen examples of how to require employers to affirmatively accommodate employees by virtue of the Rehabilitation Act, the Tennessee Handicap Act, and even Title VII itself. However, it has thus far chosen not to require accommodations of religious beliefs, and, until the statute is changed, that decision should be given force by courts.