GIVE ME THAT COLD FUSION RELIGION
A closer look at LaViolette v. Department of Commerce

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Former patent examiner Dr. Paul LaViolette (above) says he was fired from his job because of his unorthodox beliefs, which he expresses in his books (below) and on his website.
INTRODUCTION

"Protection from Discrimination May Include Belief in Aliens."\(^1\)
"EEOC Backs ‘Cold Fusion’ Devotee.\(^2\)
"Church of Cold Fusion.\(^3\)
"EEOC Rules that Cold Fusion Is a Religion.\(^4\)

Headlines for articles about the Equal Employment Opportunity Commission’s opinion in *Paul A. LaViolette v. William M. Daley, Secretary, Department of Commerce*\(^5\) grabbed readers’ attention in a variety of media, from trade newsletters to mainstream newspapers like *The Washington Post* to websites like newsoftheweird.com\(^6\) and overlawyered.com\(^7\). The EEOC probably had no idea how much interest its boilerplate opinion would generate. The seeming bizarreness of the news also provoked many readers to respond. “It’s ok to keep an open mind about the (slight) possibility that thousands of scientists who investigated cold fusion might have missed something, but jeez. This ain’t religion, and it’s not science. It’s not even an especially good legal argument,” wrote A.G. Android in the readers’ feedback section of *Slate*, Microsoft Network’s online magazine, in response to an article entitled “Is It Religious to Believe in Cold Fusion?”\(^8\)

To gain a better understanding of the EEOC opinion from a legal perspective, this paper first looks at the struggle of the legal community in defining the word “religion;” it goes on to examine how the EEOC in particular has dealt with this dilemma. Following this background information is a discussion and analysis of the specific legal issues surrounding LaViolette’s case. Currently, LaViolette does not have an attorney and has not received legal advice, but the work that I have done on this paper should be helpful to an attorney, should he need to obtain one in the future.\(^9\)

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\(^1\) Protection from Discrimination May Include Belief in Aliens, HR COMPLY NEWSLETTER.
\(^3\) Kellie Lunney, Legal Briefs: Church of Cold Fusion, GOVERNMENT EXECUTIVE, Oct. 2000, at 19.
\(^5\) LaViolette v. Dep’t of Commerce, EEOC Appeal No. 01A01748, 2000EEOPUB LEXIS 4858 (2000). 
\(^7\) The Overlawyered Group, Overlawyered.com: Chronicling the High Cost of Our Legal System (visited Nov. 20, 2000) <http://www.overlawyered.com/archives/00sep10.html>.
\(^9\) LaViolette went to the American Civil Liberties Union for help after he lost his job last year, but they told him that they weren’t interested in his case.
I. FIGURING OUT WHAT “RELIGION” SHOULD ENCOMPASS

“The word ‘religion’ is not defined in the Constitution,” the Supreme Court acknowledged in the 1878 case in which it first interpreted the First Amendment’s free exercise clause, Reynolds v. United States.\(^{10}\) It wasn’t until twelve years later, though, that the Supreme Court took its first steps toward a definition.\(^{11}\) In Davis v. Beason,\(^{12}\) Samuel Davis argued that the Idaho law that required electors to swear an oath that they were not polygamists violated his First Amendment rights insofar as it prevented Mormons from acting as electors in the Idaho territory. In the course of upholding the Idaho law, the Court defined religion theistically: “The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”\(^{13}\) In addition to the presence of a “Creator,” Justice Field also suggested that a bona fide religion would reflect the teachings and morality of “all civilized and Christian countries.”\(^{14}\) The Court confirmed its, and assumingly the nation’s, preference for a narrow conception of religion in Holy Trinity Church v. United States,\(^{15}\) in which the Court explicitly stated that “this is a Christian nation,” and later by United States v. Macintosh,\(^{16}\) asserting that “[w]e are a Christian people.”

By 1944, however, the Supreme Court had began to move away from “christocentric parochialism,”\(^{17}\) broadening its definition of religion in the case United States v. Ballard.\(^{18}\) In holding that questions regarding the truth or falsity of religious beliefs or doctrines are not the province of the jury, the Court wrote, “Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are real as life to some may be incomprehensible to others.”\(^{19}\) In 1953, the Court again expressed open-mindedness about what constitutes a religion in Fowler v. Rhode Island: “it is no business of courts to say that what is a religious practice or activity for one group is not religion under the

\(^{10}\) Reynolds v. United States, 98 U.S. 145, 162 (1878).
\(^{11}\) Note, The Concept of Religion, 107 Yale L.J. 791, 794.
\(^{12}\) Davis v. Beason, 133 U.S. 333 (1890).
\(^{13}\) Id. at 342.
\(^{14}\) Id. at 341.
\(^{15}\) Holy Trinity Church v. United States, 143 U.S. 457, 470-71 (1892).
\(^{16}\) United States v. Macintosh, 283 U.S. 605, 625 (1931).
\(^{18}\) United States v. Ballard, 322 U.S. 78 (1944). Edna and Donald Ballard were convicted of fraud for organizing and promoting the “I Am” movement through the mail.
\(^{19}\) Id. at 86.
protection of the First Amendment. A note in the *Yale Law Journal* attributes this move from theism to the rise in non-Christian immigration over the course of the twentieth century: "The resulting increase in religious diversity put pressure on the Court’s narrow, theistic definition of religion and on the related understanding of the United States as a Christian country."

But it wasn’t until 1961 that the Supreme Court expressly repudiated the *Davis* definition, recognized the existence of non-theistic religions, and extended First Amendment protection to them. In *Torcaso v. Watkins*, the Court struck down a provision of the Maryland Constitution requiring officeholders to declare their belief in God, reasoning that the state’s preference for theistic religions over non-theistic ones violated the Establishment Clause. In a footnote, the court noted that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.” George C. Freeman, III, lecturer at Tulane Law School, notes: “With *Torcaso*, the Supreme Court dispelled whatever doubts may have existed about its willingness to conceive of religion in new, and radically different, terms.”

The court took its next step in the landmark case of *United States v. Seeger*, endorsing *Torcaso’s* broader conception of religion and providing some guidelines for determining which beliefs and practices are religious. At issue was Section 6(i) of the Universal Military Training and Service Act, which granted draft exemptions to those who, “by reason of religious training and belief, are conscientiously opposed to participation in war in any form.” Congress had defined the required “religious training and belief” as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views, or a merely personal moral code.” Seemingly ignoring the statute’s endorsement of a traditional theistic conception of

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20 *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (holding that a municipal ordinance which is so construed and applied as to penalize a minister of Jehovah’s Witnesses for preaching in a public park, while other religious groups could conduct religious services there with impunity, violates the First and Fourteenth Amendments of the Federal Constitution).


22 See id.


24 *id. at 495.*


religion, the Supreme Court construed the statute’s language to reach people like Seeger, whose opposition to the war was based on his “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.” Drawing explicitly upon the work of Paul Tillich, a preeminent modern theologian, the Court reasoned that a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption” is religious.

Five years later in another draft-exemption case, a plurality of the Court took the Seeger definition one step farther in Welsh v. United States. Welsh had struck the word “religious” from his application and said that his objection to military service was based on his readings in “history and sociology.” The Court found that the sincerity and depth of one’s convictions, rather than one’s own characterization of those convictions as religious, were paramount, and that “religion” embraces beliefs that “play the role of a religion and function as a religion in [one’s] life.” As one commentator has written, granting Welsh the exemption demonstrated just how far the Court’s definition “had moved from ordinary intuition.”

Several scholars have noted that the Court somewhat retreated from its broad conceptualization of “religion” in Welsh in dicta in two later cases: Wisconsin v. Yoder and Thomas v. Review Board of the Indiana Employment Security Division. In Yoder, where the right of the Amish to withdraw their children from school after eighth grade was upheld, the Court made a strong distinction between “claims ... rooted in religious belief” and “secular considerations.” As Kent Greenawalt, a law professor at Columbia University, explains, “The Court demonstrated the narrowing of its understanding of ‘religion’ through its choice of an example of ‘secular’ motivation: Thoreau’s rejection of the social values of his time and his subsequent isolation at Walden Pond. Thoreau’s beliefs, however, would almost certainly have

29 id. at 176.
31 id. at 339–41.
37 id. at 216.
passed as religion under the ‘parallel position’ definition from Seeger and Welsh. More recently, in Thomas, the Court asserted that some claims might be “so bizarre” as to be “clearly nonreligious in motivation.” However, the Court made no attempt at providing a standard for distinguishing such claims.

The open-endedness of the Seeger-Welsh standard has given lower courts an opportunity to experiment with formulating definitions of religion for use in First Amendment cases. For instance, Judge Adams of the Third Circuit formulated a three-part inquiry in his concurring opinion in Malnak v. Yogi. First, a court must examine the content of a belief system to determine if it addresses “ultimate concerns.” Second, the court should consider the scope of the belief system to determine if it is comprehensive and not limited to one question or moral teaching. Finally, the court should scrutinize the belief system for external surface signs such as formal services, clergy, or holidays. Africa v. Pennsylvania gave Judge Adams the opportunity to apply his Malnak religion test in a majority opinion. Frank Africa, a prisoner who claimed that his religion, MOVE, required him to eat a raw food diet, sought an injunction requiring the state prison authority to provide him with raw fruits and vegetables. Africa described MOVE as a “revolutionary” organization, “absolutely opposed to all that is wrong.” Applying his Malnak test, Judge Adams went through each of the three criteria and held that MOVE did not meet the definition of religion, noting in particular that MOVE lacked the “structural characteristics”

38 Note, The Concept of Religion, supra note 21, at 798.
40 In a fascinating article in the Florida State University Law Review, Stephen Senn notes that cases that have been labeled “religious fraud[s]” typically involve asserted religious claims that “do not arise from sincere religious belief, but rather are motivated by an alternative secular purpose.” (Stephen Senn, The Prosecution of Religious Fraud, 17 FLA. ST. U.L. REV. 325, 344 (1990).) Some interesting examples of alleged theistic shams brought before lower federal courts are The Neo American Church and The Church of New Song. The Neo-American Church claimed a nationwide membership of 20,000 people; its “Catechism and Handbook” contained pronouncements of Chief Boo Hoo, the group’s official hymns were “Puff, the Magic Dragon” and “Row, Row, Row Your Boat,” and each member carried a ‘martyrdom record’ to reflect his arrests. In United States v. Kuch, 288 F. Supp. 444 (D.C. Cir. 1968), the court, in holding that Kuch had failed to establish that the Neo-American church was a religion and thus his allegedly religious use of LSD was not exempted from federal narcotics laws, noted that the group’s membership was “mocking established institutions.” The Church of the New Song (CONS) was established by federal prisoner Harry Theriault, a doctor of divinity by mail-order degree. Inmates claimed their religion required a diet consisting of Porterhouse steak and sherry and denying such special dinner accommodations violated their free exercise rights. The judge, who described the case as a “sham” and “a masquerade,” ultimately threw the case out, but the suit tied up federal courts for four years. (Church of New Song v. Establishment of Religion on Taxpayers’ Money in Fed. Bureau of Prisons, 620 F.2d 648 (7th Cir. 1980).)
41 See Note, The Concept of Religion, supra note 21.
42 In Malnak, the court considered whether Transcendental Meditation was a religion.
44 Id. at 1026.
typical of religions, such as formal services, ceremonies, clergy, hierarchical organization, efforts at propagation, and holidays. Judge Adams concluded that, instead of a religion, MOVE would be better described as “philosophical naturalism.”

Chief Judge Hand for the United States District Court for the Southern District of Alabama devised his own religion test in *Smith v. Board of School Commissioners of Mobile County.* A belief system is religious, according to his test, if it makes assumptions concerning four issues: “1) the existence of supernatural and/or transcendent reality; 2) the nature of man; 3) the ultimate end, or goal or purpose of man’s existence, both individually and collectively; and 4) the purpose and nature of the universe.” Judge Hand found that the secular humanism claim at issue in *Smith* met all four elements of the test.

Judge Cardamone of the Second Circuit has considered the issue of the definition of religion as well. In *United States v. Sun Myung Moon,* Reverend Moon leveled a constitutional challenge to his conviction for filing false tax returns. As part of his rejection of Moon’s appeal, Judge Cardamone recommended the adoption of the definition proposed by William James in “The Varieties of Religious Experience”, “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”

Not to let the justices have all the fun, numerous off-the-Bench legal scholars have developed their own definition-of-religion proposals. University of California Law Professor Jesse Choper, for instance, has advocated a definition of religion that turns on the existence of “extratemporal consequences”: “intuition and experience affirm that the degree of internal trauma on earth for those who have put their souls in jeopardy for eternity can be expected to be markedly greater than for those who have only violated a moral scruple.” For Choper, a free exercise claimant would have to believe that he would face punishment in the afterlife from his

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45 *Id.* at 1036.
47 The Eleventh Circuit, in reversing Smith, did not to rule on the lower court’s holding that secular humanism is a religion, but rather insisted that such a determination was not required to decide the case. *Smith v. Bd. of Sch. Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987).
50 *United States v. Sun Myung Moon*, 718 F.2d, 1210, 1227 (2d Cir. 1983).
performing or failing to perform the particular act in question in order for it to be protected under the First Amendment.\textsuperscript{52}

Another approach that has generated much commentary was advocated by a Harvard student in a 1978 note.\textsuperscript{53} Looking to \textit{Seeger} and \textit{Welsh}, the note suggests focusing on whether the claimed religion has a grounding in "ultimate concerns." The approach is similar to the one Judge Adams has advocated. The "ultimate concern" language comes from the writings of Paul Tillich, the theologian to which the Court referred in its \textit{Seeger} opinion. The note explains, "Tillich’s thesis … is that the concerns of any individual can be ranked, and that if we probe deeply enough, we will discover the underlying concern which gives meaning and orientation to a person’s whole life. It is of this kind of experience, Tillich tells us, that religions are made; consequently, every person has a religion."\textsuperscript{54} The note endorses a martyrdom test to determine whether an individual has an ultimate concern—the court should analyze whether the individual would "accept martyrdom in preference to transgressing its tenets."\textsuperscript{55}

In the discussion of religion in his treatise on constitutional law, Laurence Tribe once recommended an analogical approach to determining what qualifies as a religion. Tribe proposed that everything "arguably religious" should count as religious for free exercise purposes, and everything "arguably nonreligious" should count as nonreligious for establishment purposes.\textsuperscript{56} Professor Tribe, incidentally, withdrew his arguably religious/arguably nonreligious suggestion from a subsequent edition of his hornbook, but the idea of an analogical approach remains popular. For example, in a symposium on the religion clauses published in the \textit{California Law Review}, Greenawalt also advocates an analogical approach. Drawing from the philosopher Ludwig Wittgenstein, Greenawalt argues that there is no characteristic or set of characteristics that transform a belief or practice into a "religion." Therefore, rather than struggling to develop an authoritative definition of religion, courts ought to continue with the

\textsuperscript{52} Phillip Johnson, a professor at Boalt Hall School of Law, explains that Choper’s definition would only have practical effect in free exercise cases “where in fact Choper contemplates that relief from generally applicable laws would rarely be granted. For establishment clause issues, the definition of religion is unimportant to Choper, because he concludes that government has a general constitutional obligation, independent of the establishment clause, to be ideologically neutral with respect to religious and secular creeds alike.” (Phillip E. Johnson, \textit{The Religious Clauses: Concept and Compromise in First Amendment Religious Doctrine}, 72 CALIF. L. REV. 817, 836).


\textsuperscript{55} Note, \textit{Toward A Constitutional Definition of Religion}, supra note 53, at 1075.

common-law case-by-case adjudication: "courts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved."57

While Seeger and Welsh have sparked a lot of brainstorming in the legal community, there has been no consensus on how to determine what constitutes a religion and what does not. One thing is clear, however: Americans today need a flexible definition that embraces beliefs that do not fit into institutional categories. A 1999 USA Today-CNN-Gallup poll found that 54% of the respondents said that they were "religious," but 45% of those said that they were more likely to follow their own instincts than denominational teachings.58 Choper's conclusion from nearly two decades ago is probably even more applicable today: "the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all."59

57 Greenawalt, supra note 27, at 754.
59 Choper, supra note 51, at 579.
II. "RELIGION" AND THE EEOC

The U.S. Equal Employment Opportunity Commission is charged with carrying out the provisions of Title VII of the Civil Rights Act of 1964, which prohibits both private sector and public sector employment discrimination on the basis of race, color, sex, national origin, or religion. Most religious discrimination cases before the EEOC allege a failure of the employer to accommodate the employee’s beliefs and practices, and, therefore, the majority of EEOC decisions focus their analysis on whether the agency knew of the employee’s beliefs and, if so, whether the agency put a good faith effort into

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60 The EEOC has separate processes for private sector and public sector complaint processing. Individuals who believe they have been discriminated against by private sector employers begin their challenge by filing a charge with the EEOC. The EEOC then investigates the charge; if the EEOC determines that there is "reasonable cause" to believe that discrimination has occurred, it will first try to mediate a voluntary resolution between the charging party and the respondent. If reconciliation is unsuccessful, the EEOC may bring suit in federal court. In addition, whenever the EEOC concludes its processing of a case, it issues a "notice of right to sue" which enables the complainant to bring an individual action in court. (United States Equal Employment Opportunity Commission, Filing a Charge (visited Nov. 10, 2000) <http://www.eeoc.gov/facts/howtofil.html>.)

Individuals who believe they have been discriminated against by public sector employers start the process by contacting the EEO Counselor in the federal agency who allegedly did the discrimination within 45 days of the discriminatory action. The complainant then chooses to either participate in counseling or in Alternative Dispute Resolution. (This part of the process was added by a recent amendment to 29 C.F.R. Pt. 1614 and became effective November 9, 1999.) At the end of counseling, or if the ADR is unsuccessful, the individual may then file a complaint with the agency. The agency must then conduct an investigation of the complaint. Once the agency finishes its investigation, the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency. A dissatisfied complainant may appeal to the EEOC an agency’s final action within 30 days of receipt; the agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge’s decision. (United States Equal Employment Opportunity Commission, Facts About Federal Sector Equal Employment Opportunity Complaint Processing Regulations (29 C.F.R. Pt. 1614) (visited Nov. 10, 2000) <http://www.eeoc.gov/facts/fsl-fed.html>.)

accommodation. However, the determination that must be made in all religious discrimination cases is whether or not the employee holds a bona fide religious belief that falls under the protective purview of Title VII.\textsuperscript{62}

When Congress passed Title VII in 1964, it did not provide a definition of the term “religion.”\textsuperscript{63} In 1972, Congress amended Title VII to include the accommodation provision, requiring employers to “reasonably accommodate” employees’ religious practices unless such accommodation would result in “undue hardship on the conduct of the employer’s business.”\textsuperscript{64} But again, no definition of the term “religion” was provided other than the addition of Section 701(j) which expands the scope of the undefined term, providing that the “term ‘religion’ includes all aspects of religious observance and practice, as well as belief....” Finally, in 1979, the free-reigned EEOC announced that it was considering adopting a definition based on one propounded by the Supreme Court in \textit{United States v. Seeger} and asked for public comment. A reporter for \textit{Fortune} magazine happily obliged with a cynical response:

> The question on the table this time is one that has defeated thinkers with far more ratiocinative firepower than is available in the equal-opportunity bureaucracy, to wit: what is a religion? The difficulty with the Seeger concept ... is that it hopelessly blurs the boundaries between religious and political beliefs. Adoption of the definition by the EEOC would take the Civil Rights Act still further from its original moorings, and mean, in effect, that the long list of protected classes now included people who

\textsuperscript{63} See Mack A. Player, \textit{EMPLOYMENT DISCRIMINATION LAW}, at 256 (1988) (discussing the absence of a statutory definition of religion under Title VII as originally enacted).
\textsuperscript{64} 42 U.S.C. § 2000e(j) (1994). Congress also left the terms “reasonable accommodation” and “undue hardship” undefined and therefore open to varying interpretations by the courts. The Supreme Court directly address both terms for the first time in \textit{Trans World Airlines v. Hardison}, 432 U.S. 63 (1977), construing “undue hardship” to be anything more than “a de minimis cost.” After the Hardison opinion was published, many commentators predicted that the relatively light burden for employers would mean that employees would no longer find significant redress for religious discrimination under Title VII. (See Retter, \textit{The Rise and Fall of Title VII’s Requirement of Reasonable Accommodation for Religious Employees}, 11 COLUM. HUM. RTS. REV. 63 (1979); Comment, \textit{Accommodation of Employee’s Religious Beliefs}, 91 Harv. L. Rev. 265, 272-73 (1977)). Nearly a decade later, in \textit{Ansonia Board of Education v. Philbrook}, 107 S. Ct. 367 (1986), the Supreme Court further minimized employers’ accommodation obligations by finding that an employer is under no obligation to consider an employee’s preferences as long as the employer has offered an employee a reasonable accommodation. Therefore, when these two precedents are put together, they establish that an employer may avoid liability for religious discrimination under Title VII by either offering proof that it attempted some reasonable accommodation of the employee’s religion or that no accommodation was offered because any such accommodation would result in more than a de minimis cost to the employer. (Laurel A. Bedig, \textit{The Supreme Court Narrows An Employer’s Duty to Accommodate An Employee’s Religious Practices Under Title VII: Ansonia Board of Education v. Philbrook}, 53 BROOKLYN L. REV. 245, 248 (1987))
happen to hold strong beliefs about controversial matters. 
[Ad]accommodation could turn out to mean an obligation to reassign
employees who, let us say, don't want to work on some project with
military implications. It could mean a right to time off to attend
antinuclear rallies. Or, conceivably, to demonstrate against bureaucrats
who don't know when to stop. 

Despite such outcry from some, the EEOC nevertheless decided to take an expansive view of the
term "religion," using language arguably even broader than the Seege-Welsl standard. In 1980
the EEOC issued its revised Guidelines on Discrimination Because of Religion, adding the
following:

In most cases whether or not a practice or belief is religious is not an issue.
However, in those cases in which the issue does exist, the Commission
will define religious practices to include moral or ethical beliefs as to what
is right and wrong which are sincerely held with the strength of traditional
religious views... The fact that no religious group espouses such beliefs
or the fact that the religious group to which the individual professes to
belong may not accept such belief will not determine whether the belief is
a religious belief of the employee or prospective employee.

So religion, within the meaning of Title VII, does not require ecclesiasticism nor
presuppose a belief in a Supreme Being. Nevertheless, it does have limitations. Section 703(f)
of Title VII specifically excludes Communism as a basis entitled to protection from
discrimination. Courts, in interpreting the use of the term, have also found some activities to
be beyond its protection. While the Supreme Court has not interpreted "religion" under Title
VII, some lower federal courts have, taking Supreme Court precedent from other contexts where
the Court has interpreted the meaning of religion and applying it to religion in Title VII. For
instance, in its opinion in Edwards v. School Board of Norton, Va., the Federal Court for the

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67 The legislative history of Title VII makes it expressly clear that it even prohibits discrimination against an
individual whose belief is to not believe in religions (atheism). (See Barbara Kramer, Reconciling Religious Rights &
Cir. 1981). In Edwards, teacher's aide Ruby Edwards, a member of the Worldwide Church of God, believed that
church doctrine required her to abstain from secular work on the seven annual holy days and for eight days during
the Feast of Tabernacles—thus resulting in 5-10 job absences per year for religious purposes. While the church's
official "Fundamentals of Belief" mandated abstention from work for only the seven holy days, the district court
Western District of Virginia wrote, "A religious belief excludes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man's nature or the scheme of his existence as it relates in a theological framework." In *Brown v. Pena*, the federal court for the Southern District of Florida found that the complainant's "personal religious creed" requiring him to eat Kozy Kitten pet food does not relate to a "theory of man's nature or place in the Universe" and is therefore not protected by Title VII. Also, courts have consistently held that predominately social and political beliefs have been held not to rise to the level of religion; Ku Klux Klan membership, for instance, does not qualify as religion because the goals of these organizations are predominately social and political, rather than religious.

Applying the broad definition in its guidelines, the EEOC examines the issue of what constitutes a bona fide religious belief on a case-by-case basis. According to Derek Brown, legal editor for the *Federal EEO Advisor*, there is a "a blurred line" between what qualifies as a religion and what does not: "It is a subjective test that will literally depend on the assertions made by the employee in relation to his personal beliefs. In framing the complaint, the employee and agency should take great care in identifying and clearly addressing the personal beliefs of the employee and how those beliefs directly affect the work environment." In the majority of recent religious discrimination decisions, the EEOC has cited its decision in *Akers v. Department of Transportation* which, referring to *Welsh v. United States*, states that "in determining which beliefs are protected under Title VII, the Supreme Court has held that the test is whether the belief professed by the complainant is sincerely held and whether it is, in his own scheme of things, religious."

accepted the plaintiff's interpretation of her religion and held that her practice was religious for purposes of Title VII even though it was not required by her church.

70 *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977), aff'd 589 F.2d 1113, 1113 (5th Cir. 1979). In *Brown*, Stanley Brown brought suit against the Director of the EEOC after the EEOC dismissed his religious discrimination claims for not falling under the jurisdiction of Title VII. Brown alleged discrimination based on his "personal religious creed" that "Kozy Kitten People/Cat Food" contributed to his well-being and overall job performance, but the court held that his preference for pet food could not be considered a religious belief or practice because it in no way related to a "theory of man's nature or his place in the Universe."

71 See *Bellamy v. Mason's Stores, Inc.*, 502 F.2d 504, 505 (4th Cir. 1974)

72 Brown, supra note 62.

73 *Akers v. Dep't of Transp.*, 93 FEOR 20270 (EEOC OFO 5/25/93). In *Akers*, the EEOC reversed an agency's decision to reject a basis of religious discrimination in a complaint on the ground that atheism could not be considered a religion for purposes of Title VII.

Mainstream religions (e.g., Christianity, Islam, and Judaism) have been found to meet the Akers definition without a stringent requirement of subjective proof. In the past several years, the EEOC has also recognized claims based on the beliefs and practices of the Mormons/Latter-day Saints, Seventh-day Adventists, Jehovah’s Witnesses, Born-Again Believers, and members of the Worldwide Church of God. But the broad Akers definition means that your beliefs will not be immediately dismissed just because they do not fall into an institutionalized label as long as you can convincingly argue that they are “sincerely held” and, in your “own scheme of things, religious.”

For instance, in Dooley v. Department of Veterans Affairs, the EEOC found that a federal employee stated a viable religious discrimination claim when he argued that he was terminated “out of resentment of [his] ethical beliefs” because he had spoken with a visiting director about the operational inefficiencies at his workplace. The EEOC held that the Department of Veterans Affairs had wrongly dismissed Patrick Dooley’s case for “failure to state a claim.” Another ethical-beliefs case generated national and international media attention in 1996. Bus driver Bruce Anderson was fired by the Orange County Transportation Authority for refusing to distribute free hamburger coupons to passengers riding his bus. Bruce Anderson claimed that doing so would have violated his devout vegetarian belief that animals should not be killed or eaten. The EEOC investigated and held that Anderson had cause to proceed with a religious discrimination suit. Many legal commentators said that the decision was “pushing the envelope” and predicted that it would spawn a “new era of religious claims [based] on secular interests.”

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75 See Brown, supra note 62.  
76 Dooley v. Dep’t of Veterans Affairs, 100 FEOR 1307 (EEOC-OFO 6/28/00).  
78 After the EEOC announced its ruling, the OCTA decided to settle the suit. The agency agreed to pay Anderson $50,000 compensation and modify its employee handbook so all references to religious discrimination will include the phrase, “as defined by the US EEOC.” OCTA spokesman John Stundford told the Associated Press, “This settlement does not assume any wrongdoing by OCTA. In fact, we believe had this case gone to trial, we would have prevailed, but the cost of doing so outweighed the alternative.” (Associated Press, Vegetarian Gets the Green, THE NATIONAL LAW JOURNAL, Dec. 2, 1996, at A23.)  
79 Victor Epstein, Can the office accommodate belief?, BROWARD DAILY BUSINESS REVIEW, Jan. 31, 1997, at A8. See also Baker & Daniels, Praise the Lord and Pass the Sweet Potatoes, INDIANA EMPLOYMENT LAW LETTER, Oct., 1996: “Menorahs. Nativity scenes. Tofu? The cynics among us would say it was only a matter of time before the envelope of Title VII’s prohibition against religious discrimination was pushed just a bit too far.”
On the other hand, in *Reilly v. U.S. Postal Service*,\(^80\) the commission found that the complainant, who claimed that his religious beliefs were modeled on the writings of author James Joyce,\(^81\) did not establish that he held a bona fide religious belief for purposes of proving religious discrimination under Title VII. Barry J. Reilly had asserted that the United States Post Office had discriminated against him because of his religious beliefs when they placed him on emergency off-duty status and ordered him to take a psychological examination after an incident where, in reaction to Christmas music being played over a loudspeaker, he allegedly dramatically proclaimed that “Christmas music was driving him crazy” and abruptly left the facility. In *Samuel v. Department of Health and Human Services*,\(^82\) the EEOC similarly found that an employee had failed to establish that his belief was sincerely held with the strength of traditional religious views. The employee asserted that his religion, humanism, required him to adhere strictly to any oath. In this case, his oath of employment to serve the public to the best of his ability was at issue; Samuel contended that because his proficiency in Spanish was weak, he was unable to serve applicants who spoke Spanish as well as those who spoke English, in violation of his oath.

So over the last decade, the EEOC has examined religious discrimination claims based on ethical beliefs, literary beliefs, and humanistic beliefs; it wasn’t until this year, however, that the EEOC had to decide whether scientific beliefs could fit the *Akers* definition.


\(^81\) In his affidavit, the employee claimed that he followed the Joycean method of religion—he did not prefer one religion to another.

\(^82\) *Samuel v. Dep’t of Health and Human Serv.*, 87 FEOR 1021 (EEOC-OFO 2/22/87).
III. LaVIOLETTE v. DEPARTMENT OF COMMERCE

In May 1998, Dr. Paul LaViolette showed up at a U.S. Patent and Trademark Office (PTO) job fair, bearing in his hand an impressive curriculum vitae: He received a B.A. in physics from Johns Hopkins, an M.B.A. from the University of Chicago, and a Ph.D. from Portland State University. He had written three books and over thirty scientific papers, and he was the founding director of the Starburst Foundation, an institute that conducts interdisciplinary research in physics, astronomy, geology, climatology, and systems theory. Recognized in the Marquis Who's Who in Science and Engineering, Dr. LaViolette has been a scientific pioneer. He was the first to propose that high-intensity volleys of cosmic ray particles travel directly to our planet from distant sources in our galaxy, a phenomenon now confirmed by scientific data. He was also the first to discover evidence of interstellar dust in ice-age polar ice indicating the occurrence of a global cosmic catastrophe—ten years later, in 1993, the Ulysses spacecraft's observations confirmed his prediction that interstellar dust had recently entered our solar system. In 1986, he was the first to cast doubt on the big bang theory by showing that an alternative non-expanding universe cosmology made a much better fit to existing astronomical data. Undoubtedly impressed by his stellar credentials, the PTO offered Dr. LaViolette a job as a patent examiner.

His tenure with the government agency was short, though. On March 24, 1999, LaViolette's supervisor called him into his office, told him that his level of productivity was "flat" and that he would not make the expected production goal by the end of the year, and announced that his employment at the PTO would terminate on April 9th. "The announcement of my termination came as a total surprise to me because my productivity had been on an upward increase," LaViolette later explained. "Although I had not achieved the expected production level, I had been previously told by [the supervisor in charge of hiring] that as new examiners we would be given a year to reach the required level. I had been with the Patent Office only 8 months at that time."64

LaViolette went back to his desk and plotted a productivity curve. It showed that his performance was improving and that he could indeed reach the required production level by the

end of the year. LaViolette had some peer examiners review his chart and they agreed that it indicated an upward slope. So he took the curve to his supervisor and showed it to him. “Surprisingly, he continued to voice his same opinion,” LaViolette said. “Even when confronted with [contrary] evidence, he continued to say that my productivity was flat.” LaViolette then went to his director and showed her his job performance curve. He requested that she give him a two-month trial period to show that he could continue to increase his productivity. She denied his request.65

On April 5, 1999, LaViolette’s director gave him his formal letter of termination. This time, three reasons were given for his dismissal. Each, according to LaViolette, was unfounded:

1) “Specifically, you have not progressed at a rate that is expected of a new examiner.” This may be alluding to my productivity, but it does not specifically mention the productivity issue. In fact, the word productivity is not used in the letter.

2) Further she states: “You failed to incorporate feedback of senior examiners and you have not altered your examining practices. You have failed to demonstrate effective search strategies and have failed to demonstrate an understanding of the technology.” My [supervisor] did not give these as reasons for firing me. Neither did he mention any of these in my evaluation sessions. In fact, he commended me on the clarity of the arguments I made. Contrary to what [the director] wrote, I did fairly well in my search strategies, and I was certainly open to any feedback that [my supervisors] would give me. As far as learning the technology, keep in mind that [magnetic resonance imaging] is traditionally a difficult technology to learn. The primary examiner in that art area once told me that it took him 8 years to really begin to feel that he had a comfortable command of the art.

3) Further, the director states: “Additionally, you have repeatedly reported for work late. You continued to arrive to work after the established work hours even after having been counseled on several occasions.” Again, my [supervisor] did not give this as a reason for my dismissal. Neither, did he say in the prior months that tardiness would be a reason for dismissal. If I were 10 minutes late in getting to work, I would always make up by staying more than 10 minutes over time. You can verify this by checking my [supervisor]’s time sheets. We wrote down the time when we signed in and wrote down the time when we signed out. Keep in mind that I was on a special program where I was allowed to work 9 hours a day and get a Friday off once every biweek. This required that I get to work by 8:30 AM every morning, rather than by 9:30 AM as was normally allowed. I recall that my [supervisor] had

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65 Affidavit of Paul A. LaViolette, OCR No. 99-56-00500 at 6.
warned me that if I continued to miss the 8:30 deadline, he would take me off the plan and I would go back to the 8 hour per day plan. He never said anything about firing me for being late. To come to work I commuted on I-395 North which, as was commonly known, would occasionally have traffic tie-ups. The times I was late were almost always due to traffic jams on 395 and hence were not intentional. My [supervisor], however, did not remove me from the extended hour work schedule.

In summary, the reasons which [the director] gives for firing me are on the whole rather dubious, without any grounds, and contradictory.\(^86\)

LaViolette, however, believes he knows the real reason that he was fired.\(^87\) In addition to his considerable accomplishments in mainstream science, LaViolette also holds some rather unorthodox scientific beliefs. Not only does he believe in the validity of the highly controversial energy-generation concept “cold fusion,”\(^88\) but his books\(^89\) and website\(^90\) discuss some of his own unconventional scientific theories, including that antigravity technology was incorporated into the design of the B2 bomber, that certain pulsars are actually beacons created by extra-terrestrials for the purpose of interstellar communication, and that the zodiac and Sphinx are cryptograms intended by ancient civilizations to warn us about a cosmic catastrophe. For discussing these ideas in books and lectures, LaViolette has become a target of ridicule by influential lobbyists.

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\(^{86}\) Id. at 7.

\(^{87}\) In addition to being fired, LaViolette was also subsequently denied the opportunity to be rehired. On April 9, 1999, LaViolette attempted to attend another PTO job fair in order to interview with other units but was confronted by a PTO employee at the registration desk and told that they had been instructed by PTO management not to offer him any positions in any units, not just at this particular job fair but in all future ones, too. LaViolette later discovered that under the code of “Prohibited Personnel Practices” it is unlawful for a Federal official to obstruct an individual from applying for federal employment. (Id. at 25.)

\(^{88}\) Cold fusion is a controversial scientific theory that says energy can be generated inexpensively at low temperatures through fusion of hydrogen or deuterium nuclei. The discovery of cold fusion was announced by Stanley Pons and Martin Fleischmann on March 23, 1989. Wired magazine recently looked into the phenomenon and updated its readers in a story entitled, “What if Cold Fusion Is Real?”. “It was the most heavily-hyped science story of the decade, but the awed excitement quickly evaporated amid accusations of fraud and incompetence. When it was over, Pons and Fleischmann were humiliated by the scientific establishment; their reputations ruined, they fled from their laboratory and dropped out of sight. ... Despite the scandal, laboratories in at least eight countries are still spending millions on cold fusion research. During the past nine years this work has yielded a huge body of evidence, while remaining virtually unknown—because most academic journals adamantly refuse to publish papers on it. At most, the story of cold fusion represents a colossal conspiracy of denial. At least, it is one of the strangest untold stories in 20th-century science.” (Charles Platt, What If Cold Fusion Is Real?, Wired, Nov. 1998, posted at <http://www.wired.com/wired/archive/6.11/coldfusion.html>.) A list of some corporations and institutions that pursue cold fusion research is provided at <http://www.wired.com/wired/archive/6.11/fusionaries.html>.


such as Robert Park, director of public information for the American Physical Society (APS).\textsuperscript{91} The termination of his employment, according to LaViolette, was part of a plan to “weed out” examiners who held scientific beliefs with which the administration of the PTO and APS personally disagreed.\textsuperscript{92}

LaViolette filed a claim with the Office of Civil Rights in the Commerce Department, the PTO’s parent agency, alleging discrimination.\textsuperscript{93} But the agency dismissed his case on September 13, 1999, saying that his allegations of discrimination did not fall under any protected equal employment opportunity activity of Title VII of the Civil Rights Act of 1964. Then, as attorney Troy Foster, put it: “Instead of phoning home, he went to the EEOC.”\textsuperscript{94}

In his appeal to the EEOC, LaViolette asserted that “discrimination against a person on account of his beliefs is the essence of discrimination on the basis of religion.” In evaluating LaViolettes’s complaint, the EEOC referenced the two-prong Welsh test that the EEOC applied in Akers: “In determining which beliefs are protected under Title VII, the Supreme Court has held that the test is whether the belief professed by a complainant is sincerely held and whether it is, in his own scheme of things, religious.”\textsuperscript{95} The EEOC also referred to its guidelines stating that the fact that “no religious group espouses such beliefs . . . will not determine whether the belief is a religious belief of the employee.”\textsuperscript{96} Taking both of these things into consideration, the EEOC held that the Commerce Department had improperly dismissed LaViolette’s claim of religious discrimination. Accordingly, the Commission reversed the dismissal of his complaint and remanded it for further processing.

But the EEOC opinion did not end LaViolette’s fight. “We did not make a determination as to whether those two criteria [for valid religious belief] are fulfilled” in LaViolette’s case,

\textsuperscript{91} Charles Platt describes Park in a critical review of Park’s latest work, \textit{Voodoo Science: The Road From Foolishness to Fraud}: “For almost two decades, former physicist Robert Park has conducted a one-man search-and-destroy mission against inventors, scientists and pseudo-scientists who make claims that he describes as ‘totally, indisputably, extravagantly wrong.’ As a Washington lobbyist and PR flack from the American Physical Society, Park is widely quoted whenever journalists need a rebuttal source who will scoff pithily at concepts such as magnetic healing or antigravity.” (Charles Platt, \textit{Testing the Current}, \textit{Washington Post Book World}, June 25, 2000, at X05.)

\textsuperscript{92} Summary Report, supra note 84, at 1. LaViolette wasn’t the only one to lose his job during this purging process—his friend, Tom Valone, who together with LaViolette had organized and promoted a conference on new energy topics, also had his job terminated. Valone is pursuing a challenge against the PTO, but via union rather than civil-rights grounds.

\textsuperscript{93} LaViolette’s initial complaint to the Office of Civil Rights did not mention anything about discrimination on the basis of religion.

\textsuperscript{94} Troy Foster, \textit{Is Belief in UFOs a Protected Activity?}, \textit{Arizona Employment Law Letter}, Oct. 2000.

\textsuperscript{95} \textit{LaViolette v. Dep’t of Commerce}, EEOC Appeal No. 01A01748, 2000EEOPUB LEXIS 4858 (2000).

\textsuperscript{96} 29 C.F.R. §1603.1
EEOC’s Office of Federal Operations Director Carlton Hadden told The Washington Post. “Nor did we determine whether the complainant’s claims of religious violation are true.” Basically, “we just sat down and said the agency had improperly dismissed that claim, and put it back in the ballpark of the Department of Commerce.”

Under EEOC rules, the Commerce Department had 150 days from the issuance of the July 7, 2000 opinion to complete its investigation. In early November, the Commerce Department’s Office of Civil Rights (OCR) issued to LaViolette an affidavit with fifteen questions to be returned to them by December 4, 2000. If the Commerce Department concludes, after gathering more information, that his claim is still invalid, it can dismiss the complaint again. And if LaViolette is not satisfied, he can request a hearing before an EEOC administrative judge, who would rule on the complaint. “This could be a protracted process. Many of them are,” an EEOC spokesman told New Scientist.

In an interview with the Federal EEO Advisor, EEOC attorney Doug Gallegos expressed some surprise over how much media attention the EEOC opinion generated. “This is a standard case where an agency has dismissed the complaint at a very early stage,” he said. “It just happens to involve an individual with a religion that most people would find different.” Gallegos added that federal employees have, over the years, asserted “various forms” of religious beliefs—“some more conventional than others.”

For LaViolette, the ideal resolution would have been for the Commerce Department to have offered a settlement after the announcement of the EEOC decision, as did the Orange County Transportation Authority in the vegetarian case discussed earlier. There are some important differences between the two cases though, probably leading the Commerce

97 Supplee, supra note 2, at A23.
98 Some articles in the press incorrectly reported that, with its opinion, the EEOC had established that “cold fusion” is a bona fide religious belief; for instance, Robert Park of the American Physical Society titled a segment his weekly column “EEOC Rules that Cold Fusion is a Religion.” (Robert Park, American Physical Society’s “What’s New” (visited Nov. 10, 2000) <http://positron.aps.org/AN/BN00/wb081800.html>.) Others quickly stepped in to correct such assertions. “Actually, the EEOC found that the PTO improperly dismissed LaViolette’s claim of discrimination for failure to state a claim,” wrote attorney Lawrence Ebert in Intellectual Property Today. “LaViolette argued that his unconventional beliefs on cold fusion should be viewed as religion, and therefore a protected EEO activity. The EEOC agreed that he stated a claim. The substance of the case remains.” (Lawrence Ebert, Written Description: Circumscribing Possession to Prevent Overreaching, INTELLECTUAL PROPERTY TODAY, Oct. 2000, at 78.)
100 Employee Seeks Title VII Protection for ‘Cold Fusion’ Beliefs, FEDERAL EEO ADVISOR, Sept. 15,2000 [hereinafter Employee Seeks Protection].
101 See p. 15.
Department not even to consider settlement: significantly more compensation is being requested, the situation is much more political, and there is more concern over precedent implications—a bus driver being required to pass out hamburger coupons was an isolated one-time event, while nearly any terminated PTO employee could claim that the "real reason" for his termination was his unorthodox beliefs in certain scientific theories.

So now that the EEOC has returned the case to the Commerce Department, the OCR's investigation is going to include an analysis of LaViolette's beliefs to determine whether they pass the two-prong Akers inquiry. Then the OCR will have to determine whether he was indeed terminated because of these beliefs.

The fourth of fifteen questions posed to LaViolette in his affidavit probes his religious beliefs: "Please describe the unorthodox beliefs you have concerning certain scientific theories that you believe are the bases for the discrimination against you. Are there other Patent Examiners in the Patent and Trademark Office who also have these beliefs?"

Several of the articles in the press about the EEOC opinion implied that "Cold Fusion" is LaViolette's religion. But that is an oversimplification. As stated before, LaViolette asserted in his appeal to the EEOC that discrimination on the basis of his beliefs in unorthodox scientific theories, like cold fusion, is analogous to "discrimination on the basis of religion." The EEOC then wrote in its opinion: "Complainant claims he was terminated and denied the opportunity to be rehired because of religion, which embodies his cold fusion beliefs." Contrary to how some interpreted the wording in the EEOC opinion, LaViolette does not consider cold fusion to be a religion. Rather, he believes that scientific inquiry, including inquiry into ideas considered bogus by mainstream scientists, is, in a way, religious.

LaViolette says that his spiritual beliefs coincide with Eastern religious views. "The Judeo-Christian religion tends to view the physical universe (God's creation) as being separate

102 In his affidavit, LaViolette requests approximately $162,000 in lost salary and benefits (through October 2001) and $900,000 in punitive damages. (LaViolette, supra note 85.)
103 An article in The Washington Post, for instance, refers to LaViolette as a "cold fusion devotee," and the legal briefs section of the Government Executive newsletter suggests that the EEOC recognized the establishment of a "church of cold fusion." (Supplee, supra note 2, at A23; Lumey, supra note 3, at 19.)
104 As a cold fusion advocate, it was important for LaViolette to clear up this misconception in his affidavit. For if, in the end, the Commerce Department did recognize "Cold Fusion" as a religion, it would have prevented the government from ever granting cold fusion research grants or sponsoring conferences that addressed cold fusion technology since such activities could have run afoul of the First Amendment's establishment clause which requires a separation of church and state.
from God, whereas the eastern religions and ancient pantheism viewed God as inseparable with physical Creation, hence the physical world being itself sacred and our souls and physical bodies being part of God,” explains LaViolette. In his affidavit, LaViolette eloquently ties these religious beliefs to the reason for his job termination:

My books and theories, which I describe on my website and in papers I have published, present theories about the material natural world. Since I believe that the material world is part of and inseparable from God, the Supreme Being, I consider that my theories about the material world concern an aspect of God, that part that is most visible to us. Hence to discriminate against me by firing me and preventing me from being rehired because my beliefs about the material world are unorthodox and unacceptable to certain members of the U.S. Patent and Trademark Office or to certain members of the scientific community is to discriminate against me because of my religion. Such discrimination is protected against under civil rights law. Since researchers have observed cold fusion to be a phenomenon of nature, and since I believe nature to be inseparable from God, I view cold fusion as a phenomenon of God. I regard other unconventional energy generating phenomena in a similar manner. As for free energy devices, although these are man made, still they are an aspect of God because they are part of the physical material world, which I believe is an aspect of God, and because they operate by means of natural phenomena which are also aspects of God. Although the energy source for some of these devices may not be readily apparent to researchers, I believe that the prime mover ultimately responsible for powering these devices may lie in the underlying ether flux that continually sustains the universe. Although this flux is not easily sensed by our physical instruments, I believe that it does exist and is part of God. Hence I believe that such devices are activated by an aspect of God whether or not this activation source is readily apparent to us or whether or not our scientific theories have found an adequate explanation.

For these beliefs to be protected under Title VII, LaViolette has to convince the OCR that they are “sincerely held” and religious in his own “scheme of things.” In a Loyola University Chicago Law Journal article, Barbara Kramer, a senior investigator for the EEOC, describes the “requirement of sincerity” to be a low hurdle. Usually either the parties to a court action stipulate to the sincerity of the employee’s religious beliefs and practices or the court summarily holds that the beliefs are sincere; however, “if a claimed religious belief is too extreme or

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106 E-mail interview with Paul LaViolette (Nov. 22, 2000).
107 LaViolette, supra note 85.
implausible,” the court concludes that sincerity is lacking. “When the sincerity of an alleged belief is contested, the court examines the consistency with which the employee has acted with respect to that belief and the maintenance of his or her system of beliefs.”108

LaViolette’s response to question four explains some of his unorthodox scientific beliefs and details how he has expressed these ideas through articles, books, interviews, and lectures in the years prior to and during his employment at the PTO. Admittedly, his religious beliefs, unlike those of most orthodox religions, contain no consistent dogma:

In stating that my scientific beliefs and theories have a religious basis, I would like to make clear that I do not reject the scientific method. Although my belief that God exists and that he is one with both the material world and the nonmaterial spiritual realms is a matter of faith, as to my beliefs about what constitutes the particulars of the phenomena that operate in the material world, I maintain an attitude of objectivity. I arrive at my beliefs about these material phenomena through a period of careful analysis and self-criticism. I consider my theories as hypotheses that must be tested to check their validity against what is known and even, if possible, to make predictions that can be checked in the future. So my scientific beliefs, although tied in with my religious belief and world view, are not doctrinaire. We can only improve our understanding of the material world by being aware that our ideas about it are tentative and that, as our learning about the world continues, we may need to revise our theories about it. If, for example, there were no evidence that cold fusion was a real phenomenon of nature, I could no longer regard it as a true phenomenon of God. Hence in that case, it would no longer be part of my religious scheme of things. However, presently available evidence convinces me of the reality of cold fusion.109

The fact that most people associate religion with doctrinal, unchanging principles, while LaViolette’s beliefs are subject to change based upon new discoveries, does not mean that the term religion is inappropriate. What seems to be consistent in LaViolette’s religion is the duty to be inquisitive, to keep an open mind about scientific theories that attempt to explain the physical universe. He explores these ideas in his articles, books, interviews, and lectures, and by doing so is fulfilling that religious duty. Perhaps an appropriate analogy would be to equate LaViolette to a clergyman who, through religious practices, is continually gaining a better understanding of God and man’s place in the universe. From that point of view, the OCR should come to the

108 Kramer, supra note 67, at 450.
109 LaViolette, supra note 85, at 18.
same conclusion as John Elvin did in *Insight on the News*: “A bit of research reveals that there’s much more to LaViolette’s views than a simple contrarian approach to cold-fusion theory, and his views do appear to be ‘sincerely held.’”

The religious-in-one’s-own-scheme-of-things requirement is basically, according to Kramer, determining whether the sincere beliefs are “personal preference[s]” that are “devoid of a theological basis” or something more—mere personal preferences will not “rise to the level of religion within the meaning of Title VII.” Kramer calls *Brown v. Pena* the “classic ‘preference’ case.” The complexity of LaViolette’s beliefs make them much more difficult to dismiss than Brown’s. In evidence law, there has been much commentary on whether judges are qualified to determine what scientific evidence should and should not be admitted in the courtroom, and deference is usually given to the scientific community on whether the theory in question has been generally accepted. But that approach isn’t relevant here. LaViolette has ingeniously claimed that his scientific inquiries are in the providence of his religion. Therefore, we don’t need “proof” that his beliefs are correct (in fact, Ballard prevents us from even asking), nor, according to EEOC guidelines, can we rely upon whether others in the community hold the same beliefs. Determining whether a practice or belief is religious in one’s own scheme of things is admittedly a subjective test. Bizarreness raises suspicions, as the Court noted in *Thomas*.

Sometimes religions are invented for secular purposes as in the Neo-American Church and the Church of New Song, and, in such cases, courts have been traditionally unsympathetic to religious claims. Even when there isn’t an apparent secular motivation to the religious defense, sometimes an alleged “religious creed” is just simply too bizarre—as in the Kozy Kitten pet food case. LaViolette’s religion, however, does not have any apparent secular motivation, nor does it seem to be that bizarre. In the Kozy Kitten case, the court applied the Fifth Circuit’s approach to determining whether a belief is religious or not and held that the employee’s pet food beliefs did not relate to a “theory of man’s nature or his place in the Universe”—a common

10 John Elvin, *Whatever Gets You Through the Night is All Right*, INSIGHT ON THE NEWS, Sept. 11, 2000, at 34.
12 Question four on LaViolette’s affidavit does ask whether other Patent Examiners in the Patent and Trademark Office share his beliefs, but the EEOC opinion expressly notes that “the fact that no religious group espouses such beliefs . . . will not determine whether the belief is a religious belief of the employee,” quoting from 29 C.F.R. § 1605.1.
14 See note 40.
thread, albeit with different wordings, through all of the definition-of-religion approaches described in Part I of this paper.116 LaViolette’s beliefs directly relate to his “theory of man’s nature or place the Universe.” Arguably, his beliefs are at least as religious as Welsh’s.117

If it is determined that LaViolette’s beliefs are “sincerely held” and, in his own scheme of things, “religious,” the final hurdle will be convincing the OCR that the explanation for his dismissal given in the PTO’s official termination letter was merely a pretext for discriminating against him on the basis of his religion. It’s not a he-said-she-said situation, however. LaViolette has spent the last year compiling evidence to support his argument. Through vehement use of the Freedom of Information Act, LaViolette has collected half a dozen e-mails that were being circulated among management during his tenure that disparage his books and allege that he was part of a conspiracy to infiltrate the PTO to bring in unorthodox ideas about energy generation technologies (a fabrication, according to LaViolette, which was pressed upon PTO management by an American Physical Society lobbyist118). LaViolette has plotted the sent-

116 Even under the most stringent analysis, advocated by the martyrdom test in 91 HARV. L. REV. 1056, 1075 LaViolette’s beliefs would pass. In an in-depth profile on his life featured in the Washington City Paper, LaViolette likens his work to that of Superman—a messiah sent to earth to save humanity. (Sean Daly, The Man Who Fell From Earth, WASHINGTON CITY PAPER, Aug. 11, 2000, available at <http://www.washingtocitypaper.com/archives/cover2000/cover0811.html>.)

117 On the first page of his affidavit, LaViolette was provided a line on which to state his religion for the record. Going far beyond the one or two word denominational labels that most people would probably answer with, LaViolette wrote the following: “I believe in the existence of one God, whom I view as the Supreme Being encompassing all existence, both the physical material universe that we are aware of through our five senses and can detect with laboratory instruments as well as the nonmaterial, heavenly spiritual realm of being that remains hidden from our senses and instruments and that harbors all souls. I believe that this higher dimensional spiritual domain gives birth to the material universe and that processes continually operating in the spiritual domain continuously sustain physical material creation. Thus I believe that the material universe is an emergent manifestation of the greater whole that remains beyond the direct perception of our five senses. Consequently, I believe that the material universe that is the subject of scientific investigation and the realm of our everyday technologies is inseparable from God and hence is itself sacred. This conception of existence is present in my scientific writings and is the belief I hold during my prayers. My religious belief is similar in many respects to pantheism or pantheistic personalism. According to the Encyclopedia of Philosophy (edited by Paul Edwards, MacMillan Publishing), ‘pantheism essentially involves two assertions, that everything that exists constitutes a unity and that this all inclusive unity is divine.’ Also the Dictionary of Philosophy (edited by Runes) defines pantheistic personalism as ‘the doctrine that reality consists of a Supreme Personality of which the world of persons are parts, the Divine Personality having no separate existence from its creation.’ My beliefs, however, should not be confused with modern scientific pantheism which is materialistic and denies the existence of nonmaterial realms of being.” (LaViolette, supra note 85.)

118 According to LaViolette, the truth behind this fabrication is that in February, 1998, LaViolette’s friend Tom Valone e-mailed an announcement to a few of his friends informing them that there were openings in the PTO and suggesting that “all able-bodied free energy technologists” should apply. Valone’s e-mail was eventually posted on the Internet by a reader, but LaViolette claims that he never received or even knew the letter existed until after he began to work at the PTO. “Conspiracy theorists often try to twist facts to suit their theory,” LaViolette writes on his website, trying to dispel the rumor that Valone recruited him as part of a conspiracy to infiltrate the PTO. “The truth is that I did not apply for the Patent Office job with the intention of changing the Patent Office’s antiquated
dates on these e-mails and created charts that show that the number of e-mails peaked the day before the decision was made to fire him. "The context of these e-mails shows evidence of discrimination against me on account of my unorthodox beliefs in science and energy technology," explains LaViolette. "By circulating and disseminating [American Physical Society lobbyists'] e-mails and Internet postings to PTO management, management in the PTO (and within the Department of Commerce at large) were participating in and aiding this act of discrimination initiated by the APS. Their decision to fire me came only one day after an e-mail blitz, indicating that the decision was made hastily and in an effort to appease the lobbyists who were calling for the removal of me and Tom Valone."119

LaViolette's affidavit, which he returned to the OCR on December 4, 2000, included 29 meticulously compiled and presented exhibits that support his explanation for his termination including a detailed chronological summary of specific acts of discrimination against him during his tenure at the PTO, copies of e-mails ridiculing LaViolette's books and theories that were forwarded around upper PTO and Department of Commerce management and include comments added by them, and clips from APS newsletters and Internet postings (many of which were subsequently passed around the PTO management via e-mail) making fun of the PTO for hiring LaViolette and attacking free energy research, culminating with a column in which the APS praises "Park's effort to expose ... free energy schemes" and credits him with having gotten Valone fired.120

After the settlement announcement in the EEOC vegetarian case discussed earlier, Orange County Transportation Authority spokesman John Standiford told the Associated Press that OCTA was confident that if the case had gone to trial, they would have prevailed.121 It is doubtful that the Commerce Department will feel quite so strongly about its own case after reviewing LaViolette's affidavit and its supplements.

views on energy technology or for any other reason subversive to the American Physical Society's sacrosanct scientific dogma." (Paul LaViolette, Setting the Record Straight (visited Nov. 13, 2000) <http://www.etheric.com/Laviolette/newserror1.html>).

119 LaViolette, supra note 85, at 8. LaViolette's friend, Tom Valone, attempted to hold a conference on free energy research at a Commerce Department auditorium, but after a onslaught of negative publicity from the American Physical Society, the conference was rebuffed by Commerce officials and Valone was subsequently dismissed from the PTO. See also notes 91-92.

120 APS NEWS, March 2000, at 3.

121 Associated Press, supra note 78, at A23.
CONCLUSION

In his August 25th column Slate columnist Timothy Noah theorized on why LaViolette was really fired from the PTO: “A logical suspicion is that LaViolette was handing out patents for dubious cold-fusion technologies.” Soon thereafter, LaViolette contacted Noah to notify him that his assumption was completely inaccurate. Slate updated the column’s web page to inform its readers that LaViolette issued four patents during his tenure, but none of them had anything to do with free energy technology; LaViolette’s unit worked on magnetic resonance imaging. On his own website, LaViolette elaborated on Noah’s comment: “[The] reporter implies that either I was incompetent and reckless at my work or was willfully breaking the law by issuing patents for inventions that don’t really work. People who know me know that I am a discriminative thinker and very careful about the conclusions I draw, whether they be in regard to my scientific research or my work at the Patent Office.”

Apparently, at no time during the termination conversations that LaViolette had with his supervisors or in the PTO’s formal termination letter did anyone at the PTO attack the quality of LaViolette’s patent examination work or suggest that he engaged in any kind of unscrupulous behavior during the work day. This is not a religious accommodation case; LaViolette didn’t want to perform cold fusion experiments in his cubicle during coffee breaks or to proselytize his coworkers on the government’s time card. In a religious accommodation case, we would have to ask if LaViolette’s religious beliefs and practices placed an undue burden on the PTO—but here there was no burden at all. As LaViolette explains on his website, “My interest was simply to earn a decent living.” And, outside of work, LaViolette expected to be able to pursue interests and express ideas like any other American exercising his/her First Amendment rights.

“I’m trying to bring to light this issue through my case. People should not be thrown out just because they have ideas that are not agreed to by ... the American Physical Society,” LaViolette said. “The ideas that are going to change the world are those that we maybe don’t have answers for right now.”

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124 Id.
125 Supplee, supra note 2, at A23.
In an article last year in *Science* magazine, David Voss reported that the PTO is "staggering under an onslaught of patent applications"—the agency's 3000 examiners must process roughly 240,000 applications per year, a number that increases by more than 8% annually because of the surge in software and biotech development. "They are desperate and they're hiring like crazy," according to an anonymous PTO quoted by Voss. Later in the article, Voss interviewed patent consultant Greg Aharonian, editor of *Internet Patent News*. "They have a variety of problems in not being able to retain good patent examiners because of the high salaries outside," said Aharonian. "You really have to be a patriot to want to work at the Patent Office."126

Apparently, however, you have to be more than a patriot. The message that the PTO sent out by firing LaViolette is that forward-thinking scientists with unorthodox ideas need not apply; if you want to work at the Patent Office, you have to be a scientific zombie—you can only think, write, and talk about conventionally-accepted theories. It's interesting to note that this seems to be contrary to the entire idea behind the issuing of patents, where in theory all of the ideas reviewed are, in some way, novel.127

Perhaps, in the end, the resolution of LaViolette's case will change the PTO's work environment. In addition to monetary compensation, LaViolette is requesting that PTO management receive "legal counseling to make them aware that their employees have the right to keep their job[s] even if they hold ideas different from the norm."128

The EEOC opinion has already had some far-reaching effects, though—it triggered articles in a number of federal trade newsletters, including *Federal EEO Advisor*, *Federal Human Resources Week*, and *Government Executive*. The masthead of *Government Executive* explains that it "reviews cases that involve or provide valuable lessons to federal managers." The lesson to be learned here, according to EEOC attorney Doug Gallegos, is that management

126 David Voss, 'New Physics' Finds a Haven At the Patent Office, *Science*, May 21, 1999, at 1252. Voss's article includes a sidebar that criticizes the PTO for hiring "devotees of fringe technology" in an attempt to fill their openings.
127 As for the objections to unorthodox ideas voiced by lobbyists like Park of the APS, perhaps Charles Platt said it best: "so long as Park makes no mistakes, he may argue that his targets deserve their punishment. Still, his widely published attacks create a chilling effect that can discourage even legitimate scientists from discussing controversial work. This hardly seems consistent with the spirit of genuinely free inquiry that should energize science." He also specifically attacks some of Park's conclusions: "In at least one case, [Park] violates basic principles of journalism and science itself by apparently suppressing information that conflicts with his foregone conclusion. He dismisses the phenomenon of nuclear fusion at low temperatures... despite hundreds of papers, including many from scientists affiliated with respected universities...." (Platt, *supra* note 91.)
has to be “careful about what it says about a person’s religious beliefs.”\textsuperscript{129} Then again, others may glean a different message from the EEOC opinion, as did attorney Troy Foster, reporting in the \textit{Arizona Employment Law Letter}: “Although you probably have only a few employees obsessed with UFOs and extraterrestrials, this is a good lesson regarding the uncertainty of our system and the EEOC. Just when you think something is clear (for example, that belief in UFOs is not protected), you never know how the moon and planets will align. In the meantime, as Mulder and Scully advise, trust no one.”\textsuperscript{130}

\textsuperscript{129} \textit{Employee Seeks Protection}, supra note 100.
\textsuperscript{130} Foster, supra note 93.