IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAWALJEET KAUR TAGORE, Plaintiff, v. THE UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HOMELAND SECURITY; FEDERAL PROTECTIVE SERVICE; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; JANET NAPOLITANO, Secretary of the United States Department of Homeland Security; TIMOTHY F. GEITHNER, Secretary of the Treasury; WILLIAM A. CARMODY, III; DAVID HIEBERT; CHRISTINA NAVARRETE-WASSON; SERGIO ARELLANO; JAMES K. ELLIS; NIEVES NARVAEZ; and DOES 1-25, Defendants.	§ §	CIVIL ACTION NO. H-09-0027

MEMORANDUM OPINION AND ORDER

Plaintiff, Kawaljeet Kaur Tagore, alleges that she was subjected to religious discrimination and denied the freedom to practice her religion when the defendants refused to allow her to wear a kirpan — a ceremonial sword — with a 3-inch or longer blade into the federal building where she worked. Pursuant to the Memorandum Opinion and Order entered on August 21, 2009 (Docket Entry No. 26), granting Federal Defendants' Partial Motion to Dismiss (Docket Entry No. 16), the only claims remaining in this

action are (1) the claim for religious discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, that plaintiff has asserted against United States Treasury Secretary Timothy F. Geithner (Geithner), and (2) the claims for violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq., that plaintiff has asserted against the United States Department of Homeland Security (DHS), the Federal Protective Service (FPS), Janet Napolitano, William A. Carmody, III, David Hiebert, and any Does 1-25 employed by the DHS and/or the FPS in their official capacity (DHS and FPS defendants). Pending before the court are Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 57), defendants' Motion for Summary Judgment (Docket Entry No. 60), and Plaintiff's Objections to Defendants' Motion for Summary Judgment (Docket Entry No. 69). For the reasons explained below, plaintiff's motion for partial summary judgment will be denied, defendants' motion for summary judgment will be granted, plaintiff's objections to defendants' motion for summary judgment will be denied in part and mooted in part, and this action will be dismissed.

I. Undisputed Facts

In July of 2004 plaintiff began working as an agent in the Large and Mid-Size Business (LMBS) section of the Internal Revenue Service (IRS), a bureau of the United States Department of the

Treasury, in the Mickey Leland building in Houston, Texas.[1] The Leland building is classified as a Level IV facility, meaning that it "has over 450 employees, a high volume of public contact, and includes high-risk law enforcement and intelligence agencies."[2]

In April of 2005 plaintiff underwent an Amrit Sanskar ceremony in Washington, D.C., pursuant to which she was formally initiated into the Sikh faith. Following the Amrit Sanskar ceremony, plaintiff began wearing the five articles of the Sikh faith – one of which was a kirpan, an article that "resembles a knife or sword but, unlike those objects, often has an edge that is curved and blunted."[3] The kirpan that plaintiff wore immediately after the

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[1]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 9 (citing Exhibit A, May 18, 2010, Deposition of Kawaljeet Kaur Tagore (Plaintiff's 2010 Deposition), pp. 60:1-62:1). Excerpts from Plaintiff's 2010 Deposition also appear as Exhibit 12 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1.

[2]Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 3 (citing Exhibit 16, Transcript of EEOC hearing, p. 101:17-22, and Exhibit 23, Homeland Security Ongoing Challenges Impact the Federal Protective Service's Ability to Protect Federal Facilities, Statement of Mark L. Goldstein, Director Physical Infrastructure Issues, p. 7 & n.9). See also Declaration of Fred Muccino (Muccino Declaration), Exhibit 3 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 2 ¶ 4.

[3]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 9 (citing Exhibit J, Deposition of Ajai Singh Khalsa (Khalsa Deposition), pp. 56:18-57:6). See also February 16, 2007, Deposition of Kawaljeet Kaur Tagore (Plaintiff's 2007 Deposition), Exhibit J to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, and Exhibit 11 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 89:4-12 (describing kirpan as a "small sword").

Amrit Sanskar ceremony was approximately nine inches long and had a metal blade.[4] When asked at the airport to take off her kirpan, plaintiff took it off to board the flight home from Washington, D.C.[5] Plaintiff "wears the kirpan as a reminder to always 'promot[e] justice for all in life, honor, grace, compassion, generosity, [and] courage."[6] Plaintiff has testified that to her, "a Kirpan is a full Kirpan. In my mind, I don't differentiate as to how much is the edge and how much is the handle."[7]

When plaintiff returned to work she walked into the Leland building wearing her kirpan without triggering the metal detector.[8] Once at her desk, plaintiff told her immediate supervisor, Nieves Narvaez (Narvaez), that she was wearing her kirpan.[9] Narvaez instructed plaintiff "to submit to him, in writing, a letter stating that she [had been] baptized in Sikhism; explaining the

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[4]Plaintiff's testimony at the hearing held by the Equal Employment Opportunity Commission, Exhibit 16 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 30-31.

[5]Id. at 26:5-15.

[6]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, at 16-17 (citing Exhibit A, Plaintiff's 2010 Deposition, pp. 39:1-40:3).

[7]Plaintiff's 2010 Deposition, Exhibit A to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 114:11-13.

[8]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 17 (citing Exhibit A, Plaintiff's 2010 Deposition at 85:17-25 and 89:19-21).

[9]Id. (citing Exhibit A, Plaintiff's 2010 Deposition at 86:16-22).

five Sikh articles of faith and the 'need' for her to carry these articles on her person; and requesting a 'security waiver' to bring her kirpan into the Leland building."[10] Thereafter, plaintiff began wearing a shorter kirpan because she perceived that Narvaez was concerned about her kirpan and because she thought a smaller kirpan would alleviate problems with the metal detector.[11]

On April 20, 2005, plaintiff provided Narvaez a "letter from Amardeep Singh Bhalla, Legal Director of the Sikh Coalition,"[12] and Narvaez sent a request for a security waiver for plaintiff's kirpan to Micralyn Baker-Jones, an IRS Labor Relations Specialist based in Dallas.[13] In his communications with Baker-Jones, Narvaez described the kirpan as a "6-inch long sword" and expressed concern about how taxpayers would perceive a revenue agent carrying this item at all times.[14] After discussing the issue with Baker-Jones, Narvaez placed plaintiff on an interim Flexiplace arrangement pursuant to

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[10]Id. (citing Exhibit A, Plaintiff's 2010 Deposition at 75:24-77:4, and Exhibit O, Territory 1 Monthly Briefing April).

[11]Plaintiff's 2010 Deposition, Exhibit A to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 88:12-89:25.

[12]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 18 (citing Exhibit F, Bhalla's April 19, 2005, letter to Narvaez).

[13]Exhibit W to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[14]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, at 15 n.11 (citing Deposition of Micralyn Baker-Jones (Baker-Jones Deposition), Exhibit L, pp. 50:8-51:8 and Exhibit 2 thereto (handwritten notes indicating that plaintiff intended to carry a 6-inch sword)).

which she could work from home until the issue could be resolved.[15] Narvaez also instructed plaintiff not to enter a taxpayer's office due to concern that she was carrying an illegal weapon."[16] Plaintiff's inability to enter either the Leland Building or taxpayers' offices forced her "to travel to off-site locations—such as gas stations and parking lots—to retrieve information from Mr. Narvaez and the other Revenue Agents on [her] LMSB team."[17]

Baker Jones contacted Christina Navarrete-Wasson, the Equal Employment Opportunity (EEO) Director for LMSB in the EEO office in Washington, D.C., for assistance in researching EEO concerns about plaintiff's intent to wear her kirpan in the workplace.[18] Navarrete-Wasson sought information on prior precedent on employees carrying kirpans into federal facilities but found none.[19] Navarrete-Wasson learned that a federal statute, 18 U.S.C. § 930,

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[15]See Exhibits B (Deposition of Nieves Narvaez (Narvaez Deposition), p. 17:15-21) and L (Deposition of Micralyn Baker-Jones (Baker-Jones Deposition), pp. 55:18-57:22), to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[16]Narvaez Deposition, Exhibit B to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 47:23-24.

[17]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 30 (citing Exhibit B, Narvaez Deposition, pp. 46:10-21; 53:14-20).

[18]Baker-Jones Deposition, Exhibit L to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 27. See also Exhibit 6 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 27.

[19]Declaration of Christina Navarrete-Wasson (Navarrete-Wasson Declaration), Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 5-7.

criminalizes the possession of dangerous weapons on federal property, but defines "dangerous weapon" to exclude pocket knives with blades less than 2.5 inches in length.[20]

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[20]Id. ¶¶ 8 and 10. In relevant part, 18 U.S.C. § 930, provides:

> (a) Except as provided in subsection (d), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both . . .
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> . . .
>
> (d) Subsection (a) shall not apply to–
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> (1) the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law;
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> (2) the possession of a firearm or other dangerous weapon by a Federal official or a member of the Armed Forces if such possession is authorized by law; or
>
> (3) the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to hunting or other lawful purposes.
>
> . . .
>
> (g) As used in this section:
>
> (1) The term "Federal facility" means a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.
>
> (2) The term "dangerous weapon" means a weapon,

(continued...)

Baker-Jones also contacted Jon Carter, an IRS Physical Security Specialist for the Houston area, and Karen Keller in the IRS's Legal Services (Office of General Counsel) for advice. Carter contacted Marie Deger, program director for the contract guards for FPS. By mid-June of 2005 Carter and Deger both informed Baker-Jones that a kirpan with a blade measuring 2.5 inches or longer was considered a dangerous weapon that could not be allowed into the Leland building.[21]

Once the IRS understood that the FPS would not allow plaintiff to enter the Leland building wearing a kirpan with a blade 2.5 inches or longer, the following IRS employees initiated an effort to find a way to accommodate plaintiff's intent to wear her kirpan in the workplace: Narvaez, Baker-Jones, Navarrete-Wasson, and Sergio Arellano, Director of Field Operations for the IRS's LMSB

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[20](...continued)

> device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.

[21]Baker-Jones Deposition, Exhibit 6 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 60-61. See also Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶ 10 ("In early summer 2005, Ms. Baker-Jones informed me that she was unable to obtain a 'security waiver' for the kirpan due to FPS' interpretation of 18 U.S.C. § 930 to exclude knives with blades 2 ½ inches or longer from federal facilities.").

program in Houston and Narvaez's immediate supervisor.[22] This IRS working group first considered asking the plaintiff if she could wear a kirpan that would not violate 18 U.S.C. § 930.[23] To that end, on June 27, 2005, Narvaez sent plaintiff an e-mail, posing the following five questions:

> 1. Would you consider wearing a shorter blade on the Kirpan of less than 2 ½ inches?
>
> 2. Would you consider wearing a dulled blade?
>
> 3. Would you consider [wearing] a dulled blade sewn in its sheath?
>
> 4. Would you consider wearing a 'symbolic kirpan' encased in plastic or lucite?
>
> 5. Would you consider leaving the kirpan in . . . [the] car or at home while in a Federal facility?[24]

Narvaez drafted these questions "to elicit a conversation with Ms. Tagore so that we could have, you know, maybe some type of suggestion that maybe we could all live with."[25]

On June 30, 2005, Sikh coalition attorney Bhalla responded to Narvaez's e-mail on plaintiff's behalf:

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[22]Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 10-22, especially ¶ 16 (identifying the working group as Arellano, Narvaez, Baker-Jones, and Navarrete-Wasson).

[23]Id. ¶ 12.

[24]Exhibit 13 to Narvaez Deposition, Exhibit B to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[25]Narvaez Deposition, Exhibit B to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 163:14-16.

Question One: Would you consider wearing a shorter blade on the Kirpan of less than 2 ½ inches?

Answer: Ms. Tagore's *kirpan* is three inches long. It is already as small as it can be to meet what her conscious [ ] tells her are her religious mandates. I would also note that this *kirpan* is already smaller than what she would normally wear in consideration of the IRS concerns about her kirpan.

Please also keep in mind that what you call the "blade" of Ms. Tagore's kirpan is dulled. I am not sure that it could be properly called a blade in the conventional sense of the term.

Question Two: Would you consider wearing dulled blade?

Answer: As stated above, Ms. Tagore's kirpan is dulled. It is not remotely as capable of cutting as a conventional box cutter, scissor blade, stapel, or actual knife.

Question Three: Would you consider a dulled blade sewn in it's sheath?

Answer: Wearing a kirpan sewn into its sheath would clearly violate Ms. Tagore's religious mandates. She could not wear any kirpan sewn into its sheath.

Question Four: Would you consider wearing a "symbolic kirpan" encased in plastic or lucite?

Answer: Wearing a kirpan encased in plastic or lucite would violate Ms. Tagore's religious mandates. She could not encase her kirpan in plastic or lucite.

Question Five: Would you consider leaving the kirpan in her car or at home while in a Federal facility?

Answer: Leaving her kirpan in her car or at home would clearly violate Ms. Tagore's religious mandates. She could not leave her kirpan at home or in her car.[26]

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[26]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 32 (citing Exhibit 2 to Deposition of Christina Navarrete-Wasson (Navarrete-Wasson Deposition), Exhibit X to Plaintiff's Motion for Partial Summary Judgment).

On July 13, 2005, Arellano wrote to Bhalla and stated in relevant part:

> The Federal Protective Service security personnel, who are charged with protecting our facility, consider Ms. Tagore's kirpan a dangerous weapon and will not allow her to bring it into the building. In addition, IRS employees are bound by a Treasury-wide Rule of Conduct which prohibits the possession of a dangerous weapon while on official business. Consequently, we were disappointed by your client's rejection of our suggested accommodations, which we note have been found reasonable in other cases where the wearing of the kirpan is an issue.[27]

Neither plaintiff nor her attorney responded to Arellano's letter.[28]

The IRS working group briefly considered but decided not to offer plaintiff reassignment to another Houston IRS office that lacked on-site security because "there still was the issue of the statute. It didn't matter if she was in a secure or nonsecure building. If she had . . . an unmodified kirpan, she couldn't be in a nonsecure building either."[29] The IRS also

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[27]Exhibit 3 to Navarrete-Wasson Deposition, Exhibit X to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[28]Plaintiff's 2010 Deposition, Exhibit 12 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 123.

[29]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 36 (citing Exhibit X, Navarrete-Wasson Deposition, pp. 66:5-68:21). See also Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶ 17 (citing October 27, 2005, e-mail from Charles Hopkins, IRS Director of Emergency Management Programs, Exhibit D to Navarrete-Wasson Deposition stating:

(continued...)

[29](...continued)
My team conducted research on the "religious knife" question and here is what we found:

Generally the rules and regulations governing Federal Properties are prepared and promulgated by the U.S. General Services Administration (GSA) pursuant to and in accordance with the United States Code (USC). These rules and regulations are issued as "Federal Management Regulations" (FMR) and cited as The Code of Federal Regulations or CFR.

Specifically, the Federal Management Regulation (FMR) promulgated by GSA at 41 CFR subsection 102-74.440 (dtd 12/2002) states:

• "Weapons (41 CFR 102-74.440), Federal law prohibits the possession of firearms or other dangerous weapons in Federal facilities and Federal court facilities by all persons not specifically authorized by Title 18, United States Code, Section 930 (Title 18, USC Section 930). Violators will be subject to fine and/or imprisonment for periods up to five years."

Title 18, USC, Section 930 (dtd. 01/22/2002) describes a dangerous weapon as follows: The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.

Weapons are prohibited from being possessed or present in a Federal facility by anyone not specifically authorized by 18 U.S.C. 930. This basically limits possession to law enforcement officials in the lawful performance of official duties.

These regulations are applicable to all property under the authority of GSA and to all persons entering in or on such property.

So the bottom line is that unless the "religious" knife has a blade of less than 2 ½ inches, or is being carried by an appropriate law enforcement official, it is prohibited.

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considered but decided not to offer plaintiff permanent assignment to a "Flexiplace" program that would have allowed her to continue working from her home.[30]

On January 20, 2006, the IRS, through LMSB Director Sergio Arellano, sent plaintiff a letter directing her to report to work in the Leland building by January 30, 2006. The letter stated

> We previously advised you about the statutory prohibition against possessing a dangerous weapon in a federal facility (18 USC section 930), as well as the Treasury-wide Rule of Conduct which prohibits the possession of a dangerous weapon both in a federal facility and while on official duty. This statute extends to devices or instruments with blades of 2 ½ inches or longer. Because of this prohibition you are not allowed to enter the Leland Building wearing your Kirpan.
>
> We have communicated with you and your attorney in the hope that you would modify your Kirpan in such a way as to allow you to return to your office in the Leland Building. Previously we made several suggestions for modifying your Kirpan including wearing a shorter blade, or wearing a symbolic Kirpan encased in plastic or Lucite; however, your attorney has indicated that you do not wish to consider a modification of your Kirpan.
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> Over the past few months we have looked at various alternatives for accommodating your religious obligations. However, despite our efforts, we have found

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[29](...continued)
I cannot find any exceptions for religious purposes.

> I am not aware of any IRS supplemental policies or guidance related to this matter. I believe the USC, CFR, and FMR would be controlling and supersede any IRS issuances.
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> Lastly, I have asked my folks to ensure that this policy is being applied consistently at all IRS facilities.

[30]Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 15-20.

> that the federal law cited above permits no exceptions for religious reasons. . .
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> . . . I am therefore directing you to report to your manager in the Leland Building by Monday, January 30, 2006. Failure to do so will result in you being charged Absent Without Leave (AWOL) which can lead to disciplinary or adverse action up to and including removal from the Service.[31]

On January 24, 2006, plaintiff's attorney, Bhalla, responded by letter to Megan M. Bauer, an attorney in the IRS's Office of Chief Counsel. Bhalla's letter to Bauer stated in pertinent part:

> First, I would like to make clear, Ms. Tagore has worked to accommodate the IRS' concerns. What could be construed as the "blade" of Ms. Tagore's kirpan was six inches long. In order to accommodate the IRS, the "bladed" part of Ms. Tagore's kirpan is now three and one half inches long. Ms. Tagore has made this compromise in the hope that it would address the IRS' concerns. She sincerely believes that any further reduction in the size of her kirpan in order to accommodate the IRS would violate[] her sincerely held Sikh religious beliefs.
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> . . .
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> At the Leland Building, the IRS provides its employees with items that are more dangerous tha[n] Ms. Tagore's kirpan. For example, the IRS provides its employees with scissors, envelope openers, staple removers, and staplers. All these objects would cause more physical harm than Ms. Tagore's kirpan if they were adapted for unlawful use. In addition to these objects – scissors, envelope openers and staplers – which every IRS employee is provided or may access, it is my understanding that knives may be kept in IRS lunchrooms and that box cutters and other cutting instruments are kept in the IRS mailroom where many employees have access to them.
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> Not only are scissors, staplers, knives and box cutters at the Leland Building significantly more dangerous tha[n] Ms. Tagore's kirpan, but they are also more freely

[31]Exhibit 9 to Navarrete-Wasson Deposition, Exhibit X to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

> available to IRS employees and visitors. Unlike scissors or letter openers which each employee may keep in or on top of their desk, Ms. Tagore's kirpan is contained in a sheath and underneath her clothes. It is more secure and less accessible than the more dangerous objects generally available to all IRS employees in the Leland Building. Finally, I would note that while the more dangerous and more freely available objects discussed above likely number in the thousands within the Leland Building, the kirpan Ms. Tagore wears under her clothes is only one in number.
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> . . .
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> In sum . . . I am requesting that the IRS not require Ms. Tagore to appear at work without her . . . three and one half inch kirpan. Any requirement that she do so would violate federal statutory and constitutional law. I therefore request that the IRS immediately enter into a dialogue with Ms. Tagore to determine whether an accom[m]odation may be reached that would allow her to wear her kirpan to work.[32]

In a January 27, 2006, letter to Bhalla, the IRS stated:

> We have not asked you to remove your Kirpan before entering the building. We have simply informed you that a federal statute prohibits your possession of a blade 2.5 inches in length or longer in a federal facility and that in order to enter the Leland Building your Kirpan must be modified accordingly. We have provided several suggestions to you for modifying your Kirpan and urge you to do so to enable you to report to your manager . . . on January 30, 2006. Failure to do so will result in your being charged Absent Without Leave (AWOL) which can lead to disciplinary action up to and including removal from the Service.[33]

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[32]Exhibit 10 to Navarrete-Wasson Deposition, Exhibit X to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[33]Arellano letter of January 27, 2006, Exhibit D to Declaration of Sergio Arellano (Arellano Declaration), Exhibit 1 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1.

On January 30, 2006, plaintiff attempted to report for duty at the Leland building, but the FPS guards denied her entry because she was wearing a kirpan with a blade that exceeded 2.5 inches. Because plaintiff failed to report to work on January 30, 2006, the IRS declared her AWOL and stopped paying her salary.[34] Later, plaintiff's counsel contacted the IRS to seek mediation. The IRS agreed, and in February of 2006 Arellano and Navarrete-Wasson attended a mediation where plaintiff asked the IRS to allow her to work permanently either from home or from an alternate location that did not have a metal detector.[35] The IRS declined plaintiff's requests.

On March 10, 2006, plaintiff filed a Title VII EEO Charge with the United States Treasury Department alleging that the IRS had discriminated against her on the basis of religion because she was not allowed to enter the Leland building wearing her kirpan with a 3-inch blade and was considered AWOL.[36]

On May 4, 2006, the IRS issued plaintiff a "Notice of Proposed Adverse Action," informing her of its intent to terminate her

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[34]Narvaez Deposition, Exhibit B to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 97:3-99:13, and Plaintiff's 2007 Deposition, Exhibit K to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, and Exhibit 11 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 143:12-13.

[35]Arellano Declaration, Exhibit 1 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶ 21.

[36]Exhibit 14 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1.

employment.[37] On May 16, 2006, the Sikh Coalition – acting on plaintiff's behalf – objected in writing to the IRS's "Notice of Proposed Adverse Action."[38] By letter dated July 11, 2006, the IRS terminated plaintiff's employment effective July 14, 2006.[39] Plaintiff did not grieve her termination through arbitration, did not appeal her termination to the Merit Systems Protection Board (MSPB), and did not amend her EEO complaint to include her termination.[40]

On September 4, 2008, an administrative hearing on plaintiff's Title VII charge for religious discrimination against the IRS was held before an EEOC Administrative Law Judge (ALJ). On October 1, 2008, the ALJ issued a decision holding that the IRS had not violated plaintiff's rights. On October 28, 2008, the Treasury Department entered a Final Order adopting the ALJ's decision.[41]

II. Standard of Review

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law

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[37]Exhibit EE to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[38]Exhibit F to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 77-81.

[39]Arellano Deposition, Exhibit G to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 59:15-64:9.

[40]Baker-Jones Declaration, Exhibit 2 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 4-15.

[41]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 42.

entitles it to judgment. Fed. R. Civ. P. 56(c). Disputes about material facts are "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2110 (2000).

III. Cross Motions for Summary Judgment

Plaintiff seeks summary judgment on both her Title VII and RFRA claims because

> [b]y refusing to allow [her] to possess her *kirpan*—a religious article of faith—in the IRS and private

> taxpayers' offices while permitting government and non-government employees to posses longer, sharper, and more dangerous **secular** blades in these fora and taking other adverse employment actions against her (i.e. suspension and termination), the IRS failed to reasonably accommodate [her] religion (Sikhism) and can demonstrate no "undue hardship" for failing to do so. Equally, the FPS—in barring [her] from entering the IRS' offices in the Leland building and other federal facilities with her kirpan while simultaneously permitting government and non-government employees to possess longer, sharper, and more dangerous **secular** blades in these facilities—substantially burdened her exercise of Sikhism without a compelling interest and without demonstrating that there was no less restrictive means for satisfying any putative governmental interest.[42]

Asserting that the IRS offered plaintiff a reasonable accommodation of wearing a kirpan with a blade less than 2.5 inches in length,[43] and that the alternative accommodations that plaintiff seeks would cause undue hardship to the IRS,[44] Geithner argues that he is entitled to summary judgment. Asserting that their interpretation and application of 18 U.S.C. § 930 did not ban from the Leland building all kirpans but only kirpans with a blade 2.5 inches or longer, the DHS and FPS defendants argue that they are entitled to summary judgment because plaintiff cannot show that they substantially burdened her exercise of Sikhism. The DHS and FPS defendants also argue that they are entitled to summary judgment

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[42] Id. at 42-43.

[43] Defendants' Memorandum in Support of Motion for Summary Judgment, Docket entry No. 60-1, pp. 16-25.

[44] Id. at 20-21.

because their application of 18 U.S.C. § 930 is the least restrictive means of furthering a compelling government interest.[45]

A. Title VII Claim Against Timothy F. Geithner

The Title VII claim that plaintiff has asserted against Geithner for religious discrimination is based on the IRS's failure to accommodate her sincerely held religious beliefs.[46]

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[45] Id. at 35-45.

[46] Complaint, Docket Entry No. 1, pp. 11-12 ¶¶ 67-74. Although Geithner moves for summary judgment on any claim that plaintiff has attempted to assert based on disparate treatment, see Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 25-29, plaintiff's complaint does not clearly allege such a claim, and plaintiff's response to defendants' motion for summary judgment does not clearly address this argument. To the extent that plaintiff has alleged such a claim, the court concludes that Geithner is entitled to summary judgment on it because plaintiff has failed to present evidence showing that she was treated less favorably than was a similarly situated employee outside her protected class. See Toronka v. Continental Airlines, Inc., 411 Fed.Appx. 719, 723 & n.2 (5th Cir. 2011) (applying burden-shifting analysis to a claim of religious discrimination based on disparate treatment). Whether two employees are similarly situated turns not on whether their situations are "similar" but on whether they are "nearly identical." Id. (citing Williams v. Trader Publishing Co., 218 F.3d 481, 484 (5th Cir. 2000)). For employees' situations to be nearly identical, the conduct they engaged in must be nearly identical. Id. at 724 (citing Wallace v. Methodist Hospital System, 271 F.3d 212, 221 (5th Cir. 2001), cert. denied, 122 S.Ct. 1961 (2002) ("We have held that in order for a plaintiff to show disparate treatment, she must demonstrate that the misconduct for which she was discharged was nearly identical to that engaged in by an employee not within her protected class whom the company retained."). To survive Geithner's motion for summary judgment on this claim, plaintiff must present evidence showing that the IRS treated another employee who was not of the same religion more favorably than it treated her in response to nearly identical conduct. Plaintiff has not identified any similarly-situated IRS employees who were treated more favorably than she (continued...)

1. Applicable Law

Title VII makes it "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion[.]" 42 U.S.C. § 2000e-2(a)(1).

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate 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). Plaintiffs in employment discrimination cases may present their claims by either direct or circumstantial evidence, or both. See Machinchick v. PB Power, Inc., 398 F.3d 345, 350 (5th Cir. 2005). "Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption." Portis v. First National Bank of New Albany, Mississippi, 34 F.3d 325, 328-39 (5th Cir. 1994)

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[46](...continued)
under nearly identical circumstances. The closest plaintiff comes to identifying similarly-situated IRS employees is to argue that other unnamed IRS employees are allowed to access bladed tools such as scissors, letter openers, and box cutters. But plaintiff has not identified any IRS employee who has been allowed to regularly carry a knife with blade longer than 2.5 inches into the Leland building, other federal facilities, or taxpayers' offices. Accordingly, plaintiff has failed to present evidence from which a reasonable fact-finder could conclude that she was treated less favorably than was a similarly situated IRS employee outside her protected class.

(quoting Brown v. East Mississippi Electric Power Association, 989 F.2d 858, 861 (5th Cir. 1993)). "In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face." Id. at 329. Plaintiff's claims are not based on direct but on circumstantial evidence. Circumstantial evidence is evaluated using the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817 (1973). Under that analysis the plaintiff must present evidence establishing a prima facie case. Id. at 1824. If the plaintiff presents such evidence, the burden shifts to the defendant to present evidence showing that the IRS offered plaintiff a reasonable accommodation, or that accommodating plaintiff's religious beliefs would cause the IRS undue hardship. See Bruff v. North Mississippi Health Services, Inc., 244 F.3d 495, 500 & n.9 (5th Cir.), cert. denied, 122 S.Ct. 348 (2001); Weber v. Roadway Express, 199 F.3d 270, 273 (5th Cir. 2000).

2. Analysis

(a) Geithner is Entitled to Summary Judgment Because Plaintiff Has Failed to Establish a Prima Facie Case

To establish a prima facie case of religious discrimination under Title VII based on failure to accommodate her religious belief, plaintiff must show that (1) she held a bona fide religious belief (2) that conflicted with an employment requirement, (3) the employer was informed of that belief, and (4) plaintiff suffered an

adverse employment action for failing to comply with the conflicting employment requirement. See Bruff, 244 F.3d at 500 & n.9; Weber, 199 F.3d at 273.

Undisputed evidence establishes that plaintiff holds a bona fide religious belief that requires her to wear a kirpan, that plaintiff and her attorneys not only informed the IRS of this belief but also informed the IRS that the kirpan plaintiff wears has a blade or "edge" that is longer than 2.5 inches, a blade-length that the defendants determined conflicts with 18 U.S.C. § 930, the federal criminal statute governing the possession of firearms and other "dangerous weapons" in federal facilities, and that plaintiff suffered an adverse employment action for failing to report to work either without a kirpan or with a kirpan that has a blade less than 2.5 inches in length. Plaintiff argues that this undisputed evidence establishes a prima facie case of religious discrimination. Geithner does not dispute that plaintiff holds a bona fide religious belief that requires her to wear a kirpan, but does dispute plaintiff's contention that she holds a bona fide religious belief that requires her to wear a kirpan with a blade that is 2.5 inches or longer.[47]

[47]Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 39. See also Plaintiff's Surreply to defendants' Motion for Summary Judgment, Docket Entry No. 85, pp. 6-9, challenging "the government's continuing attack on Ms. Tagore's sincerity."

In her motion for summary judgment plaintiff asserts that

> [i]t was and remains [her] sincerely held religious belief that the government's attempted "modification" of her kirpan—including shortening the kirpan's "blade" to less than three (3) inches—would have not only de-legitimized her kirpan but stripped it of any religious significance to her.[48]

Citing her own deposition testimony as well as that of her expert witness, Ajai Singh Khalsa, and her brothers, Jasmeet Singh and Ramandeep Tagore, plaintiff asserts that her "belief in this regard is shared by many Sikhs."[49] Plaintiff argues that by forcing her "to choose between donning such a 'modified' kirpan or losing her employment with the federal government, the [defendants] curtailed her religious conduct and impacted her religious expression to a significant and real degree."[50] But the evidence on which plaintiff relies refutes her contention that she holds a bona fide belief that "shortening the kirpan's 'blade' to less than three (3) inches — would have not only de-legitimize[] her kirpan but strip[] it of any religious significance to her,"[51] or that "donning such a 'modified' kirpan . . . [would] impact[] her religious expression to a significant and real degree."[52]

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[48]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 58-59.

[49]Id. at 59.

[50]Id.

[51]Id.

[52]Id.

Regarding the length of the blade or edge of the kirpan, plaintiff's expert witness, Ajai Singh Khalsa, testified that there is nothing in Sikh religious scripture about the length of a kirpan, but that when the specific requirement for wearing the kirpan was written down in approximately 1699, that requirement generally referred to a 3-foot sword.[53] Khalsa explained that

> [t]here has been a lot of discussion in the community and, you know, over time, generally the community has accepted a notion that something smaller than that is acceptable, and exactly where the bottom line of that is something that people will differ on, okay.
>
> I would say there is a general consensus that 3 inches is the minimum length.[54]

When questioned about how he arrived at his conclusion about the general consensus for 3 inches, Khalsa explained

> [w]ell, I mean, it's how you arrive at consensus. You talk to a lot of people and you see what just about everybody agrees to. And I think there is a general consensus in the community that 3 inches is, sort of, the bottom of that -- you know, is the smallest that you could wear that would be acceptable.[55]

When asked, why that was so, Khalsa stated that was his

> personal opinion, and I wouldn't universalize this in any way, but my personal opinion is that at less than 3 inches, it could never be a weapon in the hands of somebody who wasn't highly trained, and so I think at 3 inches -- and the law echoes this.
>
> For the most part, most State legislatures have set 3 inches as the maximum length of a blade that one can

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[53]Khalsa Deposition, Exhibit J to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 73:2-74:6.

[54]Id. at 74:6-16.

[55]Id. at 74:18-25.

> carry legally on their person at all times. There may be specific restrictions about things in one place or another, but as a general rule, you know, a person can walk around with a knife in their pocket that's no longer than 3 inches and not be considered carrying a dangerous weapon.
>
> Once you get over 3 inches, then it's, more often than not, considered a weapon. And I think -- you know, and again, this isn't Sikh teachings, this is now just my own basic experience -- a knife of less than 3 inches is extremely difficult to use as a weapon unless you are an extremely highly-trained individual.[56]

When asked what he would have done if the law allowed the carrying of knives with only 2.5-inch instead of 3-inch blades, Khalsa said

> I probably would have said -- I probably would have still held the line at 3 inches.
>
> I mean, it was convenient that State law happens to be 3 inches, and 3 inches is sort of a generally-accepted length, but if the particular statute had been 2 and a half inches, I believe I still would have held the line at 3.[57]

When asked, why that was so, Khalsa responded, "[b]ecause I do sincerely believe that anything less than that is -- it's now crossed the line to becoming merely symbolic."[58]

Like Khalsa, plaintiff's brothers, Jasmeet Singh and Ramandeep Tagore, did not testify that there is any requirement of the Sikh religion for the kirpan to be a certain length.[59]

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[56] Id. at 75:2-76:1.

[57] Id. at 201:6-13.

[58] Id. at 201:15-17.

[59] Deposition of Jasmeet Singh, Exhibit P to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 31:17-32:6; (continued...)

Plaintiff testified at her deposition that she does not differentiate between the kirpan and the kirpan's blade or edge, and when asked if she would consider wearing a kirpan with a blade of less than 2.5 inches she had no personal belief regarding whether she could do so or not:

> Q. . . . Would you consider wearing a shorter blade on the Kirpan of less than 2-1/2 inches.
>
> Did you consider that option?
>
> MR. NEWAR: Again, to the extent any of your considerations were based on discussions with the Sikh Coalition lawyers, you cannot answer.
>
> But as far as when you immediately read this document, if you had some thoughts at that point in time, you can answer.
>
> THE WITNESS: Okay.
>
> First of all, to me a Kirpan is a full Kirpan. In my mind, I don't differentiate as to how much is the edge [i.e., the blade] and how much is the handle. So this question was irrelevant in that sense that why is it only that we have the edge piece of it and not the Kirpan in totality.
>
> So that's -- that entered my mind when I read this question and I discussed the details with [the] Sikh Coalition.
>
> Q. (BY MS. MEI) What if it had been, [w]ould you consider wearing a Kirpan of less than 2-1/2 inches?
>
> A. Could you repeat the question, please.
>
> Q. Would you consider wearing a Kirpan of less than 2-1/2 inches?

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[59](...continued)
Deposition of Ramandeep Tagore, Exhibit R to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 59:20-60:12.

> MR. NEWAR: She's asking you if the statement had stated, Would you consider wearing a Kirpan of less than 2-1/2 inches.
>
> I assume you're talking about taking out the word "blade."
>
> MS. MEI: Yes.
>
> . . .
>
> THE WITNESS: Those details were discussed with the Sikh Coalition.
>
> Q. (BY MS. MEI) Did you have a personal belief of whether you could wear a Kirpan of less than 2-1/2 inches?
>
> A. At that time, no.
>
> Q. As you sit her today?
>
> A. In my mind, to me a Kirpan is in totality. I don't look at as to how much is the edge or not.[60]

Because evidence presented by plaintiff's witnesses establishes that Sikh religious beliefs do not require a kirpan to be a certain length, and because plaintiff testified that when considering the length of her kirpan, she does not differentiate between the blade and handle, the evidence that plaintiff cites in support of her motion for summary judgment would not allow a reasonable fact-finder to conclude that plaintiff has a bona fide religious belief that the blade of the kirpan she wears must be 2.5 inches or longer. Because plaintiff was not prohibited from

[60]Plaintiff's 2010 Deposition, Exhibit A to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, and Exhibit 12 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 114:1-115:25.

wearing a kirpan with a blade less than 2.5 inches in length, plaintiff has failed to establish a prima facie case because she has failed to present evidence that she held a bona fide religious belief that conflicted with an employment requirement.

(b) Geithner is Entitled to Summary Judgment Because Accommodating Plaintiff's Religious Belief Would Have Caused the IRS Undue Hardship

Geithner argues that he is entitled to summary judgment on plaintiff's Title VII claim because the IRS satisfied the reasonable accommodation requirement of Title VII both by exerting a good-faith effort to find a reasonable accommodation for plaintiff's religious beliefs and by offering plaintiff the reasonable accommodation of wearing a kirpan with a blade less than 2.5 inches in length.

"Accommodation can take place in two fundamental ways: (1) an employee can be accommodated in his or her current position by changing the working conditions, or (2) the employer can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to arise." Bruff, 244 F.3d at 500. The Supreme Court has held that the employee must be reasonable in seeking an accommodation, and explained that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." Ansonia Board of Education v. Philbrook, 107 S.Ct. 367, 372 (1986) (quoting Brener v. Diagnostic Center

Hospital, 671 F.2d 141, 145-46 (5th Cir. 1982)). "By its very terms [Title VII] directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." Id. "Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." Id. (citing Trans World Airlines, Inc. v. Hardison, 97 S.Ct. 2264, 2271-72 (1977)). Because Title VII does not define reasonable accommodation, "[t]he determination of whether an accommodation is reasonable in a particular case must be made in the context of the unique facts and circumstances of that case." Rodriguez v. City of Chicago, 156 F.3d 771, 776 n.7 (7th Cir. 1998), cert. denied, 119 S.Ct. 1038 (1999). See also Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir.), cert. denied, 115 S.Ct. 2600 (1995).

(1) IRS Provided Timely Interim Accommodation

Citing, Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975), plaintiff argues that the IRS did not satisfy its burden of demonstrating that it made a reasonable accommodation because no accommodation was offered until she had been banished from both the Leland building and taxpayers' offices.[61] In Young the Fifth Circuit held that "[a]ccommodation

[61]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 48.

as a defense must be unsubtle, direct, undelayed and communicated without equivocation. The statutory defense of accommodation is not met by some post hoc hypothesis." Id. at 145.

Plaintiff's contention that the IRS failed to timely accommodate her religious belief is refuted by undisputed evidence that as soon as plaintiff informed her immediate supervisor, Narvaez, that after the Amrit Sanskar ceremony plaintiff would be wearing a kirpan, Narvaez contacted Baker-Jones, an IRS Labor Relations Specialist based in Dallas, for guidance as to whether a security waiver could be obtained to permit plaintiff to wear her kirpan into the Leland building.[62] After consulting with Baker-Jones, Narvaez directed plaintiff to work from home pursuant to an interim Flexiplace arrangement until the issue could be resolved. Narvaez also directed plaintiff not to visit taxpayers' offices wearing a kirpan with a blade longer than 2.5 inches because such a blade could be considered a dangerous weapon.[63] By directing plaintiff to work from home – albeit on an interim basis – the IRS timely provided plaintiff an accommodation for her bona fide religious belief in a manner that was not only "unsubtle, direct, undelayed, and communicated without equivocation," but also allowed plaintiff to continue performing "pretty much" the same work she had performed when working from the office.[64]

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[62] Id. at 14.

[63] Id. at 28-30.

[64] Plaintiff's 2010 Deposition, Exhibit A to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 108:3-109:6.

(2) IRS Tried But Failed to Find a Permanent Reasonable Accommodation

The IRS argues that it is entitled to summary judgment because it has not only attempted to accommodate plaintiff's religious beliefs in good faith, it has also offered her the reasonable accommodation of wearing a kirpan with a blade that is less than 2.5 inches long. Plaintiff contends that the IRS failed to engage in a good-faith effort to offer her a permanent reasonable accommodation, and failed to offer her a permanent accommodation.

Undisputed evidence establishes that once plaintiff began working from home pursuant to the interim Flexiplace arrangement, the IRS embarked on a months-long effort to understand her religious beliefs and to find a permanent accommodation that would allow her to return to work at both the Leland building and taxpayers' offices. The IRS's attempts to reasonably accommodate plaintiff's bona fide religious beliefs included efforts by plaintiff's immediate supervisors to determine if a security waiver could be obtained that would allow her to wear a kirpan with a 3-inch blade into the Leland building. When, by mid-June of 2005, plaintiff's immediate supervisors had found no applicable guidance, and realized that a security waiver could not be obtained for a kirpan with a 3-inch blade because the FPS considered blades 2.5 inches or longer to be dangerous weapons banned from federal facilities by 18 U.S.C. § 930, the IRS attempted to initiate an interactive dialogue with plaintiff to determine whether she could wear a kirpan that did not violate 18 U.S.C. § 930.

When the IRS's efforts to bring plaintiff's kirpan into compliance with 18 U.S.C. § 930 failed, plaintiff's supervisors tried but failed to find a reasonable permanent accommodation by exploring the possibilities of allowing plaintiff to work from a federal facility that lacked on-site security or allowing plaintiff to work from home permanently. The IRS ultimately decided that reassigning plaintiff to anther federal facility would not be feasible because "despite the absence of any on-site security . . . [at] two Houston IRS offices — [as long as plaintiff] had not reduced the 'blade' of her kirpan to less than 2.5 inches . . . [plaintiff] remained in violation of 18 U.S.C. section 930."[65] Plaintiff's supervisors also explored the possibility of allowing plaintiff to work from home on a permanent basis, but ultimately concluded that possibility was not feasible due to hardships that such an arrangement would impose on the plaintiff and on plaintiff's supervisors and co-workers.[66]

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[65]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 36 (citing Exhibit X, Navarrete-Wasson Deposition, pp. 66:5-68:21). See also Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶ 17 (citing October 27, 2005, e-mail from Hopkins, Exhibit D attached thereto).

[66]See Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 29-31 (describing hardships plaintiff experienced on interim Flexiplace assignment); Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 7 ¶ 20 (describing duties that plaintiff would have difficulty performing if placed on permanent Flexiplace assignment); Narvaez Declaration, Exhibit 4 to Defendants' Memorandum in Support of Motion for Summary Judgment, (continued...)

On January 20, 2006, Arellano sent plaintiff a letter directing her to report to work in the Leland building by January 30, 2006. In pertinent part the letter stated

> [w]e previously advised you about the statutory prohibition against possessing a dangerous weapon in a federal facility (18 USC Section 930), as well as the Treasury-wide Rule of Conduct which prohibits the possession of a dangerous weapon both in a federal facility and while on official duty. This statute extends to devices or instruments with blades of 2-1/2 inches or longer. Because of this prohibition you are not allowed to enter the Leland Building wearing your Kirpan.
>
> We have communicated with you and your attorney in the hope that you would modify your Kirpan in such a way as to allow you to return to your office in the Leland Building. Previously we made several suggestions for modifying your Kirpan including wearing a shorter blade, or wearing a symbolic Kirpan encased in plastic or Lucite; however, your attorney has indicated that you do not wish to consider a modification of your Kirpan.
>
> Over the past few months we have looked at various alternatives for accommodating your religious obligations. However, despite our efforts, we have found that the federal law cited above permits no exceptions for religious reasons. . . .
>
> . . . I am therefore directing you to report to your manager in the Leland Building by Monday, January 30, 2006. Failure to do so will result in you being charged Absent Without Leave (AWOL) which can lead to disciplinary or adverse action up to and including removal from the Service.[67]

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[66](...continued)
Docket Entry No. 60-1, pp. 9-10 ¶ 38 (describing difficulties permanent Flexiplace option posed to plaintiff and other IRS employees).

[67]Exhibit 9 to Navarrete-Wasson Deposition, Exhibit X to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

Following a January 24, 2006, request from plaintiff's attorney, "that the IRS not require Ms. Tagore to appear at work without her . . . three and one half inch kirpan,"[68] the IRS sent plaintiff another letter restating its position:

> [w]e have not asked you to remove your Kirpan before entering the building. We have simply informed you that a federal statute prohibits your possession of a blade 2.5 inches in length or longer in a federal facility and that in order to enter the Leland Building your Kirpan must be modified accordingly. We have provided several suggestions to you for modifying your Kirpan and urge you to do so to enable you to report to your manager . . . on January 30, 2006. Failure to do so will result in your being charged Absent Without Leave (AWOL) which can lead to disciplinary action up to and including removal from the Service.[69]

Geithner argues that the letters the IRS sent to plaintiff in January of 2006 offered plaintiff a reasonable accommodation of wearing a kirpan with a blade less than 2.5 inches. The court is not persuaded by this argument because had plaintiff reported to her office wearing a kirpan with a blade less than 2.5 inches in length she would merely have complied with the employment requirement that she not wear a blade 2.5 inches or longer into a federal facility; she would not have accepted a reasonable accommodation offered by the IRS. See Bruff, 244 F.3d at 500

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[68]Exhibit 10 to Navarrete-Wasson Deposition, Exhibit X to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57.

[69]Exhibit D to Arellano Declaration, Exhibit 1 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60.

("Accommodation can take place in two fundamental ways: (1) an employee can be accommodated in his or her current position by changing the working conditions, or (2) the employer can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to arise."). See also Brener, 671 F.2d at 146 (recognizing that employees have no burden to modify their religious beliefs, and that a reasonable accommodation is an option that allows the employees to satisfy their religious obligations).

(3) Accommodations Plaintiff Sought Would Have Caused the IRS Undue Hardship

Plaintiff argues that Geithner is not entitled to summary judgment because the IRS has failed to prove that it was unable to reasonably accommodate her religious beliefs without undue hardship. Plaintiff explains:

> First, the IRS denied [her] request for a "security waiver" to bring her *kirpan* into the Leland building, despite granting such "waivers" to *non-government* construction workers with more dangerous secular blades.
>
> Second, the IRS refused to allow [her] to bring a "dulled" kirpan into its workplace, despite the fact that the agency invited and [she] accepted this very "accommodation" in June, 2005.
>
> Third, the IRS refused to allow [her] to continue working from home—as she had done from April, 2005 to January 30, 2006 under the IRS-imposed "informal Flexiplace" arrangement—and out of taxpayer offices.
>
> Finally, the IRS refused to re-assign [her] to or allow her to work out of one of the two Houston IRS offices or one of the many other IRS offices across the country that

> have *no* on-site physical security. Although the IRS will undoubtedly attempt to justify this refusal by claiming that 18 U.S.C. section 930's ban on "dangerous weapons" applies to all federal facilities regardless of their lack of on-site security, the fact that the IRS repeatedly and knowingly *allowed* [her] to enter and work in these federal facilities with her *kirpan* in the summer of 2005 nullifies this argument.[70]

The Supreme Court has described "undue hardship" as any act requiring an employer to bear more than a "de minimus cost" in accommodating an employee's religious beliefs. Hardison, 97 S.Ct. at 2277 n.15. The phrase "de minimis cost" entails not only monetary concerns, but also burdens on the employer's business including impact on plaintiff's co-workers. Id., "[t]he rationale underlying this determination is that anything more than a de minimis cost would result in discrimination against other employees, a result the [Supreme] Court concluded Congress did not intend." Brener, 671 F.2d at 146. "The 'mere possibility' of an adverse impact on co-workers . . . is sufficient to constitute undue hardship." Bruff, 244 F.3d at 501 n.14 (quoting Weber, 199 F.3d at 274).

(i) Security Waiver

Geithner argues that the IRS was precluded from granting plaintiff's request for a security waiver to wear her kirpan with a 3-inch blade into the Leland building, other federal facilities,

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[70]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 46-47.

and taxpayers' offices by 18 U.S.C. § 930, which treats knives with blades 2.5 inches or longer as dangerous weapons and prohibits their entry into federal facilities, and by 31 C.F.R. § 0.215,[71] a Treasury Department regulation that bars employees from possessing a dangerous weapon on government property or on official duty.[72] In support of this argument Geithner cites EEOC guidance stating "if a religious practice actually conflicts with a legally mandated security requirement, an employer need not accommodate the practice because so doing would create an undue hardship,"[73] and Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 830-31 (9th Cir. 1999), for its holding that if accommodating an employee's religious beliefs requires an employer to violate federal or state law, the existence of that law establishes undue hardship and relieves the employer of liability.

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[71]31 C.F.R. § 0.215 governs possession of weapons and explosives and provides:

> (a) Employees shall not possess firearms, explosives, or other dangerous or deadly weapons, either openly or concealed, while on Government property or official duty.
>
> (b) The prohibition in paragraph (a) of this section does not apply to employees who are required to possess weapons or explosives in the performance of their official duties.

[72]Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Docket Entry No. 66, pp. 21-29.

[73]Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 18-19 (citing Exhibit 25 thereto, EEOC Compliance Manual, Chapter 12, Religious Discrimination (July 2, 2008) at 63 and 65 n.166 (citing 18 U.S.C. § 930 as an example of such a law)).

Undisputed evidence presented by Fred Muccino, Law Enforcement Program Manager for the FPS, establishes that the FPS – not the IRS – is responsible for providing security at the entrances of federal facilities, including the Leland building,[74] and that based on language in 18 U.S.C. § 930(g)(2) that excludes from the definition of "dangerous weapon" "a pocket knife with a blade of less than 2 ½ inches in length," the FPS interprets that statute to apply to all knives or knife-like items with blades 2.5 inches or greater that are not to be used as a work-related tool, regardless of their subjective dangerousness.[75] Muccino explained that this bright-line rule cabins the discretion of individual security guards who may have divergent interpretations of what constitutes a "dangerous weapon," and provides guidance for guards who must regularly make immediate decisions on the job.[76] Muccino also explained that "[w]hile a building may, based on the wishes of the tenants in that building, determine that it will more strictly limit items that may enter the building, it cannot relax standards below what is permitted by 18 U.S.C. § 930."[77]

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[74]Muccino Declaration, Exhibit 3 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 4, 6-7.

[75]Id. ¶ 9.

[76]Id. ¶ 10.

[77]Id. ¶ 7.

Asserting that the IRS has made no showing that her dulled kirpan is a dangerous weapon, plaintiff argues that the IRS has failed to show either that her kirpan is subject to 18 U.S.C. § 930(a) or, if so, that it is not subject to one of the exceptions provided by 18 U.S.C. § 930(d). Asserting that the IRS provides Leland building employees access to secular knives and other bladed instruments that not only exceed 2.5 inches but are sharper and more dangerous than her kirpan (e.g., scissors, box cutters, and retractable razor blades), plaintiff also argues that the IRS has misapprehended 18 U.S.C. § 930, and that the IRS's selective enforcement of 18 U.S.C. § 930 against religious knives nullifies any undue hardship caused by her request for a security waiver to wear a kirpan with a blade longer than 2.5 inches into the Leland building, other federal facilities, and taxpayers' offices.[78]

Plaintiff's arguments ignore the undisputed evidence presented by her own expert that a kirpan with a 3-inch blade is a weapon.[79] Plaintiff's arguments also ignore the undisputed evidence that the FPS — not the IRS — controls security at the entrances to the Leland and other federal buildings, and that while building tenants

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[78]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 49-52; Plaintiff's Response to Defendants' Motion for Summary Judgment, Docket Entry No. 68, pp. 28-29; Plaintiff's Reply to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, Docket Entry No. 82, pp. 20-23.

[79]See Khalsa Deposition, Exhibit J to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 75:2-76:4 (describing kirpan as a weapon).

like the IRS may decide to more strictly limit items that may enter a federal building, a building tenant cannot relax standards below what is permitted by 18 U.S.C. § 930.[80] Although plaintiff cites Response 13 of Defendants' First Amended Response to Plaintiffs' Fourth Set of Requests for Admission as evidence that "Building Security Committees could grant an 'exception or exemption' to allow into federal facilities 'items [that] conflicted with 18 U.S.C. section 930,"[81] and that "[s]uch evidence belies the agencies' claim to have a 'bright-line rule' barring all non-work-related knives with blades of 2 ½ inches or greater,"[82] Response 13 does not support plaintiff's contention because it refers to box cutters, which are work-related tools. Because plaintiff has Because plaintiff has failed to present any evidence contradicting Geithner's evidence that the FPS – not the IRS – controls access to

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[80]Muccino Declaration, Exhibit 3 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶ 7. See also Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Docket Entry No. 66, p. 22 (citing Transcript from EEOC Hearing, Exhibit 16 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 106:20-107:4 and 108:19-110:16, testimony undisputedly attributed to FPS Commander William Carmody, that FPS controlled access to Leland building, that IRS had no authority to grant plaintiff a security waiver to wear a kirpan with a 3-inch blade into a federal facility, and that FPS applied 18 U.S.C. § 930 to prohibit any non-work related implement with a blade 2.5 inches or longer).

[81]Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 82, p. 22 (citing Exhibit I to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 10-11 (Response 13)).

[82]Id.

federal facilities, that the FPS treats all non-work related knives with 2.5-inch blades as dangerous weapons, and that the IRS has no authority to issue a security waiver for an item that the FPS treats as a dangerous weapon prohibited by 18 U.S.C. § 930, plaintiff has not presented any evidence from which a reasonable fact-finder could conclude that obtaining a security waiver for plaintiff to wear her kirpan with a 3-inch blade into the Leland and other federal facilities would not impose an undue hardship on the IRS.

(ii) "Dulled" Kirpan

Although plaintiff argues that the IRS offered to accommodate her religious belief by allowing her to wear a kirpan with a dulled blade, and that she accepted that offer, the evidence does not support the plaintiff's argument. On June 27, 2005, Narvaez sent plaintiff an e-mail asking, inter alia, "[w]ould you consider wearing a dulled blade sewn in its sheath?" This question was not posed as an offer of a reasonable accommodation but, instead, "to elicit a conversation with Ms. Tagore so that we could have, you know, maybe some type of suggestion that maybe we could all live with."[83] Moreover, since the IRS has submitted undisputed evidence in the form of testimony from FPS Commander William Carmody that security guards cannot be expected to distinguish between a dulled

[83]Narvaez Deposition, Exhibit B to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 163:14-16.

and a sharp blade,[84] and that the FPS interpreted and applied 18 U.S.C. § 930 to require that the blade of any kirpan worn by the plaintiff inside the Leland building be less than 2.5 inches in length,[85] plaintiff's wearing of a dulled kirpan would have imposed the same undue hardship on the IRS that her request for a security waiver imposed.

(iii) Permanent Flexiplace Assignment

Geithner argues that plaintiff's supervisors considered but decided not to place plaintiff in a formal "Flexiplace" program that would have allowed her to work from home on a permanent basis (1) because the IRS did not then have a permanent Flexiplace option, (2) because the plaintiff's position required attendance at federal buildings for meetings and training sessions, (3) because remote access and video teleconferencing capabilities were not advanced enough to make electronic attendance at all meetings and training sessions feasible, and (4) because permanent Flexiplace

[84]Transcript from EEOC Hearing, Exhibit 16 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 106:20-107:10 (testimony attributed to William Carmody in the Memorandum in Support of Defendant's Motion for Summary Judgment, Docket Entry No. 60-1, p. 3 (identifying testimony on p. 101 as Carmody's) and p. 6 (identifying testimony on pp. 108-110 as Carmody's).

[85]Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Docket Entry No. 66, p. 35 (citing Transcript from EEOC Hearing, Exhibit 16 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 126:11-21).

would not have been practical or desirable since revenue agents normally collaborate with peers and supervisors on assignments.[86]

The undisputed evidence establishes that after extensive consideration of plaintiff's duties as a revenue agent, plaintiff's supervisors determined that she could not perform the job for which she had been hired if she worked permanently from home and was unable to enter a federal building. Navarrete-Wasson explains:

> I drafted another Case Summary outlining this option. A true and correct copy of my December Case Summary is attached as Exhibit F. IRS did not have a permanent Flexiplace arrangement in place at the time, and extended Flexiplace arrangements, while possible, were only permitted if they did not compromise an employee's work-related responsibilities. After extensive consideration, we decided that Ms. Tagore could not perform the duties for which she was hired by working permanently from home. As a Revenue Agent, Ms. Tagore was required to attend frequent meetings and interviews at the Leland Building or other federal facilities. Furthermore, Ms. Tagore was expected to meet with taxpayers in their office buildings, ... Finally, Ms. Tagore was a relatively junior employee and was required to complete various training sessions at the Leland Building, which often required in-person attendance. Because Ms. Tagore could not enter the Leland (or any other federal) building while wearing her kirpan, we determined that a permanent Flexiplace arrangement was not feasible.[87]

Narvaez explained that

> [w]e decided that the permanent Flexiplace option posed numerous difficulties and was not feasible for a number of reasons. These reasons included (1) the need for

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[86]Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 11-12, 20-22.

[87]Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Plaintiff's Motion for Summary Judgment, Docket Entry No. 60-1, p. 7 ¶ 20.

> Ms. Tagore to attend meetings, conferences, interviews, trainings, and other activities at federal facilities, including the Leland Building; (2) the need for Ms. Tagore to visit taxpayer sites; (3) the possibility of having to constantly reassign Ms. Tagore to new cases if her assigned cases required her to visit federal facilities or taxpayer sites; and (4) the various difficulties and burdens, outlined above in paragraphs 22-29, that we had experienced during Ms. Tagore's informal Flexiplace arrangement. I memorialized these concerns in a memorandum I wrote on December 28, 2005, which is attached as Exhibit F.[88]

Additional difficulties experienced during plaintiff's informal Flexiplace arrangement caused by her inability to enter either the Leland Building or taxpayers' offices included the need for Narvaez and other Revenue Agents "to travel to off-site locations—such as gas stations and parking lots—to [exchange] information" with plaintiff.[89]

Plaintiff has not offered any evidence capable of refuting Geithner's evidence that maintaining plaintiff on permanent Flexiplace status would have caused undue hardship to her supervisors and co-workers in time taken away from their own jobs and duties to travel to off-site locations to exchange information with her. Moreover, plaintiff acknowledges that although the work she performed from home during the interim Flexiplace arrangement

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[88]Narvaez Declaration, Exhibit 4 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 9-10 ¶ 38.

[89]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 30 (citing Exhibit B, Narvaez Deposition, pp. 46:10-21 and 53:14-20).

was largely the same work that she performed from the office, the Flexiplace arrangement had adverse consequences. For example, plaintiff acknowledges that her inability to enter taxpayers' offices "ensured that [she] would not be able to fully and effectively discharge her duties as a LMSB Revenue Agent,"[90] and "was not able to have the benefit of the explanation the taxpayer provided of some of the records."[91] Plaintiff also acknowledges that the Flexiplace arrangement physically isolated her from the other Revenue Agents on her LSMB team, prevented her from collaborating with her LSMB team members, and may have stigmatized her.[92] Moreover, plaintiff acknowledges that permanent placement on Flexiplace status would require aid provided by the IRS's video-conference and teleconferencing capabilities.[93]

Because Geithner has presented undisputed evidence that allowing plaintiff to remain on Flexiplace assignment permanently would have imposed more than a de minimis burden on plaintiff's ability to be an effective revenue agent and on her supervisors and co-workers, plaintiff has failed to raise a genuine issue of material fact for trial by presenting evidence from which a reasonable fact-finder could conclude that allowing her to continue

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[90] Id. at 29.

[91] Id.

[92] Id. at 30-31.

[93] Id. at 37.

permanently on Flexiplace assignment would not cause undue hardship to the IRS.

(iv) Reassignment to Another Federal Facility

The IRS considered but declined to offer plaintiff reassignment to an IRS office in a federal facility other than the Leland building because Arellano, Narvaez, and Baker-Jones were advised by John Manuel and Charles Hopkins of IRS Physical Security, that 18 U.S.C. § 930 bars a knife with a blade of 2.5 inches or longer from any federal facility. In an October 27, 2005, e-mail Hopkins explained that

> [m]y team conducted research on the "religious knife" question and here is what we found:
>
> Generally the rules and regulations governing Federal Properties are prepared and promulgated by the U.S. General Services Administration (GSA) pursuant to and in accordance with the United States Code (USC). These rules and regulations are issued as "Federal Management Regulations" (FMR) and cited as The Code of Federal Regulations or CFR.
>
> Specifically, the Federal Management Regulation (FMR) promulgated by GSA at 41 CFR subsection 102-74.440 (dtd 12/2002) states:
>
> "Weapons (41 CFR 102-74.440), Federal law prohibits the possession of firearms or other dangerous weapons in Federal facilities and Federal court facilities by all persons not specifically authorized by Title 18, United States Code, Section 930 (Title 18, USC Section 930). Violators will be subject to fine and/or imprisonment for periods up to five years."
>
> Title 18, USC, Section 930 (dtd. 01/22/2002) describes a dangerous weapon as follows: The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is

> readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.
>
> Weapons are prohibited from being possessed or present in a Federal facility by anyone not specifically authorized by 18 U.S.C. 930. This basically limits possession to law enforcement officials in the lawful performance of official duties.
>
> These regulations are applicable to all property under the authority of GSA and to all persons entering in or on such property.
>
> So the bottom line is that unless the "religious" knife has a blade of less than 2 ½ inches, or is being carried by an appropriate law enforcement official, it is prohibited.
>
> I cannot find any exceptions for religious purposes.
>
> I am not aware of any IRS supplemental policies or guidance related to this matter. I believe the USC, CFR, and FMR would be controlling and supersede any IRS issuances.
>
> Lastly, I have asked my folks to ensure that this policy is being applied consistently at all IRS facilities.[94]

Because it is also undisputed that the FPS, not the IRS, controlled access not only to the Leland building but to other federal facilities to which plaintiff could have been reassigned, and because plaintiff does not dispute that 18 U.S.C. § 930 as written applies to all federal facilities and not merely to federal facilities with metal detectors at the entrances,[95] plaintiff has

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[94]Navarrete-Wasson Declaration, Exhibit 5 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶ 17 (citing October 27, 2005, e-mail from Hopkins, Exhibit D attached thereto).

[95]See § III.A.2(b)(3)(i), above. See also Muccino Declaration, Exhibit 3 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 4, 6-7, and 9.

failed to present evidence from which a reasonable jury could conclude that the FPS's application of 18 U.S.C. § 930 did not create an undue hardship that prevented the IRS from reassigning her to work from a federal facility that did not have a metal detector at the entrances.

3. Conclusions

The undisputed evidence establishes that plaintiff was not allowed into the federal building where she worked for the IRS wearing a kirpan with a 3-inch blade because the DHS and FPS defendants who were responsible for security at the entrances to that and other federal facilities interpreted and applied 18 U.S.C. § 930 to prohibit entering into federal facilities with any knife-like object with a blade of 2.5-inches or longer. The undisputed evidence also establishes that the IRS provided plaintiff a reasonable interim accommodation but failed to offer plaintiff a reasonable permanent accommodation because no accommodation could be found that would not cause the IRS undue hardship. Plaintiff has failed to present evidence from which a reasonable fact-finder could conclude that any of the accommodations plaintiff sought would not cause the IRS undue hardship. Accordingly, the court concludes that Geithner is entitled to summary judgment on plaintiff's Title VII claim for religious discrimination.

B. Religious Freedom Restoration Act Claims

Plaintiff argues that she is entitled to summary judgment on the RFRA claims for religious discrimination that she has asserted against the FPS and DHS defendants because (1) wearing a kirpan constitutes a sincere exercise of her religion—Sikhism, (2) the defendants' ban of her kirpan with its 3-inch blade substantially burdened her exercise of Sikhism, and (3) the defendants have failed as a matter of law to overcome RFRA's strict scrutiny affirmative defense. Defendants argue that they are entitled to summary judgment on plaintiff's RFRA claims because she cannot demonstrate how and/or why the government's requirement that she wear a kirpan with a blade that is less than 2.5 inches in length substantially burdened her practice of Sikhism, and because the government's requirement that she wear a kirpan with a blade that is less than 2.5 inches in length was the least restrictive means of furthering the compelling government interest in the security of federal facilities.[96]

1. Applicable Law

The RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a).

[96]Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 2.

Subsection (b) provides an exception pursuant to which the government may substantially burden a person's exercise of religion if (1) it furthers a compelling governmental interest; and (2) it is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb1-(b)(1) and (2).

Congress passed the RFRA in 1993 to legislatively overrule the Supreme Court's holding in Employment Division, Department of Human Resources of Oregon v. Smith, 110 S.Ct. 1595 (1990), that neutral laws of general applicability that burden religious exercise do not violate the First Amendment. Congress explained that RFRA was passed

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398[, 83 S.Ct. 1790,] (1963) and Wisconsin v. Yoder, 406 U.S. 205[, 92 S.Ct. 1526,] (1972), and to guarantee its application in all cases where the free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b). For plaintiff to establish her RFRA claim she must prove that the IRS substantially burdened the exercise of her sincerely held religious belief. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S.Ct. 1211, 1219 (2006) (recognizing that prima facie case under the RFRA is established by showing that a government requirement (1) substantially burdens (2) a sincere (3) religious exercise).

RFRA does not define the term "substantial burden," but the Supreme Court and the Fifth Circuit have explained its meaning.

The Supreme Court has stated that government actions work a "substantial burden" on a person's religious exercise when it "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." Sherbert, 83 S.Ct. at 1794. See also Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. 1319, 1326 (1988) (a governmental burden is considered substantial when it has a "tendency to coerce individuals into acting contrary to their religious beliefs"); Thomas v. Review Board of the Indiana Employment Security Division, 101 S.Ct. 1425, 1432 (1981) (choice between unemployment benefits or religious duties imposed a substantial burden because it exerted "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

In Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004), cert. denied, 125 S.Ct. 2549 (2005), the Fifth Circuit defined "substantially burden" as used in the analogous Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 20000cc-2(b) in similar terms. After considering the plain wording of the statute, its legislative history, and the Supreme Court's use of the term "substantially burden" in other contexts, the Adkins court held that a "regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." Id. at 570. The effect of a government action or

regulation is "significant" when it either (1) influences an adherent to act in a way that violates her religious beliefs or (2) forces the adherent to choose between enjoying some generally available, non-trivial benefit, or following her religious beliefs. Id.

> On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Id. No test for the presence of a substantial burden may require that the religious exercise at issue be central to the adherent's religion. Nevertheless, the complaining adherent must demonstrate "the honesty and accuracy of [her] contention that the religious practice at issue is important to the free exercise of [her] religion." Id.

Plaintiff bears the burden of showing that a substantial burden exists. Id. at 567 ("Initially, it falls to the plaintiff to demonstrate that the government practice complained of imposes a 'substantial burden' on [her] religious exercise."). The substantial-burden inquiry is fact-specific and requires a case-by-case analysis. Id. at 571. If plaintiff successfully shows a substantial burden on her religious exercise, then the burden shifts to the defendants to demonstrate that the policies at issue are the least restrictive means of furthering a compelling governmental interest. Gonzalez, 126 S.Ct. at 1217 and 1219.

2. Analysis

(a) No Genuine Issue of Material Fact as to Whether Prohibition of Dangerous Weapons with 2.5-Inch or Longer Blades from Federal Facilities Substantially Burdened Plaintiff's Exercise of Sikhism

Plaintiff alleges that her adherence to the Sikh faith requires her to wear a kirpan at all times, and that defendants' application of 18 U.S.C. § 930 to prohibit her from wearing a kirpan with a 3-inch blade into the Leland building, other federal facilities, and taxpayers' offices substantially burdened the free exercise of her sincerely held religious belief because it forced her to choose between working for the IRS and serving her country – which she truly enjoyed – and adhering to her Sikh faith, which she believes requires her to don a kirpan at all times.[97] Plaintiff argues that defendants forced her to make this choice under penalty of criminal fine and/or imprisonment because 18 U.S.C. § 930(a) provides "[e]xcept as provided in subsection (d), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both."[98]

Although defendants assume for the purposes of the pending motions that wearing a kirpan is a sincere religious exercise for

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[97] Id. at 58-59.

[98] Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 57 & n.40.

plaintiff, defendants argue that "plaintiff has failed to establish that wearing a kirpan with a blade of less than 2 ½ inches would have substantially burdened her religious exercise."[99] Defendants argue that they did not substantially burden plaintiff's exercise of Sikhism because they did not prohibit her from wearing all kirpans into federal facilities, but only prohibited her from wearing a kirpan whose blade exceeded 2.5 inches in length. Defendants state that they prohibited plaintiff from wearing her kirpan with a 3-inch blade into the Leland building and other federal facilities based on 18 U.S.C. § 930, which bars "dangerous weapons" from federal facilities, but excludes from the definition of "dangerous weapons" "a pocket knife with a blade of less than 2 ½ inches in length." 18 U.S.C. § 930(g)(2). William Carmody and David Hiebert, the FPS officials responsible for supervising security at the Leland building where plaintiff worked, testified that plaintiff would have been permitted to enter the building with a kirpan whose blade was shorter than the length specified in 18 U.S.C. § 930(g)(2).[100] Thus, defendants argue that the relevant question is whether plaintiff would have been substantially burdened by wearing a kirpan with a blade of less than 2.5 inches

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[99]Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 35.

[100]Transcript of EEOC Hearing, Exhibit 16 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 126:11-21; Heibert Deposition, Exhibit 8 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 30:9-13.

instead of the kirpan with a blade of 3 inches that plaintiff preferred.

Plaintiff describes defendants' view of the "relevant inquiry" as "whether governmental regulations substantially burden [her] religious free exercise broadly defined,"[101] and argues that the "relevant inquiry" is "whether the regulations substantially burden [the] specific religious practice of wearing a 3-inch kirpan."[102] Citing Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009), plaintiff argues that defendants have substantially burdened her religious exercise because they completely banned her from wearing a kirpan with a 3-inch blade and a complete ban on an activity is by definition a substantial burden on that activity.[103] In Merced the Fifth Circuit explained that "[t]he relevant inquiry is not whether governmental regulations substantially burden a person's religious free exercise broadly defined, but whether the regulations substantially burden a specific religious practice." Id. at 591. Plaintiff has testified, however, that before consulting with her attorneys she had no personal belief about whether she could wear a kirpan with a blade shorter than 2.5 inches,[104] that she does not

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[101]Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 82, p. 29.

[102]Id.

[103]Id.

[104]Plaintiff's 2010 Deposition, Exhibit A to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, and Exhibit 12 (continued...)

differentiate between a kirpan's blade and handle,[105] and that she did not choose her kirpan based on blade length.[106] This testimony refutes plaintiff's contentions that wearing a kirpan with a blade that is longer instead of shorter than 2.5 inches is important to the free exercise of her religious beliefs, and that defendants' application of 18 U.S.C. § 930 to prohibit her from wearing a kirpan with a 3-inch blade into the Leland building forced her to choose between working for the IRS and adhering to her Sikh faith.

The difference between the 3-inch bladed kirpan that plaintiff preferred and a kirpan with a blade of less than 2.5 inches that the defendants would have permitted plaintiff to wear into the Leland and other federal buildings is analogous to cases where courts have found that the resulting burden is not "substantial" under RFRA. See Gladson v. Iowa Department of Corrections, 551 F.3d 825, 834 (8th Cir. 2009) (dismissing allegations "for the most part conclusory" when prisoners failed to offer evidence explaining why a three-hour ceremony was significantly different from the eight-hour one they desired); Living Water Church of God v. Charter Township of Meridian, 258 Fed.Appx. 729, 738-39 (6th Cir. 2007), cert. denied, 128 S.Ct. 2903 (2008) (holding that denial of

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[104](...continued)
to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 114:23-115:22.

[105]Id. at 114:11-13.

[106]Id. at 88:22-89:25.

church's application to build a gymnasium adjacent to existing worship facilities was not a substantial burden under RLUIPA because the gymnasium was unrelated to religious worship and the church could expand its worship space by another 14,000 feet without restriction); Hernandez v. C.I.R., 109 S.Ct. 2136 (1989) (concluding that an "incrementally larger tax burden" from a charitable deduction disallowance could not substantially burden Scientologists merely because adherents would have "less money available"). Defendants contend that these cases share with the present case a "size issue," i.e., an assertion that a substantial burden arises if a religious object or practice is limited to a particular size, degree, or number. Defendants contend – and the court agrees – that such claims provide courts no principled reason for accepting one limiting measurement over another. See Strutton v. Meade, No. 4:05CV02022, 2010 WL 1253715, *49 (E.D. Mo. March 31, 2010) (rejecting claim that one weekly meeting instead of two was burdensome the court explained that it "could just as easily conclude that [a plaintiff's] exercise is substantially burdened unless he has three, or four, or five services per week").

Because plaintiff has testified that before she consulted with her attorneys she had no personal belief about whether she could wear a kirpan with a blade shorter than 2.5 inches, and because she does not differentiate between a kirpan's blade and handle, and she did not choose her kirpan based on blade length, there is no

evidence to support the assertions in plaintiff's briefing that defendants' requirement that plaintiff wear a kirpan with a blade that is a half-inch shorter than the 3-inch blade she preferred to wear substantially burdened plaintiff's exercise of Sikhism. See Smith v. Allen, 502 F.3d 1255, 1278 (11th Cir. 2007), abrogated on other grounds by Sossamon v. Texas, 131 S.Ct. 1651, 1657 n.3 (2011) ("If the word 'substantial' in the statutory phrase 'substantial burden,' . . . is to retain any meaning, it must, at a minimum, be construed as requiring something more than solely the denial of a request that is sincere. An alternate approach . . . would result in the word 'substantial' . . . as being mere surplusage, since every governmental action denying a requested item to be used in religious observance would give rise to a prima facie . . . claim."). See also H.R. Rep. No. 106-219, Religious Liberty Protection Act (1999) ("The modifier 'substantially' is intended in ensure that strict scrutiny is not triggered by trivial, technical, or *de minimus* [sic] burdens on religious exercise.").[107] Accordingly, the court concludes that the DHS and FPS defendants are entitled to summary judgment because plaintiff has failed to present evidence capable of creating a genuine issue of material fact as to whether the defendants substantially burdened the free exercise of plaintiff's sincerely held religious beliefs.

[107]Exhibit 24 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, p. 13.

(b) No Genuine Issue of Material Fact as to Whether Prohibition of 2.5-Inch or Longer Blades Is Least Restrictive Means to Serve Compelling Government Interest of Securing Federal Facilities from Dangerous Weapons

RFRA places on the defendants the burden of proving that the burden it created both advances a compelling interest and is the least restrictive means of doing so. See Gonzales, 126 S.Ct. at 1211.

(1) Securing Federal Facilities from Dangerous Weapons is a Compelling Government Interest

Defendants argue that their enforcement of 18 U.S.C. § 930 against plaintiff to prohibit her from entering the Leland building and other federal facilities with a kirpan that has a 3-inch blade did not violate RFRA because a restriction on blades 2.5 inches or greater was the least restrictive means of furthering a compelling government interest in securing federal facilities from dangerous weapons. Defendants explain that they did not permit plaintiff to enter the Leland building with her kirpan because its 3-inch blade exceeded the 2.5-inch limit specified in 18 U.S.C. § 930 that criminalizes the possession of a dangerous weapon in a federal facility but excludes from its definition of "dangerous weapon" a pocket knife with a blade of less than 2.5 inches in length. 18 U.S.C. § 930(g)(2).

The protection of public safety is a compelling governmental interest. The DHS and FPS thus have a compelling interest in protecting the safety of employees and visitors to federal

facilities by preventing potentially dangerous weapons from entering those facilities. See Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (school's ban on kirpans furthered interest in campus safety).[108] Citing Gonzales, 126 S.Ct. at 1220-21, plaintiff argues that the defendants "cannot rely on 'general platitudes,' but must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests,"[109] and that "[t]his is especially true where[, as here,] the public safety statute in question contains ***exemptions*** from its requirements."[110] Asserting that defendants have failed to establish that her 3-inch bladed kirpan constitutes a dangerous weapon, plaintiff argues that the defendants have failed to establish a compelling interest in banning her from carrying her kirpan into federal facilities. This argument is refuted by the testimony of plaintiff's expert, Khalsa,

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[108]In Cheema the court held that a ban on weapons in a public school violated the rights for Sikh students carrying kirpans required by their religion. Evaluating the plaintiffs' application for a preliminary injunction based on their RFRA claim that some students should be allowed to carry knives to school because they are an essential part of their religion, the court concluded that the school's decision to ban the knives completely would likely impose a substantial burden on the students' religious beliefs, and that the school could achieve its goal of safety through a less restrictive means. The court entered a preliminary injunction ordering that the knives could be carried only if they were sewn into their sheaths, worn underneath the children's clothes, and subject to inspection by school officials.

[109]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 60.

[110]Id. at 61.

that a kirpan with a 3-inch blade can be used as a weapon, even by a person who is not highly trained.[111]

As the Supreme Court stated in a recent RFRA case, "the government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the required religious accommodations would seriously compromise its ability to administer the program." Gonzales, 126 S.Ct. at 1223. The Court cited and approved three cases as examples of such situations: Braunfeld v. Brown, 81 S.Ct. 1144 (1961), United States v. Lee, 102 S.Ct. 1051 (1982), and Hernandez, 109 S.Ct. at 2149. In Braunfeld the Court upheld a denial of an exemption to Sunday closing laws for Saturday Sabbath observers, noting that an exemption would defeat the purpose of a uniform day of rest for all. 81 S.Ct. at 1148. In Lee and Hernandez the Court upheld the denial of tax exemptions to members of certain religious groups, holding that a functional tax system would be impossible if religious denominations were granted exemptions. Lee, 102 S.Ct. at 1055; Hernandez, 109 S.Ct. at 2149.

Undisputed evidence presented by Fred Muccino, Law Enforcement Program Manager for the FPS, establishes that the FPS is responsible for providing security at the entrances of federal

[111]Khalsa Deposition, Exhibit J to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57; and Exhibit 9 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 75:2-76:4.

facilities, including the Leland building,[112] and that based on language in 18 U.S.C. § 930(g)(2) that excludes from the definition of "dangerous weapon" "a pocket knife with a blade of less than 2 ½ inches in length," the FPS interprets and applies that statute to apply to all knives or knife-like items with blades 2.5 inches or greater that are not to be used as a work-related tool, regardless of their subjective dangerousness.[113] Muccino explained that this bright-line rule cabins the discretion of individual security guards who may have divergent interpretations of what constitutes a "dangerous weapon," and provides guidance for guards who must regularly make immediate decisions on the job.[114] Muccino also explained that "[w]hile a building may, based on the wishes of the tenants in that building, determine that it will more strictly limit items that may enter the building, it cannot relax standards below what is permitted by 18 U.S.C. § 930."[115]

This evidence establishes that security personnel guarding the entrances to federal facilities must make snap decisions as to whether to permit or not to permit items to enter, and that a clear, easily-applied rule that bars all implements with blades 2.5

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[112]Muccino Declaration, Exhibit 3 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, ¶¶ 4, 6-7.

[113]Id. ¶ 9.

[114]Id. ¶ 10.

[115]Id. ¶ 7.

inches or longer provides the greatest assurance of security, consistency, predictability, and regularity for individuals entering federal facilities. This case is analogous to Braunfeld, Lee, and Hernandez in that a fundamental security system at the entrance to federal facilities would be impossible if case-by-case exemptions were granted for anyone carrying an otherwise prohibited knife or knife-like object because of alleged religious convictions. Accord, United States v. Adeyemo, 624 F.Supp.2d 1081, 1094 n.11 (N.D. Cal. 2008) (holding that under RFRA and Gonzales, a court "must . . . consider the overall impact that a religious exemption available to [the individual] and all similarly-situated . . . adherents [to the individual faith] would have").[116]

(2) Least Restrictive Means

Plaintiff argues that the DHS and FPS defendants are unable to prove that "completely barring [her] from entering [federal and

[116]This would be the case with respect to plaintiff, who has not only worn at least two different kirpans with different length blades, but also submitted conflicting evidence regarding the length of the blade she seeks to wear. See Plaintiff's 2010 Deposition, Exhibit 12 to Defendants' Memorandum in Support of Motion for Summary Judgment, Docket Entry No. 60-1, pp. 45:19-46:6 (stating that in response to Narvaez's concern about her kirpan, she began wearing a shorter kirpan with a smaller blade). See also Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 19 and 45 (arguing that plaintiff seeks to wear a kirpan with a 3-inch blade), and January 24, 2009, letter from Bhalla to Bauer, Exhibit 10 to Navarrete-Wasson Deposition, Exhibit X to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57 ("requesting that the IRS not require Ms. Tagore to appear at work without her . . . three and one half inch kirpan.").

taxpayers'] offices with her kirpan was the least restrictive means of satisfying [a compelling government] interest."[117] Citing Spratt v. Rhode Island Department of Corrections, 482 F.3d 33, 41 (1st Cir. 2007), plaintiff argues that "[u]nder RFRA, the government 'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice,"[118] and citing Merced, 577 F.3d at 595, plaintiff argues that "the government must rebut any less restrictive means proffered by the plaintiff."[119] Plaintiff argues that "before barring [her] from entering all federal facilities with her kirpan, the FPS neither considered nor offered [her] any alternative to such an outright ban,"[120] and that

> the FPS rejected a number of measures—including ones proffered by [plaintiff]—that were less restrictive than an outright ban of her *kirpan*. First, [plaintiff] proposed and the FPS rejected granting her the same "security waiver" of 18 U.S.C. § 930 as it routinely grants non-government construction workers to bring longer and sharper "dangerous weapons" into federal buildings. The FPS rejected such a "security waiver" despite the fact that the FPS, in *conjunction* with other federal agencies (e.g. the FBI) and other federal branches (e.g. the United States judiciary), had afforded such a waiver to other *kirpan*-carrying Sikhs under similar circumstances. . . .

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[117]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, p. 64.

[118]Id.

[119]Id.

[120]Id. at 65.

> Second, the FPS declined to afford [plaintiff] the same waiver or exception that it indisputably affords more dangerous secular bladed instruments—such as box cutters, razor-blade knives, scissors, and letter openers—in federal facilities. The FPS has attempted to rationalize this disparate treatment of [plaintiff's] *kirpan* by asserting that these secular knives are "tools of the trade" necessary to perform secular tasks. However, 18 U.S.C. § 930 contains no exception for secular "tools of the trade." As a consequence, the agency's justification only serves to underscore the agency's religious bias against [plaintiff] and her *kirpan*.[121]

In Merced, 577 F.3d at 595-96, the Fifth Circuit held that the RFRA's least-restrictive-means test is not satisfied where the plaintiff proffers even one less restrictive alternative that the government fails to rebut.

In support of her argument that less restrictive means exist to further the compelling interest of securing federal facilities from dangerous weapons, plaintiff cites the testimony of Dalbir Singh Gill that he was granted a security waiver on two different occasions in 2009 to enter a federal building in New Jersey to take tests as part of the employment application process while wearing a kirpan with a 3-inch blade under his clothes.[122] Plaintiff cites the deposition testimony of Ajai Singh Khalsa that the Chief Judge for the United States District Court for the District of Minnesota has granted him permission to wear a

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[121] Id. at 65-66.

[122] Declaration of Dalbir Singh Gill, Exhibit Q to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, ¶¶ 4-12.

kirpan into federal courthouses in Minnesota, and that the kirpan he wears has a 3-inch blade.[123] Plaintiff also cites the Declaration of Tarunjit Singh Butalia that Secret Service officials allowed him to wear a kirpan with an edge that is at least 3 inches in length into The White House.[124] The evidence provided by Gill, Khalsa, and Butalia is inapposite, however, because the issue in those instances was whether a kirpan could be worn into a federal facility;[125] plaintiff has not presented any evidence showing that the length of a kirpan's blade was at issue or even considered in any of those instances. Those situations are also distinguishable from the present case because the security waivers that Gill, Khalsa, and Butalia received were not permanent waivers for a limitless number of entries but, instead, waivers for discrete occasions. The most analogous situation to the plaintiff's is that of Khalsa who received permission from the Chief Judge of the United States District Court for the District of Minnesota to wear his kirpan into federal courthouses. But the solution reached in that instance was expressly premised on the judge's understanding

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[123]Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 65-66 (citing Exhibit J, Khalsa Deposition, pp. 167-79 and 201, and Exhibit Q, Affidavit of Dalbir Singh Gill).

[124]Plaintiff's Second Surreply to Defendants' Motion for Summary Judgment, Docket Entry No. 86, pp. 2-3 (citing Exhibit A, Declaration of Tarunjit Singh Butalia).

[125]See Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 66, pp. 30-31.

that Khalsa's need to wear his kirpan into federal courthouses in Minnesota "probably [didn't] require a global resolution" because "the situation seems to arise so seldom."[126]

Plaintiff also argues that the presence of tools such as scissors, letter openers, box cutters, and cake knives in the Leland and other federal buildings, requires defendants to grant her a security waiver because allowing secular tools while disallowing her religious knife is discriminatory. However, plaintiff's comparison of her kirpan, which is described as a weapon by her expert witness,[127] and tools required to perform job duties within federal facilities is inapposite. Alternatively, plaintiff argues that defendants should allow her to wear her 3-inch bladed kirpan into federal facilities because she wears her kirpan for the lawful purpose of exercising her religious beliefs and, as such, the presence of her kirpan in federal facilities is consistent with 18 U.S.C. § 930(d)(3), which permits "the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to . . . other lawful purpose."

Citing United States v. Cruz-Bancroft, No. 1:09-mj-00319, Mem. Op. at 4 (D.N.M. January 4, 2010), the only case known to have

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[126]Exhibit 40 to Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Docket Entry No. 66.

[127]Khalsa Deposition, Exhibit J to Plaintiff's Motion for Partial Summary Judgment, and Exhibit 9 to Defendants' Memorandum in Support of Motion for Summary Judgment, p. 75:2-76:4.

addressed the meaning of "other lawful purpose" used in 18 U.S.C. § 930(d)(3), defendants argue that

> by its express terms the statute demands inquiry into [the] purpose in bringing the firearm [or weapon] to a Federal facility. In other words, the possession of the firearm [or weapon] must be not only lawful, but also must be for a lawful purpose that is related to the federal facility. Any other interpretation would fail to give full effect to every word in the statute . . . Thus, the Court holds that § 930(d)(3) applies to the lawful possession of a weapon incident to hunting or to another lawful purpose related to the Federal facility in question.[128]

Because plaintiff's purpose in wearing her kirpan was not related to the federal facility, and plaintiff does not argue otherwise, the court concludes that plaintiff has failed to raise a genuine issue of material fact as to whether the exemption provided by 18 U.S.C. § 930(d)(3) applies to her.

3. Conclusions

The undisputed facts are that the DHS and FPS defendants did not allow plaintiff into the federal building where she worked wearing a kirpan with a 3-inch blade because they interpreted and applied 18 U.S.C. § 930 to prohibit carrying any knife-like object with a blade of 2.5 inches or longer into a federal facility unless it was carried for a purpose that was related to the federal facility at issue. It is also undisputed that plaintiff would have been permitted to return to work at the IRS's office in the Leland

[128]Exhibit 30 to Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Docket Entry No. 66.

building and taxpayers' offices had she worn a kirpan whose blade was a half-inch shorter than the one she wore. Throughout her briefing plaintiff conflates the defendants' allowance of work-related tools such as scissors, letter openers, and box cutters, with the allowance of her kirpan, which according to her own expert is a bladed weapon.[129] Agencies like the DHS and the FPS, which are appropriately concerned with balancing the security needs of federal facilities with plaintiff's desire to carry a kirpan, could not authorize what they reasonably understood to be a violation of a federal statute. Contrary to assertions in plaintiff's briefing, the DHS and FPS defendants did not interpret or apply 18 U.S.C. § 930 to ban all kirpans but, instead, only those with blades 2.5 inches or longer. Because plaintiff has testified that she does not distinguish between the length of the blade and the length of the handle on her kirpan, plaintiff has failed to offer any evidence from which a reasonable jury could conclude that wearing a kirpan with a blade that is less than 2.5 inches in length substantially burdened the exercise of her sincerely held belief in Sikhism. The court also concludes that the burden placed on plaintiff's religious exercise by the government's requirement that the blade of her kirpan be less than 2.5 inches in length is the least restrictive means of advancing a compelling government interest in securing federal facilities from dangerous weapons.

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[129] See Khalsa Deposition, Exhibit J to Plaintiff's Motion for Partial Summary Judgment, Docket Entry No. 57, pp. 75:2-76:4 (describing kirpan as a weapon).

IV. Plaintiff's Objections to Defendants' Evidence

Plaintiff objects to various categories of defendants' summary judgment evidence as inadmissible.[130] Plaintiff objects to the declarations and deposition testimony of Arellano, Narvaez, and Navarrete-Wasson. Although plaintiff objects to defendants' reliance on the testimony of these allegedly "interested witnesses" in support of their motion for summary judgment, the testimony of these "interested witnesses" is also cited by plaintiff in her own motion for summary judgment. Since plaintiff as well as defendants rely on the testimony of these three witnesses, plaintiff's objection to defendants' reliance on their testimony is unfounded. Moreover, the court is not persuaded that plaintiff has presented any credible reasons for excluding this testimony.

Plaintiff also objects to (1) defendants' voluntary disclosure of their putative offers of compromise and her rejection of those offers at the parties' February 2006 mediation, (2) defendants' inadmissible hearsay statements, and (3) defendants' lack of personal knowledge.[131] Plaintiff objects to a number of statements in each of these three categories of evidence. Because the court has resolved the pending motions for summary judgment without reference to any of the statements to which plaintiff expressly objects, plaintiff's remaining objections to defendants' summary judgment evidence are moot.

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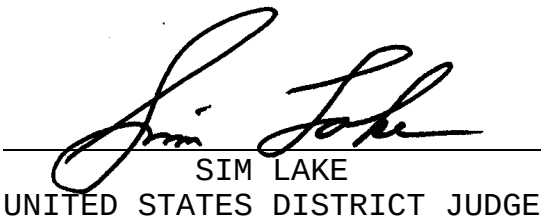
[130]Plaintiff's Objections to Defendants' Motion for Summary Judgment, Docket Entry No. 69.

[131]Id. at 3-9.

V. Conclusions and Order

For the reasons explained above, Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 57) is **DENIED**, defendants' Motion for Summary Judgment (Docket Entry No. 60) is **GRANTED**, and Plaintiff's Objections to Defendants' Motion for Summary Judgment (Docket Entry No. 69) is **DENIED** as to the testimony of defendants' "interested witnesses" -- Arellano, Narvaez, and Navarrete-Wasson -- and **MOOT** in all other respects.[132]

SIGNED at Houston, Texas, on this 22nd day of July, 2011.



SIM LAKE
UNITED STATES DISTRICT JUDGE

[132]The court has allowed the parties extraordinary leeway in submitting numerous briefs and other written materials in connection with the pending motions. As the length of this Memorandum and Order indicates, the court has expended considerable time reading these papers and performing a significant amount of independent research to be as fully informed as possible when addressing the parties' arguments. While, because of the sheer volume of information presented, it is not impossible that some arguments were overlooked, the parties should assume that failure to expressly address a particular argument in this Memorandum and Order reflects the court's judgment that the argument lacked sufficient merit to warrant discussion. Accordingly, the court strongly discourages the parties from seeking reconsideration based on arguments they have previously raised or that they could have raised.