668 N.E.2d 1298
423 Mass. 534, 668 N.E.2d 1298, 71 Fair Empl.Prac.Cas. (BNA) 1145, 68 Empl. Prac. Dec. P 44,187
(Cite as: 423 Mass. 534, 668 N.E.2d 1298)

Supreme Judicial Court of Massachusetts, Bristol.

Kathleen PIELECH & another [FN1]

FN1. Patricia Reed.

v.

MASSASOIT GREYHOUND, INC. [FN2]

FN2. We acknowledge the filing of amicus briefs by the Attorney General, the Roman Catholic Archbishop of Boston together with the Roman Catholic Bishops of Fall River and Worcester and the administrator of the Roman Catholic Diocese of Springfield, Catholic League for Religious and Civil Rights, the Anti-Defamation League, and Civil Liberties Union of Massachusetts.

Argued Nov. 7, 1995.
Decided Aug. 20, 1996.

Former employees of dog racing track sued track alleging requirement that they work on Christmas day violated statute which prohibits employers from imposing upon employees as conditions of employment terms or conditions the compliance with which would require them to forgo or violate practice of religion "as required by that creed or religion." The Superior Court Department, Bristol County, John J. O'Brien, J., granted employer's motion for summary judgment. Employees appealed. The Supreme Judicial Court, O'Connor, J., granted application for direct review, and held that statute was unconstitutional under establishment clause.

Affirmed.

Abrams, J., filed dissenting opinion in which Liacos, C.J., and Greaney, J., joined.

West Headnotes

[1] Constitutional Law k84.5(12)
92k84.5(12)

[1] Labor and Employment k4
231Hk4
(Formerly 255k10.5 Master and Servant)
Statute which prohibits employers from imposing on employees terms or conditions compliance with which would require employees to violate practice of religion as required by that religion was unconstitutional under establishment clause, as it distinguished between sincerely held religious beliefs that were shared with others belonging to organized church and beliefs that were not similarly shared. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 151B, § 4, subd. 1A.

[2] Constitutional Law k48(1)
92k48(1)
Statutes are to be construed so as to avoid unconstitutional result or likelihood thereof, but only if reasonable principles of interpretation permit it.

[3] Statutes k174
361k174
Court must construe statutes as they are written.

[4] Constitutional Law k70.1(2)
92k70.1(2)
Scope of authority of Supreme Judicial Court to interpret and apply statutes is limited by its constitutional role as judicial, rather than legislative body. M.G.L.A. Const. Pt. 1, Art. 30.

[5] Statutes k181(1)
361k181(1)
In construing legislative enactment, it is duty of Supreme Judicial Court to ascertain and implement intent of legislature.

[6] Statutes k181(2)
361k181(2)
Supreme Judicial Court cannot interpret statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires different conclusion.

[7] Constitutional Law k70.1(2)
92k70.1(2)
Supreme Judicial Court is under duty to avoid judicial legislation in guise of new constructions to meet real or supposed new popular viewpoints, preserving always to legislature alone its proper prerogative of adjusting statutes to changed conditions.

[8] Statutes k184
361k184
Statutory language is principal source of insight into legislative purpose.

[9] Labor and Employment k4
231Hk4
(Formerly 255k10.5 Master and Servant)
Statute which prohibits employers from imposing on employees terms or conditions compliance with which would require employees to violate practice of religion as required by that religion is limited to persons whose practices and belief mirror those required by dogma of established religions. M.G.L.A. c. 151B, § 4, subd. 1A.

[10] Constitutional Law k84.1
92k84.1
Statute that prefers one or more religions over another violates establishment clause. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law k84.2
92k84.2
Belief need not be shared by organized sect or church to be protected religious belief under First Amendment. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law k84.2
92k84.2
If religious beliefs are sincerely held, albeit not by organized sect or church, they are entitled to the same protection under First Amendment as those more widely held by others. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law k84.5(12)
92k84.5(12)

[13] Labor and Employment k5
231Hk5
(Formerly 255k10.5 Master and Servant)
Statute which prohibits employers from imposing on employees terms or conditions compliance with which would require employees to violate practice of religion as required by religion violated establishment clause by promoting excessive governmental entanglement with religion; it compelled courts in cases in which dogma of established church or religion was disputed to ascertain requirements of religion. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 151B, § 4, subd. 1A.

[14] Constitutional Law k84.1
92k84.1
Courts avoid excessive governmental entanglement with religion by abstaining from resolution of controversies regarding religious matters. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law k84.1
92k84.1
Essential purpose of establishment clause is to assure that government maintains benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. U.S.C.A. Const.Amend. 1.

****1299 *534** Howard A. Brick, Boston, for Anti-Defamation League.

Joel A. Kozol (William I. Cowin with him), Boston, for defendant.

Harvey A. Schwartz, for Kathleen Pielech & another, submitted a brief.

***535** Nancy J. Gannon, of Wisconsin, for amicus curiae Catholic League For Religious and Civil Rights.

Howard A. Brick, Sally J. Greenberg and Carl E. Axelrod, and Ruth L. Lanser, Steven Freeman and Debbie N. Kaminer of New York, for amicus curiae Anti-Defamation League.

Scott Harshbarger, Attorney General, and Freda K. Fishman, Assistant Attorney General, for amicus curiae, Attorney General.

Toni G. Wolfman, Michael A. Albert, and Sarah R. Wunsch for, amicus curiae, Civil Liberties Union of Massachusetts.

Wilson D. Rogers, Jr., Frederic J. Torphy, James F. Cosgrove, and John A. Egan, for amicus curiae, Roman Catholic Archbishop of Boston & others.

Before LIACOS, C.J., and WILKINS, ABRAMS, LYNCH, O'CONNOR, GREANEY and FRIED, JJ.

O'CONNOR, Justice.

The plaintiffs, former at-will employees of the defendant corporation, seek damages based on their assertion that the defendant required them, as a condition of their continued employment, to work on Christmas Day in contravention of their "creed or religion as required by that creed or religion" in violation of G.L. c. 151B, § 4(1A) (1994 ed.). The plaintiffs also claim entitlement to relief ****1300** under G.L. c. 93, § 102 (1994 ed.) (Massachusetts Equal Rights Act). The plaintiffs moved for summary judgment and the defendant filed a cross motion for summary judgment as to liability. A Superior Court judge allowed the defendant's motion and denied that of the plaintiffs. The plaintiffs appealed, and we granted their application for direct appellate review. We affirm the judgment for the defendant, although

our reasoning differs from that of the Superior Court judge.

The following undisputed facts are established by the summary judgment materials: The plaintiffs were employed by the defendant as part-time parimutuel clerks at the Raynham-Taunton Greyhound Track. On December 18, 1992, the defendant posted a notice informing all regularly scheduled employees that they would be required to work on Christmas night, Friday, December 25, 1992. The plaintiffs were regularly scheduled to work on Fridays, but requested Christmas off to observe the holiday. The defendant denied their requests. The plaintiffs failed to appear for work on December 25. The parties differ as to whether they were "terminated" or "suspended." In any event, they suffered "adverse action" for purposes of c. 151B, § 4(1A).

***536** In addition, the plaintiffs submitted affidavits that at the relevant time they were devout members of the Roman Catholic Church and that, as such, their religious beliefs prohibited them from working on Christmas. The question whether abstinence from work on Christmas was required by Roman Catholic dogma was also the subject of affidavits given by two Roman Catholic priests, one of which was submitted by the plaintiffs and the other of which was submitted by the defendant. The affidavit submitted by the defendant essentially stated that Roman Catholics are obligated to attend one mass celebrated between 4 P.M. on December 24 and 1 P.M. on December 25, and that the church neither prohibits its members from working on Christmas nor requires them to worship on Christmas night. The priest's affidavit submitted by the plaintiffs said that "[o]n Sundays and other holy days of obligation the faithful are ... to abstain from those labors and business concerns which impede the worship to be rendered to God, the joy which is proper to the Lord's Day, or the proper relaxation of mind and body." That affidavit also cited the following statement from The Catholic Encyclopedia as authoritative:

> "Church law forbids servile work on Sundays and holy days of obligation, but exceptions are made for those functions that are necessary for the well-being of society, or for those who must support their family or to maintain their livelihood."

"Based on the authorities provided by the parties, [the motion judge] rule[d]" as follows: "Catholic dogma does not *require* worshippers to abstain from working on Holy days. The only requirement the church absolutely imposes upon its followers is to attend mass. Plaintiffs were not denied the opportunity to attend mass, and therefore, plaintiffs cannot establish that they were forced to forgo a practice required by their religion. The fact that plaintiffs wished to further observe the Christmas holiday does not constitute a religious requirement. See *Lewis v. Area II Homecare for Senior Citizens, Inc.,* [397 Mass. 761, 772, 493 N.E.2d 867 (1986)]. As plaintiffs' claim for violation of G.L. c. 151B, [§] 4(1A) fails, so too must their claims premised on G.L. c. 93, [§] 102." (Emphasis in original.)

General Laws c. 151B, § 4(1A), provides in pertinent part the following:

> ***537** "It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or [forgo] 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 ****1301** to the religious needs of such individual.... The employee shall have the burden of proof as to the required practice of his creed or religion."

This court construed G.L. c. 151B, § 4(1A), in *Lewis v. Area II Homecare for Senior Citizens, Inc.,* 397 Mass. 761, 771, 493 N.E.2d 867 (1986). We held, "The statute does not deal with the full panoply of religious beliefs, practices, preferences, and ideals.... The application of the statute is much more narrow. It prohibits an employer from requiring an employee, as a condition of employment, to violate or forgo the *practice* of her religion as *required* by that religion. It follows that the threshold showing an employee must make is whether the activity sought to be protected is a religious practice and is required by the religion." (Emphasis in original.) *Id.* at 771-772, 493 N.E.2d 867. Later, in *Kolodziej v. Smith,* 412 Mass. 215, 588 N.E.2d 634 (1992), in which the plaintiff sought damages and other relief "on the ground that the defendants made her retention of employment conditional on her forgoing the practice of her 'creed or religion as required by that creed or religion' in violation of G.L. c. 151B, § 4(1A)," *id.* at 216, 588 N.E.2d 634, we held that the judge in the Superior Court had correctly directed verdicts for the defendants on that claim. We reasoned as follows:

> "In *Lewis v. Area II Homecare for Senior Citizens, Inc.,* 397 Mass. 761, 771, 493 N.E.2d 867 (1986), we observed that this 'statute does not deal with the full panoply of religious beliefs, practices, preferences, and ideals,' but focuses instead on *required* religious *practices.* The plaintiff produced no evidence that the defendants' condition

for her continuing as controller, 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." (Emphasis in original.) *Id.* at 221, 588 N.E.2d 634.

[1] ***538** The plaintiffs' brief in the present case states that "[t]his appeal presents a direct challenge to this Court's recent interpretations of c. 151B, § 4(1A), which hold that the only religious beliefs protected by the employment discrimination statute are those that are required by the dogma of an established religion. This interpretation of the statute denies protection to employees whose sincere religious beliefs differ from the established dogma of their religion or are not accepted as dogma by any religion. Such an interpretation violates the Establishment Clause of the First Amendment to the United States Constitution and Article 2 of the Declaration of Rights." The plaintiffs' contention that, in *Lewis v. Area II Homecare for Senior Citizens, Inc., supra,* and *Kolodziej v. Smith, supra,* this court misconstrued c. 151B, § 4(1A), is based entirely on their argument that, so construed, the statute is unconstitutional. The plaintiffs then conclude as follows:

"To salvage the constitutionality of the statute it must be applied broadly to protect holders of all religious beliefs, not just those who follow the dogma of an established religion. Applied in that manner, since the plaintiffs have proven that the dictates of their own consciences and their religious beliefs founded on those dictates prohibited them from working on what to them was the most holy day of the year, and since their employer fired them for refusing to violate their religious beliefs, they were entitled to summary judgment as to liability."

No question concerning the constitutionality of c. 151B, § 4(1A), was raised in *Lewis* or *Kolodziej.* That question is presented to this court for the first time in this case. As we shall explain later in this opinion, we agree that G.L. c. 151B, § 4(1A), as construed by this court in those cases, and as we construe it in this case, is unconstitutional. We do not agree with the plaintiffs, however, that the appropriate remedy is for us to interpret the statute as "protect[ing] holders of all religious beliefs, not just those who follow the dogma of an established religion." Instead, we conclude that the plaintiffs' reliance on that statute, unconstitutional as it is, is unwarranted.

****1302** [2][3][4][5][6][7][8] "[S]tatutes are to be construed so as to avoid an unconstitutional ***539** result or the likelihood thereof," *Adamowicz v. Ipswich,* 395 Mass. 757, 763-764, 481 N.E.2d 1368 (1985), but only "if reasonable principles of interpretation permit it." *School Comm. of Greenfield v. Greenfield Educ. Ass'n,* 385 Mass. 70, 79, 431 N.E.2d 180 (1982). "We must construe the statutes as they are written." *Brennan v. Board of Election Comm'rs of Boston,* 310 Mass. 784, 789, 39 N.E.2d 636 (1942). "The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body. See art. 30 of the Massachusetts Declaration of Rights. In construing a legislative enactment, it is our duty to ascertain and implement the intent of the Legislature.... We cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction. *Milton v. Metropolitan Dist. Comm'n,* 342 Mass. 222, 227, 172 N.E.2d 696 (1961)." *Rosenbloom v. Kokofsky,* 373 Mass. 778, 780-781, 369 N.E.2d 1142 (1977). "As Justice Qua stated in *Commonwealth v. Isenstadt,* 318 Mass. 543, 548, 62 N.E.2d 840 (1945), this court is under a duty 'to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.' " *Commonwealth v. A Juvenile,* 368 Mass. 580, 595, 334 N.E.2d 617 (1975). "Statutory language is the principal source of insight into [l]egislative purpose. *Hoffman v. Howmedica, Inc.,* 373 Mass. 32, 37, 364 N.E.2d 1215 (1977)." *Commonwealth v. Lightfoot,* 391 Mass. 718, 720, 463 N.E.2d 545 (1984).

[9] General Laws c. 151B, § 4(1A), declares unlawful an employer's imposition on an employee of "terms or conditions, compliance with which would require such individual to violate, or [forgo] the practice of, his creed or religion *as required by that creed or religion*" (emphasis added). In order to construe 151B, § 4(1A), as protecting "holders of all religious beliefs, not just those who follow the dogma of an established religion," as urged by the plaintiffs, we would be required to ignore, that is, treat as surplusage, the words "as required by that creed or religion." It is unlikely that the Legislature intended such a result. See *Bolster v. Commissioner of Corps. & Taxation,* 319 Mass. 81, 84-85, 64 N.E.2d 645 (1946) ("None of the words of a statute is to be regarded as superfluous ..."). The effect of the quoted statutory language is to limit the application of the statute to persons whose practices and beliefs mirror those required by the dogma of established ***540** religions. To construe the statute as not containing such limitation "would be to engage in a judicial enlargement of the clear statutory language beyond

the limit of our judicial function. We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. XXX of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved. *King v. Viscoloid Co.,* 219 Mass. 420, 424-425, 106 N.E. 988 [1914]. *Simon v. Schwachman,* 301 Mass. 573, 581-582, 18 N.E.2d 1 [1938]. We will not do so now." *Dalli v. Board of Educ.,* 358 Mass. 753, 759, 267 N.E.2d 219 (1971) (declining to construe language in vaccination statute exempting persons subscribing to "the tenets and practice of a recognized church or religious denomination" to include others whose sincerely held religious beliefs nevertheless conflict with vaccination).

We come now to our discussion of the constitutionality of G.L. c. 151B, § 4(1A). The First Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, *Everson v. Board of Educ. of Ewing,* 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides in pertinent part that "Congress shall make no law respecting an establishment of religion."

****1303** [10][11][12] A statute that prefers one or more religions over another violates the establishment clause. *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 381, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985). *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703, 710, 105 S.Ct. 2914, 2918, 86 L.Ed.2d 557 (1985). *Larson v. Valente,* 456 U.S. 228, 245, 102 S.Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982). Also, "in order for a belief to be a protected religious belief, it is not necessary that it be shared by an organized sect or church." *Kolodziej v. Smith, supra* at 220, 588 N.E.2d 634. "If [religious] beliefs be sincerely held they are entitled to the same protection as those more widely held by others." *Dalli v. Board of Educ., supra* at 758, 267 N.E.2d 219. Thus, G.L. c. 151B, § 4(1A), which distinguishes between (1) an individual's sincerely held religious belief that is shared with others belonging to an organized church or sect and (2) a belief that is not similarly shared, violates the establishment clause.

[13][14][15] General Laws c. 151B, § 4(1A), also offends the establishment clause by promoting excessive governmental entanglement with religion. Courts avoid such entanglement by abstaining from the resolution of controversies regarding religious matters. *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 718, 96 S.Ct. 2372, 2384, 49 L.Ed.2d 151 (1976). *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 450, 89 S.Ct. 601, 606-07, 21 L.Ed.2d 658 (1969). See *Redmond v. GAF Corp.,* 574 F.2d 897, 900 (7th Cir.1978)***541** (stating, in interpreting Title VII provisions prohibiting employment discrimination based on religion, that "to restrict the act to [protecting only] those practices which are mandated or prohibited by a tenet of the [plaintiff's] religion ... would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion. We find such a judicial determination to be irreconcilable with the warning issued by the Supreme Court in *Fowler v. Rhode Island,* [345 U.S. 67, 70, 73 S.Ct. 526, 527-28, 97 L.Ed. 828 (1953),] '[I]t is no business of courts to say ... what is a religious practice or activity ...' "). This doctrine is directly related to the establishment clause's essential purpose, which is to assure that government maintains "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of the City of N.Y.,* 397 U.S. 664, 669, 90 S.Ct. 1409, 1412, 25 L.Ed.2d 697 (1970). See *Alberts v. Devine,* 395 Mass. 59, 72, 479 N.E.2d 113, cert. denied sub nom. *Carroll v. Alberts,* 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985) ("First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization"); *Wheeler v. Roman Catholic Archdiocese,* 378 Mass. 58, 63-64, 389 N.E.2d 966, cert. denied, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979) (dismissing complaint seeking imposition of trust on church property because statements in earlier cases "suggesting generally that the courts should be less reluctant to intervene in cases [touching religious matters] involving property rights or personal rights were written before the teachings of more recent relevant Supreme Court opinions, particularly *Serbian E. Orthodox Diocese,* were available," and because "sound policy dictates that the denominations, and not the courts, interpret their own body of church polity"), cert. denied, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979); *United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc.,* 349 Mass. 595, 598, 211 N.E.2d 332 (1965) (courts will not interfere in a controversy which is exclusively or primarily of an ecclesiastical nature); *Moustakis v. Hellenic Orthodox Soc'y,* 261 Mass. 462, 466, 159 N.E. 453 (1928) ("It is not the province of civil courts to enter the domain of religious denominations for the purpose of deciding controversies touching matters exclusively ecclesiastical").

***542** General Laws c. 151B, § 4(1A), effectively compels courts, in cases where the dogma of an established church or religion is disputed, to ascertain the requirements of the religion at issue. This may occur in ****1304** connection with a trial with or without a jury or, as here, in connection with rulings on motions for summary judgment. We conclude that G.L. c. 151B, § 4(1A), construed as we have concluded it must be construed, would require our courts in this case to determine what actions and beliefs are required of adherents to the Roman Catholic faith. These are not proper matters for the courts to decide. For this reason, in addition to its preference of religious beliefs and practices that are shared by organized churches over those not so shared, we conclude that § 4(1A) violates the establishment clause of the First Amendment. [FN3] The plaintiffs' claims grounded on G.L. c. 151B, § 4(1A), therefore, must fail.

> FN3. We need not consider or discuss the plaintiffs' assertion that c. 151B, § 4(1A), as we construe it, also violates art. 2 of the Massachusetts Declaration of Rights.

The plaintiffs rely on G.L. c. 93, § 102, the Massachusetts Equal Rights Act, as well as on G.L. c. 151B, § 4(1A). In their brief, the plaintiffs do little more than assert in conclusory fashion that the judge in the Superior Court should have analyzed their c. 93, § 102, claim "under the more strict requirements of art. 2 [of the Massachusetts Declaration of Rights]." The plaintiffs' treatment of that issue is insufficient appellate argument. Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

Judgment affirmed.

ABRAMS, Justice (dissenting, with whom LIACOS, C.J., and GREANEY, J., join).

Today the court unnecessarily declares unconstitutional a statute designed to protect the religious beliefs of workers in this Commonwealth. As a result, two women have been denied the chance to show that their sincerely held religious beliefs do not permit them to work on Christmas, and they have lost their jobs. Even more regrettably, workers in this Commonwealth have now lost an important State protection designed to preserve their religious beliefs against the unreasonable demands of employers. This unfortunate ***543** result has been reached, despite the fact that the provision at issue was enacted more than twenty years ago and has been regularly invoked by employees without questions being raised as to its constitutionality. The result clearly does not comport with the legislative objective and is not required by the words of the statute.

The court cites generally correct principles of statutory interpretation, see *ante* at 1302, but fails to apply them properly and ignores other applicable canons of construction. Rather than accepting a reasonable, constitutional interpretation of the statute, the court relies on a rigid and overly analytic interpretation of its words which disregards a manifest legislative objective to protect sincerely held religious beliefs. [FN1]

> FN1. The court's opinions in *Lewis v. Area II Homecare for Senior Citizens, Inc.,* 397 Mass. 761, 493 N.E.2d 867 (1986), and *Kolodziej v. Smith,* 412 Mass. 215, 588 N.E.2d 634 (1992), have not unconstitutionally interpreted G.L. c. 151B, § 4(1A) (1994 ed.). *Ante* at 1300. In *Lewis,* the court merely stated that to prevail, an employee must show that the activity sought to be protected (in this case, abstaining from work on Christmas night) is a religious practice and is required by a plaintiff's religion. *Lewis, supra* at 771, 493 N.E.2d 867. The court did not define a plaintiff's religion to mean only those beliefs and practices endorsed by officials of her church. Later, in *Kolodziej,* the court clarified the plaintiff's burden as one of producing evidence that the complained of employment practice caused the employee to miss religious services or compromise her faith. *Kolodziej, supra* at 221, 588 N.E.2d 634. While the court did note that "[t]here was no evidence that Roman Catholic dogma forbade her attendance at the seminar," the court did not require such evidence as proof of the plaintiff's faith and this observation was not essential to the judgment in the case. *Id.*

The court is required to "indulge *every* rational presumption in favor of [the statute's constitutionality]" (emphasis added). *Neff v. Commissioner of the Dep't of Indus. Accidents,* 421 Mass. 70, 73, 653 N.E.2d 556 (1995), quoting *Commonwealth v. Lammi,* 386 Mass. 299, 301, 435 N.E.2d 360 (1982). In 1971, in *Dalli v. Board of Educ.,* 358 Mass. 753, 267 N.E.2d 219 (1971), this court held unconstitutional the provisions of G.L. ****1305** c. 76, § 15, which offered protection only to persons whose religious beliefs were sanctioned by a recognized church or religious denomination. The wording of G.L. c. 151B, § 4(1A) (1994 ed.), differs

from that of G.L. c. 76, § 15, which was held to be unconstitutional in *Dalli.* However, unlike G.L. c. 76, § 15, G.L. c. 151B, § 4(1A), does not specifically limit its protection to adherents to "the tenets and practice of a recognized church or religious denomination." It instead prohibits an employer from requiring an individual to violate or forgo the practice of his creed or ***544** religion as required by that creed or religion. General Laws c. 151B, § 4(1A), does not require that the person's creed or religion be "recognized" or even that the religious beliefs be shared with others. No affidavit or testimony of an official of a recognized church is required by the express wording of the statute. In holding unconstitutional a statute which was enacted two years after the *Dalli* decision, [FN2] the court ignores the general rule of statutory construction that the Legislature is presumed to have had knowledge of the decisions of this court. *MacQuarrie v. Balch,* 362 Mass. 151, 152, 285 N.E.2d 103 (1972). See *International Fidelity Ins. Co. v. Wilson,* 387 Mass. 841, 854, 443 N.E.2d 1308 (1983) (Legislature presumably aware of decisions of this court).

FN2. Subsection 1A was inserted by St.1973, c. 929 (approved Oct. 17, 1973).

The court should assume that the Legislature in enacting the statute, did not embark on an exercise in futility, but rather intended that the statutory text reflect the teaching of the *Dalli* case and comply with the First Amendment and art. 2 to the Massachusetts Declaration of Rights. The statute should be interpreted, as the Legislature intended, to constrain religious intolerance and to provide broad protection to a person's religious beliefs, as sincerely held by that person, whether officially approved by a recognized church or not. [FN3] See *Attorney Gen. v. Desilets,* 418 Mass. 316, 323, 636 N.E.2d 233 (1994) ("Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion"); *Dalli, supra* at 758, 267 N.E.2d 219 ("If the beliefs be sincerely held they are entitled to the ***545** same protection as those more widely held by others"). This reading of the statute is reasonable, gives meaning to all the words chosen by the Legislature, and conforms with our previous rulings that this court will not involve itself in determining religious dogma. See, e.g., *United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc.,* 349 Mass. 595, 598, 211 N.E.2d 332 (1965) ("It is settled by our decisions that courts will not interfere in a controversy which is exclusively or primarily of an ecclesiastical nature"); *Moustakis v. Hellenic Orthodox Soc'y,* 261 Mass. 462, 466, 159 N.E. 453 (1928) ("It is not the province of civil courts to enter the domain of religious denominations for the purpose of deciding controversies touching matters exclusively ecclesiastical"). Contrary to being rendered superfluous by such a reading of the statute, the language "as required by that creed or religion" is necessary to limit protection only to those practices a person sincerely believes ****1306** are required by his or her religion. It is the court's interpretation of the statute, and not the words of the statute, which thwarts the legislative intent.

FN3. Such a reading of the statute comports with Federal caselaw under the First Amendment to the United States Constitution and § 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)(1) (Title VII). See *Frazee v. Illinois Dep't of Employment Sec.,* 489 U.S. 829, 832-833, 109 S.Ct. 1514, 1516-1517, 103 L.Ed.2d 914 (1989), holding that *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), and *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), all rested on the fact that each of the claimants had a sincere belief that his or her religion required him or her to refrain from the work in question not on consideration that each was a member of a particular religious sect or on a tenet of a sect forbidding such work. The Supreme Court, in *Frazee,* explicitly rejected the notion that to claim the protection of the free exercise clause one must be responding to the commands of a particular religious organization. *Frazee, supra* at 834, 109 S.Ct. at 1517-18. See also *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 73-74, 97 S.Ct. 2264, 2271-2272, 53 L.Ed.2d 113 (1977) (noting that 1972 amendments to Title VII defined religion to include all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate without undue hardship).

The case should be remanded to the Superior Court for a determination whether the plaintiffs sincerely believed that their religion forbade them from working on Christmas. [FN4] The issue on remand is purely one of credibility. Any inquiry into the doctrines of the Roman Catholic Church and any testimony by religious authorities is unnecessary as both irrelevant to the inquiry and in violation of the

establishment clauses. If, on remand, the plaintiffs satisfy their burden of showing a sincerely held belief that their religion requires them to abstain from servile work on Christmas, the burden would then shift to the defendant to prove that undue hardship would result from any accommodation made to meet the plaintiffs' religious needs. See G.L. c. 151B, § 4(1A).

> FN4. Remand is necessary because there is a genuine factual dispute as to the sincerity of the plaintiffs' beliefs that they must abstain from work on holy days. The plaintiffs allege in their affidavits a belief that Christmas is a holy day of obligation, that Christmas is the most significant occasion of the Church year, and that working on Christmas offends the requirements of their religion. The defendant, however, asserts in an affidavit that the plaintiffs have worked on other holy days of obligation, thereby questioning the sincerity of the plaintiffs' beliefs.

423 Mass. 534, 668 N.E.2d 1298, 71 Fair Empl.Prac.Cas. (BNA) 1145, 68 Empl. Prac. Dec. P 44,187

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804 N.E.2d 894
441 Mass. 188, 804 N.E.2d 894, 93 Fair Empl.Prac.Cas. (BNA) 749
(Cite as: 441 Mass. 188, 804 N.E.2d 894)

Briefs and Other Related Documents

Supreme Judicial Court of Massachusetts,
Bristol.
Kathleen PIELECH & another [FN1]

FN1. Patricia Reed.

v.
MASSASOIT GREYHOUND, INC. (and a companion case).

Argued Dec. 1, 2003.
Decided March 11, 2004.

Background: Following remand of employees' action against employer for discrimination, 47 Mass.App.Ct. 322, 712 N.E.2d 1200, the Superior Court Department, Bristol County, John A. Tierney, J., refused to allow employees to amend complaint to add Title VII claim but entered judgment on jury verdict for employees on other claims. Parties appealed, and case was transferred.

Holdings: The Supreme Judicial Court, Ireland, J., held that:
(1) employer's due process rights were violated by retroactive application of amendments to statute protecting an employee from being required to work in contravention of sincerely held religious belief, and
(2) trial court acted within its discretion in refusing to allow employees to amend complaint.
Affirmed in part and vacated in part with directions.

West Headnotes

[1] Statutes k262
361k262
Where it appears that the Legislature intended an act to be retroactive, this intent should be given effect in so far as the Massachusetts and Federal Constitutions permit.

[2] Constitutional Law k188
92k188
Only those retroactive statutes which, on a balancing of opposing considerations, are deemed to be unreasonable, are held to be unconstitutional.

[3] Constitutional Law k48(1)
92k48(1)
A statute is presumed to be constitutional and every rational presumption in favor of the statute's validity is made.

[4] Constitutional Law k48(3)
92k48(3)
A party challenging the constitutionality of a statute bears a heavy burden to demonstrate, beyond a reasonable doubt, that there are no conceivable grounds supporting its validity.

[5] Constitutional Law k47
92k47

[5] Constitutional Law k70.3(1)
92k70.3(1)

[5] Constitutional Law k70.3(4)
92k70.3(4)
In determining whether a statute is constitutional, a court is only to inquire into whether the Legislature had the power to enact the statute and not whether the statute is wise or efficient.

[6] Civil Rights k1106
78k1106

[6] Constitutional Law k253(4)
92k253(4)
Employer's due process rights were violated by retroactive application of amendments to statute protecting employee from being required to work in contravention of sincerely held religious belief; amendments removed requirement that employee's belief be shared by others belonging to an organized church or sect and thus created new substantial right. U.S.C.A. Const.Amend. 14; M.G.L.A. Const. Pt. 1, Art. 10; M.G.L.A. c. 151B, § 4, subd. 1A.

[7] Judgment k581
228k581
Application of doctrine of res judicata to case that was reopened under rule governing relief from judgment did not defeat purpose of rule. Rules Civ.Proc., Rule 60(b)(6) 43B M.G.L.A.

[8] Appeal and Error k1201(6)
30k1201(6)

Trial court acted within its discretion on remand in refusing to allow employees to amend their complaint to add federal Title VII claim to their claim for discrimination under Commonwealth law; employees had had ample prior opportunities to raise Title VII claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[9] Pleading k236(1)
302k236(1)
The decision to grant a motion to amend complaint falls within the motion judge's broad discretion.

West Codenotes
Unconstitutional as Applied

M.G.L.A. c. 151B, § 4(1A)

****895 *189** Harvey Weiner, Boston (Barry D. Ramsdell & Michael P. Duffy with him) for the plaintiffs.

Joel A. Kozol, Boston (Christine P. Deshler with him) for the defendant.

****896 *188** Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, SOSMAN, & CORDY, JJ.

***189** IRELAND, J.

This case has a long procedural history, which we discuss below, concerning the same plaintiffs who were before this court in *Pielech v. Massasoit Greyhound, Inc.,* 423 Mass. 534, 668 N.E.2d 1298 (1996), cert. denied, 520 U.S. 1131, 117 S.Ct. 1280, 137 L.Ed.2d 356 (1997) (*Pielech I*). In *Pielech I,* this court declared G.L. c. 151B, § 4(1A), unconstitutional. Subsequently, the Legislature amended the statute, including a provision to make the amendment retroactive. St.1997, c. 2. After a jury trial in the Superior Court where the defendant was found, inter alia, liable for discrimination, the parties filed cross appeals. We transferred the case here on our own motion.

Because we conclude that the changes to G.L. c. 151B, § 4(1A), have a substantial effect on the defendant's rights, retroactive application of those changes violates the defendant's due process rights under the Fourteenth Amendment to the United States Constitution and art. 10 of Massachusetts Declaration of Rights.

1. *Procedural background.*

We recount the relevant procedural history, much of which is discussed in *Pielech I, supra; Opinion of the Justices,* 423 Mass. 1244, 673 N.E.2d 36 (1996); and *Pielech v. Massasoit Greyhound, Inc.,* 47 Mass.App.Ct. 322, 712 N.E.2d 1200 (1999) (*Pielech II*).

a. *Before the 1997 amendment.* This case began when the two plaintiffs alleged that they were discriminated against after the defendant terminated their part-time jobs when they refused to work their regularly scheduled shift, which fell on Christmas Day of 1992. The plaintiffs claimed that they were devout Roman Catholics and their beliefs obligated them to refuse to work on Christmas Day. In their complaint, the plaintiffs alleged discrimination (G.L. c. 151B, § 4 [1A]), violation of the Massachusetts Equal Rights Act (G.L. c. 93, § 102), and intentional and negligent infliction of emotional distress. A Superior Court judge granted the defendant's cross motion for summary judgment on the issue of liability under G.L. c. 151B, ***190** § 4(1A), because no tenet of Roman Catholic dogma required that the plaintiffs abstain from working on Christmas Day.

The plaintiffs appealed, and in *Pielech I,* this court held that G.L. c. 151B, § 4(1A), violated the establishment clause because it protected an employee from being required to work in contravention of a sincerely held religious belief only if that belief was shared by others belonging to an organized church or sect. See *Opinion of the Justices, supra* at 1245, 673 N.E.2d 36. In response, the Legislature amended the statute in 1997, granting individuals protection from discrimination for their sincerely held religious beliefs, whether or not such beliefs are part of religious dogma.

Moreover, the Legislature made the 1997 statute retroactive. Section 3 of St.1997, c. 2, states:

> "The provisions of section two of this act shall apply to all claims arising not earlier than three years before the effective date of this act which have not yet been filed, and to all other claims pending before the commission against discrimination or a court on the effective date of this act, including claims upon which final judgment or judgment after rescript has not entered or as to which a period to file an appeal, certiorari petition, petition for rehearing or similar motion has not expired on said effective date."

****897** In 1996 (before the Legislature adopted the amended statute) an order adopted by the House of Representatives and submitted to the Justices asked, inter alia, whether the retroactive provision in the amendment violated the due process clause of the

Fourteenth Amendment and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights. The Justices declined to address the question, stating, "[T]he answer ... will depend on the facts of each case." *Opinion of the Justices, supra* at 1247, 673 N.E.2d 36.

b. *After the 1997 amendment.* The day after the 1997 statute was enacted, "the plaintiffs initiated a separate action ... in the Superior Court under G.L. c. 151B, § 4(1A), as amended by St.1997, c. 2, repeating the discrimination claims of their 1993 complaint." *Pielech II, supra* at 324, 712 N.E.2d 1200. [FN2] In addition, inter ***191** alia, "the plaintiffs ... on March 28, 1997, ... fil [ed] an 'emergency' motion pursuant to Mass. R. Civ. P. 60(b)(6), 365 Mass. 828 (1974), in which they sought relief from the summary judgment dismissing their original complaint ... [and] filed a motion to amend their original complaint by substituting the amended § 4(1A) and adding a count under Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e (1994), accompanied by a 'First Amended Complaint' that repeated verbatim the counts under G.L. c. 93, § 102, and for intentional and negligent infliction of emotional distress contained in their original complaint. On April 25, 1997, the rule 60(b)(6) motion was denied by the same Superior Court judge." [FN3] *Pielech II, supra* at 324, 712 N.E.2d 1200.

> FN2. The plaintiffs also filed, and the United States Supreme Court denied, a petition for certiorari. That part of the procedure is discussed in *Pielech v. Massasoit Greyhound, Inc.,* 47 Mass.App.Ct. 322, 324, 712 N.E.2d 1200 (1999) (*Pielech II*), and need not be repeated here.

> FN3. These motions followed the denial of the plaintiffs' petition for certiorari. See *Pielech II, supra.*
> Three judges made rulings concerning the plaintiffs' action. We shall refer to the judge who ruled on the defendant's motion for judgment notwithstanding the verdict as the "trial judge." We shall use the term "motion judge" to refer to the judges who ruled on the plaintiffs' motion to amend their complaint and their motion pursuant to Mass. R. Civ. P. 60(b), 365 Mass. 828 (1974).

The plaintiffs appealed. The Appeals Court reversed the motion judge's denial of the rule 60(b)(6) motion as to the plaintiffs' claims under the 1997 statute only. [FN4] *Pielech II, supra* at 328, 712 N.E.2d 1200. The Appeals Court did not decide the issue of the constitutionality of the 1997 statute. *Pielech II, supra* at 327-328, 712 N.E.2d 1200.

> FN4. Regarding the plaintiffs' other claims, the Appeals Court foreclosed the plaintiffs from pursuing their G.L. c. 93 and intentional infliction of emotional distress claims, but stated, "The plaintiffs' motion to amend their original complaint by adding a count under Title VII also appears to be duplicative of the c. 151B claim, but, in any event, the disposition of that motion is left to the Superior Court on remand." *Pielech II, supra* at 327, 712 N.E.2d 1200.

After the motion judge denied the plaintiffs' motion to amend the complaint to add a Title VII claim and consolidated the two cases, the matter went to trial on the G.L. c. 151B, § 4(1A), claim. At the close of evidence, the trial judge denied the defendant's motion for a directed verdict pursuant to Mass. R. Civ. P. 50(a), 365 Mass. 814 (1974), on the ground that the retroactive application of the 1997 statute violated its due process rights. The jury returned a special verdict, finding that ***192** the defendant had discriminated against the plaintiffs and that its refusal to accommodate the plaintiffs' religious beliefs was not because ****898** of an undue hardship. The jury awarded compensatory damages to both plaintiffs and punitive damages in the amount of one dollar each. The trial judge ruled on posttrial motions from both the plaintiffs and defendant, but the only posttrial motion relevant here is the defendant's motion for judgment notwithstanding the verdict. The trial judge denied that part of the defendant's motion concerning whether the retroactive application of the 1997 statute violated its due process rights. [FN5]

> FN5. The trial judge's denial of the defendant's motion for judgment notwithstanding the verdict on the ground that the amended statute violates the establishment clause was not appealed.

Both parties raise several issues on appeal. [FN6] However, because we conclude that the retroactive clause of the 1997 statute violates the defendant's due process rights, we need not address all of them.

> FN6. The plaintiffs argue that the motion judge erred in denying them leave to amend their complaint to add a Title VII claim, which we discuss, *infra.* They also argued that the trial judge erred in denying them punitive damages under the 1997 statute's retroactive provision, charging the jury and

admitting irrelevant and prejudicial evidence (requiring a new trial on the award of punitive damages), and reducing the award of attorney's fees they requested. The plaintiffs also asked this court to award appellate attorney's fees and costs.

In addition to the argument that we address in this opinion, that the retroactive application of the 1997 statute violated its due process rights, the defendant argues that the trial judge erred in allowing the plaintiffs to recover prejudgment interest for the period prior to the enactment of the 1997 statute, and that the amount of attorney's fees awarded was excessive.

2. *Discussion.*

[1] a. *Retroactivity of the 1997 statute.* "Where it appears that the Legislature intended an act to be retroactive, this intent should be given effect in so far as the Massachusetts and Federal Constitutions permit." *St. Germaine v. Pendergast,* 416 Mass. 698, 702, 626 N.E.2d 857 (1993), citing *Canton v. Bruno,* 361 Mass. 598, 606, 282 N.E.2d 87 (1972).

[2][3][4][5] Only those retroactive statutes "which, on a balancing of opposing considerations, are deemed to be unreasonable, are held to be unconstitutional." *Leibovich v. Antonellis,* 410 Mass. 568, 577, 574 N.E.2d 978 (1991), quoting *American Mfrs. Mut. Ins. Co. v. Commissioner* ***193*** *of Ins.,* 374 Mass. 181, 189-190, 372 N.E.2d 520 (1978). [FN7] See *St. Germaine v. Pendergast, supra* at 702-704, 626 N.E.2d 857. A statute is presumed to be constitutional and every rational presumption in favor of the statute's validity is made. *Id.,* and cases cited. The challenging party bears a heavy burden to demonstrate, beyond a reasonable doubt, that there are no conceivable grounds supporting its validity. *Id.* at 703, 626 N.E.2d 857, citing *Leibovich v. Antonellis, supra* at 576, 574 N.E.2d 978. A court is only to inquire whether the Legislature had the power to enact the statute and not whether the statute is wise or efficient. *St. Germaine v. Pendergast, supra* at 703, 626 N.E.2d 857, citing *Leibovich v. Antonellis, supra.*

FN7. *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.,* 374 Mass. 181, 191, 372 N.E.2d 520 (1978), identified a three-prong test with which to analyze the reasonableness of a retroactive statute: the nature of the public interest, the nature of the rights affected retroactively, and the extent or scope of the statutory effect or impact. We acknowledge, but need not address, each argument the parties made concerning these factors.

As we noted above, the Legislature's enactment of the 1997 statute was in response to our decision in *Pielech I.* See *Opinion of the Justices, supra* at 1244-1245, 673 N.E.2d 36. In *Pielech I, supra* ****899*** at 536-539, 668 N.E.2d 1298, this court determined that the defendant did not violate the earlier version of the statute because it covered religious discrimination only if the religious belief or practice was required by a religion; it did not cover sincerely held religious beliefs. The court went on to hold, however, that that very feature was what rendered the statute unconstitutional. *Id.* at 540-542, 668 N.E.2d 1298.

This case is similar to and governed by *St. Germaine v. Pendergast, supra.* St. Germaine was severely injured while working on the defendant's single-family home. *Id.* at 699-700, 626 N.E.2d 857. St. Germaine and his parents brought an action claiming, inter alia, that the defendant was liable for violating provisions of G.L. c. 143, § 51. *Id.* at 700, 626 N.E.2d 857. This court held that the relevant provisions of G.L. c. 143, § 51, did not cover a single-family home under construction. *Id.* at 700-701, 626 N.E.2d 857. In response, the Legislature enacted St.1992, c. 66, and amended the statute, inserting language that covered the defendant's actions and made the 1992 statute retroactive. *Id.* at 701, 626 N.E.2d 857. The court held:

> "The substantial effects the statute would have on [the ***194*** defendant's] rights, holding his past actions to a new and significant obligation, offset any public interest there may be in providing retroactively for civil liability for violations of the State Building Code. We conclude that the retroactive application of St.1992, c. 66, amending G.L. c. 143, § 51, to [the defendant] is unreasonable and violates art. 10.... [F]airness is the touchstone of due process and to hold [the defendant] liable to new obligations would offend fundamental fairness. A statute that retroactively imposes liability, without regard to fault, on a person who could reasonably have relied on the law at the time he elected to perform an act on which the new statutory liability is sought to be based violates art. 10, where no significant public interest is served by creating liability."

Id. at 703-704, 626 N.E.2d 857.

[6] Like the statute in the *St. Germaine* case, the 1997 statute created a new substantial right. The statute as it existed in 1992 did not cover discrimination based on an individual's sincerely held religious beliefs, but the 1997 statute does. In this case, if the plaintiffs are

allowed to use the retroactive section of the 1997 statute, the defendant will be held to an obligation that the law did not require of it at the time of the incident. At the time the plaintiffs were terminated, G.L. c. 151B, § 4(1A), plainly stated that it protected only those individuals who were observing the requirements of an organized religion, and case law described that statutory requirement in similar terms. See, e.g., *Kolodziej v. Smith,* 412 Mass. 215, 220-221, 588 N.E.2d 634 (1992) (employer's requiring attendance at work-related nondenominational seminar that used religious references does not violate requirements of plaintiff's religion; G.L. c. 151B, § 4[1A], covers required religious practices); *Lewis v. Area II Homecare for Senior Citizens, Inc.,* 397 Mass. 761, 771-772, 493 N.E.2d 867 (1986) (no violation of G.L. c. 151B for discharge of employee who took unapproved two-month leave of absence to do missionary work for her church where religion did not mandate particular time period and place for missionary work). See also *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination,* 401 Mass. 566, 517 N.E.2d 1270 (1988).

We conclude that the effect on the defendant's rights of the ***195** liability newly ****900** created by the 1997 statute offsets any public interest there may be in providing a retroactive cause of action for discrimination based on sincerely held religious beliefs. *St. Germaine v. Pendergast, supra* at 703, 626 N.E.2d 857. Cf. *Leibovich v. Antonellis, supra* at 576-578, 574 N.E.2d 978 (upholding retroactive application of statute authorizing parent's right to bring claim for loss of consortium of child where statute did not alter standards for determining kind of behavior constituting negligence, but merely expanded class of potential plaintiffs who may recover for their injuries); *Keniston v. Assessors of Boston,* 380 Mass. 888, 904-906, 407 N.E.2d 1275 (1980) (limiting application of retroactive tax legislation, where legislature's time period too oppressive); *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., supra* at 192-194, 372 N.E.2d 520 (upholding retroactive application of automobile insurance statute where legislation was emergency in nature to remedy substantial defect that could not have been perceived at time of previous law's enactment and Commissioner of Insurance had implied power of retroactive adjustment in intensely regulated industry). The issue is not whether there is an important public interest at stake in prohibiting discrimination against persons for their sincerely held religious beliefs-- there obviously is such an interest. Rather, the issue is whether there is an important public interest in making that prohibition operate retroactively. Here, there is no indication that any significant number of persons will benefit from or need the retroactivity provision, and indeed, there is every indication that the retroactivity provision was enacted solely to benefit these plaintiffs. See generally *St. Germaine v. Pendergast, supra* at 701, 703- 704, 626 N.E.2d 857. Cf. *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., supra* at 192, 372 N.E.2d 520 (retroactive legislation to correct impact of insurance rates on large numbers of citizens).

In denying the part of the defendant's posttrial motion for a judgment notwithstanding the verdict concerning the retroactivity of the 1997 statute, the trial judge relied on Title VII. He reasoned, and the plaintiffs also argue, that because Title VII already prohibited discrimination against a person's sincerely held religious beliefs, and the defendant was subject to Title VII, the defendant could not have reasonably relied solely on Massachusetts law when it terminated the plaintiffs. We are unpersuaded by that argument. As discussed, the 1997 statute created ***196** new legal liability on the defendant that did not exist when the plaintiffs' complaint arose. Although Title VII did include protection for sincerely held religious beliefs, the employer's burden to accommodate those religious beliefs under Title VII is not the same as the burden imposed by the 1997 statute. Indeed, Title VII relieves an employer of the obligation to accommodate when that accommodation would impose even a de minimis cost on the employer. [FN8] See, e.g., *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination,* 401 Mass. 566, 577, 517 N.E.2d 1270 (1988) (affirming finding that employer did not incur more than de minimis cost to accommodate plaintiff's religious needs, in action under both Title VII and G.L. c. 151B, § 4[1A]). By comparison, the undue hardship standard under G.L. c. 151B, ****901** § 4(1A), includes "the inability of an employer to provide services which are required by and in compliance with all federal and state laws ... or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation." Because the plaintiffs failed to raise Title VII in the original complaint, the jury did not consider the evidence in light of Title VII. We have no way of knowing what the jury's verdict would have been had they considered Title VII's undue hardship standard, but we do know that the standard is notably different from

that imposed by G.L. c. 151B, § 4(1A). As such, one cannot treat Title VII as a sufficiently precise equivalent to the 1997 statute to avoid due process problems with retroactivity.

> FN8. In fact, the plaintiffs' counsel objected to the trial judge's failure to instruct the jury that Title VII's "de minimis" standard for the accommodation required of the employer was not enough under the 1997 statute. At oral argument, the plaintiffs' counsel conceded that, if there was more than a de minimis cost to the defendant, Title VII would entitle the defendant to judgment in its favor.

[7] b. *Denial of the plaintiffs' motion to amend.* The plaintiffs argue that we should reverse the motion judge's denial of their motion to amend their complaint to add a Title VII claim. They ***197** argue that his decision was based on an error of law because he stated that the plaintiffs' claim was barred by the doctrine of res judicata. They claim that applying the doctrine of res judicata to a case that was reopened under rule 60(b)(6) defeats the purpose of the rule. We disagree; it was not an error of law for the motion judge to deny the motion. The cases on which the plaintiffs rely to argue error of law are not apt. See, e.g., *Shaughnessy v. Board of Appeals of Lexington,* 357 Mass. 9, 12, 14, 255 N.E.2d 367 (1970) (error of law where judge denied motion because of his ruling that he lacked jurisdiction to hear case); *Cuzzi v. Board of Appeals of Medford,* 2 Mass.App.Ct. 887, 318 N.E.2d 842 (1974) (same); *Loranger Constr. Corp. v. E.F. Hauserman Co.,* 1 Mass.App.Ct. 801, 294 N.E.2d 453 (1973) (judge erred in denying motion to amend on grounds that party failed to state cause of action).

[8][9] The plaintiffs next argue that the motion judge had no basis to deny the motion, even if it was within his discretion. Again, we disagree. The Appeals Court reversed the judge's denial of the plaintiffs' rule 60(b)(6) motion only as to the plaintiffs' claim under the 1997 statute. The Appeals Court left it to the motion judge to determine the disposition of the motion to amend. *Pielech II, supra* at 328-329, 712 N.E.2d 1200. We cannot say that the motion judge abused his discretion in denying the plaintiffs' motion to amend their complaint to add a Title VII claim, especially given the procedural permutations of this case, and the lateness of the plaintiffs' motion. The motion judge held that denying the motion to amend was not unfair because the plaintiffs had had ample opportunity to raise a Title VII claim. Moreover, the motion judge, citing the Appeals Court's decision in *Pielech II,* stated that it was not unfair to deny the addition of an unpleaded theory (Title VII) where the plaintiffs' two other claims, which were pleaded, were foreclosed because they could have been the subject of an appeal after *Pielech I.* [FN9] The motion judge also stated that the other claims "passed into finality" when the United ****902** States Supreme Court denied the plaintiffs' petition for certiorari. The decision to grant a motion ***198** to amend falls within the motion judge's broad discretion, *Harvard Law Sch. Coalition for Civil Rights v. President & Fellows of Harvard College,* 413 Mass. 66, 72, 595 N.E.2d 316 (1992), and we see no abuse of discretion.

> FN9. This court did not address the emotional distress claim and noted that the plaintiffs' treatment of the equal rights issue (G.L. c. 93, § 102) was insufficient appellate argument. *Pielech v. Massasoit Greyhound, Inc.,* 423 Mass. 534, 542, 668 N.E.2d 1298 (1996), cert. denied, 520 U.S. 1131, 117 S.Ct. 1280, 137 L.Ed.2d 356 (1997).

3. *Conclusion.*

For the reasons stated above, we conclude that a retroactive application of the 1997 statute would violate the defendant's due process rights under art. 10. Accordingly, we affirm the allowance of the defendant's motion for judgment notwithstanding the verdict with respect to the awarding of punitive damages and reverse the denial of the motion with respect to the issue of the retroactive application of the amended statute. We vacate the judgment for the plaintiffs and direct that judgment be entered for the defendant. We affirm the motion judge's denial of the plaintiffs' motion to amend their complaint.

So ordered.

441 Mass. 188, 804 N.E.2d 894, 93 Fair Empl.Prac.Cas. (BNA) 749

Briefs and Other Related Documents (Back to top)

. 2003 WL 23282446T2 (Appellate Brief) Brief for the Defendant/Appellant/Cross-Appellee Massasoit Greyhound Association, Inc. (Aug. 01, 2003)Original Image of this Document (PDF)

. 2003 WL 23282448T2 (Appellate Brief) Reply Brief for the Defendant/Appellant/Cross-Appellee Massasoit Greyhound Association, Inc. (Aug. 01, 2003)Original Image of this Document (PDF)

. SJC-09080 (Docket) (Aug. 01, 2003)

. 2003 WL 23282447T2 (Appellate Brief) Reply Brief for the Plaintiffs/Appellees/Cross-Appellants Kathleen Pielech and Patricia Reed (Apr. 24, 2003)Original Image of this Document (PDF)

. 2002 WL 32364833T2 (Appellate Brief) Brief for the Plaintiffs/Appellees/Cross-Appellants Kathleen Pielech and Patricia Reed (Sep. 12, 2002)Original Image of this Document with Appendix (PDF)

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