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INTRODUCTION

The Civil Liberties Union of Massachusetts (CLUM) submits this brief as amicus curiae to urge reversal of the decision below -- an unprecedented ruling that erroneously attributed certain religious beliefs to two individuals despite their unrefuted, sworn testimony that they hold different religious beliefs.

After seven years of employment at defendant's racetrack, during which time plaintiffs provided satisfactory service without a single disciplinary incident or reprimand, the plaintiffs were summarily fired for refusing to work on Christmas Day 1992. The plaintiffs had explained to the defendant that their religion forbids them from working on Christmas Day. Their religious views, to be sure, diverge from those of some other Christians, and indeed of other Catholics. But G.L. c. 151B, § 4(1A) (the "religious accommodation in employment statute") protects minority religions and denominations as fully as majority religions -- and could not constitutionally do otherwise.

In its award of summary judgment to the defendant, the Superior Court told the plaintiffs

that it knew better than they what their religion required. Ignoring the lengthy history of religious pluralism and diversity protected by the federal and state constitutions, the Superior Court embarked on the disturbing path of defining another's religious identity rather than leaving such definition up to the sincere individual.

Defendant has asked the courts of this Commonwealth to enter into an unnecessary, and possibly unconstitutional, debate over the nature of Roman Catholic dogma. The Superior Court has, unfortunately, agreed to be drawn into that debate by considering the affidavit of a Roman Catholic priest submitted by defendant. The content of Catholic dogma, however, does not define what plaintiffs' religion requires. The plaintiffs have never adopted the views expressed in that priest's affidavit, nor have they acknowledged that priest as a spokesperson of, or authority on, their faith. Indeed, in sworn affidavits, plaintiffs have stated that their religion differs from the dogma espoused by the affiant cited by the lower court.

Unless the defendant can establish that the plaintiffs are being insincere, or alternatively

that the accommodation of their beliefs would have imposed on it an undue hardship, the plaintiffs are entitled to judgment in their favor. If plaintiffs' sincerity is challenged, however, then summary judgment is not the appropriate means for resolving the issue. Consequently, the entry of summary judgment must be reversed, and the case remanded for further proceedings.

ISSUE PRESENTED

Pursuant to G.L. c. 151B, § 4(1A), is an employer prohibited from terminating an employee for refusing to work on a particular day if abstaining from work on that day is required by the employee's religion, as she sincerely understands and interprets it, and assuming she has duly notified the employer of such religious requirement?

INTEREST OF AMICUS CURIAE

The Civil Liberties Union of Massachusetts (CLUM), an affiliate of the American Civil Liberties Union, is a nonprofit, non-partisan organization with over 13,000 members state-wide. Throughout its seventy-five year history, CLUM has worked to defend and protect civil rights and

liberties guaranteed by the state and federal constitutions and laws.

In Massachusetts, CLUM has a long history of participation as amicus curiae in cases concerning religious liberty, separation of church and state, and freedom from discrimination. Recent such cases include Attorney General v. Desilets, 418 Mass. 316 (1994), Commonwealth v. Twitchell, 416 Mass. 114 (1993), Reep v. Commissioner, 412 Mass. 845 (1992), Kolodziej v. Smith, 412 Mass. 215 (1992), and Murphy v. I.S.K. Con., 409 Mass. 842 (1991).

CLUM has an interest in rectifying the lower court's misapplication of the religious accommodation statute.

STATEMENT OF THE CASE

In June 1993, Kathleen Pielech and Patricia Reed (the "plaintiffs" or the "employees"), two former employees of Massasoit Greyhound, Inc. (the "employer" or the "racetrack"), filed a civil rights action alleging violations of G.L. c. 151B, § 4(1A),[1] § 9, G.L. c. 93, § 102, and intentional

[1] Chapter 151B, Section 4(1A) provides:

It shall be unlawful discriminatory practice for an employer to impose upon an

and negligent infliction of emotional distress.[2] The gravamen of their complaint was that they had been fired, in violation of § 4(1A), for refusing to work on a day they considered to be holy.

In March 1994, the racetrack served a motion for summary judgment, together with the affidavits of George L. Carney, Jr. (an officer of Massasoit Greyhound which operates the racetrack) and Monsignor Eugene McNamara (a Roman Catholic priest). Plaintiffs served an opposition and a cross-motion for partial summary judgment as to

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> individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual . . . shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day. . . .

[2] This brief will address only the alleged violation of c. 151B, § 4(1A). Amicus expresses no view on any of the other counts in the Complaint.

liability, together with the affidavits of each of the plaintiffs and of Monsignor John J. Oliveira (a Roman Catholic priest and Vicar). The racetrack opposed the plaintiffs' motion and further filed the affidavit of Letitia Wood (an employee of the racetrack).

On June 30, 1994, the Superior Court for Bristol County (O'Brien, J.) granted the racetrack's motion for summary judgment, and denied plaintiffs' cross-motion. Stating that "[t]he pivotal issue in this case is whether Roman Catholic dogma requires its adherents to refrain from working on Holy Days," the Superior Court relied upon the affidavit of Msgr. McNamara, adduced by the employer, and held that no such requirement exists. The court therefore concluded that the employer did not violate the statute.

The plaintiffs appealed, and in December 1994 this Court granted the plaintiffs' request for direct appellate review.

STATEMENT OF FACTS

Defendant Massasoit Greyhound operates the Taunton-Raynham Greyhound Track. (A. 80, 76)

Plaintiffs Kathleen Pielech and Patricia Reed were employed by Massasoit as part-time parimutuel clerks for seven years. (A. 61) During that time, the racetrack was generally closed on Christmas. (A. 65)

On December 16, 1992, nine days before Christmas, the racetrack learned that its request to open on December 25 of that year had been approved by the state Racing Commission. (A. 44) Both plaintiffs were regularly scheduled to work on Fridays (A. 38, 41), and December 25 fell on a Friday. The employer posted a notice informing regularly-scheduled employees that they would be required to work on Christmas Day, and requesting additional volunteers to work that day as well. (A. 77, 81) The record does not reflect the number of volunteers who responded to this notice, nor has the racetrack put into evidence the number of employees it needs to operate on a given day.

After the notice was posted, each plaintiff spoke with her supervisor and requested that she not be required to work on December 25, 1992. In so doing, each stated that it would violate her religious beliefs and the requirements of her

religion to work on that day. (A. 81-82).[3] The employer informed both plaintiffs that they were expected to work on December 25, 1992. (A. 82) Both plaintiffs refused to report for work on that day. (A. 77, 82).

The next day, both plaintiffs were fired (A. 82), or indefinitely suspended (A. 77).[4] It is undisputed that the decision to take such action against the plaintiffs was based exclusively on their refusal to work on Christmas Day. (A. 63, 73). The racetrack also admits that it has made reasonable accommodations to the religious needs

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[3] The racetrack does not appear to concede this fact. Nonetheless, in reviewing the entry of summary judgment for the defendant, the Court must resolve all factual disputes in favor of the non-movants and draw all justifiable inferences in their favor. See G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 263 (1991) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)); Willitts v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 203 (1991).

[4] There appears to be a dispute of fact in the record as to whether the plaintiffs were terminated, as they allege (see A. 82), or merely suspended, as the racetrack contends (see A. 77). It is undisputed, however, that an adverse employment action was taken against them as a result of their failure to appear for work on December 25, 1992.

of other employees in the past. (A. 78) In their seven years of employment for the racetrack, neither plaintiff had ever been subject to any reprimands, warnings, suspensions, or other disciplinary measures, and each had been a satisfactory employee. (A. 61, 62)

SUMMARY OF ARGUMENT

The religious accommodation in employment statute, G.L. c, 151B, § 4(1A) has been construed by this Court to require only reasonable accommodation, not absolute accommodation, of employees' religious requirements. As so construed, the statute meets the constitutional requirements set forth by the U.S. Supreme Court. Br. 10-15.

The Superior Court erred in awarding the racetrack summary judgment. Although the statute protects only abstention from work that is "required" by a religion, and although certain interpretations of the Catholic faith make abstention from work optional rather than mandatory, the plaintiffs follow a stricter interpretation of their faith. The requirements of their religion are not uniquely defined by the

tenets of Catholic dogma. Consequently, the affidavit of Msgr. McNamara (even assuming it were uncontroverted, which it was not) would not resolve the issue before the court as a matter of law. Under the First Amendment, and even more explicitly under the Massachusetts Constitution, each individual may choose to worship in the manner dictated by his or her own conscience. As plaintiffs understand their religion, it forbids work on Christmas. Br. 15-23.

This Court should therefore reverse the decision below and remand the case to the Superior Court. Upon remand, the racetrack may be given the opportunity (if it believes it can do so) to challenge the sincerity of the plaintiffs' assertions regarding their beliefs. As to undue hardship, however, the racetrack has asserted no such defense, and has failed to adduce any evidence of such hardship in opposition to plaintiff's cross-motion for summary judgment. Consequently, plaintiffs should be awarded partial summary judgment under Rule 56(d) on the issue of whether accommodation of their religious

requirement would have caused the racetrack undue hardship. Br. 24-32.

ARGUMENT

I.G.L. c. 151B, §4(1A) IS CONSTITUTIONAL IF INTERPRETED TO REQUIRE ACCOMMODATION ONLY WHEN NO UNDUE HARDSHIP WILL RESULT.

In 1985, the United States Supreme Court held that a Connecticut statute that provided employees with the absolute right not to work on their chosen Sabbath violated the Establishment Clause of the First Amendment. See Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). Emphasizing repeatedly the absolute and unqualified nature of the statutory requirement, and the fact that "the statute takes no account of the convenience or interests of the employer," id. at 709, the Court struck the statute down.

In a much-cited concurring opinion, Justice O'Connor noted that she

> do[es] not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 are similarly invalid. These provisions preclude employment discrimination based on a person's religion and require private employers to reasonably accommodate the religious practices of employees unless to do so would cause

> undue hardship to the employer's business.

Id. at 711-12.

The Thornton opinions thus establish the parameters of a constitutionally-sound statute requiring employers to accommodate the religious obligations of their employees not to work on certain days: As long as the statute is not absolute, but rather hinges the accommodation requirement on an assessment of whether it would impose an undue hardship on the employer, the statute passes constitutional muster. See L. Tribe, American Constitutional Law 1196 (2d. ed. 1988) ("The [Thornton] opinion's language suggests that the statute might have survived if it had balanced the employee's religious needs with the employer's reasonable needs.").

On the face of the Massachusetts statute, it is not clear whether the accommodation requirement is absolute or conditional. The first sentence of Section 4(1A) provides that "[i]t shall be unlawful" for an employer to impose as a condition of retaining employment

> any terms or conditions, compliance with which would require [the employee] to

> violate or forego the practice of his creed or religion as required by that religion including . . . the observance of any particular day or days . . . as a . . . holy day and the employer shall make reasonable accommodation to the religious needs of such individual.

(Emphasis added.) If the clause underlined above is construed as a modification of the preceding language, then this sentence imposes a conditional, not absolute, requirement.

The second sentence of the statute does not expressly incorporate a balancing test. Rather, it simply states that "[n]o individual who has given [proper] notice shall be required to remain at his place of employment during any day . . . that, as a requirement of his religion, he observes as his sabbath or other holy day."

The third sentence provides that the employee need not be compensated for religious absences, and the fourth sentence defines "reasonable accommodation" to mean

> such accommodation to an employee's or prospective employees' religious observance or practice as shall not cause undue hardship in the conduct of the employer's business.

(Emphasis added.)

The fifth sentence provides that "[t]he employee shall have the burden of proof as to the required practice of his creed or religion."

In the second paragraph, the statute defines "undue hardship" to include the employer's inability to provide legally-required services, situations involving health or safety concerns, and situations in which the employee is "indispensable" and irreplaceable. The statute concludes by stating that "[t]he employer shall have the burden of proof to show undue hardship."

Although certain provisions in Section 4(1A), such as sentence two, could be read in isolation as absolute requirements, the concept of "reasonable accommodation" permeates the statute (appearing both before and after sentence two) and appears to have been intended to modify the entire statute by subjecting it to a balancing test. Reasonable accommodation, moreover, is specifically defined by reference to the concept of "undue hardship," which itself requires balancing (to determine what is "undue"). The statute therefore should be read as a whole to

impose conditional, rather than absolute, requirements.[5]

This reading of the statute as conditioning the religious accommodation requirement upon the absence of undue hardship is supported by the case law. In New York & Massachusetts Motor Service, Inc. v. Massachusetts Commission Against Discrimination, 401 Mass. 566, 575-76 (1988) ("New York-Mass"), the only reported case to have considered the question,[6] this Court stated that

[5] See Adamowicz v. Ipswich, 395 Mass. 757, 763-64 (1985) ("statutes are to be construed so as to avoid an unconstitutional result or the likelihood thereof"); Beeler v. Downey, 387 Mass. 609, 613 (1982) ("it is our duty, if reasonably possible, to interpret statutes in a manner that avoids unnecessary decision of a serious constitutional question"). Cf. Leibovich v. Antonellis, 410 Mass. 568, 576 (1991) (party asking court to declare a statute unconstitutional "bears a heavy burden" and "must demonstrate beyond a reasonable doubt that there are no 'conceivable grounds' which could support its validity").

[6] There are two other cases in which this Court addressed § 4(1A), Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761 (1986) and Kolodziej v. Smith, 412 Mass. 215 (1992), but in neither case did the Court have occasion to consider whether "undue hardship" balancing test was intended to modify all provisions of the religious accommodation statute.

the statute "essentially outlines a three-part inquiry": First, the employee must show that the employer required the employee to violate a religious practice required by the employee's religion, and that the statutory notice requirements were met.[7] "The burden then shifts to the defendant-employer to prove that accommodation of the complainant's religious obligations would impose on the employer an undue hardship as defined by the statute." Thirdly, the tribunal then determines whether statutory "undue hardship" has been shown in light of the standards

[7] At no point below did the racetrack allege or argue that plaintiffs had failed to give the statutorily-required notice. It has therefore waived any such contention, which would in any event be meritless.

set forth in the statute.[8] The "undue hardship" exception has thus been expressly held to be a limitation on the accommodation requirement.

In short, the religious accommodation in employment statute is constitutional because -- notwithstanding what could on an isolated reading of certain sentences therein be considered an absolute requirement -- it has been interpreted to require accommodation of an employee's religious needs only if such accommodation does not impose an "undue hardship" on the employer.

II. THE RACETRACK VIOLATED THE STATUTE BY TERMINATING PLAINTIFFS' EMPLOYMENT FOR FAILURE TO WORK ON CHRISTMAS DAY.

The racetrack's motion for summary judgment established a false syllogism. It argued, in

[8] The Court in New York-Mass further noted that the employer had not shown that it would suffer an "undue hardship" from accommodating the employee's religious needs because it would have incurred no more than a de minimis cost from such accommodation. 401 Mass. at 578-79. The definition of undue hardship as being more than a "de minimis cost" is derived from TWA v. Hardison, 432 U.S. 63 (1977), but has not expressly been adopted in Massachusetts. See 401 Mass. at 577 ("We need not consider" whether construction of § 4(1A) to impose more than a de minimis cost violates the Establishment Clause).

essence, that: (a) plaintiffs are Roman Catholics; (b) Roman Catholic dogma does not require abstinence from work on Christmas Day; and therefore (c) plaintiffs' religion does not require them to abstain from work on Christmas day. From (c), of course, the conclusion would follow that the employer did not violate the statute. The fallacy in this argument, however, lies in its assumption that plaintiffs' religious beliefs are uniquely and exhaustively defined by the tenets of Roman Catholic dogma. Although the plaintiffs do, indeed, describe themselves as practicing Roman Catholics, such self-description does not permit the courts to dictate to the plaintiffs what ecclesiastical authority must guide their religious beliefs. If -- as the evidence here shows -- the plaintiffs' own interpretation of their religion imposes certain requirements on them, it is not for this or any Court to tell them otherwise.[9]

[9] This argument does not, of course, imply that every religious practice must be accommodated. There may well be persons whose religious practices would impose such a burden on their employer that the employer need not accommodate them. Whether accommodation is required is measured by the "undue

Consequently, it is unnecessary (and possibly improper) for the courts to take up the challenge of determining what is or is not required by Roman Catholic dogma.[10] Cf. Fortin v. Roman Catholic

[10] In choosing to conduct the analysis of Roman Catholic dogma, the Superior Court may have erroneously believed that it was following the teaching of a very different case, Kolodziej v. Smith, 412 Mass. 215, 221 (1992). In Kolodziej, the plaintiff was required by her employer to participate in a motivational seminar that used religiously-inspired references that plaintiff found offensive. Rejecting the claim that such mandatory attendance violated § 4(1A), the Court noted that:

> The plaintiff produced no evidence that the . . . attendance at the seminar required her to miss any religious service or to compromise her faith. There was no evidence that Roman Catholic dogma forbade her attendance at the seminar.

In context, it is clear that the reference to "Roman Catholic dogma" was merely an illustration of one type of evidence that the plaintiff might have tried to adduce in support of a claim that some required practice of her religion had been impeded. Obviously, the Court did not mean to imply -- as the Superior Court in this case seems to have held -- that the received dogma of the Roman Catholic Church is the only possible source or evidence of an employee's religious requirements. In this case, unlike in Kolodziej, there is evidence in the record that the requirement imposed by the racetrack -- working on Christmas Day -- forced the employee to compromise her faith if she wished to avoid losing her job. Plaintiffs' own testimony establishes (or, at a

Bishop of Worcester, 416 Mass. 781, 788 (1994) (court is not to entangle itself in religion by attempting to decide matters of "religious doctrine, polity, and practice"); United Kosher Butchers Association v. Associated Synagogues of Greater Boston, Inc., 349 Mass. 595, 598 (1965) ("It is settled by our decisions that courts will not interfere in a controversy which is exclusively or primarily of an ecclesiastical nature."). What the Court may consider is what is required by the religious beliefs of the plaintiffs as they have expressed it.

A. Plaintiffs' Religion Requires Them To Abstain From Work On Christmas Day.

There is sworn testimony in the record that clearly establishes what the plaintiffs' religious beliefs are. Each plaintiff, in her affidavit, states: "My Catholic faith requires me to abstain from work on Christmas." A. 38 (Affidavit of

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minimum, creates an issue of material fact) that their religion forbids such work. In Kolodziej, by contrast, the plaintiff did not assert that the seminar interfered with any of her "required religious practices," 412 Mass. at 221 (emphasis in original).

Kathleen Pielech, ¶ 4); A. 41 (Affidavit of Patricia Reed, ¶ 4). Each plaintiff told her supervisor of this religious obligation. See A. 38 (Pielech Aff., ¶ 8) ("I told her that I could not compromise my religious belief and that my faith required me to celebrate Christ's birth and prohibited me from working on Christmas."); A. 41 (Reed Aff., ¶ 8) ("I told [my supervisor] that Christmas is a Holy day and that it would be sacrilegious for me to work. I explained that my faith prohibited me from working at the track on Christmas.").

Certain ecclesiastical leaders of the Catholic Church may sincerely believe that work is permissible on Christmas Day. The plaintiffs, however, do not. The racetrack cannot obtain summary judgment on the theory that Canon Law, as interpreted by the Superior Court, dictates what the plaintiffs may or may not believe, when their own testimony is to the contrary.[11] Amicus is

[11] It is tempting to be drawn into the ecclesiastical debate by pointing out that the dictates of Canon Law state that, on Christmas, which is a "holy day of obligation," "the faithful . . . are to abstain from those hard labors and business concerns which impede the worship to be rendered to God, the joy which is proper to the

aware of no other case in which a court has been permitted to dictate to a plaintiff what ecclesiastical authority she must recognize as binding.

Of course, it is always open to a defendant to challenge a plaintiff's sincerity and thereby to put in issue the veracity of her affidavit. See Attorney General v. Desilets, 418 Mass. 316, 329-30 (1994) ("The sincerity of [an] action assertedly founded on religious beliefs is open to challenge.") If a person falsely and opportunistically claims to adhere to a particular religious belief in order to reap the benefits of § 4(1A), the defendant may seek appropriate discovery and introduce evidence aimed at demonstrating that person's hypocrisy and insincerity.[12] If the defendant in this case had

Lord's Day, or the proper relaxation of mind and body." Canon 1247. (A. 18) This text would certainly appear to support plaintiffs' view. Nonetheless, an analysis of the content of the canons is unnecessary. The only issue is what plaintiffs believe their religion to require. Even if there are inconsistencies between a person's religious beliefs and those of the leaders of her church, the courts are still bound to consider only the beliefs of the individual in question.

[12] Cf. McConnell, Accommodation of Religion, 1985 The Supreme Court Review 1, 53 (1985) (noting

wished to raise such a challenge it could have done so; and it may still have the opportunity to do so upon remand.[13]

Absent a challenge to sincerity, however, it is left to the conscience of each individual to determine what her religion requires. The history of religious pluralism in this country offers countless instances in which individuals who consider themselves to be members of the same religion have starkly different interpretations of that religion's requirements. For example, among religious Jews, there are differences in interpretation of the requirements of kashrut

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that, although some might feign Sabbath observance in order to be guaranteed a particular weekend day off, this risk does not outweigh the desirability of requiring accommodation, particularly because "[t]he statute guards against the possibility of feigned Sabbath observance by allowing the [factfinder] to inquire into the employee's 'sincerity.' Sincere Sabbath observance has its own restrictions; most workers would probably be unwilling to be so constrained in their activities during their day off.")

[13] See infra Part III.A. Even if the employer may be able to show at trial that plaintiffs were insincere, such a theory is obviously not amenable to proof in the employer's favor on the present summary judgment record.

(dietary laws) not only among different branches of Judaism but even within Orthodox Judaism itself.[14] Some Moslem women believe that they must wear veils when appearing in public, while others believe that Western attire is acceptable to the dictates of their religion.[15]

This Court would not presume to decide which of the above beliefs was a proper interpretation of Jewish or Moslem dogma. Instead, it would doubtless permit each individual to worship "in the manner and season most agreeable to the dictates of his conscience," as required by the language of Article 2 of the Declaration of Rights. A person's self-description as a "religious Jew" would not end the inquiry as to

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[14] See Sullivan, Are Kosher Food Laws Constitutionally Kosher?, 21 B.C. Envir. Aff. L. Rev. 201, 239 (1993).

[15] Fundamentalist versions of Islamic Sharia (religious law), based on an interpretation of one verse of the Koran, require women to wear veils covering all but their hands, feet, and a portion of the face when appearing in public. Other interpretations of the Koran impose no such requirement. See Zolan, The Effect of Islamization on the Legal and Social Status of Women in Iran, 7 B.C. Third World L.J. 183, 186-87 (1987).

what her religion requires, nor would it give a court license to use the affidavit of some purported ecclesiastical authority to contradict her own testimony as to what foods she considers herself ritually permitted to eat. To put the plaintiffs' religion to the test by judging it in light of affidavits introduced from priests or other ecclesiastical leaders whom plaintiffs do not necessarily acknowledge as authoritative is to undermine the freedom of religion repeatedly recognized by this Court.[16] The courts of the Commonwealth do not sit to protect the requirements of well-known, hierarchically-organized religions while shunning the beliefs of those who adhere to a stricter or more fundamentalist interpretation of religious law.[17]

[16] See Commonwealth v. Nissenbaum, 404 Mass. 575, 582 n.5 (1989) ("Any person may worship in the manner he thinks most agreeable to the Deity."); (Attorney General v. Desilets, 418 Mass. at 338 ("[I]f this or any court purports to consider whether a practice is truly a form of worship, then in essence the court is inquiring into the validity of a religious belief. No civil court, however, may make such an inquiry.").

[17] Such preferred treatment of certain religious groups and discrimination against others would "violate[] the First and Fourteenth Amendments of the United States Constitution, as well as art. 2

This point was made perhaps most clearly in this Court's unanimous opinion in Kolodziej:

> [I]n order for a belief to be a protected religious belief, it is not necessary that it be shared by an organized sect or church.

412 Mass. at 220. In Desilets, the Court again reaffirmed this principle, noting that

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of the Declaration of Rights of the Massachusetts Constitution." Dalli v. Board of Education, 358 Mass. 753, 759 (1971).

it is not relevant whether the belief is shared by an organized sect or church, or for that matter, by any other person.

418 Mass. at 338 n.4.

In short, the question whether working on Christmas Day violates the tenets of established Roman Catholic dogma is irrelevant. The only question is whether such work violates the requirements of plaintiffs' religion -- which, although based on the Roman Catholic faith, need not (and apparently does not) comport in all respects with the provisions of Catholic dogma as set forth in Msgr. McNamara's affidavit. Instead, the plaintiffs' religion interprets the principles of Catholicism along somewhat more fundamentalist lines.[18]

[18] Although the plaintiffs' beliefs need not be shared by any organized sect in order to be legitimate religious beliefs, it is nonetheless noteworthy that their views are shared by at least some branches of the Catholic Church. The Superior Court chose to focus only on the affidavit of Msgr. McNamara; but the plaintiffs had filed an affidavit from a different church leader, Monsignor Oliveira, whose testimony indicates that "servile" work -- i.e., "[o]ccupations that rely primarily on physical activity for material gain" -- is forbidden on "holy days of obligation" such as Christmas Day. (A. 35, ¶ 5) Msgr. Oliveira's affidavit notes that there is an exception to this prohibition for such functions as are "necessary for the well-being of society" (a classification

B. The Superior Court[28] Misinterpreted Lewis and Consequently Erred In Awarding The Racetrack Summary Judgment.

Because abstention from work on Christmas is required, and not merely desirable or laudatory, by the terms of plaintiffs' religion as they interpret it, the Superior Court erred in awarding summary judgment to the racetrack.

In its summary judgment motion, the racetrack pointed out that in Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761 (1986), this Court held that § 4(1A) applies only where the employer has required an employee to violate or forego the "practice" of her religion as "required" by that religion. The racetrack argued that Ms. Pielech and Ms. Reed were not prevented from attending any religious services (since such

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that seems unlikely to encompass parimutuel wagering). Exceptions are also made where work is necessary to sustain the individual or his family, or in cases of emergency. Otherwise, at least according to this witness (whose authoritativeness cannot be weighed on a summary judgment motion), "the requirement that Catholics refrain from working Christmas Day is . . . a basic rule and requirement for those who practice the Catholic faith." (A. 35, ¶¶ 5, 6)

services were available during hours that plaintiffs were not required to be on duty at the racetrack). (A. 52-53). The racetrack thus argued that it did not impede any required religious "practice" of the plaintiffs'. But, as shown in Part II.A above, it is a required religious practice for the plaintiffs to abstain from work throughout Christmas Day. It is beyond cavil that a religious practice can be defined negatively (i.e., not engaging in certain conduct) as well as positively.[19] Indeed, barely six months ago, this Court expressly held that a landlord's religiously-motivated decision to refuse to rent an apartment to unmarried cohabitants was a religious practice: "Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion."

[19] For example, well-known religious practices include the Moslem practice of abstaining from drinking alcohol, the Jewish practice of abstaining from eating pork and shellfish, and the Hindu practice of abstaining from eating beef. Numerous religions also impose restrictions on the types of activities in which an adherent may engage on certain days of the week or year.

Attorney General v. Desilets, 418 Mass. 316, 323 (1994).

In adopting the racetrack's analysis of Lewis, the Superior Court misconstrued that decision. In that case, Emma Lewis had sought to take a two-month leave of absence from her employment to do missionary work abroad for her church. "The plaintiff had been asked by her church to serve as a missionary during this period and she wished to honor this request." 397 Mass. at 764 (emphasis added). As the underlined words in the above sentence indicate, the activity at issue in Lewis was not a religious requirement, but rather was simply an optional religious endeavor that the plaintiff desired to carry out. Consequently, as this Court held, Lewis's employer had no legal obligation under §4(1A) to grant her request for a leave. Because plaintiffs here have shown a religious requirement, Lewis is not on point.[20]

[20] The facts of Lewis help place in context the Court's statement in that opinion that § 4(1A) "does not deal with the full panoply of religious beliefs, practices, preferences, and ideals." 397 Mass. at 771. This language was not meant to imply that only the requirements of well-known or established religious bodies are entitled to

III. A REMAND IS NECESSARY TO RESOLVE MATTERS NOT YET RESOLVED BY THE SUPERIOR COURT

As argued above, entry of summary judgment for defendant was erroneous because plaintiffs' religion required abstinence from work on Christmas. The plaintiffs have established a prima facie case that the adverse employment action taken against them was based on the exercise of their religious beliefs.[21] It does not automatically follow, however, that summary judgment should have been entered for plaintiffs.

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statutory protection. Rather, it simply draws a distinction between religious requirements and other religiously-motivated actions or endeavors. That distinction was crucial in Lewis. Here, however, the distinction is beside the point. As shown above, from the plaintiffs' personal religious perspective, abstention from work on Christmas is a requirement, not a mere option.

[21] It is undisputed that the employment action was taken against both employees solely as a result of their failure to report for work on Christmas. See Defendant's Answers to Interrogatories Nos. 2, 3. (A. 61-62) Defendant has also conceded (at least as to plaintiff Reed) that it was informed prior to the date in question that plaintiff would not work on Christmas "because of her religion" and that she believed Christmas to be "the most holy day." (A. 67-68)

There are two potentially viable issues remaining with respect to liability: first, the burden (if any) that accommodation would impose on the employer, and second, the plaintiffs' sincerity. If the racetrack has properly preserved the sincerity issue, it may be entitled to a trial on that issue. As to any defense that accommodation would have been a hardship, however, the racetrack has failed to adduce evidence sufficient to meet its burden of proof. At a minimum, therefore, Plaintiff is entitled to partial summary judgment holding that the racetrack has not shown that it would have suffered "undue hardship" if it had permitted Ms. Pielech and Ms. Reed to take Christmas Day off.

A. Plaintiffs Are Entitled To Partial Summary Judgment On The Issue of Undue Hardship.

The racetrack has adduced no evidence going to a defense of "undue hardship." Plaintiffs are therefore entitled to partial summary judgment on any such purported defense.

As discussed in Part I above, the statute exempts an employer from the religious accommodation requirement if the employer can show

that such accommodation would cause it to suffer "undue hardship," in the sense of imposing a significant cost, or creating an emergency, or impeding the operation of the racetrack's business.

When plaintiffs filed their cross-motion seeking summary judgment as to liability, however, the racetrack did not counter that motion with evidence tending to show that it would have suffered any hardship (let alone "undue" hardship) by letting plaintiffs take Christmas Day off. Indeed, it did not even adduce evidence (nor did it argue) that the plaintiff's absence on Christmas Day in any way interfered with its operations, created any emergency, or resulted in any significant added cost.

The statute expressly places the burden of proof as to hardship upon the defendant. See c. 151B, § 4(1A), ¶ 2 ("The employer shall have the burden of proof to show undue hardship."). Pursuant to Rule 56(d), therefore, plaintiffs are entitled to partial summary judgment on this issue. See Kourouvacilis v. G.M. Corp., 410 Mass. 706, 713-14 (1991) (requiring non-movant who seeks

to avoid summary judgment to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial).

Even if the racetrack had sought to adduce such evidence, it would have been unlikely to be able to bear its burden of proving undue hardship. In New York-Mass, for example, a truck driver sought to take six days off work (not the single day at issue here) for religious reasons. The Commission Against Discrimination determined that the employer could reasonably have accommodated the employee by redistributing his routes among other drivers for those days. This Court affirmed that ruling, holding that such redistribution of duties imposed no more than a de minimis cost upon the employer (even though it would have violated the seniority system by which the company traditionally allocated vacation preferences). See 401 Mass. at 578. Absent a showing that staff levels would have fallen "below the minimum level needed to operate the business," id., the company could not show "undue hardship."

Here, a fortiori, it appears highly unlikely that a company with $20,000,000 annual revenues

(A. 68) would have been unable to continue functioning without two part-time clerks. Indeed, the racetrack admits it has made accommodation for other employees' religious needs in the past. (A. 78) In any event, the racetrack has not adduced evidence on the issue and plaintiffs are therefore entitled to partial summary judgment.

B.The Racetrack Is Unlikely To Be Able To Prove Insincerity, <u>But It May Be Entitled To Try.</u>

It is less clear whether the plaintiffs are entitled to partial summary judgment as to the issue of sincerity. The racetrack has insinuated that it questions the plaintiffs' sincerity. It raised this issue by adducing evidence and commenting on the fact that plaintiffs had both worked on other "holy days of obligation" of the Catholic Church besides Christmas, such as "the Ascension," "the Assumption" and "All Saints Day." (A. 11, 20)

But these facts standing alone prove nothing. It is quite possible (and indeed the evidence supports the view) that plaintiffs consider Christmas to be the <u>most</u> holy day of the year, and that their religious beliefs therefore require

abstention from work on that day even if they do not require such abstention on other holy days. See A. 68 (Defendant's Answer to Interrogatory No. 18) (admitting that plaintiff Reed had informed her supervisor that she considered Christmas to be "the most holy day").

The employer seems unlikely to be able to disprove the plaintiffs' sincerity. Both plaintiffs are active in their church. Ms. Pielech attends Mass regularly and teaches catechism class. (A. 37) She also serves her church as a lay lecturer and often does readings at Mass. Id. Ms. Reed attends Mass daily and teaches catechism class. (A. 41). Neither plaintiff has ever worked on Christmas. (A. 38, 41) The plaintiffs' views as to abstention from work, moreover, are supported by the testimony of a Monsignor of the church (A. 34-35), and are firmly grounded in the literal meaning of the language of Canon 1247, which expressly states that the faithful "are to abstain" from work on Christmas.[22] Although from an abundance of

[22] Monsignor Oliveira's interpretation of the Canon is evidence that there are ecclesiastical authorities whose views comport with plaintiffs', and thus that their asserted religious beliefs are

caution the Court might choose give the racetrack the opportunity, upon remand, to attempt to establish lack of sincerity, it will clearly be an uphill battle.[23]

C. Appropriate Relief Remains To Be Determined.

Finally, assuming the racetrack is unable to assert or prevail on the insincerity issue, the Superior Court should then determine the nature and scope of appropriate relief to which plaintiffs are entitled.

CONCLUSION

This Court should reverse the summary judgment entered below, enter partial summary judgment for plaintiffs on the issue of undue hardship, and remand the case to the Superior Court for further proceedings and a determination of appropriate relief.

Respectfully Submitted,

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not opportunistic inventions.

[23] The Court may wish to leave the issue of whether plaintiffs can be awarded partial summary judgment as to sincerity to the Superior Court in the first instance.

Toni G. Wolfman, BBO #532620
Michael A. Albert, BBO #558566
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
(617) 832-1000

Sarah R. Wunsch, BBO #548767
Massachusetts Civil Liberties
Union Foundation
99 Chauncy Street, Suite 310
Boston, MA 02111
(617) 482-3170