Good morning Mr. Chairman and members of the Committee. I am pleased to appear this morning to testify as an expert in the field of employment law on S.1124, the Workplace Religious Freedom Act of 1997 ("WRFA"). My private law practice has focused on employment discrimination issues for more than twenty years. Prior to that, I served in various positions in the federal government including as Director of the Office of Federal Contract Compliance Programs ("OFCCP") at the Department of Labor. As a result, I have had the opportunity repeatedly to watch the impact of employment legislation in the real world and to see how well-intended provisions too often fail to serve the worthy goals motivating their enactment.

I agree wholeheartedly with the drafters of the bill before you that religious freedom in the workplace is an important goal. Moreover, it is always refreshing to see a bi-partisan effort directed toward the achievement of such a worthy goal. But I appear this morning to express a series of reservations concerning both the overall design and particular provisions of
Let me begin by observing that the matter of religious freedom in the workplace is already a highly regulated field. The First Amendment to the federal Constitution -- which applies in the workplace just as in every other place -- provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech .... (Emphasis added.)

While my expertise is employment law, not constitutional law, I have always understood the First Amendment to create limits beyond which Title VII may not go in either "establishing" or "prohibiting" religious expression. As respected Fifth Circuit jurist Edith H. Jones said in rejecting a sex discrimination verdict based only on what was claimed to be sex-biased expression, "Where pure expression is involved, Title VII steers into the territory of the First Amendment." 1/

Title VII, of course, goes far beyond mere protection of expression to protection of a state of being with respect to religion. Under Title VII, Executive Order 11246 administered by the OFCCP and a myriad of state and local laws, employees are protected from discrimination not only because they have uttered religious expressions but because they "are" of a particular faith. Just as employers may not take adverse action against an applicant or employee because he or she is a particular race, color, or sex or has a particular national origin, adverse

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actions may not be taken because a person is of a particular faith.

Moreover, the current definition of "religion" in Title VII places it in a special category of regulation that goes beyond expression and state of being. The current definition impliedly requires an employer to reasonably accommodate any religious observance or practice unless the employer can demonstrate that a suggested accommodation would impose an "undue hardship" on the employer. As with certain disabilities, certain religious observances and practices sometimes conflict with the ordinary requirements of the workplace. This was the fundamental reason that conduct related to disabilities in the workplace could not be regulated by merely adding "disabled" to the string of personal characteristics protected by Title VII. Instead, a whole new statutory scheme was created -- the Americans with Disabilities Act ("ADA").

Thus, the field of religious freedom in the workplace is not one in which the Congress may be plowing new ground.

It is against the foregoing legal backdrop that I consider the proposal now before you. As I understand it, the goal of the current proposal is essentially to raise the standard of "undue

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2/ 42 U.S.C.A. § 2000e (j) provides that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."
hardship" that must be shown by an employer before rejecting a suggested accommodation of a religious observance or practice. In form, the proposal appears to respond to the holding of the Supreme Court in Trans World Air Lines v. Hardison. 2/ For the last twenty years, that case has defined what may be described as a de minimus burden of religious accommodation for employers.

In that case, Mr. Hardison did not want to work on Friday evening or Saturday -- a scheduling matter ordinarily controlled by the applicable collective bargaining agreement. As is often the case, an accommodation of Mr. Hardison would have been another employee's unexpected burden. After deciding that the terms of the collective bargaining agreement should not be abrogated in order to accommodate the requested leave of absence, the Court's opinion concluded with the following:

In the absence of clear statutory language or legislative history to the contrary, we will not readily construe [Title VII] to require an employer to discriminate against some employees in order to enable other to observe their Sabbath. 2/

It is in this context that the de minimus standard should be reviewed.

In my opinion, the legislation now before the Committee is flawed, in part, because it does not embody a clear legislative expression on a number of aspects of the problem of accommodating religious observance and practice. In addition, I would


2/ Id. at 85.
respectfully submit that the current proposal is unnecessarily over broad in ways likely to lead to more litigation than religious freedom.

Permit me to review a series of issues which the Committee may wish to consider:

1. The bill provides that an accommodation will be deemed to impose an "undue hardship" on an employer if it "will result in the inability of an employee to perform the essential functions of the employment position of the employee."

Frequently, as in *Hardison*, the accommodation under consideration will be a leave of absence requested by an employee for the purpose of a Sabbath or other religious observance. Plainly, on the day or days of leave requested, the employee will be unable to perform any of the functions of his or her position, essential as well as nonessential. Does this mean that leaves of absence will always be deemed to impose an "undue hardship?" If so, how is this provision to be read in a manner consistent with other provisions, such as the provision that contemplates transferring an employee to replace an employee on leave.

Thus, as the bill is written, employers are left to guess which leaves will be deemed to be a reasonable accommodation even though the employee will be unable to perform any duties during the leave. Indeed, I would point out that under the ADA, not working has not proven to be an acceptable accommodation. Thus, to the extent the bill contemplates leave as an acceptable accommodation, it should speak unambiguously to this issue.
2. The bill says that one of the factors that should be considered in deciding whether a requested accommodation is deemed to impose an undue hardship is "the number of individuals who will need the particular accommodation...." Frankly, the idea that an individual's right should depend simply on the size of the group of which he or she is a member is totally foreign to the field of employment law. Clearly, Congress would not have accepted as part of the ADA a proposal providing that leave for a therapeutic purpose requested by the first employee in a given week could not be deemed an "undue hardship" but the same request from the tenth employee that week would. Nor would Title VII ever tolerate the notion that an employer could engage in gender-based hiring after completing some particular number of gender-blind hiring decisions per month. Title VII is intended to guarantee the individual rights of members of groups large and small -- even members of majorities. Accommodations requested by members of a more well-accepted religion should not be deemed to impose undue hardships simply because of the number of members in the group -- when members of an obscure faith suffer no such risk?

Moreover, even if employers were called upon to respond to accommodation requests based on the numbers, how would they do it? Would the first five Jewish employees to ask for leave on Yom Kippur be told "yes" and number six through the remainder be told "no?" And if the later-comers were told "no," would the first five still be permitted the leave? What guidance would an
employer have for deciding whether five or fifty-five was the proper line to draw? It is unsettling at best to imagine employers being saddled with the unguided statutory duty to "triage" requests for religious accommodations.

I respectfully suggest that this provision should be rethought.

3. One way in which new employment legislation frequently creates needless controversy is by failing simply to adopt parallel provisions from existing employment statutes. Wisely, Congress elected in the ADA to adopt the enforcement mechanisms of Title VII rather than creating an entirely new enforcement mechanism within the ADA.

With this principle in mind, I would suggest that if the Committee believes that new legislation should include a list of "other factors" for determining whether a suggested accommodation poses an "undue hardship," it might consider adopting word-for-word the list of factors set forth in the ADA for determining whether an accommodation would impose an undue hardship on a covered entity. In this way, employers would be permitted to build upon the body of experience gained through practice and litigation under the ADA.

4. There are provisions of the proposal before the Committee which appear to me to go far beyond existing requirements applicable in contexts other than religion.

For example, the WRFA provides that "an accommodation by an employer shall not be deemed to be reasonable if such accommodation does not remove the conflict between employment requirements and the religious observance or practice of the employee." The phrase "remove the conflict" suggests an absolute standard not applicable in the ADA. Under the ADA, an accommodation may well be reasonable even if some residual "conflict," if you will, remains between the ordinary requirements of a job and the incumbents physical or mental limitations. The essential concept of an "accommodation" is for a means to be found to allow the co-existence of competing interests -- not the elimination of either. To eliminate the conflict means that the requested accommodation becomes a non-negotiable order.

Similarly, the WRFA provides that violation of a bona fide seniority system would not be a defense to an employer's inability to change a work schedule or a job assignment. In addition, the proposal provides that overtime pay and other benefits otherwise due -- whether pursuant to a collective bargaining agreement or the Fair Labor Standards Act itself -- will not be paid if the work that otherwise would trigger such benefits is work performed in order to accommodate requirements of an employee. In Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), cert. denied, 117 U.S. 1318 (1997), the Seventh Circuit held that a bona fide collective bargaining agreement would not be abrogated by the ADA in order to place a
disabled employee in a position to which he would not otherwise be entitled.

This result was consistent with the terms of Title VII, which expressly provides that compliance with a bona fide seniority system may not be the basis for a charge of discrimination outlawed by Title VII. As an amendment to Title VII, the WRFA would thus appear to create an absolute conflict not only within Title VII itself but with a well-settled principle under both the ADA and the Rehabilitation Act of 1973. Too, the Fair Labor Standards Act does not permit a covered employee to waive its protections. Thus, the WRFA apparently amends, sub silentio, major portions of other employee protection statutes.

While the foregoing comments may be thought of as mere drafting problems, in my mind they are emblematic of a much more fundamental problem with the proposed legislation.

The proposed legislation runs into a wide variety of difficult problems while on a road that does not even go to the heart of any existing problem. The few cases being reported and the few charges received in this are relate almost exclusively to only two subjects -- religious leave and religious harassment. Indeed, I am aware of a recent survey conducted by one of the largest associations of human resources professionals suggesting that religious practice is already being accommodated in a growing number of workplaces.
To the extent that the Committee may wish to require employers with more than fifteen employees to accommodate requests for leave for religious observances, it may wish simply to mandate a fixed period of unpaid, personal leave. While I don't necessarily support yet additional required leave, this would be a simpler means of achieving the apparent goals of this bill than the complicated structure it now assumes. I say "personal leave" rather than "religious leave for reasons both legal and practical. Legally, I believe that Congress would engender very substantial constitutional problems if it were to attempt to define approved "religious" leave. Most observers recoil at the recent action of the Russian Duma in protecting the freedoms of a limited list of "approved" religions, an exercise which I believe our First Amendment would not permit. Practically, any entitlement to "religious leave" would be, in practice, an entitlement to personal leave. Even medical certification for leave under the Family and Medical Leave Act is being recognized as a system of questionable utility. It is impossible to imagine any system of "religious certification," even if constitutional, that would be worth the effort.

Accordingly, it would be appropriate for the Congress to acknowledge that any entitlement to religious leave is, in fact, an entitlement to personal leave.

The problem of religious harassment in the workplace, to the extent it exists at all, is one adequately addressed by existing law. In my judgment, recent guidelines on religious expression
in the federal workplace have it about right for both the public and private sector. Those guidelines, expressly based on existing law, suggest that employees "may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion." "But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome."

Supervisors are cautioned "to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior ... and should, where necessary, take appropriate steps to dispel such misperceptions."

These are well-worn concepts familiar to employers, employees and the courts. If employers permit heated hallway discussions about baseball, they may not prohibit heated hallway discussions about being born again. If they permit at least an initial invitation to dinner even though it is unwelcome, they similarly should permit invitations to a place of worship. These are simple examples of disparate treatment which Title VII has been handling quite nicely for more than a generation. To go beyond these broad principles would raise very serious issues that ought to be fully explored.

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I am pleased to have had the opportunity to express my views today on the legislation before the Committee and would be delighted to answer any questions you may have.