2001 WL 1168156
United States District Court, S.D. Indiana, Indianapolis Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
OAK–RITE MANUFACTURING CORPORATION, Defendant.

No. IP99–1962–C–H/G. | Aug. 27, 2001.

Opinion

ENTRY ON SUMMARY JUDGMENT MOTIONS

DAVID F. HAMILTON, Judge.

***1** This case presents a conflict between the religious beliefs of a job applicant and an employer's safety policies. For safety reasons, defendant Oak–Rite Manufacturing Corporation requires employees to wear long pants in its metal-working factory. The Equal Employment Opportunity Commission (EEOC) has sued Oak–Rite on behalf of Brenda S. Enlow. Enlow's religion requires women to wear modest skirts and dresses, not pants. Enlow applied for a press operator job at Oak–Rite. She was not hired because she said she could not comply with its pants-only policy.

The EEOC claims that Oak–Rite discriminated against Enlow on the basis of religion, in violation of Title VII of the Civil Rights Act of 1964, by failing to accommodate Enlow's religious belief by allowing her to wear a long skirt to work in the factory. The EEOC also claims that Oak–Rite violated the record-keeping provisions of Title VII. Oak–Rite has moved for summary judgment on the EEOC's religious discrimination claim. The EEOC has moved for summary judgment on its record-keeping claim.

As explained below, the court grants Oak–Rite's motion. Oak–Rite's pants-only policy is a facially neutral and reasonable safety measure. There is no evidence of any religious hostility on the part of Oak–Rite. An employer's duty under Title VII to accommodate religious practices is limited to workplace modifications that place no more than a *de minimis* burden on the employer. The accommodation that the EEOC suggests—"a reasonably close-fitting, denim or canvas dress/skirt that extends to within two or three inches above the ankle, when worn with leather above-the-ankle boots extending up under the dress/skirt"—would impose an undue hardship on Oak–Rite by requiring it to experiment with employee safety. The proposed accommodation raises its own problems in terms of trade-offs between entanglement of a long skirt and/or severe restrictions on mobility and flexibility. No evidence shows that the proposed solution has worked safely in any comparable manufacturing setting. The employer's limited duty of accommodation under Title VII does not require an employer to choose between potential Title VII liability on the one hand and experimenting with increased risk of workplace injuries on the other.

The court also grants the EEOC's motion for summary judgment on the record-keeping claim. The undisputed facts show that Oak–Rite violated the statutory requirements as a matter of standard operating practices.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). However, summary judgment is not a substitute for a jury's determination about credibility or about whether a reasonable inference should be drawn from circumstantial evidence of a person's intentions. Under Rule 56(c) of the Federal Rules of Civil Procedure, the court should grant summary judgment if and only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Pafford v. Herman,* 148 F.3d 658, 665 (7th Cir .1998).

***2** On a motion for summary judgment, the moving party must first come forward and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that the party believes demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the moving party has met the threshold burden of supporting the motion, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

In determining whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to and draw all reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Haefling v. United Parcel Service, Inc.,* 169 F.3d 494, 497 (7th Cir.1999). However, the existence of "some alleged factual dispute between the parties," or "some metaphysical doubt" does not create a genuine issue of fact. *Piscione v. Ernst & Young, L.L.P.,* 171 F.3d 527, 532 (7th Cir.1999). Rather, the proper inquiry is whether a rational trier of fact could reasonably find for the party opposing the motion with respect to the particular issue. See, *e.g., Jordan v. Summers,* 205 F.3d 337, 342 (7th Cir .2000).

Local Rule 56.1 Issues

The EEOC has raised several issues under this court's Local Rule 56.1, which governs the mechanics of summary judgment practice in this district. The court addresses the most significant of those objections by category.

The EEOC complains that many of Oak–Rite's stated facts contain argument, such as "all plant personnel must adhere to the safety and personal protective equipment policies," and "Enlow did not identify her religion or request an accommodation." Both of those assertions strike the court as statements of fact that could be verified or falsified. The EEOC has offered argument (but not evidence) to rebut those assertions. See Local Rule 56.1(f) & (g) (moving party's properly supported facts are treated as undisputed unless they are specifically controverted by citation to record evidence).

As the EEOC has acknowledged, there is a thin line between describing facts and making arguments. In general, Oak–Rite's submissions have not crossed that line, but there is one minor exception. The court sustains the EEOC's objection to Oak–Rite's assertion that "Enlow admitted Oak–Rite did not disparage her religion and that she had no evidence to demonstrate that Oak–Rite acted intentionally, recklessly or with indifference." The deposition testimony on which Oak–Rite relies indicates only that Enlow could not identify any evidence to support particular allegations in the complaint drafted by the EEOC.[1]

The EEOC also objects to certain paragraphs of the 31 employee affidavits Oak–Rite has submitted. The affidavits are very similar in content, though not quite identical. The EEOC contends that the affidavits include inadmissible lay opinions under Fed.R.Evid. 701 and that they contain irrelevant and immaterial information.

***3** Federal Rule of Evidence 701 provides that lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed.R.Evid. 701. The decision to admit lay opinion testimony under Rule 701 is committed to the district court's discretion. *United States v. Espino,* 32 F.3d 253, 256–57 (7th Cir.1994).

The EEOC argues that lay opinions must be based on "special knowledge" to be admissible. EEOC Br. at 10, citing *Asplundh Manufacturing Division v. Benton Harbor Engineering,* 57 F.3d 1190, 1202 (3d Cir.1995), for the proposition that lay opinion testimony must be based on "special knowledge or experience to ensure that the lay opinion is rationally derived from the witness's observation ."[2]

The EEOC overstates Rule 701's requirements, which are not onerous. Lay witnesses may offer opinions based on their own experiences. See Fed.R.Evid. 701, advisory committee notes (lay testimony results from a process of reasoning familiar in everyday life). Conversely, they may not offer opinions about matters about which they lack personal knowledge or other appropriate foundation. See *Gorby v. Schneider Tank Lines, Inc.,* 741 F.2d 1015, 1021 (7th Cir.1984) (eyewitness could not offer opinion about whether truck driver could have avoided accident; although witness knew how to drive, he was not present in the truck and there was no evidence that he was familiar with the type of truck involved). In addition, as the 2000 amendment to Rule 701 makes explicit, lay witnesses may not offer expert opinion about scientific or technical matters

without satisfying Rule 702's requirements for expert testimony.

The court overrules the EEOC's Rule 701 objections to those portions of the employee affidavits that address the scope and enforcement of Oak–Rite's pants-only policy; the perceived effectiveness of the policy; female employees' opinions that they would not wear skirts to work because of safety concerns; and employees' opinions that they would not wear shorts or skirts in the plant because of safety concerns. These assertions do not depend on specialized technical or scientific knowledge. The affidavits sufficiently demonstrate that the affiants have personal knowledge of these matters.

The court sustains the EEOC's Rule 701 objections to those portions of the affidavits stating Oak–Rite's reason for its dress code (¶ 18 in most of the affidavits); and predicting that changing the pants-only policy would result in more serious injuries to employees (¶¶ 16–17 in most of the affidavits). Based on the record evidence, the affiants lack the personal or specialized knowledge required to predict reliably that changing the pants-only policy would actually cause an increase in employee injuries. In addition, no evidence shows that the employee-affiants have personal knowledge about the reasons for Oak–Rite's policy decisions. The court has included the relevant facts from the affidavits in the statement of facts below.

***4** The EEOC also has argued that Oak–Rite's denials of many assertions in the EEOC's statement of additional facts proves that there are disputed questions of fact for trial. A moving party's denial of assertions in a non-moving party's statement of additional facts has little point. If the non-moving party has asserted facts without sufficient support in the evidence or based on inadmissible evidence, the moving party may find it worthwhile to make those points. Because the court must construe evidence in the light reasonably most favorable to the non-moving party, however, the moving party need not and should not try to respond with denials based on conflicting evidence. The failure to "deny" such assertions of additional facts at the summary stage does not amount to an admission for purposes of future proceedings.

Undisputed Facts

For purposes of Oak–Rite's summary judgment motion, the following facts are either undisputed or reflect the record in the light reasonably most favorable to the EEOC.

Oak–Rite's Business and Factory: Oak–Rite manufactures large and small metal parts. Oak–Rite is a "job shop," which means that it makes many different types of parts depending on customers' needs at a given time. Oak–Rite has produced items including automotive trim and ashtrays, burner rings for electric stoves, oven door frames, and furnace filter frames. Oak–Rite employs about 38 production workers.

Oak–Rite employees work with a variety of metals including stainless steel, aluminum, brass, coil roll steel and pre-finished vinyl clad. The metals range in thickness from 8 thousandths to 120 thousandths of an inch thick. For purposes of comparison, a typical razor blade is 20 to 25 thousandths of an inch thick.

It is Oak–Rite's policy that all employees must be able to operate all of the machines in the plant. The reason for the policy is that Oak–Rite's production demands change depending on customer orders. J. Steward Dep. at 81, 85–87. As a practical matter, however, some employees have never operated certain machines. See Herron Dep. at 26–28, 32. Employees work on the machines for which they have received training. See Turley Dep. at 37. Some employees become particularly adept with certain machines. See Herron Dep. at 23; Turley Dep. at 34. In addition, some machines require a good deal of physical strength and have been operated only by men. Herron Dep. at 26–27.

Employees may be allowed to express their preference not to work on certain machines. Herron Dep. at 32; Turley Dep. at 34, 36–37. However, "you have to do what they tell you," particularly if the plant is shorthanded. Herron Dep. at 32. If an employee does not have the skills to run machinery, he or she initially might be assigned packing or assembly tasks, but such an employee eventually would be expected to run machinery. Turley Dep. at 39.

If hired, Brenda Enlow would have worked as a press operator. Oak–Rite would have expected her to be able to run a press (of which there are several types), as well as a rivet machine and grinder. J. Steward Dep. at 77–85.

***5** Many of the machines at Oak–Rite require the use of foot pedals. Turley Dep. at 22–23. The pedals are located a few inches to seven or eight inches to one foot off the ground. Turley Dep. at 31 (pedals are up to seven to eight inches off of the ground); Herron Dep. at 24 (you have to lift your leg knee-high, up to a foot off of the ground). The foot pedals can be

adjusted on some machines. Herron Dep. at 25. The rivet machine requires the operator to sit close to the machine with her legs apart at about a 90 degree angle to accommodate the part being worked on (usually a furnace filter). Turley Dep. at 57, 70; J. Steward Dep. at 78.[3]

Oak–Rite's Safety Policy: Oak–Rite has required employees to wear pants as a safety precaution since 1960. Oaks Dep. at 55. Employees are not permitted to wear shorts or skirts. In 1996, Oak–Rite adopted for all plant personnel a Personal Protective Equipment Policy (PPEP), which incorporated the longstanding pants-only policy. The PPEP also prohibits sleeveless shirts and thin-soled shoes, and it requires employees to wear protective gloves and eyewear when appropriate. See G. Steward Dep. at 45, Pl. Dep. Ex. 2 ("1. Pants will be worn that are full length whereby not having any exposed skin. 2. Shirts and blouses will cover the stomach area and will also cover the shoulder and protrude down the arm a minimum of 3″.").

Oak–Rite developed the PPEP following a voluntary on-site consultation with the Indiana Department of Labor, Bureau of Safety, Education and Training, which the parties refer to as "IOSHA." See Yotz Report at 2–3. IOSHA provides free consultations to help small employers like Oak–Rite gain expertise in occupational safety and health matters. *Id.;* J. Steward Dep. at 50. IOSHA consultants inspect work sites to assess hazards and to determine compliance with OSHA standards. Yotz Report at 2. The participating employer must agree in advance to correct any serious hazards that a consultant may discover. If an employer fails to comply with a consultant's recommendation, the consultant refers the matter to an OSHA enforcement officer. *Id.* at 3; J. Steward Dep. at 50.

Oak–Rite requested an IOSHA consultation in 1995. Yotz Report at 3. In 1996, the IOSHA consultant issued a report based on his on-site visit. Among other things, the consultant concluded that Oak–Rite had failed to conduct, certify, and maintain a Personal Protective Equipment Hazard Assessment. *Id.*

In response to the consultation, plant manager Jerry Steward developed the PPEP by conducting a hazard assessment for each job. See J. Steward Dep. at 42–44; Pl. Dep. Ex. 2. Jerry Steward is responsible for enforcing the company's safety policies. During the hazard assessment, he considered various safety risks throughout the plant and developed plans to address those risks. Steward also completed a general form regarding hazards applicable to all plant personnel. Yotz Report at 3.

***6** The pants-only component of the PPEP is intended to reduce the exposure of skin to sharp metal parts and the risk that loose clothing could become stuck on parts or machinery. J. Steward Dep. at 46–47. The pants-only policy also assures that Oak–Rite employees are dressed in a "decent" manner. G. Steward Dep. at 46.[4]

In addition to the dress code in the PPEP, employees also must not wear too loose-fitting clothing to avoid getting it caught on machinery or parts. J. Steward Dep. at 90–91. Steward does not have a precise definition for measuring when clothing is too loose.

Oak–Rite enforces the pants-only policy. Empl. Affs. ¶ 7. Oak–Rite has sent an employee home for wearing pants to work that expose too much skin. Turley Dep. at 47. Oak–Rite has prohibited non-employees from entering the production floor in shorts and sandals. *Id.* at 52–53; Herron Dep. at 43. Oak Rite also has sent employees home for wearing loose sweatpants and has instructed an employee to tuck in a baggy shirt. J. Steward Dep. at 92; Turley Dep. at 82. In addition, Oak–Rite has sent employees home for wearing thin-soled shoes and has disciplined an employee for not wearing safety glasses. Turley Dep. at 54–55.

Enlow's Application to Oak–Rite: Brenda Enlow applied for a job at Oak–Rite on or about August 9, 1999. Jerry Steward interviewed her. J. Steward Dep. at 26. Enlow was considered for a press operator position, which was the only position available at the time. *Id.* at 77.

During the interview, Enlow told Steward that her religious beliefs prevented her from wearing pants. Enlow Decl. ¶ 7. Steward explained to Enlow that Oak–Rite employees must wear pants. Enlow Dep. at 71. Enlow stated that she would not wear pants to get the job. *Id.* at 71–72. Enlow did not request any modifications in the policy to accommodate her religious beliefs, nor did Steward suggest any possible modifications. Enlow Dep. 82–83; Enlow Decl. ¶ 11; J. Steward Dep. at 31–32. The subject simply did not come up.

Oak–Rite did not hire Enlow. J. Steward Dep. at 27. The undisputed evidence shows that Steward offered Enlow the job and she said, "I can't take the job." *Id.* Steward told Enlow to come back in or call if she ever changed her mind about wearing pants. Enlow Decl. ¶ 12. He also commented that machinists were hard to come by. *Id.* at ¶ 10.

Enlow did not discuss her religious beliefs in detail during the interview. According to Enlow, her belief that she should not

wear pants is based on Deuteronomy 22:5 which states that a woman shall not wear anything that pertains to a man. Enlow Decl. ¶ 5. (The King James Version reads: "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the Lord thy God.") In addition, Enlow is a member of the Conservative Holiness faith, which has the following dress code:

> ***7** 100. Attire. Women are to dress with the modesty and simplicity which has always characterized truly holy people. In the light of the Scriptures they are to avoid undue exposure of the body brought about by certain styles and are to be free from makeup, all rings and other items of ornamental jewelry; We are to maintain sleeves that extend below the elbow and dresses that extend below the knees. We further hold that natural (uncut) hair for women and girls is the rule of the Bible (except for medicinal reasons), and that masculine apparel for these is inconsistent with the same. While such precepts are directed largely toward women, it is out of harmony with the spirit of the Bible to exclude men from requirements regarding modesty, jewelry and simplicity. It is in keeping with the Word of God that men abstain from long hair (I Corinthians 11:14 & 15).

Enlow Dep. Ex. 4 (International Conservative Holiness Association Policy 1998 at 23); see also Enlow Dep. at 119–20.

Expert and Other Opinions: Both parties have retained experts on occupational safety who offer competing views on the relative safety of skirts. The EEOC's expert, Thomas J. Martin, does not dispute the need for protecting Oak–Rite employees' skin from sharp edges of metal parts. He proposes as a reasonable accommodation in this case allowing employees to wear a "reasonably close-fitting, denim or canvas dress/skirt that extends to within two or three inches above the ankle, worn with leather above-the-ankle boots extending up under the dress/skirt." Martin further opined that "the risk of entanglement while wearing a dress/skirt of the above type in the manufacturing areas of Oak–Rite at present is not appreciably different than wearing properly-sized pants in the same areas, unless Oak–Rite were to introduce entanglement hazards as discussed in the Report."

Martin agrees with Oak–Rite that the possibility of being cut by metal is a hazard. Martin Report at 5. Martin also acknowledged in his report:

> The wearing of a dress or skirt by shop workers in an industrial facility is not a common practice. From a safety perspective, the considerations to wearing a dress/skirt at Oak–Rite include an increased risk of entanglement in moving parts if guarding is not adequate below waist height, and the increased risk of cuts or abrasions from exposed skin on the legs of the wearer. Both of these considerations are highly dependent upon the type of skirt/dress, its length, "looseness," and the material it is made from.

Id. Martin's report does not offer any evidence of the use of his proposed solution—the "reasonably close-fitting" ankle-length skirt worn with above the ankle leather boots—in any manufacturing setting. Nor does any other evidence show the successful use of that solution in any manufacturing setting, especially one comparable to Oak–Rite's facility in terms of extremely sharp edges, machinery, and materials that could entangle loose clothing below the knee, and the need for mobility or flexibility.[5]

***8** During a visit to Oak–Rite, Martin observed an employee operating the rivet machine. The employee's legs were apart and he was straddling the machine while seated. Martin believes this operation could be performed by the operator sitting with her legs together (and presumably to one side of the machine), although this may be a less comfortable position. According to Martin, the operation also could be performed while standing, with minor modifications to the machine. *Id.* at 6. Martin's report does not indicate that he or anyone else tried these alternatives. (The court cannot help but note that both experts and the court are males who have no known experience trying to do factory work while wearing snug ankle-length skirts.)

Oak–Rite's expert, Kenneth J. Yotz, has opined that the pants-only policy is "reasonable and necessary" and "consistent with" state and federal OSHA requirements. Yotz Aff. ¶¶ 9–10. Yotz believes that allowing Oak–Rite employees to wear skirts or dresses would increase the risk of employee injury. *Id.* at ¶ 11. He found that "a laceration and/or puncture hazard" is present for employees working at Oak–Rite and that wearing long pants can "significantly moderate" that hazard. Yotz Report at 4. Yotz did not specifically address, however, Martin's proposed solution for the close-fitting ankle-length skirt with leather boots.

Enlow believes that she would be able to operate the machines at Oak–Rite safely while wearing a reasonably close-fitting

skirt. Enlow Decl. ¶¶ 16, 17. She believes that she would be able to work foot pedals raised from the ground up to approximately one foot off the ground while wearing a reasonably close-fitting skirt. See *id.* Enlow has worked in other factories and has some experience working machines with foot pedals. *Id.* at ¶ 16. However, Enlow has never seen the machines on the Oak–Rite production floor, and there is no evidence that she has experience with the same types of machines. See Enlow Dep. at 93. Enlow admits that she does not know if wearing a long skirt with leather boots would remedy all the potential safety risks she could face at Oak–Rite. *Id.*

Jerry Steward believes that a close-fitting skirt would alleviate the risk of a skirt getting caught in machinery but that it would not afford sufficient mobility to operate the machines. J. Steward Dep. at 96–99. Oak–Rite's female employees have stated that they would not wear a skirt of any length in the plant because of safety issues. Employee Affs. ¶ 20.

Regarding Martin's proposed solution of a snug ankle-length skirt, the only evidence in the record from people who have actually worn such skirts (and who know about the work at Oak Rite) indicates that the solution would cause its own problems by limiting mobility and by creating its own related exposure risks. When asked about doing the work while wearing a long, straight skirt with no skin exposed, Shelly Herron testified that employees wearing such skirts "would be so backed up with their own work, because they can't maneuver as well ... you have to do a lot of bending over, squatting down, going up, loading filters now in a truck, and bringing them down ... It's hard enough wearing pants." Herron Dep. at 55. She testified that she had tried to work wearing tight jeans before, and that it "was a pretty bad day. It's just hard to maneuver. You have so much dirty work, bending and getting into so much stuff, picking up metal, you know, dumping boxes of scrap metal ." *Id.* at 47–48. Herron also testified that an employee wearing a long straight skirt with boots would have less protection from cuts because "by the time she got it yanked up to bend down to get what she's getting, something could happen." *Id.* at 56–57.

***9** Cindy Turley testified that a woman wearing such a long skirt would have trouble lifting up her feet unless the skirt had a split that exposed skin, and that she would not be able to run the rivet machine without pulling her skirt up to expose her legs. Turley Dep. at 56–57. Turley also described an incident in which she tore her jeans and scratched her leg as she walked past an uneven stack of metal brackets. She was asked:

> Q Would this incident have been any different if you would have been wearing a long denim skirt and work boots with no exposed skin?
>
> A Yeah. I probably would have fell flat on my face, because I wouldn't have been able to spread by legs fast enough to be able to catch myself. It caught my pants and it tangled it. I stumbled forward. If I had had a long skirt on, I would have fell to the floor.
>
> Q How do you know that?
>
> A Because long, straight skirts, with a split in it, you can't move your legs very far apart. I've worn them before and you've only got so much leg room down to your foot.
>
> Q So it's your opinion—
>
> A The experience of wearing a skirt before, yeah. I could have fell and it could have ended up—kept injuring my face, my arm, my neck.
>
> Q Have you conducted any studies to determine whether a skirt would be—would make you more likely to fall in such an incident?
>
> A Have I done any studies?
>
> Q Mm-hmm.
>
> A No.
>
> Q Are you just guessing that would be the result if you were to wear a [skirt] in the same incident?
>
> A Have you ever wore a long skirt before? You can't move much in them. You can't take your steps as big.

Turley Dep. at 60–61. Other facts are noted below, using the standard for deciding a summary judgment motion.

Oak–Rite's Summary Judgment Motion

I. ***The Employer's Duty to Accommodate Religious Beliefs***

Title VII of the Civil Rights Act of 1964 makes it unlawful to "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e–2. Under Title VII, "religion" includes:

> all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

This definition imposes on employers a duty to provide a reasonable accommodation for an employee's religious beliefs and observances unless the employer can show it is unable to do so without undue hardship. *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68–69 (1986); *EEOC v. Ilona of Hungary, Inc.,* 108 F.3d 1569, 1574 (7th Cir.1997).

To establish a *prima facie* case of religious discrimination by failure to accommodate, a plaintiff must show that: (1) she follows a bona fide religious practice that conflicts with an employment requirement; (2) she brought the practice to the employer's attention; and (3) the religious practice was the basis for an adverse employment action. *EEOC v. United Parcel Service,* 94 F.3d 313, 317–18 (7th Cir.1996), citing *Wright v. Runyon,* 2 F.3d 214, 216 n. 4 & 217 (7th Cir.1993). The employer may respond to the *prima facie* case by proving either that it offered a reasonable accommodation which the employee did not accept, or that it was unable to provide a reasonable accommodation without undue hardship. See *id.* The employer bears the burden of proof on these issues. *EEOC v. Ilona of Hungary,* 108 F.3d at 1576. A plaintiff is not required to propose a specific accommodation. *Redmond v. GAF Corp.,* 574 F.2d 897, 901 (1978).

***10** The EEOC has not alleged and no evidence suggests that Oak–Rite harbored any discriminatory animus against Enlow because of her religion. In addition, it is undisputed that Enlow did not get a job at Oak–Rite because it has a pants-only policy and Enlow does not wear pants. Accordingly, there is no need for any pretext inquiry. The parties agree that Oak–Rite's stated reason for its employment decision is the true reason for the decision. See *Russell v. Acme Evans Co.,* 51 F.3d 64, 68 (7th Cir.1995) (pretext "means a lie, specifically a phony reason for some action"). The issue is whether Title VII requires Oak–Rite to modify its policy to accommodate Enlow's religious beliefs.[6]

The EEOC has presented evidence that (1) Enlow's religious practice of not wearing pants conflicts with Oak–Rite's pants-only policy; (2) Enlow told Oak–Rite about her religious practice; and (3) Enlow's religious practice was the reason she did not go to work for Oak–Rite. The EEOC has presented a prima facie case for purposes of summary judgment. Oak–Rite has not claimed that it offered Enlow any form of reasonable accommodation. The issue is therefore whether Oak–Rite can show as a matter of law that accommodation of Enlow's religious beliefs would not be possible without imposing an "undue hardship" on Oak–Rite.

II. ***"Undue Hardship" and the Claim for Failure to Accommodate***

A proposed accommodation is an "undue hardship" if it results in more than a "*de minimis* " cost to the employer. *TWA, Inc. v. Hardison,* 432 U.S. 63, 84 (1977), *cited in EEOC v. Ilona of Hungary, Inc.,* 108 F.3d at 1576. The relevant costs may include not only monetary costs but also the employer's burden in conducting its business. *Beadle v. City of Tampa,* 42 F.3d 633, 636 (11th Cir.1995), citing *Hardison,* 432 U.S. at 84 n. 15; see also *Cook v. Chrysler,* 981 F.2d 336, 339 (8th Cir.1992) (hardship need not be quantified precisely in economic terms). The inquiry ultimately boils down to whether the employer acted reasonably. *Beadle,* 42 F.3d at 636, citing *United States v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir.1976).

In *Hardison,* the Supreme Court held that accommodating an employee's request not to work on his Sabbath would have been an undue hardship because the proposed accommodations would have (1) caused the employer's operation to suffer by removing an employee or supervisor from his position to work plaintiff's job; (2) violated a seniority system in the collective

bargaining agreement; or (3) cost the employer $150 in premium pay to another employee until the plaintiff earned sufficient seniority to obtain a position that did not require Saturday work. 432 U.S. at 77–85. These burdens were deemed to impose "more than a *de minimis* cost" and therefore were not required under Title VII. *Id.* at 84.

The issue of undue hardship generally is a question of fact, see *Nottelson v. Smith Steel Workers,* 643 F.2d 445, 452 (7th Cir.1981), citing *Redmond,* 574 F.2d at 903, but questions of undue hardship have been resolved as a matter of law, especially where the employer showed that the proposed accommodation would either cause or increase safety risks or the risk of legal liability for the employer. Regarding safety risks, see *Bhatia v. Chevron U .S.A.,* 734 F.2d 1382, 1383–84 (9th Cir.1984) (accommodating employee's refusal to shave beard that interfered with breathing apparatus needed for safety would create risk of violating occupational safety laws); *Kalsi v. New York City Transit Authority,* 62 F.Supp.2d 745, 759–60 (E.D.N.Y.1998) (accommodating employee's refusal to wear hard hat would increase risk of injury and liability), *aff'd mem.,* 189 F.3d 461 (2d Cir.1999). Regarding legal risks, see *Sutton v. Providence St. Joseph Medical Center,* 192 F.3d 826, 830 (9th Cir.1999) (accommodating employee's refusal to use Social Security number would cause employer to violate federal law); *Lee v. ABF Freight Sys., Inc.,* 22 F.3d 1019, 1023 (10th Cir.1994) (accommodating employee's Sabbath by violating collective bargaining agreement would cause undue hardship).

***11** A few cases have considered challenges to pants-only policies on religious discrimination grounds. Although none of the cases are controlling here, the EEOC has not cited any successful challenge to a pants-only policy in a manufacturing environment.

The closest case is an earlier unsuccessful EEOC challenge to another pants-only policy. In *EEOC v. Heil–Quaker Corp.,* the court rejected a religious discrimination challenge to a safety rule that prohibited wearing skirts in a factory. 1990 WL 58543, No. 1–88–0439 (M.D.Tenn. Jan. 29, 1990) (ruling for employer after trial). The EEOC's own experts had testified that skirts and dresses were more hazardous than pants, and that they had never seen a skirt on a production worker in a manufacturing plant. The court wrote that the case was "wholly lacking in merit."[7]

The Seventh Circuit's decisions applying the undue hardship standard provide limited guidance directly applicable to the safety-related issues in this case, but they make clear that the "more than *de minimis* " standard allows imposition of only the most modest burdens on employers. See *Ryan,* 950 F.2d at 461–62 (transferring plaintiff to another city and retraining him for different work would be an undue hardship because it would involve more than a *de minimis* cost); *Nottelson,* 643 F.2d at 452 (loss of plaintiff's union dues was a *de minimis* cost and therefore not an undue hardship; fear of "steamroller effect" was conjectural); *EEOC v. Ilona of Hungary, Inc.,* 108 F.3d at 1574 (rejecting undue hardship defense where employer asserted it lost $769 when employees missed work for religious holiday; employer could have avoided loss by granting leave requests and rescheduling services). The Seventh Circuit appears not to have addressed the undue hardship defense directly in a case involving safety concerns.

The analysis in *Baz,* 892 F.2d at 705–08, provides the Seventh Circuit's clearest guidance for analyzing the undue hardship issue in this case. In *Baz,* the plaintiff was a chaplain at a Veterans Administration psychiatric hospital. The hospital fired him because his pastoral approach and religious faith led him to take approaches in dealing with patients that the hospital staff viewed as incompatible with sound patient care.

The chaplain argued that the hospital's defense required "objective, expert testimony" that the patients were harmed by his evangelism. 782 F.2d at 706. The Seventh Circuit wrote that the plaintiff's demand for objective proof of harm confused the business necessity defense for a disparate impact claim with the undue hardship standard in a failure to accommodate case. Writing for the court, Judge Cudahy explained that the defendants "need only introduce evidence to show that accommodation would create a hardship on his business." The defendants were not required "to show that their philosophy of total patient care is objectively better than that espoused by [plaintiff]; they need only show that it would be a hardship to accommodate his theology in view of their established theory and practice." *Id.*

***12** In this case, the evidence frames the undue hardship issue. The EEOC's expert witness, Thomas Martin, acknowledges that it is "not a common practice" for workers in an industrial facility to wear dresses or skirts. Martin does not offer any view as to how common the practice is, or in what kinds of factories dresses or skirts are worn. Martin also acknowledges that wearing a dress or skirt at Oak–Rite presents legitimate safety concerns. The safety considerations include an increased risk of entanglement in moving parts below waist height and an increased risk of cuts or abrasions from exposed skin. Martin reasonably observed that both considerations depend on the type of fabric and the skirt's length and fit. Martin Report at 7–8.

The only reasonable accommodation Martin suggests is wearing "a reasonably close-fitting, denim or canvas dress/skirt that extends to within two or three inches above the ankle, when worn with leather above-the-ankle boots extending up under the

dress/skirt." He opined that the clothing would provide safety protection from cuts and abrasions equivalent to that of long pants. He also opined that the clothing would not create an appreciably greater risk of entanglement. The EEOC and Martin recognize that, to gain the protection of the skin with an ankle-length skirt, there is a trade-off between (a) the risk of entanglement of cloth if a skirt is too loose and (b) restrictions on movement if the skirt is too snug. See Martin Report at 8; EEOC Br. at 16–17. Martin did not offer any view as to actual practices in terms of the length and fit (because of potential snags and entanglement of loose fabric).

At bottom, the problem here is one of risk and uncertainty. There is no evidence that any modern factory, let alone one that presents safety challenges comparable to those of Oak–Rite's factory, has production workers wearing the proposed outfit of a close-fitting ankle-length skirt. Yet, under the EEOC's theory, Title VII required Oak–Rite to consider, to propose, and then to implement a modest but novel experiment in industrial safety, using Mrs. Enlow as the test subject. That very uncertainty, as reflected by differing views in the evidence, is sufficient to establish an undue hardship in this case.

This case does not present the simpler sorts of undue hardships presented by such accommodations as schedule and shift changes, where disagreement about consequences might present triable issues of fact. The few reported cases dealing with safety risks and legal risks make clear that an employer can be subjected to an undue hardship (a burden that is more than *de minimis*) if the proposed accommodation would create any significant safety or legal *risks.*

For example, in *Bhatia v. Chevron U.S.A.,* the Ninth Circuit affirmed summary judgment for an employer that required machinists whose duties involved potential exposure to toxic gas to shave any facial hair that prevented them from achieving a gas-tight seal when wearing a respirator. 734 F.2d 1382 (9th Cir.1984). All machinists were required to comply with the policy even though machinists sometimes were assigned to jobs that did not require the use of a respirator. 734 F.2d at 1383. Because assignments were unpredictable, the employer required all machinists to be able to use a respirator safely. *Id.* The plaintiff had worked as a machinist since before the policy against facial hair had taken effect. For religious reasons, the plaintiff did not shave. He was suspended without pay and then placed in a lower-paying job that did not expose him to gas.

***13** The Ninth Circuit held that allowing the plaintiff to work as a machinist on assignments where he would be exposed to gas would be an undue hardship because the employer "would risk liability" under California occupational safety standards. 734 F.2d at 1384. In addition, retaining the plaintiff as machinist and assigning him only to assignments that did not involve exposure to toxic gas would impose two undue hardships on the employer. First, the employer would have to revamp its unpredictable system of work assignments. Second, the employer would have to require the plaintiff's co-workers to perform his share of dangerous work. *Id.* Affirming summary judgment for the employer, the court concluded that "Title VII does not require Chevron to go that far." *Id.* The Ninth Circuit did not require the employer to prove that the accommodation would *actually* violate state laws or cause injury. The increased risks were sufficient.

Relying in part on *Bhatia,* a district court conducted a similar analysis and reached a similar conclusion in a case involving an employer's hard hat policy. *Kalsi,* 62 F.Supp.2d 745, *aff'd mem.,* 189 F.3d 461 (2d Cir.1999) (affirming "for substantially the reasons stated by the district court"). In *Kalsi,* the plaintiff's religious beliefs required him to wear a turban at all times. He was hired as a subway car inspector. The New York Transit Authority required all inspectors to wear hard hats, and it fired the plaintiff because he would not wear one.

The court granted summary judgment for the employer on undue hardship grounds. The plaintiff argued that he should be allowed to perform his job (with some modifications) without a hard hat, and his occupational safety expert opined that his position should not have required a hard hat. *Id.* at 759. The plaintiff proposed that he work only inside subway cars, where there is less risk of head injury, and that he take unpaid breaks if his assigned team was performing tasks for which the employer considered hard hats most necessary. *Id.* at 759.

The plaintiff's expert acknowledged that accommodating the plaintiff in this manner would increase his risk of head injury. He opined, however, that if plaintiff wore a turban, he would be unlikely to experience a "catastrophic" injury. *Id.* at 759–60. The expert also made several suggestions for how workplace hazards could be avoided so that hard hats would be unnecessary.

Rejecting the plaintiff's arguments, the court reasoned: "Title VII does not require employers to absorb the cost of all less than catastrophic physical injuries to their employees in order to accommodate religious practices." 62 F.Supp.2d at 760. The risks inherent in the proposed accommodation were not limited only to the increased risk of personal injury to plaintiff. They also included the risk of injury to plaintiff's co-workers who might be called on to rescue him or who might become hurt if he were incapacitated. *Id.* The court rejected plaintiff's expert's suggestions about possible modifications to the work environment because those modifications would have involved more than a *de minimis* cost.

***14** The court assumes for purposes of summary judgment that Martin's proposed accommodation of the snug ankle-length skirt and boots would provide protection from cuts and abrasions that would be comparable to the protection provided by long pants, but that protection would be gained at a cost. Martin did not conduct any tests of mobility or entanglement—the recognized trade-offs against which he proposes to gain sufficient protection from cuts and abrasions from sharp metal edges. Nor is there any other evidence indicating that such an outfit is practical in a relatively dangerous factory setting.

Forcing Oak–Rite to test Martin's hypothesis that some skirts are as safe and practical as pants would impose an undue hardship. It would do so by increasing the risk of injury to its employee, as well as by increasing the risk of legal liability for such injuries through worker's compensation. See *Kalsi,* 62 F.Supp.2d at 760. Title VII does not require employers to test their safety policies on employees to determine the minimum level of protection needed to avoid injury.

To carry its burden of showing undue hardship, Oak–Rite is not required to prove conclusively that Enlow would be injured by wearing a snug ankle-length skirt. See *Baz v. Walters,* 782 F.2d at 706 (employer need only show that accommodation would be a hardship in light of employer's established practice). For example, in *Favero v. Huntsville Ind. Sch. Dist.,* 939 F.Supp. 1281 (S.D.Tex.1996), *aff'd mem.,* 110 F.3d 793 (5th Cir.1997), several school bus drivers claimed a school district failed to accommodate their religious holidays by allowing time off. The school district argued that accommodation would cause an undue hardship because it could not cover all the bus routes. The drivers argued that delays caused by "doubling up" on routes could not be an undue hardship because such delays occurred for other reasons. The district court rejected that argument and granted summary judgment for the school district:

> Plaintiffs' argument that because there were no children stranded by a broken down bus, plaintiffs' absence could not have created a potential for delay in delivering the children, is also without merit. Plaintiffs' emphasis on reviewing the situation in hindsight would allow employers to deny requests only when they were certain in advance that the requested absence would cause an undue hardship. This is not what Title VII requires.

939 F.Supp. at 1293. The Fifth Circuit affirmed. See also *Draper v. United States Pipe & Foundry Co.,* 527 F.2d 515, 521 (6th Cir.1975) ("[S]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business. Title VII does not require that safety be subordinated to the religious beliefs of an employee.").

It is undisputed that Oak–Rite incorporated its pants-only policy in its safety policy based on Jerry Steward's assessment of hazards in the workplace. Steward conducted this assessment pursuant to OSHA regulations and in response to an on-site OSHA consultation. The EEOC has not argued that Steward's conclusion that the pants-only policy should be included in the PPEP is unreasonable. Instead, the EEOC simply has taken the position that the OSHA standard could be satisfied in a different way. Whether Steward's construction of OSHA standards is as narrowly-tailored as it could be is not material to the applicable legal standard—which requires a showing of only more than *de minimis* costs. Title VII does not require Oak–Rite to experiment with a looser safety policy in the hope that IOSHA might agree with the EEOC that a reasonably close fitting long skirt is as safe as pants made of the same material. The risk of being fined by IOSHA is sufficient to establish an undue hardship. See *Bhatia,* 734 F.2d at 1384 (reasonable risk of liability under California OSHA standards demonstrated undue hardship as a matter of law). Also, Enlow could not have waived any of her rights under Indiana's worker's compensation law to ease the legal risks of liability under that statute for injuries arising from an accommodation of her religious beliefs. See Ind.Code § 22–3–2–15(a) (waiver of worker's compensation rights limited to approved settlements of claims).

***15** The record also contains evidence about Oak–Rite's policy and practice of requiring employees to be able to work on any of the company's machinery. Requiring Oak–Rite to accommodate Enlow by assigning her only to those machines that could be operated most safely in a skirt also would impose an undue hardship on the administration of Oak–Rite's business. See *Bhatia,* 734 F.2d at 1384 (as a matter of law, Title VII did not require employer to revamp its unpredictable assignment policy); see also *Weber v. Roadway Express, Inc.,* 199 F.3d 270, 274 (5th Cir.2000) (as a matter of law, Title VII did not require employer to allow plaintiff to modify employer's scheduling practices even though plaintiff was not a collective bargaining unit member; modifications could have adverse impact on co-workers). This is particularly true because Oak–Rite is a job shop with changing production needs.

When dealing with issues of safety and practicality, such as an employee's ability to move her legs around machinery and to operate foot pedals without entangling loose clothing, the undisputed facts before the court show some significant risk and uncertainty regarding the EEOC's proposal. There is no evidence that the proposal has been tried successfully under any

comparable conditions, let alone that any tests were done at the Oak–Rite facility.

In other words, the EEOC wants to hold Oak–Rite liable under Title VII (with punitive damages, no less) for having failed first to think of and then to carry out an experiment in employee safety that, as far as this record shows, no other factory in the United States has tried. The court concludes that to require such an experiment would impose an undue hardship as a matter of law.

III. ***Punitive Damages***

Even if Oak–Rite were not entitled to summary judgment on the merits, it would still be entitled to summary judgment on the EEOC's prayer for punitive damages. An award of punitive damages under Title VII requires proof that the defendant violated the law "with malice or reckless indifference to the federally protected rights of the aggrieved individual." 42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 536–37 (1999).

There is no evidence of malice in this case. The EEOC argues, however, that punitive damages are appropriate because Oak–Rite recklessly disregarded the duty of reasonable accommodation under Title VII. Negligence is not enough. The Supreme Court explained in *Kolstad:* "Applying this standard in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." 527 U.S. at 536.

The key language is "perceived risk." There must be evidence that would allow a reasonable inference that the employer in fact perceived a risk that its actions would violate federal law. Negligence or ignorance of the law is not enough under *Kolstad.* See also *Farmer v. Brennan,* 511 U.S. 825, 842 (1994) (applying subjective standard of recklessness to civil liability for Eighth Amendment violations, subjective knowledge can be proved by circumstantial evidence, including obviousness of risk of harm).

***16** Such evidence of recklessness may be circumstantial, of course, as the Court explained in *Farmer v. Brennan.* At the same time, the Supreme Court taught in *Kolstad* that punitive damages may not be available in some cases of intentional discrimination:

> There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. See, *e.g.,* 42 U.S.C. § 2000e–2(e)(1) (setting out Title VII defense "where religion, sex, or national origin is a bona fide occupational qualification"); see also § 12113 (setting out defenses under ADA).

527 U.S. at 537.

These limitations apply here. A claim for failure to accommodate does not require any proof of discriminatory intent or animus against the plaintiff's religious beliefs. There is no direct evidence that Oak–Rite perceived any risk that its safety policy might violate Title VII. There also is no circumstantial evidence that the risk was so obvious that knowledge could reasonably be inferred. Even under the most optimistic view of the law for the EEOC, the underlying theory of discrimination in this case is "novel or otherwise poorly recognized."

The EEOC has not cited any decisions finding a pants-only policy unlawful in any manufacturing facility. In fact, the court is aware of only one case on this issue. The EEOC lost it, and the court declared the case "wholly lacking in merit." *EEOC v. Heil–Quaker Corp.,* 1990 WL 58543. Moreover, the undisputed evidence shows that Enlow never asked for any form of accommodation for her beliefs. The court assumes that the job applicant need not use the words "reasonable accommodation" to put the employer on notice of its obligations under Title VII, but there is no evidence of any reminder here.

Finally, as noted above, there is no evidence that any manufacturing facility in the United States has employees actually wearing the snug ankle-length skirts proposed by the EEOC's expert as they work. A reasonable trier of fact could not find that Oak–Rite's failure to propose or implement such a plan to have been in reckless disregard of Enlow's federally protected rights.

The EEOC argues, nevertheless:

> Having made no attempt whatsoever even to consider accommodating Enlow, Mr. Steward acted recklessly and indifferently toward Enlow's federally protected right. Mr. Steward may be assumed to know the straightforward requirements of Title VII, as he is the person at Oak–Rite responsible for assuring compliance with Title VII.

EEOC Br. at 22. Putting aside the reference to "the straightforward requirements of Title VII" in a case unprecedented on the merits, the EEOC's only supporting citation for this bold assertion is to "compare" the Tenth Circuit's decision in *Deters v. Equifax Credit Information Services, Inc.,* 202 F.3d 1262, 1269 (10th Cir.2000) ("[R]ecklessness and malice are to be inferred when a manager responsible for setting or enforcing policy in the area of discrimination does not respond to complaints, despite knowledge of serious harassment."). The invited comparison makes the point. The plaintiff in *Deters* presented evidence of egregious, long-term sexual harassment. The supervisor to whom she complained repeatedly took no action despite witnessing some of the harassment himself. In response to complaints, he told the plaintiff that the harasser was "just friendly, and that she was reading too much into it," and that other harassers were "revenue producers" and that she was not. *Id.* As of 1994 and 1995 when the events in *Deters* occurred, such treatment of a victim of sexual harassment was obviously unlawful, so the inference of recklessness was quite reasonable. This case is so different that the EEOC's invited comparison demonstrates that punitive damages could not be awarded here even if summary judgment were not appropriate on the merits.

EEOC's Summary Judgment Motion

***17** The EEOC has asserted a claim against Oak–Rite for failing to comply with certain Title VII record-keeping requirements since at least August 9, 1999, the date of Enlow's interview. Second Amended Cplt. ¶ 9. Title VII requires employers to make and keep records "relevant to the determinations of whether unlawful employment practices have been or are being committed." 42 U.S.C. § 2000e 8(c). EEOC regulations specify that employers must preserve personnel records, including application forms, for one year. 29 C.F.R. § 1602.14.

During discovery, the EEOC learned that Oak–Rite had a practice of not retaining the applications from all individuals whom it did not hire. Evidence about the precise scope of the practice is in conflict. Gerald Steward testified that applications of rejected applicants were being thrown away. G. Steward Dep. at 19. Jerry Steward testified that the applications that were thrown away were those from applicants who rejected offers or who withdrew their applications. J. Steward Dep. at 24, 127. Under this practice, Oak–Rite threw away Enlow's application.

The EEOC has moved for summary judgment on its record-keeping claim. The EEOC seeks injunctive relief in the form of an order that Oak–Rite shall "make and preserve all records, in accordance with the provisions of Section 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–8(c), relevant to the determination of whether unlawful employment practices have been or are being committed." In response to the EEOC's motion, Oak–Rite asserts that it has discontinued its former practice and now maintains all records required by 42 U.S.C. § 2000e–8(c), including the applications forms of individuals who seek employment at Oak–Rite but who do not receive or accept an offer. Oak–Rite asserts that an injunction is not necessary, but says it has no objection to an injunction limited to requiring it to keep records of applicants to whom job offers are made and rejected and applicants who withdraw their applications.

Despite the conflict in the evidence about the precise scope of the violations, the undisputed facts show at least some systematic violations of the record-keeping requirements. The court therefore will issue a permanent injunction requiring Oak–Rite to comply with 42 U.S.C. § 2000e–8(c). The injunction shall remain in effect for two years, with the court retaining jurisdiction during that time. After the injunction expires, of course, the statute will presumably continue to govern Oak Rite's conduct.

Conclusion

"We are not without sympathy for employees trapped between their jobs and deeply held religious beliefs. Religious faith is ordinarily consistent with most employment obligations." *Wright v.. Runyon,* 2 F.3d 214, 218 (7th Cir.1993). When the two conflict, Title VII establishes the parameters for how courts must resolve the dispute. Title VII does not require employers to

undertake experiments with employee safety or legal liability to test a theory about how a facially-neutral safety policy might be modified. Accordingly, the court grants Oak–Rite's motion for summary judgment on the EEOC's religious discrimination claim. The court also grants the EEOC's summary judgment on its record-keeping claim against Oak–Rite. The court will issue a permanent injunction and final judgment.

***18** So ordered.

Parallel Citations

88 Fair Empl.Prac.Cas. (BNA) 126

Footnotes

1 The exception is minor because, even though Enlow's testimony would not bar the EEOC from offering evidence on these points, the EEOC has in fact not offered any such evidence. Hostility to Enlow's religious beliefs is a subject on which the EEOC would bear the burden of proof. There is no evidence that Oak–Rite disparaged Enlow's religious beliefs or otherwise exhibited any hostility to her religion. The court addresses below the EEOC's argument that Oak–Rite's failure to propose an accommodation shows such reckless disregard for Enlow's rights as to support punitive damages.

2 The decision in *Asplundh Manufacturing* was considerably narrower. The Third Circuit confined its ruling to cases that test the boundaries between expert and lay opinion, where a so-called "lay" opinion depends in part on the witness's special knowledge or experience. See 57 F.3d at 1201–03.

3 As noted below, the EEOC's expert witness believes an operator could run the rivet machine with her knees together on one side of the rivet machine, although there is no evidence that the expert or anyone else has tried to do so.

4 Jerry Steward testified that he believes an IOSHA consultant suggested that he include a pants-only policy in the PPEP. J. Steward Dep. at 55–56. Steward also testified that he discussed the pants-only policy with an IOSHA consultant after Enlow interviewed for the job. The consultant who conducted an on-site visit in August 1999 does not recall any such conversation. McCain Aff. ¶ 7. If asked for advice about such a policy, that consultant would refer the employer to OSHA regulations advising that PPEP policies be used in conjunction with other sound manufacturing practices. *Id.* at ¶ 11. For purposes of summary judgment, the court must accept McCain's account of the facts.

5 Enlow has worn skirts in other factories, but the record before the court offers no specifics about those factories or how they compare to Oak–Rite in ways material to the safety issues.

6 The parties have argued about whether the EEOC must prove "pretext" as part of its case. Some language in *Tincher v. Wal–Mart Stores, Inc.,* 118 F.3d 1125, 1130–31 (7th Cir.1997), and *Baz v. Walters,* 782 F.2d 701, 706 (7th Cir.1986), might be read to require such proof. Neither case presented a pure claim of failure to accommodate, however, and issues of motive were relevant in both. In straightforward claims of failure to accommodate, the Seventh Circuit has not described pretext as an element of the plaintiff's case. See *Redmond,* 574 F.2d at 901–04 (accommodation for Saturday Bible class); *EEOC v. Ilona of Hungary,* 108 F.3d at 1575 (leave for religious holidays); *Wright,* 2 F.3d at 216–18 (time-off for Sabbath); *EEOC v. United Parcel Service,* 94 F.3d at 317–18 (accommodation for beard); *Rodriguez v. City of Chicago,* 156 F.3d 771, 775 (7th Cir .1998) (police officer sought to be excused from assignment to patrol abortion clinic); *Ryan v. U.S. Dept. of Justice,* 950 F.2d 458, 461–62 (7th Cir.1991) (FBI agent requested removal from assignment to investigate nonviolent anti-military activities); *Nottelson v. Smith Steel Workers,* 643 F.2d 445, 451 (7th Cir.1981) (accommodation for religious conviction against paying union dues).

7 Other challenges to pants-only policies have not involved a safety-based undue hardship defense under Title VII. See *Killebrew v. Local Union 1683,* 651 F.Supp. 95 (W.D.Ky.1986) (union was not liable for religious discrimination under Title VII for not modifying its bumping rules to permit the plaintiff to bid on office job, which she could have performed while wearing a skirt or dress); *Reid v. Kraft General Foods, Inc.,* 1995 WL 262531 (E.D.Pa. Apr. 27, 1995) (fact questions regarding reasons behind the timing of plaintiff's hire precluded summary judgment on Title VII reasonable accommodation issue where employer eventually hired plaintiff and allowed her to wear a skirt with her uniform; employer did not raise undue hardship defense); *Seabrook v. City of New York,* No. 99 Civ. 9134(HB), 2001 WL 40767 (S.D.N.Y. Jan. 16, 2001) (granting Department of Corrections summary judgment on free exercise and Fourteenth Amendment challenges to pants-only policy where plaintiff corrections officers had designed a prototype skirt to be worn with prison riot gear; Title VII claim was not yet ripe); *Kisco Co. v. Missouri Comm'n on Human Rights,* 634 S.W.2d 497, 498–99 & n. 2 (Mo .App.1982) (employer's pants-only policy did not violate state anti-discrimination statute, but state law did not impose duty to accommodate).