PROGRAM MATERIALS
Program #3066
March 13, 2020

It's Against My Religion' Navigating Religious Accommodations in the Workplace

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"It's Against My Religion" Navigating Religious Accommodations in the Workplace

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"It's Against My Religion"
Navigating Religious Accommodations in the Workplace

Valerie K. Ferrier, Esq.
March 13, 2020 | 1:00 PM
CLE Esq. Webinar

1:00 PM – 1:05 PM 5 min

I. Religion and the Workplace Conflict: Overview

1. The Law on Religious Conflict
2. Reasonable Accommodations
3. Examples of Accommodations
4. Cases

1:05 PM – 1:20 PM 15 min

II. The Law on Religious Conflict

1. What is protected?
2. What legally is religion?
3. What religions are covered under Title VII?

References:

Peterson v. Wilmur Communications, Inc., 205 F. Supp. 2d 1014 (E.D. Wis. 2002)

Cloutier v. Costco Wholesale, 390 F.3d 126 (1st Cir. 2004)

1:20 PM – 1:35 PM 15 min

III. Reasonable Accommodations

1. Employer's duty to reasonably accommodate
2. Examples of conflict with job requirements
3. Undue hardship considerations

1:35 PM – 1:45 PM 10 min

IV. Examples of Accommodations

1. Modifications of uniform policies
2. Employer's Religious Beliefs

References:

Jenkins v. New York City Transit Authority, 646 F.Supp.2d 464 (SDNY 2009)

Tisby v. Camden Cnty. Corr. Facility, 448 N.J. Super. 241 (2017)

EEOC v. United Health Programs of Am., 213 F. Supp.3d 377 (EDNY 2016)

1:45 PM – 2:00 PM 15 min

IV. Accommodation Examples from Cases, Takeaways & Questions

1. Attendance and Scheduling
2. Employer's Religious Beliefs
3. Exemption from Job Duties
4. Exemption from Uniform Requirements

References:

EEOC v. JBS USA, LLC, 8:10-cv-318 (D. Neb. 2013)

Porter v. City of Chicago, 700 F. 3d 944 (7th Cir. 2012)

EEOC v. Dynamic Medical Services, 13-cv-21666, S.D. Fla, 2013

Chikuri v. St. Vincent New Hope, 2011 U.S. Dist. LEXIS 41473, 2011 WL 1458167 (S.D. Ind. Apr. 15, 2011)

Nobach v. Woodland Village Nursing Ctr., 13-60378 (5th Cir. 2014)

EEOC v. Consol Energy, Inc., 16-1230 (4th Cir. 2017)

Webb v. City of Philadelphia, 562 F. 3d 256 (3d Cir. 2009)

EEOC v. Abercrombie & Fitch, 575 U.S. ___ (2015)

1 CLE credit (Professional Practice) 60 min

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Religion and the Workplace Conflict

- The Law on Religious Conflict
- Reasonable Accommodations
- Examples of Accommodations
- Cases

The Law on Religious Conflict

Religious Discrimination under Title VII

- Prohibits discrimination and harassment based on an employee's "sincerely held" religious beliefs or practices (two distinct concepts)
- Requires reasonable accommodation to resolve the conflict between the work requirement and the employee's religious beliefs and religious expression
- *unless doing so would cause an undue hardship on the employer*
- Prohibits retaliation against an individual for opposing discrimination based on religious beliefs or participating in the investigative or charge process regarding a claim of religious discrimination

What is (Legally) Religion?

- Very broadly defined under the law
  - It includes all aspects of religious observance, practice, and belief.
  - It includes not just traditional organized religions, but also religious beliefs that are new, uncommon, not part of a formal church or sect.
- Religious beliefs generally concern "ultimate ideas" about "life, purpose and death."
- Not just limited to what we think of as "traditional" or "major" religions

Nature of Practice or Belief

- In most religious discrimination cases whether or not a practice or belief is "religious" is not at issue.
- In cases where the issue does exist, a court will look at the sincerity of the person's beliefs
  - Courts will rarely consider whether this is a "real" religion

Sincerely Held Beliefs

- Whether employee has behaved in manner markedly inconsistent with professed belief;
- Whether accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- Whether timing of request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
- Whether employer otherwise has reason to believe the accommodation is not sought for religious reasons.

Peterson v. Wilmur Communications, Inc.
(205 F. Supp. 2d 1014 [E.D. Wis. 2002])

- Employee was a follower and a "reverend" of the World Church of the Creator, an organization that preaches a system of beliefs called Creativity, the central tenet of which is white supremacy.
- Creativity considers itself to be a religion, but it does not espouse a belief in an afterlife or any sort of supreme being.
- The employee supervised eight people, three of whom were not white.
- After he appeared in a local news story associated with the group, he was suspended and later demoted.
- The court noted that "Purely moral and ethical beliefs [atheism] can be religious so long as they are held with the strength of religious convictions" and held Creativity to be a religion.
- The Court granted summary judgment to the employee.

What Religions Are Covered by Title VII?

- Religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people (even atheism)
- For example, in *Cloutier v. Costco Wholesale*, 390 F.3d 126 (1st Cir. 2004), an employee, a member of the Church of Body Modification, had an eyebrow piercing. The employer's dress code forbade wearing any facial jewelry. The employer (after suspending her) eventually offered to allow the employee to wear either a Band-Aid over her facial jewelry or a retainer in place of the jewelry, but the employee refused any accommodation other than complete exemption from the policy.
- The District Court granted summary judgment to Costco because the accommodation offered was reasonable as a matter of law.
- The Circuit affirmed on other grounds, because there was no accommodation that the plaintiff would accept

Reasonable Accommodations

Reasonable Accommodation

- Under Title VII, an employer has a duty to reasonably accommodate an employee's sincerely held religious beliefs and practices
  - *unless doing so would cause an undue hardship*
- Employers have affirmative duty to reasonably accommodate
- There may also be local laws applicable to reasonable accommodations
  - New York City, for example, recently enacted a law requiring an employer to engage in a "cooperative dialogue" with an employee who requests an accommodation, or whom the employer has reason to know, might need an accommodation, and to provide a written decision as to what, if any, accommodation will be granted

Accommodating Religious Beliefs

- Employer's duty to accommodate is generally triggered when:
  - a conflict arises between employee's sincere religious belief and a work rule or requirement *and*
  - employer knows of or even suspects the conflict
- Once duty is triggered, employer must either:
  - offer a reasonable accommodation or
  - demonstrate that *any* potential accommodation creates an undue hardship
- Employer is obligated to initiate the accommodation process
- Once started, bilateral cooperation is required
  - Unless there is no accommodation that can be made

Accommodating Religious Beliefs

- The employer need offer only a reasonable accommodation, not necessarily the one the employee prefers
- To be reasonable the accommodation generally must resolve the conflict, not just lessen it
- Obligation is continuing, even if the employee gives up and acquiesces rather than be disciplined or terminated
- If employee's beliefs evolve, the employer may not be more or less accommodating, but must take each new request at face value

What Might Cause a Conflict?

- Observance of a Sabbath or religious holiday
- Need for prayer break during work hours
- The wearing of religious garb/jewelry
- Religious practice of following certain dietary requirements
- Religious practice of not working during a mourning period for a deceased relative

Other Examples:

- Religious prohibition against medical examinations
- Religious prohibition against membership in labor and other organizations
- Religious prohibitions against performing a specific duty of employment
- Religious practices concerning personal grooming habits
- Religious objection to vaccines

What is "Undue Hardship"?

- An undue hardship is defined as "any act that would require an employer to bear greater than a de minimis cost in accommodating an employee's religious belief."
  - Burdensome financial cost
  - Disruption of workplace
  - Interference with seniority rights
  - Violation of Collective Bargaining Agreement
  - Added unreasonable burden to co-workers
  - Putting employer in position where it might be violating a different law (Establishment Clause of the First Amendment)
  - Workplace or public safety considerations
  - Loss of efficiency

Reasonable Accommodation or Undue Hardship?

- Factors to consider in determining what a reasonable accommodation is and whether it constitutes an undue hardship:
  - Size of work force and number of employees requiring accommodation
  - Nature of the job(s) that present a conflict
  - Cost of the accommodation
  - Administrative requirements of the accommodation
  - Whether the employees affected are under a collective bargaining agreement
  - What alternatives are available and have been considered by the employer

Examples of Accommodations

Examples of Accommodations

- Flexible or optional holidays
- Flexible schedules or work breaks
  - Use of lunch time in exchange for early departure
  - Staggered work hours
  - Opportunities to make up time missed due to religious observance
- Lateral transfer or change in job requirements
- Relief from union dues or allowing employee to provide dues to a charitable organization of his or her choice
- An exemption from a dress code
- Voluntary substitution or swaps allowing a co-worker to cover an absence

Modification to Uniform Policies

- Modification of workplace practices, policies and procedures may need to occur
  - This is where dress and grooming standards come into play
- If an employer has a dress or grooming policy that conflicts with an employee's sincerely held religious beliefs, the employee may ask for an exception to the dress or grooming policy as a reasonable accommodation
- Some courts have been skeptical of employee dress codes, outside of a law enforcement context, *see, e.g., Jenkins v. New York City Transit Authority*, 646 F.Supp.2d 464 (SDNY 2009).
- Generally must accommodate absent a bona fide safety or health concern (corrections officers, police), *See, e.g., Tisby v. Camden Cnty. Corr. Facility*, 448 N.J. Super. 241 (2017).

What about the Employer's Religious Beliefs?

- EEOC Compliance Manual, Section 12: "Some employers have integrated their own religious beliefs or practices into the workplace, and they are entitled to do so."
- If an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons "absent a showing of undue hardship."
  - Doesn't cost anything.
  - Doesn't disrupt business operations or other workers.

- Courts attempt to balance the right of employers to express themselves in the workplace and the right of employees not to be coerced.
- Employers are free to express religious viewpoints, but must make sure they do not require or coerce an employee to abandon, alter or adopt a religious practice as a condition of employment.

Employer's Religious Beliefs: *EEOC v. United Health Programs of Am.*, 213 F. Supp.3d 377 (EDNY 2016)

- Small Long Island-based company selling health plans required employees to adhere to "Onionhead" teachings and practices and fired those who didn't
  - Employer said this was not religious, but employees testified that it was (prayer, chanting, burning candles and incense, reference to demons)
- An employer cannot discriminate or retaliate against an employee who fail to adopt the religious beliefs of the employer (reverse religious discrimination)
  - Employer cannot express preference for employees who subscribe to one religion over another

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Examples from Cases

Attendance and Scheduling
EEOC v. JBS USA, LLC, 8:10-cv-318 (D. Neb. 2013)

- JBS refused to allow 153 Muslim employees to use their "informal breaks" (typically reserved for bathroom breaks) to pray, instead requiring them to pray during their regularly scheduled breaks. JBS also refused to change all employees' meal break times during Ramadan to accommodate its Muslim employees' prayer schedule and to shorten the overall workday (with a corresponding decrease in pay for all employees).
- Court noted that employer can establish an undue hardship in two ways:
  - the accommodation creates more than a de minimis cost to the employer or
  - the accommodation would have caused more than a de minimis imposition on co-workers
- Court held that granting such requests would have imposed a greater than de minimis burden on JBS and on the non-Muslim employees

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Porter v. City of Chicago, 700 F. 3d 944 (7th Cir. 2012)

- Employer's offer to permit plaintiff to change shifts was a reasonable accommodation since it would have eliminated the conflict between her work schedule and her religious practice of attending church every Sunday, even though it was not the accommodation she preferred

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Employer's Religious Beliefs – Attendance and Scheduling

EEOC v. Dynamic Medical Services, 13-cv-21666, S.D. Fla, 2013

- Employees required to attend daily Scientology classes as a condition of their employment filed suit
- EEOC sued arguing "Such alleged practices violate Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of religion-which includes forcing employees to conform to a particular religion."
  - Claim: Employer failed to accommodate religious beliefs by denying employees' requests to skip classes
  - Case settled for $170,000

Exemption from Job Duties

Chikuri v. St. Vincent New Hope, 2011 U.S. Dist. LEXIS 41473, 2011 WL 1458167 (S.D. Ind. Apr. 15, 2011)

- Plaintiff, a nursing home employee, asked to be exempted from driving a resident to the Church of the Nazarene
- The request was denied, and she refused anyway, leading to dismissal
- Employee failed to identify a bona fide religious practice and instead merely alleged that she was "exploring" becoming a Muslim. She failed to identify a specific religious practice or belief held by her that was used as a basis for her termination, instead pointing to the religious practices of a patient which merely made her uncomfortable.

Nobach v. Woodland Village Nursing Ctr., 13-60378 (5th Cir. 2014)

- Employee was fired from her job at a nursing home for refusing to read the Rosary to a resident.
- While the employer acknowledged that this was the reason for her discharge, the court found that the plaintiff failed to present any evidence that she informed anyone involved in her discharge that her refusal was based on her religious beliefs. Nor was there any evidence that anyone involved in her discharge suspected that her refusal was based on her religious beliefs.

EEOC v. Consol Energy, Inc. 16-1230 (4th Cir. 2017)

- Employee, a devout evangelical Christian, refused to use biometric hand scanner due to fear of the Mark of the Beast, which would allow the Antichrist to manipulate him, dooming him to be "tormented with fire and brimstone"
- Employer made a non-religious accommodation for others who couldn't use it due to injuries, but wouldn't allow plaintiff to opt-out, so he retired under protest
- The company violated Title VII by allowing non-religious exemptions from the policy, but not a religion-based exemption

Uniform Requirements
Webb v. City of Philadelphia, 562 F. 3d 256 (3d Cir. 2009)

- Plaintiff, a practicing Muslim, was a police officer for the City of Philadelphia; she asked to wear a headscarf while on duty but was denied because of a conflict with the uniform requirements
- Court held that uniform requirements were crucial to the safety of officers, their morale and esprit de corps, and public confidence in the police
- Allowing her to wear the headscarf would constitute an undue hardship on the police department because the police need to project religious and political impartiality
  - Slippery slope for requests by others

EEOC v. Abercrombie & Fitch, 575 U.S. ___ (2015)

- Women fired or not hired for wearing hijabs; A&F said headscarves violated its "All-American Look Policy" and argued that accommodation would have resulted in undue hardship
  - Job applicant had been interviewed and hired while wearing a hijab and had worked without incident for four months, so court dismissed A&F's argument (N.D. Okla.)
  - But Tenth Circuit reversed Oklahoma District Court $20,000 jury award, holding that EEOC failed to show that applicant informed A&F of a conflict between her "inflexible religious belief" and work rule or requested accommodation from compliance with the rule

EEOC v. Abercrombie & Fitch Supreme Court Reversal

- U.S. Supreme Court rejected the 10th Circuit analysis and held that an employer cannot escape liability for religious discrimination under Title VII by arguing that it did not have actual knowledge of an individual's need for a religious accommodation.
- Under Title VII, if religion is a "motivating factor" in the decision, that's enough
  - Even if the employer isn't sure of the person's religion, but merely suspects they may have to make an accommodation they don't want to make
  - "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

Some Takeaways

- You might not recognize it as a religion, but the law might
  - All it takes is for the belief to be "sincerely held"
- If an employee asks for a religious accommodation, determine if it is reasonable; if so, just do it
- Document the request, all conversations about it, and the decision whether to accommodate
- Undue hardship must be real and must not just be other employees' complaints

Religious Accommodation Checklist:

- Engage in interactive process/cooperative dialog
- Determine whether practice/belief is religious
- Understand employee's request
- Consider whether employer can provide requested accommodation or alternative accommodation without creating undue hardship
- Involve Human Resources professionals and attorneys when needed

Questions?

Thank you for participating.
Any questions?

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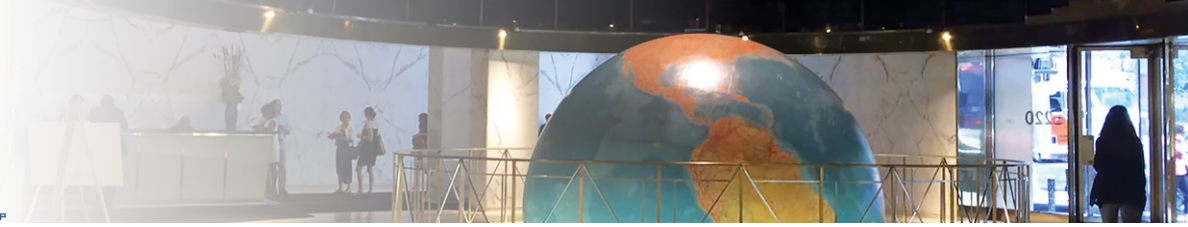

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UNITED STATES DISTRICT COURTS: SOUTHERN, EASTERN, WESTERN, AND NORTHERN DISTRICTS OF NEW YORK

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVENTS

THE GREAT DEBATE: HOT TOPICS IN EMPLOYMENT LAW

MAR 12, 2019 PANELIST - CLE PRESENTATION, NEW YORK COUNTY LAWYERS ASSOCIATION

RELIGIOUS ACCOMMODATION: BALANCING THE RELIGION AND WORK CONFLICT

FEBRUARY 20, 2019 WEBINAR

MISCLASSIFICATION: PITFALLS AND BEST PRACTICES FOR NEW YORK EMPLOYERS

NOVEMBER 15, 2018 WEBINAR

VALERIE K. FERRIER

PARTNER

AREAS OF PRACTICE

LABOR AND EMPLOYMENT

Valerie K. Ferrier is a Partner and head of MCB's Labor and Employment Practice Group. Ms. Ferrier is an experienced trial attorney, offering advice and counseling to clients to mitigate and manage risk regarding compliance issues, in addition to providing handbook and policy updates, and management and employee training. Ms. Ferrier has experience defending discrimination claims, including those brought under Title VII, the Americans with Disabilities Act, the First and Fourteenth Amendments, and the New York State and City Human Rights Laws. Her practice includes the defense of wage and hour and misclassification claims, both single plaintiff and class and collective actions, under the Fair Labor Standards Act and the New York Labor Law. Ms. Ferrier has successfully defended both state and federal jury and bench trials, and has experience with state and federal appellate practice.

Ms. Ferrier comes to MCB from Ford Harrison, a boutique Labor & Employment defense firm. Earlier in her career, Ms. Ferrier served as managing partner of the New York office of a Florida-based commercial defense firm. She also worked for nearly eight years in the in-house law department of the Metropolitan Transportation Authority, ultimately attaining the position of Executive Agency Counsel.

Ms. Ferrier earned her J.D. from St. John's University School of Law in 2007 and her B.A. from Simon's Rock College of Bard. She is admitted to practice in New York, Virginia, and New York federal courts.

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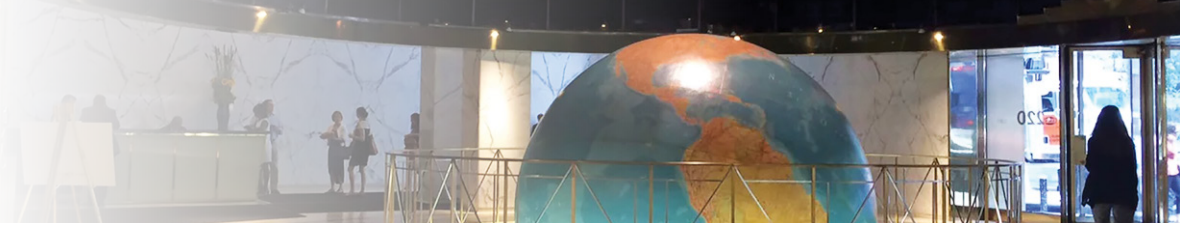

Valerie K. Ferrier cont.

Partner

Representative Experience*

- Successfully settled case on behalf of small business owner for $9,000 fourteen months after plaintiff, a former employee, demanded $105,000 alleging unpaid overtime. Case was settled without conducting any depositions. New York Supreme Court, 2019.
- Successfully opposed motion by group of former employee construction workers for permission to proceed as a class action. New York Supreme Court, 2019.
- Obtained summary judgment dismissing former employee's retaliation claim. Eastern District of New York, 2018.
- Defeated plaintiff 's (former employee) motion for conditional class certification for alleged unpaid overtime. Prior to answering the complaint or conducting any discovery, a cross-motion for summary judgment was granted on behalf of the business owner. Northern District of New York, 2017.
- Successfully defended employer in case where a former employee alleged disability discrimination under the Americans with Disabilities Act. Following three years of litigation, opposing counsel withdrew from the case, admitting that "Plaintiff cannot succeed in his opposition and the filing of any response papers to Defendant's for summary judgment would be [sanctionable conduct]." The motion for summary judgment was ultimately granted on behalf of the employer. Eastern District of New York, 2017.
- Obtained case dismissal for lack of personal jurisdiction in client's contract dispute with former business partner. Eastern District of New York, 2016.
- Obtained case dismissal in racial discrimination claim by former employee. Eastern District of New York, 2014.

continued...

**Every case is different. Past experience does not guarantee results.*

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Valerie K. Ferrier cont.

Partner

Publications

Sexual Harassment Training: Are You in Compliance?

January 2020, MD News

#MeToo and the Backlash to the Backlash

September 30, 2019, MCB Defense Practice Update Fall 2019

Sweeping Changes to New York State Discrimination Law

September 2019, MD News

"Key Updates in International Employment Law for 2019," *Today's General Counsel* (Forthcoming Summer Issue 2019).

"The Writing is on the Wall: A $15 Minimum Wage Edges Toward the New Normal," Briefs – Cuban American Bar Association (Forthcoming Summer Issue 2019).

"Municipal Liability Under the ADA for Website Inaccessibility," FordHarrison, LLP (Jan 30, 2019).

"Michigan Legislature Alters the Minimum Wage," *On the Clock,* FordHarrison, LLP (Jan 10, 2019).

"New Year's Resolutions: Upcoming Increases to Minimum Wage in Many US States," *The Word,* Ius Laboris (Nov 29, 2018).

"Ninth Circuit Perpetuates Uncertainty in 80/20 Rule for Employers of Tipped Workers," FordHarrison, LLP (Oct 2, 2018).

"'This Call is Being Recorded': Secret Workplace Recordings," FordHarrison, LLP (Sep 6, 2018).

"New York State Issues Draft Anti-Sexual Harassment Training," FordHarrison, LLP (Aug 29, 2018).

"New York City Takes a Step Toward Minimum Wage for App-Hail Drivers," *On the Clock,* FordHarrison, LLP (Aug 17, 2018).

"New York City Commission on Human Rights Issues Mandatory Anti-Sexual Harassment Poster," FordHarrison, LLP (Aug 15, 2018).

"New York City Considering Mandatory Minimum Wage for App-Hail Drivers," FordHarrison, LLP (Jul 12, 2018).

"When a Plaintiff's Perjury Could Block a Wage Award," Law360 (Apr 10, 2018).

F.3d at 421 (citing 20 C.F.R. § 404.1520b(c)(1)). Instead, the hearing officer adopted the opinion of consulting source Dr. Hoffman, whose report is arguably more conclusory than those of Dr. Payne and Dr. Brand.[11] Compare Admin. R. 502-19, with id. at 360–64, and id. at 468–73.

[7, 8] While, as a general matter, a hearing officer has broad discretion to make factual findings and credibility determinations, the hearing officer here fell short of his obligations in evaluating the functional effects of Dean's mental impairments. Cf., e.g., Genier, 606 F.3d at 50 ("Because the [hearing officer's] adverse credibility finding ... was based on a misreading of the evidence, it did not comply with the [hearing officer's] obligation to consider 'all of the relevant medical and other evidence[.]'" (quoting 20 C.F.R. § 404.1545(a)(3))). Having concluded that the hearing officer's residual functional capacity determination is not supported by substantial evidence, it follows that the hearing officer's reliance on the opinion of vocational expert Garozzo is error, since that opinion was based on the hearing officer's flawed residual functional capacity determination. See, e.g., Aubeuf v. Schweiker, 649 F.2d 107, 114 (2d Cir.1981) ("The vocational expert's testimony is only useful if it addresses whether the particular claimant, with his limitations and capabilities, can realistically perform a particular job.").

tunately, Dr. Payne's assessment is of little probative value in this case because 'significant' is not a vague term that does not have a standard definition within the framework of Social Security Disability rules and regulations." Id.; see also id. at 18 (affording "some weight to the vague opinion of Dr. Payne ... to the extent that [it is] consistent with the residual functional capacity described above.").

11. For example, while Dr. Hoffman states that Dean "is able to understand, execute, and remember simple and detailed instructions and work like procedures[,]" he does not indicate the basis of this conclusion, and in fact Dean apparently struggled during Dr. Hoffman's examination. See Admin. R. 518 ("[Mental Status Examination] was positive for difficulty performing serial 3s and difficulty on delayed recall."). By contrast, Dr. Payne's report describes Dean's memory as "[i]mpaired" and notes that Dean "recalled 3 out of 3 objects immediately and 0 out of 3 after a five minute delay." Id. at 362.

III. CONCLUSION

Based on the foregoing analysis, Dean's complaint for relief, ECF No. 1, is granted in part. The decision of the Commissioner is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

WEST KEY NUMBER SYSTEM

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, Plaintiff,

v.

UNITED HEALTH PROGRAMS OF AMERICA, INC. and Cost Containment Group, Inc., Defendants.

Elizabeth Ontaneda, Francine Pennisi, and Faith Pabon, Plaintiffs-Intervenors,

v.

United Health Programs of America, Inc. and Cost Containment Group, Inc., Defendants.

14-CV-3673 (KAM)(JO)

United States District Court, E.D. New York.

Signed 09/30/2016

Background: Equal Employment Opportunity Commission (EEOC) filed suit on

behalf of class of former employees, seeking damages from employers for alleged intentional religious discrimination in violation of Title VII, including reverse and conventional discrimination under theories of disparate treatment, hostile work environment, failure to accommodate, and retaliation. Plaintiffs moved for partial summary judgment, and defendants cross-moved for summary judgment on all claims.

Holdings: The District Court, Matsumoto, J., held that:

(1) employers' alleged conflict resolution program was religion under Title VII;

(2) summary judgment was precluded on reverse religious discrimination claims based on disparate treatment;

(3) summary judgment was precluded on reverse religious discrimination claims based on hostile work environment;

(4) religious discrimination claim based on failure to accommodate was not actionable;

(5) summary judgment was precluded on religious retaliation claim;

(6) summary judgment was precluded on religious discrimination claim based on disparate treatment; but

(7) religious discrimination claim based on hostile work environment was not actionable.

Motion granted; cross-motion granted in part and denied in part.

1. Federal Civil Procedure ⇐2541

Deposition testimony can be sufficient to create genuine disputes of material fact for purposes of summary judgment.

2. Civil Rights ⇐1522

Actions for violations of Title VII can be brought either by aggrieved individuals or by the Equal Employment Opportunity Commission (EEOC). Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(f).

3. Civil Rights ⇐1152, 1163

Title VII protects against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

4. Civil Rights ⇐1243

Title VII prohibits employers from retaliating against employees for engaging in protected activity. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

5. Civil Rights ⇐1163

Aside from protecting employees from discrimination on the basis of their religion, Title VII also protects employees from discrimination because they do not share their employer's religious beliefs. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

6. Civil Rights ⇐1163

Under Title VII, a religious discrimination claim premised on an employer's preference for a particular religious group is often referred to as a "reverse religious discrimination" claim. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights ⇐1154

In analyzing a Title VII religious discrimination claim, the determination of what is a religious belief or practice is more often than not a difficult and delicate task. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

8. Civil Rights ⇐1504

An Equal Employment Opportunity Commission (EEOC) guideline is entitled to deference under *Skidmore*, because

EEOC guidelines reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

9. Civil Rights ⇐1154

Constitutional Law ⇐1292

To determine whether a given set of beliefs constitutes a religion for purposes of either the First Amendment or Title VII, courts generally evaluate: (1) whether the beliefs are sincerely held, and (2) whether they are, in the believer's own scheme of things, religious. U.S. Const. Amend. 1; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

10. Civil Rights ⇐1154

To determine whether beliefs constitute a religion under Title VII, evaluating whether the beliefs are sincerely held, particularly when the belief system is nontraditional, is inherently fact-intensive. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

11. Civil Rights ⇐1154

In evaluating whether beliefs are sincerely held, as required for the beliefs to constitute a religion under Title VII, courts must be mindful to differentiate between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

12. Civil Rights ⇐1154

That an individual or entity purportedly holding the beliefs rejects the characterization of the beliefs as religious is not dispositive of whether the beliefs constitute a religion under Title VII. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

13. Civil Rights ⇐1154

In analyzing whether a set of beliefs are religious, in the believer's own scheme of things, as required for the beliefs to constitute a religion under Title VII, courts look to whether the belief system involves ultimate concerns; a concern is ultimate when it is more than intellectual, and a concern is more than intellectual when a believer would categorically disregard elementary self-interest in preference to transgressing its tenets. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

14. Civil Rights ⇐1154

Religious beliefs protected by Title VII need not be acceptable, logical, consistent, or comprehensible to others; a religious belief can appear to every other member of the human race preposterous, yet still be entitled to protection. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

15. Civil Rights ⇐1154

An expansive conception of religious belief is appropriate in the context of a religious discrimination claim brought under Title VII. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

16. Civil Rights ⇐1163

Employers' alleged conflict resolution program constituted "religion," within meaning of Title VII, in action against employers alleging discrimination against employees who rejected program or had different beliefs; program's system of beliefs and practices was more than intellectual and involved ultimate concerns signifying religiosity, including chants, prayers, mentions of God, transcendence, and souls.

Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); 29 C.F.R. § 1605.1.

See publication Words and Phrases for other judicial constructions and definitions.

17. **Federal Civil Procedure** ⇐184.30

Equal Employment Opportunity Commission (EEOC) was not precluded from identifying three new claimants after filing action seeking damages from employers for alleged intentional religious discrimination against employee claimants in violation of Title VII, since claims of new claimants were effectively identical to claims of pre-existing claimants, as arising out of same alleged course of conduct, in same office, by same individuals, and during time period already covered by charges in initial complaint, and before filing suit EEOC was not required to specifically identify, investigate, give notice of reasonable cause, and conciliate each employee who was allegedly subjected to discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

18. **Civil Rights** ⇐1536, 1545

Disparate treatment claims for employment discrimination, under Title VII, are assessed under the burden-shifting framework established by *McDonnell Douglas*, requiring plaintiff to first establish a prima facie case of discrimination, which is a minimal burden; if plaintiff successfully establishes a prima facie case, the burden shifts to the defendants to establish a legitimate, nondiscriminatory reason for their actions, and should the defendants meet their burden, the inquiry then returns to the plaintiff to demonstrate that the proffered reason is a pretext for discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

19. **Civil Rights** ⇐1163

Under Title VII, in the reverse religious discrimination context, plaintiff need not demonstrate that she is a member of a protected class, as is required to establish a prima facie case in a more straightforward Title VII discrimination claim. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

20. **Civil Rights** ⇐1158

Federal Civil Procedure ⇐2497.1

Defeating summary judgment for a disparate treatment claim of employment discrimination under Title VII requires only that plaintiff present evidence from which a reasonable jury could find that the defendant was in fact motivated at least in part by the prohibited discriminatory animus. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

21. **Civil Rights** ⇐1163

Under the modified *McDonnell Douglas* framework for establishing a prima facie case where a plaintiff avers that she was subjected to reverse religious discrimination in violation of Title VII because she rejected her employer's religious beliefs, she must establish that: (1) she was qualified for the position at the time of her termination, (2) her employer subjected her to an adverse employment action, and (3) some additional evidence supports the inference that the adverse action was taken because of a discriminatory motive based on the employee's failure to adopt or follow the employer's religious beliefs. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

22. **Civil Rights** ⇐1163

In demonstrating qualification for a position, as required to establish a prima facie case of reverse religious discrimination, under Title VII, employees must show that they were qualified for their positions at the time their employment ended. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

23. Civil Rights ⚖1163

In establishing a prima facie case of reverse religious discrimination, under Title VII, plaintiff must satisfy her burden of demonstrating that she was qualified for the position at the time of her termination by showing that she possesses the basic skills necessary for performance of the job; therefore, especially where termination is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult to draw. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

24. Civil Rights ⚖1163

In establishing a prima facie case of reverse religious discrimination, under Title VII, the employee is not required to establish performance that is satisfactory to the employer, but only that she possesses the basic skills necessary for performance of the job. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

25. Federal Civil Procedure ⚖2497.1

Genuine issues of material fact remained as to whether employees were qualified for their positions at time they were allegedly terminated for rejecting employers' religious beliefs, thus precluding summary judgment as to whether employees established prima facie case of reverse religious discrimination based on disparate treatment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

26. Civil Rights ⚖1163

An "adverse employment action," as required to establish a prima facie case of reverse religious discrimination in violation of Title VII, is defined as a materially adverse change in the terms and conditions of employment, including termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

27. Civil Rights ⚖1163

A mere inconvenience or alteration of job responsibilities does not constitute an "adverse employment action" required to establish a prima facie case of reverse religious discrimination in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

28. Federal Civil Procedure ⚖2497.1

Genuine issues of material fact remained as to whether employees were subjected to adverse employment action by allegedly being terminated for rejecting employers' religious beliefs, thus precluding summary judgment as to whether employees established prima facie case of reverse religious discrimination based on disparate treatment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

29. Civil Rights ⚖1535

In establishing a prima facie case of reverse religious discrimination, under Title VII, the element requiring an inference of discrimination is a flexible one that can be satisfied differently in differing factual scenarios; the inference can be taken from circumstances including the employer's criticism of the plaintiff's performance in religiously degrading terms, more favorable treatment to employees subscribing to the religious beliefs of the employer, or the sequence of events leading to the adverse employment action suffered by plaintiff.

Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

30. **Federal Civil Procedure** ⚖2497.1

Genuine issues of material fact remained as to whether employers' adverse actions of terminating employees were motivated, at least in part, by employees' rejection of employers' religious beliefs, thus precluding summary judgment as to whether employees established prima facie case of reverse religious discrimination based on disparate treatment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

31. **Federal Civil Procedure** ⚖2497.1

Genuine issues of material fact remained as to whether employers articulated legitimate, non-discriminatory explanations for terminating employees, thus precluding summary judgment on employees' claims against employers for reverse religious discrimination based on disparate treatment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

32. **Federal Civil Procedure** ⚖2497.1

To avoid summary judgment at the stage in which plaintiff offers evidence that an employer's reason for an adverse employment actions was pretext for reverse religious discrimination in violation of Title VII, plaintiff must offer evidence from which a reasonable jury could conclude by a preponderance of the evidence that religious discrimination played a role in the adverse actions taken against plaintiff. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

33. **Federal Civil Procedure** ⚖2497.1

Genuine issues of material fact remained as to whether employer's proffered reasons for adverse actions against employees were pretext for religious discrimination by terminating them for rejecting employers' religious beliefs, thus precluding summary judgment as to employees' reverse religious discrimination claims against employers based on disparate treatment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

34. **Civil Rights** ⚖1163

In determining whether an employer's reason for taking an adverse employment action was pretext for reverse religious discrimination in violation of Title VII, a court must examine the totality of the record and cannot isolate each piece of evidence. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

35. **Civil Rights** ⚖1147

Title VII bars employers from requiring employees to work in a hostile or abusive environment. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

36. **Civil Rights** ⚖1505(2, 7)

Generally, an individual must file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of an alleged unlawful employment practice in violation of Title VII; however, an exception exists where a defendant has allegedly engaged in a continuous policy of discrimination. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

37. **Civil Rights** ⚖1505(7)

Under the "continuing violation exception" to the Title VII limitations period, if a Title VII plaintiff files an Equal Employment Opportunity Commission (EEOC) charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely

standing alone. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

38. Civil Rights ⚿1505(7)

Under continuing violation doctrine, four employees' claims against employers for reverse religious discrimination based on hostile work environment were timely due to two of those employees' timely filing charges with Equal Employment Opportunity Commission (EEOC) for their claims unlawful practices and abusive work environment imposing employers' religious beliefs on employees; allegations by the two employees who timely filed mirrored allegations of the other two employees, who had not filed charges within 300 days of challenged conduct, and put employers on notice of possibility of additional Title VII claims by other employees based on same conduct. Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq.

39. Civil Rights ⚿1147

In order to make out a hostile work environment claim, under Title VII, plaintiff must demonstrate: (1) that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile work environment to the employer. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

40. Civil Rights ⚿1147

In establishing that an employee's workplace was permeated with discriminatory intimidation, as required to support a hostile work environment claim, under Title VII, the employee must show both that the misconduct was severe or pervasive enough to create an objectively hostile or abusive working environment and that she subjectively perceived the environment to be hostile or abusive. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

41. Civil Rights ⚿1147

Although isolated incidents of discriminatory conduct will usually fall short of establishing a hostile work environment in violation of Title VII, a single incident can create a hostile work environment if the incident is sufficiently severe. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

42. Civil Rights ⚿1147

Courts must look to the totality of the circumstances in determining whether a workplace environment is sufficiently hostile or abusive to be actionable under Title VII, but certain factors guide the analysis including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

43. Civil Rights ⚿1528

An employer is presumptively liable for harassment in violation of Title VII based on a hostile work environment if the plaintiff was harassed not by a mere coworker but by someone with supervisory or successively higher authority over the plaintiff, although in certain circumstances an affirmative defense may be available; however, no affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

44. Federal Civil Procedure ⚿2497.1

Genuine issues of material fact remained as to whether employees' workplace was permeated with discriminatory

intimidation that was sufficiently severe or pervasive to alter conditions of work environment due to supervisors' imposition of employers' religious beliefs and practices on employees, thus precluding summary judgment on employees' claim against employers for reverse religious discrimination based on hostile work environment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

45. Civil Rights ⇐1528

In evaluating a hostile work environment claim, under Title VII, a "supervisor" is someone who can effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

46. Federal Civil Procedure ⇐2497.1

Genuine issues of material fact remained as to whether alleged harasser, who imposed employers' religious beliefs and practices on employees, was supervisor, and whether employers exercised reasonable care to prevent and promptly correct any harassment by supervisor, thus precluding summary judgment on employees' claim against employers for reverse religious discrimination based on hostile work environment in violation of Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

47. Civil Rights ⇐1252

Title VII retaliation claims require that employees' protected activity must be the but-for cause of their terminations. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

48. Civil Rights ⇐1162(1)

Under Title VII, to establish a prima facie case of religious discrimination based on failure to accommodate, plaintiff must prove that: (1) he has a bona fide religious belief that conflicts with an employment requirement, (2) he informed the employer of this belief, and (3) he was disciplined for failure to comply with the conflicting employment requirement. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

49. Civil Rights ⇐1162(2)

Employee never sought any religious accommodation from employer, and thus, employee failed to establish prima facie case of religious discrimination, in violation of Title VII, based on employer's alleged failure to accommodate employee's religious practices. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); 29 C.F.R. § 1605.2(c)(1).

50. Civil Rights ⇐1243

To establish a prima facie case of retaliation, under Title VII, plaintiff must show that: (1) she was engaged in protected activity by opposing a practice made unlawful by Title VII, (2) employer was aware of that activity, (3) she suffered adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

51. Federal Civil Procedure ⇐2497.1

Genuine issues of material fact remained as to whether employer proffered pretextual reasons for terminating employee after she voiced her religious objections to employer's beliefs in different religion, thus precluding summary judgment on employee's Title VII claim that she was terminated by employer in retaliation on basis of her own religious beliefs. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

52. Civil Rights ⇐1153

Plaintiffs who seek to make out a prima facie case of religious discrimination under Title VII must show that (1) they held a bona fide religious belief conflicting with an employment requirement, (2) they informed their employers of this belief, and (3) they were disciplined for failure to comply with the conflicting employment requirement. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

53. Federal Civil Procedure ⇐2497.1

Genuine issue of material fact remained as to whether employer's proffered reason for terminating employee allegedly for failing to report to work was pretext for religious discrimination after she had voiced her religious objections to employer's beliefs in different religion, thus precluding summary judgment on employee's religious discrimination claim, under Title VII, based on disparate treatment. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

54. Civil Rights ⇐1147

To state a hostile work environment claim under Title VII, plaintiff must plead facts tending to show that the complained of conduct: (1) is objectively severe or pervasive such that it creates an environment that a reasonable person would find hostile or abusive, (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive, and (3) creates such an environment because of plaintiff's protected characteristic. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

55. Civil Rights ⇐1161

Employee was not subjected to hostile work environment because of her religion, as required to support her religious discrimination claim under Title VII, where vast majority of alleged religious hostility by employee's supervisor occurred before employee informed employer that she was Catholic, and employee was not subjected to severe or pervasive religious hostility in brief window of one month between informing employer of her religion and her termination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

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MEMORANDUM & ORDER

MATSUMOTO, United States District Judge

The Equal Opportunity Employment Commission (the "EEOC") brings this action on behalf of a group of former employees ("claimants" or "plaintiffs") of United Health Programs of America Inc. ("UHP") and Cost Containment Group Inc. ("CCG") (collectively, "defendants") who claim principally that they were subjected to religious discrimination in their workplace in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[1] Claimants have moved for partial summary judgment on the discrete issue of whether certain practices and beliefs (re-

1. Certain plaintiffs-intervenors are separately represented, but have joined the EEOC's briefing. Except where necessary for the discussion below, the court refers to both the plaintiffs-intervenors and the claimants as "claimants" or "plaintiffs."

ferred to herein as "Onionhead" and "Harnessing Happiness") purportedly imposed on employees by supervisors in defendants' workplace constitute a religion. Defendants have cross-moved for summary judgment on all claims, the nature of which will be discussed in greater detail below. For the reasons stated herein, claimants' motion is GRANTED and defendants' motion is GRANTED in part and DENIED in part.

BACKGROUND

The facts provided below derive from the parties' Local Rule 56.1 statements, as well as from the deposition testimony and other exhibits attached by the parties in their cross-motions for summary judgment.[2] The facts below are undisputed unless otherwise noted. The court has construed the facts in the light most favorable to the non-moving party with respect to each motion.

I. Factual Background

A. Defendants' Companies and Other Related Entities

Defendants operate a "small wholesale company that provides discount medical plans to groups of individuals" as well as a number of other for-profit and non-profit entities.[3] (Def. 56.1 ¶¶ 1-10.) Defendants' organizations, which at all relevant times employed fewer than 50 people, have conducted their business since 2006 out of a single office located in Long Island, New York. (Def. 56.1 ¶¶ 2-5.)

B. The Claimants

Claimants all worked for defendants for different periods of time:

(1) Sandra Benedict: September 2011 – March 2012. (Pl. 56.1 ¶ 144.)

(2) Danielle Diaz: July 2010 – December 15, 2012. (*Id.* ¶ 163.)

2. The parties have filed statements of undisputed material facts, oppositions, and a reply, pursuant to Local R. 56.1. (*See* ECF No. 77, Defendants' Statement of Undisputed Material Facts ("Def. 56.1"); ECF No. 80, Plaintiffs' Statement of Material Facts and Statement of Disputed Material Facts ("Pl. 56.1"); ECF No. 84, Defendants' Counterstatement to Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts and Objections and Responses to Statement of Disputed Material Facts ("Def. 56.1 Resp."); ECF No. 81, Plaintiffs' Responses to Defendants' Rule 56.1 Statement of Undisputed Material Facts ("Pl. 56.1 Resp."); ECF No. 83, Defendants' Rule 56.1 Reply Statement ("Def. 56.1 Reply").) Deposition testimony (ECF No. 87, Tabs A-T) is referred to by the relevant exhibit's tab number and the deponent's surname. Each joint exhibit (ECF No. 86, Exs. 1-143, A-S) is referred to as "Jt. Ex." followed by its corresponding number or letter.

As noted above, the parties have cross-moved for summary judgment. Defendants have moved for summary judgment on all claims. (ECF No. 76, Defendants' Memorandum in Support of Motion for Summary Judgment ("Def. Mem.").) Plaintiffs have opposed defendants' motion and separately moved for partial summary judgment solely on the issue of whether the beliefs and practices referred to as Onionhead and Harnessing Happiness constitute a religion. (ECF No. 79, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Partial Summary Judgment ("Pl. Mem.").) Both parties filed reply briefs. (ECF No. 82, Defendants' Reply in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Def. Reply"); ECF No. 85, Plaintiffs' Reply in Support of Plaintiffs' Motion for Partial Summary Judgment ("Def. Reply").)

3. CCG is a holding company that houses UHP and other entities. (Def. 56.1 ¶¶ 1-10.) At all relevant times, claimants were employed by CCG, UHP, or an entity falling under CCG's umbrella. Because the distinction between the different corporate entities is generally not relevant to this action, the court refers to the entities collectively as "defendants" or as "CCG."

(3) Jennifer Honohan: Approximately 1992 – February 3, 2012. (*Id.* ¶ 193.)

(4) Karen Josey: March 2011 – Approximately November or December 2011. (*Id.* ¶ 237.)

(5) Regina Maldari: October 2004 – May 2008. (*Id.* ¶ 333.)

(6) Elizabeth Ontaneda: 1992 – August 24, 2010. (*Id.* 56.1 ¶ 259.)

(7) Faith Pabon: October 2010 – March 2012. (*Id.* ¶ 283.)

(8) Cynthia Pegullo: 2004 – 2007 and then again from 2008 – April 2011. (Def. 56.1 ¶ 262.)

(9) Francine Pennisi: November 2004 – August 2010. (*Id.* ¶ 276.)

(10) Elizabeth Safara: December 2004 – August 2008. (*Id.* ¶ 296.)

C. Onionhead and Harnessing Happiness Programs

Beginning around 2007, CCG Chief Executive Officer Robert Hodes ("Hodes") and Chief Operations Officer Tracy Bourandas ("Bourandas") determined that their previously effective corporate culture was deteriorating amid a difficult financial period for the company. (Def. 56.1 ¶¶ 37, 79-81.) Hodes and Bourandas hired Hodes's aunt, Denali Jordan ("Jordan" or "Denali"), to provide assistance. (*Id.* ¶¶ 77-81.) Jordan considered herself a teacher and parent to Hodes, and they maintained a close relationship. She stayed at Hodes's home when working at defendants' office. (Pl. 56.1 ¶ 73.) Before Jordan began working with defendants, she developed a program called Onionhead (Pl. 56.1 ¶ 2),[4] the purpose and nature of which is strongly disputed by the parties. It is undisputed that defendants used the Onionhead program in the workplace after Jordan began to work with defendants. It is also undisputed that defendants provided administrative and financial support to Onionhead that was unrelated to defendants' other business. (Def. 56.1 ¶ 7.) Beyond the undisputed fact that Onionhead was utilized in defendants' workplace, however, the parties' respective views of when, how, and why Onionhead was implemented are practically irreconcilable and, as explained in greater detail throughout this memorandum and order, require a trial to resolve the disputed issues.

Defendants describe Onionhead as a multi-purpose conflict resolution tool, while plaintiffs characterize it as a system of religious beliefs and practices. (*Compare, e.g.*, Def. 56.1 ¶ 11 *and* Tab I, Jordan Dep. at 235, *with, e.g.*, Pl. 56.1 Resp. ¶ 11.) According to defendants, Jordan created Onionhead as a "tool to help children, including those with disabilities, identify, understand, and communicate emotions." (Def. 56.1 ¶ 12.) Although Onionhead was initially targeted toward children, gradually defendants contend that its purpose expanded to assist "people of all ages with addiction, abuse and domestic violence, family issues, marital problems, eldercare, death and dying, the full spectrum of autism and other cognitive disabilities or illnesses (such as Alzheimer's), and to generally develop better problem-solving and communication skills." (*Id.*) Onionhead practices include the use of "tools," many of which describe a "total of 150 different emotions," including cards, pins, dictionaries, workshop materials, magnets, journals, and a "Declaration of Virtues of Empowerment." (*Id.* ¶¶ 13, 20(a)-(e).) Onionhead materials often include images of an anthropomorphic Onion. (*E.g.*, Jt. Exs. A-O.)

Beginning around 2011, Jordan merged some of the concepts and principles under-

4. Jordan created Onionhead in 1990 (Jt. Ex. 2, ¶ 8), and incorporated it as Onionhead & Co. Inc. in 2007. (Def. 56.1 ¶ 11.) Initially incorporated as a for-profit venture, Onionhead became a non-profit organization in October 2011. (*Id.*)

lying Onionhead into a program referred to as Harnessing Happiness,[5] which was designed to make Onionhead more "suitable for adults." (Jt. Ex. 2, ¶¶ 26-27; Def. 56.1 ¶¶ 25-27.) Harnessing Happiness is now the "umbrella name" Jordan employs to describe the programs she offers. (Def. 56.1 ¶ 25.) Today, Onionhead falls under the Harnessing Happiness "umbrella."[6] (*Id.*)

Claimants maintain a widely divergent view of Onionhead and Harnessing Happiness. (Pl. 56.1 ¶¶ 1-45.) Claimants contend that Onionhead and Harnessing Happiness are a "system of religious beliefs and practices" with a corresponding "comprehensive system of multiple products and programs." (Pl. 56.1 ¶ 4; Pl. 56.1 Resp. ¶ 11.) Emails in the record regarding Onionhead and Harnessing Happiness, sent between Jordan and other supervisors and employees working for defendants, involve discussions about God, spirituality, demons, Satan, divine destinies, the "Source," purity, blessings, and miracles. (Jt. Exs. 8, 78-81, 89, 117.) In one email from 2011, Hodes groups Onionhead with "higher guidance teachings." (Jt. Ex. 117.) Claimants also emphasize that many of the materials associated with Onionhead and Harnessing Happiness — some of which, however, were not used at defendants' workplace — contain spiritual and religious imagery and iconography. (Pl. 56.1 ¶¶ 1-41.) For example, one Onionhead document is referred to as the *Declaration of Virtues for Empowerment.* (Jt. Ex. K.) The document contains a list of 12 virtues, and provides:

"Because the road to Heaven is paved with the power of what is good in us, we have devised The Declaration of Virtues for Empowerment .... Onionhead's goal is to help transform negative thought forms into positive thought forms, thereby co-creating a new loving, wondrous garden for us all to thrive in." (*Id.*) Another document, used in office workshops conducted by defendants while the majority of claimants were employed (Def. 56.1 Resp. ¶ 24), is referred to as the *Onionhead Keys and Codes to Living Good.* (Jt. Ex. M.) The document contains the following examples of religious and spiritual language:

- "Keys and codes have been a part of the Divine Plan from the beginning of time. Every sacred tribe and religion have codes hidden within their scripts, books and scrolls. It was, and still is, a way to integrate our heavenly nature into our human nature."
- "The Onionhead program is designed to transform negative thoughts and behaviors into positive thoughts and behaviors.... Choice, not chance, determines human destiny and only moral code determines the state of Heaven on Earth."
- "Our soul is our constant reminder of our higher self. It stays with us in order to keep us on the track of what is right and righteous."

(*Id.*)

D. Implementation of Onionhead at CCG

As noted above, Jordan first began working with defendants in 2007. Jordan's

5. Jordan and another individual founded Harnessing Happiness as a non-profit organization. (Jt. Ex. 2, ¶¶ 26-33.) The parties dispute whether the entity remains active. (*Compare* Def. 56.1 ¶ 33, *with* Pl. 56.1 Resp. ¶ 33.) It is undisputed, however, that defendants, as they had done with Onionhead, provided administrative and financial support for Harness Happiness. (Def. 56.1 ¶ 7.)

6. The events underlying this action, which generally took place between 2007 and 2012, involve both Onionhead and Harnessing Happiness. The court refers to the programs collectively as Onionhead and/or Harnessing Happiness except where the distinction is relevant.

first visit to defendants' office was in October 2007, and she stayed for five days. (Pl. 56.1 ¶ 88.) She was introduced to and met with the employees during three separate group meetings. (*Id.*) When Jordan initially arrived, defendants' upper managers referred to her as a "spiritual advisor," though she stated that she disliked the term.[7] (Jt. Ex. 97 (email from Jordan stating that "I was called a spiritual advisor").) Jordan testified that when she first arrived at CCG, she viewed "a lot of disharmony." (Tab I, Denali Dep. at 21.) She also testified that she believed a disproportionate number of the employees "had cancer" and that she "had not been exposed to that before." (*Id.*) Jordan testified that she "attempted to change the atmosphere and to try to create a camaraderie and a unification in the people." (*Id.* at 22; *see also id.* at 24 ("I felt that my role was to create more harmony, period.").) After Jordan's initial visit in October 2007, CCG brought her back in February 2008 and approximately every month or two afterward. (Pl. 56.1 ¶ 93.) Her monthly visits sometimes lasted several days, and she was paid approximately $330,000 annually for her work. (*Id.* ¶¶ 94-96.)

[1] Because claimants were employed at different times, their individual experiences with Onionhead, Harnessing Happiness, and Jordan differed, sometimes significantly. Based on the record, however, certain experiences were allegedly shared by most or all of the claimants. For example, virtually all of the claimants characterize Onionhead-related workshops, prayers, and meetings implemented in the workplace as effectively mandatory (though defendants contend that they were entirely voluntary). (Pl. 56.1 ¶¶ 100, 109-14; Def. 56.1 ¶¶ 49, 51; Pl. 56.1 Resp. ¶ 52.) Claimants also describe being required to attend one-on-one meetings with Jordan (which defendants do not explicitly dispute or counter with admissible evidence). (Pl. 56.1 ¶ 98, Def. 56.1 Resp. ¶ 98.) During both the workshops and the one-on-one meetings with Jordan, claimants describe being requested to share personal information about themselves. (*E.g.*, Pl. 56.1 ¶ 98.) At times, Jordan offered unsolicited advice about their personal lives. For example, two claimants testified that Jordan suggested to them that they leave their husbands. (*Id.* ¶¶ 181, 251.) Defendants offer no evidence to the contrary but, instead, object that the fact is no material, is based on hearsay, and is self-serving. The court notes that deposition testimony can be sufficient to create genuine disputes of material fact for purposes of summary judgment.[8] *See Hamilton v. A C & S, Inc.*, No. 94–CV–4397, 1998 WL 633682, at *4 (S.D.N.Y. Sept. 15, 1998) ("A litigant's deposition testimony is sufficient to raise an issue of fact precluding summary judgment.").

Many claimants also offer evidence (and defendants again offer no contrary evidence) of a number of other workplace

7. Defendants contend that Jordan was a management and wellness consultant for defendants, while plaintiffs contend that she was an employee and supervisor employed by defendants. (*Compare, e.g.*, Def. 56.1 ¶¶ 82-83, *with* Pl. 56.1 Resp. ¶¶ 82-83.)

8. Defendants strongly dispute that many of the practices discussed here occurred. In resolving defendants' motion for summary judgment, however, the court must view the facts in the light most favorable to claimants. Defendants also assert running boilerplate objections (without explanation or legal support) to claimants' testimony. For example, defendants argue that claimants' statements that they were told "demons" were entering the workplace through the overhead lighting are hearsay. (Def. 56.1 Resp. ¶ 142.) Plainly, however, statements like the ones regarding "demons" are not being offered for the truth of the matter asserted.

practices they shared in common. Some claimants describe being told to burn candles and incense to "cleanse the workplace." (*Id.* ¶¶ 265, 373-74.) Some claimants also describe being told that they should not use overhead lighting "in order to prevent demons from entering the workplace through the lights." (*Id.* ¶¶ 142, 206, 262.) Claimants also describe instances in which they were required to engage in chanting and prayer in the workplace. (*E.g.*, Tab H, Honohan Dep. at 113; Tab N, Ontaneda Dep. at 213; Tab R, Safara Dep. at 60-61; Tab O, Pabon Dep. at 119, 125; Tab J, Josey Dep. at 119.)

Each claimant contends that she was ultimately terminated by defendants either because she rejected Onionhead beliefs or because of her own non-Onionhead religious beliefs. Claimants further offer uncontroverted evidence that certain other employees who participated in Onionhead activities or adhered to Onionhead beliefs were given progressive discipline when they erred instead of being terminated. (Pl. 56.1 ¶¶ 379-91.) Although defendants concede that a number of the claimants were terminated (Def. Mem. at 36 n.27), they contend that others voluntarily resigned. Defendants further contend that none of the claimants were qualified for their positions at the time of their terminations, and that any terminations (or other adverse employment actions) were imposed for legitimate, nondiscriminatory reasons.

The individual circumstances of each claimant will be discussed below as relevant to their particular claims.

II. Procedural Background

On June 7, 2011 Ontaneda and Pennisi filed charges of discrimination and retaliation against defendants with the EEOC. (Jt. Exs. 61-62.) On July 27, 2012, Pabon also filed a charge against defendants with the EEOC. (Jt. Ex. 63.) On March 13, 2014, the EEOC issued a letter of determination stating that Ontaneda, Pabon, and Pennisi — along with a "class of additional claimants," whose names were not specified — had been discriminated against on the basis of religion, and attached a proposed conciliation agreement. (Jt. Ex. 64.) The following month, on April 22, 2014, the EEOC sent a letter to defendants indicating that conciliation efforts had been unsuccessful and that further efforts to conciliate would be futile. (Jt. Ex. 65.)

[2] Actions for violations of Title VII can be brought either by aggrieved individuals or by the EEOC. Here, the EEOC brought this enforcement action on June 11, 2014, under 42 U.S.C. § 2000e–5(f). Aggrieved individuals have the "right to intervene in a civil action brought by the [EEOC]." 42 U.S.C. § 2000e–5(f)(1). On July 2, 2014, the court granted, on consent, Ontaneda, Pennisi, and Pabon's motions to intervene in the instant action. (July 2, 2014 Docket Entry; ECF Nos. 4, 7.) On October 9, 2014, the EEOC filed the operative amended complaint. (Jt. Ex. 67.) The EEOC identified Benedict, Diaz, Honohan, Josey, Maldari, and Pegullo as claimants on January 12, 2015. (Def. 56.1 ¶ 316.) The EEOC identified Safara as a claimant on February 28, 2015. (*Id.*)

LEGAL STANDARD

Summary judgment is appropriate "only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010) (citing Fed. R. Civ. P. 56). A dispute of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct.

2505, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmovant. *See Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 340 (2d Cir. 2010). The standard remains the same in the context of cross-motions. "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001)

DISCUSSION

[3, 4] As relevant here, Title VII prohibits employers from discriminating against employees on the basis of religion. 42 U.S.C. § 2000e–2(a)(1) ("It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or 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 ...."). "Title VII has been interpreted to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs." *Lampros v. Banco do Brasil, S.A.*, No. 10–CV–9576, 2012 WL 6021091, at *6 n.3 (S.D.N.Y. Dec. 4, 2012) (quoting *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993)), *aff'd*, 538 Fed.Appx. 113 (2d Cir. 2013). Title VII also prohibits employers from retaliating against employees for engaging in protected activity. *See* 42 U.S.C. § 2000e–3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter ....").

Claimants here assert claims under a variety of Title VII theories including disparate treatment, hostile work environment, failure to accommodate, and retaliation. There are effectively two groups of claims. The first group of claims is premised on reverse religious discrimination: that defendants subjected claimants to discrimination by imposing religious practices and beliefs on claimants. The second group of claims fall within the more traditional religious discrimination and retaliation rubric: claimants assert that they were discriminated against and retaliated against on the basis of *their own* religious beliefs. Claims falling in the first group, the reverse religious discrimination claims, can be broken down as follows:

(1) Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo contend that they were terminated because they opposed Onionhead practices and beliefs.

(2) All claimants claim that they were subjected to a hostile work environment based on coerced adherence to Onionhead practices and beliefs.

Claims falling in the second group, the more straightforward religious discrimination and retaliation claims, are as follows:

(3) Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo claim that they were subjected to religious discrimination on the basis of their religious beliefs.

(4) All claimants assert that they were subjected to a hostile work environment on the basis of their religious beliefs.

(5) All claimants allege that defendants failed to accommodate their religious beliefs.

(6) Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo allege that they were retaliated

against after engaging in protected activity.[9]

In resolving the parties' respective motions, the court first addresses claimants' partial motion for summary judgment, which requires resolving the issue of whether Onionhead/Harnessing Happiness constitutes a religion for purposes of Title VII. The court subsequently addresses defendants' motion for summary judgment, which requires an analysis of each of the six aforementioned theories of Title VII liability asserted in this action.

I. Claimants' Motion for Partial Summary Judgment

[5, 6] As noted earlier, Title VII prohibits employers from discriminating on the basis of religion. 42 U.S.C. § 2000e–2(a)(1). Aside from protecting employees from discrimination on the basis of *their* religion, Title VII also protects employees from discrimination because they do not share their employer's religious beliefs. *See Mandell v. Cty. of Suffolk*, 316 F.3d 368, 378 (2d Cir. 2003) ("An employer discriminating against any non-Catholic violates the anti-discrimination laws no less than an employer discriminating only against one discrete group ...."). A religious discrimination claim premised on an employer's preference for a particular religious group is often referred to as a "reverse religious discrimination" claim. *See Noyes*, 488 F.3d at 1168–1169; *Shapolia*, 992 F.2d at 1038. Claimants here bring both conventional religious discrimination claims (contending that they were discriminated against because of their religious beliefs) as well as reverse discrimination claims (contending that they were discriminated against because CCG discriminated against employees who objected to or failed to adhere to Onionhead practices and beliefs, and treated differently employees who did share and adhere to Onionhead practices and beliefs).

In most cases where reverse religious discrimination claims are asserted, the employer's religious beliefs are fairly easy to ascertain. In *Shapolia*, for example, the plaintiff, a non-Mormon, alleged that a Mormon supervisor gave him a negative evaluation, which contributed to his eventual termination, because he did not share the supervisor's religious beliefs. *See* 992 F.2d at 1035, 1037; *see also Noyes*, 488 F.3d at 1165 ("[Plaintiff] alleges that a supervisory employee at her former employer, Kelly Services, Inc., was a member of a small religious group, the Fellowship of Friends, and that he repeatedly favored and promoted other Fellowship members."). Here, however, defendant contends that Onionhead is not a religion. (Def. Mem. at 3-9.) Accordingly, before evaluating plaintiffs' claims premised on reverse religious discrimination, the court must determine whether Onionhead is a religion for purposes of Title VII.

A. Defining Religious Belief Under Title VII

[7] "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67

9. Plaintiffs-intervenors Ontaneda, Pennisi, and Pabon also assert claims under the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.* Because the standard for addressing claims under the NYSHRL is identical to the standard governing the Title VII claims, the court does not separately analyze Ontaneda, Pennisi, and Pabon's NYSHRL claims. *See Hyek v. Field Support Servs., Inc.*, 461 Fed.Appx. 59, 60 (2d Cir. 2012) ("Claims brought under the NYSHRL are analyzed identically and the outcome of an employment discrimination claim made pursuant to the NYSHRL is the same as it is under ... Title VII." (internal quotation marks and citation omitted)).

L.Ed.2d 624 (1981); *Sherr v. Northport–E. Northport Union Free Sch. Dist.*, 672 F.Supp. 81, 92 (E.D.N.Y. 1987) ("Defining 'religion' for legal purposes is an inherently tricky proposition."). Because of the intrinsic difficulties associated with evaluating whether a particular practice or belief is religious in nature, there is "no consensus on how to define religion" for purposes of employment discrimination cases. Donna D. Page, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. Pa. J. Lab. & Emp. L. 363, 371 (2005). Neither the Supreme Court nor the Second Circuit has addressed how to define religion for purposes of a Title VII action.

[8] The court begins with the text of Title VII. Title VII provides that the "term 'religion' includes all aspects of religious observance and practice." 42 U.S.C. § 2000e(j). EEOC guidelines further 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.

29 C.F.R. § 1605.1. The EEOC adopted its expansive definition of religion based on two Supreme Court decisions, *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) and *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), which defined religion broadly for purposes of addressing conscientious-objector provisions to the selective service law.[10]

Delineating the meaning of "religion" for purposes of Title VII often requires resort to First Amendment[11] cases, where non-traditional religions and religious practices are a frequent source of litigation. *See Genas v. State of N.Y. Dep't of Corr. Servs.*, 75 F.3d 825, 832 (2d Cir. 1996) ("Title VII was designed to protect employees from the workplace effects of many of the same forms of discrimination that are forbidden by the Constitution — discrimination on the basis of race, color, religion, gender, and national origin."); *see also EEOC v. Abercrombie & Fitch Stores,*

10. In *Welsh*, the Court explained that if "an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time," his beliefs qualify as religious beliefs that would entitle him to an exemption from the draft. 398 U.S. at 340, 90 S.Ct. 1792. The EEOC's guideline, which derives from *Seeger*, is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), because EEOC guidelines "reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009) (internal quotation marks and citation omitted).

11. The First Amendment, as relevant here, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. I. The first clause, referred to as the Establishment Clause, bars "governmental preference for one religion over another." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 879, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005). The second clause, referred to as the Free Exercise Clause, "bars government action aimed at suppressing religious belief or practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Souter, J., concurring).

Inc., 731 F.3d 1106, 1117 (10th Cir. 2013) (recognizing reliance placed on First Amendment cases in defining religion for purposes of Title VII), *rev'd on other grounds*, — U.S. ——, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015); *Reed v. Great Lakes Cos., Inc.*, 330 F.3d 931, 934 (7th Cir. 2003) (Posner, J.) (finding in part based on "analogy to cases under the free-exercise clause of the First Amendment" that antipathy toward atheists is prohibited by Title VII); *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) (relying on First Amendment jurisprudence in evaluating the breadth of protection afforded under Title VII for a Seventh-Day Adventist).[12]

In *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986), the Second Circuit explicitly considered First Amendment principles in evaluating whether the plaintiff, a member of the Worldwide Church of God, could establish a *prima facie* case of religious discrimination against his employer under Title VII. *See id.* at 481–82 ("We see no reason for not regarding the standard for sincerity under Title VII as that used in free exercise cases."); *Eatman v. United Parcel Serv.*, 194 F.Supp.2d 256, 268 (S.D.N.Y. 2002) ("A court's limited role in determining whether a belief is 'religious' is the same under Title VII as it is under the Free Exercise Clause of the First Amendment.").

[9] To determine whether a given set of beliefs constitutes a religion for purposes of either the First Amendment or Title VII, courts frequently evaluate: (1) whether the beliefs are sincerely held and (2) " 'whether they are, in [the believer's] own scheme of things, religious.' " *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (quoting *Seeger*, 380 U.S. at 185, 85 S.Ct. 850); *see also Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) ("[T]he inquiry is whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." (internal quotation marks and citation omitted)); *Eatman*, 194 F.Supp.2d at 268 (same, in Title VII context).

[10, 11] Evaluating the first factor, sincerity – particularly when the belief system is non-traditional — is inherently fact-intensive. *See Patrick*, 745 F.2d at 157 ("Sincerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant's most veiled motivations and vigilantly separate the issue of sincerity from the factfinder's perception of the religious nature of the claimant's beliefs. This need to dissever is most acute where unorthodox beliefs are implicated."); *Jack-*

12. Former West Virginia Senator Jennings Randolph, the proponent of Section 701(j) of Title VII — which provides the above-mentioned definition of "religion" — discussed the term "religion" during floor debate, explaining:

> The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment – not merely belief, but also conduct; the freedom to believe, and also the freedom to act. I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments."

118 Cong. Rec. 705 (1972) (statement of Sen. Randolph). Commentators, too, have recognized that in determining "whether a given belief or action is religious ... for purposes of Title VII, courts have sought guidance from cases defining 'religion' as the term is used in the free exercise clause of the first amendment." Randall J. Borkowski, *Defining Religious Discrimination in Employment: Has Reasonable Accommodation Survived Hardison?*, 2 Seattle U. L. Rev. 343, 347 (1979) (collecting cases) (footnotes omitted).

son, 196 F.3d at 321 (reversing grant of summary judgment where there were genuine issues of material fact regarding whether a plaintiff's religious beliefs were sincerely held). Courts must be mindful to "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick*, 745 F.2d at 157.

[12] That an individual or entity purportedly holding the beliefs rejects the characterization of the beliefs as religious is not dispositive. In *Warner v. Orange Cty. Dep't of Prob.*, 115 F.3d 1068, 1075 (2d Cir. 1996), for example, the Second Circuit found an Alcoholics Anonymous program that a convict was required to attend as a condition of his probation was religious in nature, over the objection of prison officials who characterized the program as therapeutic rather than religious. In *Malnak v. Yogi*, 592 F.2d 197, 214 (3d Cir. 1979), the court determined that a public school's offering of a course called the Science of Creative Intelligence Transcendental Meditation violated the Establishment Clause of the First Amendment over the objection of the school that the course was secular in nature.[13]

[13, 14] In analyzing the second factor — whether a set of beliefs are, in the believer's "own scheme of things, religious," *Seeger*, 380 U.S. at 185, 85 S.Ct. 850 — courts look to whether the belief system involves "ultimate concern[s]." *Int'l Soc. For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981); *Sherr*, 672 F.Supp. at 92 ("The Supreme Court and Second Circuit have each declared religion to involve the 'ultimate concerns' of individuals ...."). "A concern is ultimate when it is more than intellectual." *Barber*, 650 F.2d at 440 (internal quotation marks and citation omitted). "A concern is more than intellectual when a believer would categorically disregard elementary self-interest in preference to transgressing its tenets." *Id.* (internal quotation marks and citation omitted). Moreover, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714, 101 S.Ct. 1425. "A religious belief can appear to every other member of the human race preposterous," yet still be entitled to protection. *Stevens v. Berger*, 428 F.Supp. 896, 899 (E.D.N.Y. 1977); *see also United States v. Ballard*, 322 U.S. 78, 87, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) ("The religious views espoused by [the criminal defendants] might seem incredible, if not preposterous, to most people. But ... those doctrines are [not] subject to trial ....").[14]

13. Significantly, under the *sui generis* circumstances of this action, the court is uncertain whether an employer's beliefs must be "sincerely held" in order to qualify as religious for purposes of a reverse religious discrimination claim under Title VII. In the usual Title VII and First Amendment case, placing the burden on a plaintiff to establish that her beliefs are sincerely held is sound because it prevents individuals from seeking refuge on religious grounds for beliefs that the plaintiff herself does not subjectively recognize as religious. Placing the same burden on a plaintiff to prove that her employer's religious beliefs are sincerely held (particularly when the employer argues otherwise) is significantly less sound, and may erect an unnecessarily high barrier to relief for plaintiffs seeking to establish reverse religious discrimination claims when the employer's purported religion is nontraditional and the employer denies that its beliefs and practices are religious. In the First Amendment Establishment Clause scenario, for example, a plaintiff need not establish that the government actor sincerely holds the beliefs the plaintiff alleges to be religious. *E.g.*, *Patrick*, 745 F.2d at 157.

14. An expansive conception of religion is perhaps particularly appropriate in the context of a religious discrimination claim brought under Title VII. Although a broad reading of religion in the First Amendment realm "would bar the government on establishment

Defendants, relying principally on Third Circuit caselaw, contend that a narrower definition of religion applies. In *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), on which defendants rely, the Third Circuit applied three

> "useful indicia" to determine the existence of a religion.... First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Id. at 1032. The Second Circuit, however, has rejected the "narrow definition of 'religious belief' promulgated by the Third Circuit." *Patrick*, 745 F.2d at 156 (reversing grant of summary judgment where district court had relied on *Africa*, and holding that a more "expansive conception of religious belief" applied).[15]

[15] As the legal principles outlined above make plain, an "expansive conception of religious belief" is appropriate, at least in this circuit. *Patrick*, 745 F.2d at 158; *United States v. Allen*, 760 F.2d 447, 449–50 (2d Cir. 1985) (recognizing that in "recent years, the concept of religion has certainly broadened" and explaining that courts apply an "expansive definition of religion"). In accordance with the generous parameters defining religion, courts regularly determine that non-traditional beliefs can qualify as religions. In *Warner*, the Second Circuit found that the twelve-step Alcoholics Anonymous program had "a substantial religious component" because: (1) participants were told to pray to God; (2) meetings opened and closed with prayer; and (3) the program placed a "heavy emphasis on spirituality and prayer, in both conception and in practice." 115 F.3d at 1075. In *Patrick*, the Second Circuit reversed a grant of grant summary judgment to a prison that prohibited a prisoner from practicing his professed religion, referred to as the Five Percenter faith. *See* 745 F.2d at 160. The prisoner described the Five Percenter faith as devoted to "spiritual enlightenment" through study of "the Bible, Elijah Mohammed's Body of Lessons and Plus Lessons, and the Egyptian Book of the Dead." *Id.* at 155. Five Percenters also "conceiv[ed] of [their] ideals by reference to the realm of mathematics." *Id.* Although Five Percenters worshipped Allah, the faith was "marked by

clause grounds from providing even the most essential public services to religious organizations," *Barber*, 650 F.2d at 439 n.12, no such concerns arise in the Title VII context involving non-government employers. Moreover, a broad reading of religion under Title VII is consonant with the "broad remedial purposes of Title VII," *Kane v. Douglas, Elliman, Hollyday & Ives*, 635 F.2d 141, 142 (2d Cir. 1980) (citing *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972)); *see also Mach Mining, LLC v. EEOC*, ___ U.S. ___, 135 S.Ct. 1645, 1656, 191 L.Ed.2d 607 (2015) (noting EEOC's "responsibility to eliminate unlawful workplace discrimination"); *EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96, 102 (2d Cir. 2015) (recognizing that "the purpose behind Title VII" is to "eliminat[e] discrimination in the workplace")

15. Further, only two decisions of courts in this circuit appear to have ever relied on the Third Circuit's narrow definition of religion, one of which was affirmed on different grounds, *New Creation Fellowship of Buffalo v. Town of Cheektowaga*, N.Y., No. 99–CV–460, 2004 WL 1498190, at *32 (W.D.N.Y. July 2, 2004), *aff'd sub nom. New Creation Fellowship of Buffalo v. Town of Cheektowaga*, 164 Fed.Appx. 5 (2d Cir. 2005), and one of which was subsequently reversed in relevant part. *Altman v. Bedford Cent. Sch. Dist.*, 45 F.Supp.2d 368, 378 (S.D.N.Y. 1999), *aff'd in part, vacated in part, rev'd in part*, 245 F.3d 49 (2d Cir. 2001).

informality," without any fixed places of worship. *Id.* In reversing the grant of summary judgment principally because the sincerity of the plaintiff's beliefs were in dispute, the court emphasized the right of citizens "to explore diverse religious beliefs in accordance with the dictates of their conscience" and that "unorthodox beliefs forbidden elsewhere have consistently found tolerance and acceptance on our shores." *Id.* at 155, 157; *cf. Torcaso v. Watkins*, 367 U.S. 488, 495 n.11, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (characterizing "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism" as religions).

Lower courts in this circuit have faithfully adhered to the Second Circuit's expansive definition of religion, including in the First Amendment context. In *Berger*, 428 F.Supp. at 896, a husband and wife seeking welfare benefits on behalf of their four minor children refused to comply with a state law regulation followed by the Suffolk County Department of Social Services requiring that they provide a copy of their children's social security cards. *Id.* at 897. They explained that "the use of social security numbers was a device of the Antichrist, and that they feared the[ir] children, if numbered in this way, might be barred from entering Heaven." *Id.* The court concluded, after a detailed analysis of the complex biblical history and literature that the plaintiffs marshalled to support their views, that the plaintiffs' "belief must be characterized as religious for purposes of this case." *Id.* at 902–905. The court's holding was grounded in the principles of religious freedom and tolerance discussed earlier:

> Delicacy in probing and sensitivity to permissible diversity is required, lest established creeds and dogmas be given an advantage over new and changing modes of religious belief. Neither the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious.

Id. at 900.

In *Sherr*, 672 F.Supp. at 81, the plaintiffs, two couples, refused to consent to inoculation of their children, which was mandatory for the children to attend school. *Id.* at 83–84. According to one of the family's complaints, their beliefs required all persons to "live in harmony with the mutual world and its order." *Id.* at 92. The complaint provided that "[a]ll things are part of one intimate universe, or whole." *Id.* Testifying about his beliefs, one parent explained that he viewed "God as being pervasive everywhere" and "saw [him]self as God in expression or life in expression." *Id.* at 93. "Immunization in my eyes," the plaintiff testified, "in the framework of my religious beliefs and in my wife's, I might add, interferes with the health of the organism." *Id.* Emphasizing that the plaintiffs' beliefs were "replete with references to 'God' " and that the plaintiffs' very willingness to engage in a protracted legal battle reflected that their beliefs were "rooted in matters of 'ultimate concern,' " the court held that the plaintiffs' views could fairly be "classified as religious." *Id.* at 93.

Courts outside this circuit, too, have applied a definition of religion consistent with the views adopted in the cases outlined above. *See, e.g., Malnak*, 592 F.2d at 198–99 (Third Circuit holding that Transcendental Meditation class involving mantras and chanting was "religious in nature"); *Toronka v. Cont'l Airlines, Inc.*, 649 F.Supp.2d 608, 612 (S.D. Tex. 2009) (finding religious a plaintiff's "belief in the power of dreams," which he characterized as "a moral and ethical belief" rooted in the "traditional religious convictions of his African origin").

On the other hand, not all non-traditional belief systems are religious. In *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 79 (2d Cir. 2001), the Second Circuit held that a school's celebration of Earth Day — notwithstanding school-sponsored prayers worshipping the Earth — did not violate the First Amendment. Similarly, in *Allen*, 760 F.2d at 447, the court addressed, *inter alia*, an Establishment Cause defense to a group of antinuclear protesters' convictions for damaging property at an Air Force base during a protest. *Id.* at 448–49. The protesters argued that "there has arisen a national religion of nuclearism ... in which the bomb is the new source of salvation" and that the new religion focused "on the acceptance of nuclear weapons as sacred objects." *Id.* at 449 (internal quotation marks omitted). The court held that the protesters' concerns reflected disagreements principally grounded in "political judgment, not religious belief." *Id.* at 450.

B. Onionhead is a Religion for Purposes of Title VII

[16] With the abovementioned principles in mind, the court concludes that Onionhead qualifies as a religion for purposes of Title VII. First, as to sincerity, there is a genuine factual dispute regarding the sincerity of defendants' beliefs that is underscored by the difficulty here of ascribing religiosity to beliefs argued by their purported adherents to be secular. Moreover, the court finds disputed factual issues regarding whether the defendants' actions of bringing Jordan and the Onionhead/Harnessing Happiness beliefs, practices and materials into defendants' workplace establishes that the defendants sincerely believed in Jordan's teachings. *See Patrick*, 745 F.2d at 159 ("This Court has consistently held where subjective issues regarding a litigant's state of mind, motive, sincerity or conscience are squarely implicated, summary judgment would appear to be inappropriate and a trial indispensable ...." (collecting cases)). Second, as to whether the beliefs are religious, the court finds as a matter of law that they are. *See Barber*, 650 F.2d at 440 ("We think it is clear that Krishna Consciousness is a 'religion'....").

i. Sincerity

Defendants argue that "there is no evidence that anyone associated with this matter sincerely held beliefs" related to Onionhead. (Def. Mem. at 8.) The undisputed, documentary evidence alone, however, is at least sufficient for a trier of fact to find that Jordan and Hodes held sincere beliefs regarding Onionhead/Harnessing Happiness. For example:

- In approximately October 2007, the CEO of CCG, invited Jordan and paid her to come into his offices to work with his employees and conduct meetings and workshops. Hodes was a nephew of Jordan and they shared a close relationship. Jordan stayed in Hodes's home during her periods of working at defendants' offices. Hodes was aware of his aunt's sincerely held beliefs as reflected in emails he and other managers received from Jordan. (E.g., Jt. Ex. 79-81, 105, 117.)
- On July 23, 2009, Jordan wrote an email to management (including Hodes and Bourandas) and 27 other CCG employees (including Pegullo, Pennisi, and Honohan) explaining that she wanted to "run an Onionhead workshop," as a "vehicle towards Onionhead reaching the world." (Jt. Ex. 8.)
- In a December 1, 2010 email, Jordan wrote to CCG supervisors Lane Michel and Bourandas complaining about Hodes' management. (Jt. Ex. 89.) In

the email, she wrote that "Onionhead CANNOT BREATHE IN THE LAND OF DECEPTION, DECEIT, DISRUPTION, AND DESTRUCTION." (*Id.* (emphasis in original)) She implored Michel and Bourandas to oust Hodes: "The demon is fighting for control and if you two do not take charge, your Divine destiny as King and Queen is destroyed and the kingdom will be lost." (*Id.*)

- On November 28, 2011, Jordan wrote again to Hodes describing a plan to donate certain unspecified Onionhead cards to schools. (Jt. Ex. 79.) In the email, Jordan wrote that donating the cards was "important [ ] because Onionhead is extremely pure .... Adults seem very far away from Source. Because these cards are for younger children, I suspect[ ] we may have a chance to protect them.... Purity is the most important issue for the recovery of our planet. It is all I live for." (*Id.*)
- In an undated email to Hodes, Bourandas, RickProtas, and other CCG employees, Jordan shared feedback she had received during a conference at which Onionhead had been discussed. (Jt. Ex. 80.) She described the "miracles that our little guy has performed" and wrote: "God is pleased with our perseverance. We must never give up." (*Id.*)
- In an undated email to Bourandas, Hodes, and other CCG employees, Jordan described Onionhead cards, an Onionhead dictionary, and a new Onionhead website. (Jt. Ex. 81.) She explained that users of Onionhead materials "will see the world shift. Onionhead is now a school ... a school for solutions. But in fact ... we are the GRAIL [16] SCHOOL .... we are in a race with time." (*Id.*)
- A jury could find from documentary evidence that Hodes held sincere beliefs in precepts of Onionhead and Harnessing Happiness. (Jt. Ex. 117.) In a December 16, 2010 email responding to Jordan's statement that she was growing a sixth finger (*see* Jt. Ex. 120), Hodes likened Jordan's experience to a science fiction program in which a man "gains intellectual power while growing a six[th] finger, but uses it for destruction instead of light." (*Id.*) Hodes wrote that the sixth finger "may represent the beginning of an evolution," and that the man who "uses the higher intelligence for destruction instead of good may represent those who have taken [Jordan's] technology (Onionhead and higher guidance teachings) and used or are using them for destructive or dark purposes instead of light." (*Id.*)

A reasonable jury could find that by inviting Jordan into the workplace, paying her to meet and conduct workshops, authorizing her to speak to employees about matters related to their personal lives, disseminating Onionhead/Harnessing Happiness material and directing employees to attend group and individual meetings with Jordan, Hodes and his upper management held sincere beliefs in Onionhead and Harnessing Happiness. Although defendants are correct that Jordan, in an affidavit, stated that she does not believe and never has believed in Onionhead as a religion (Jt. Ex. 2, ¶¶ 17, 19, 30), undisputed documentary evidence conflicts with her statement and indicates that a reasonable jury could find otherwise. To the extent that estab-

16. The term "grail" has religious connotations. Webster's defines grail as "the cup or platter which according to medieval legend was used by Christ at the Last Supper." *Grail, Webster's Third New International Dictionary* 986 (2002).

lishing an employer's beliefs are sincerely held is a requirement for purposes of a reverse discrimination claim under Title VII (*but see supra* note 13) a reasonable jury could find that Jordan, Hodes, and several of defendants' managers or supervisors held sincere beliefs regarding Onionhead.

ii. Religious Nature of Beliefs

Turning to the more difficult question about whether the nature of the beliefs qualifies as religious, the court concludes that the beliefs are religious within the meaning of Title VII.

Here, as an initial matter, the above-described emails reflect references — in the specific context of discussions about Onionhead — to God, spirituality, demons, Satan, divine destinies, miracles, "higher guidance teachings," and a grail. (Jt. Exs. 8, 78-81, 89, 117.) Jordan herself stated that she had been referred to as a "spiritual advisor" for some time while working for defendants (though she disliked the term). (Tab B, Benedict Dep. at 85; Tab M, Maldari Dep. at 62-63, 103; Tab Q, Pennisi Dep. at 59-63; Tab R, Safara Dep. at 52; Jt. Ex. 97 (email from Jordan stating that "I was called a spiritual advisor").)

Additional documentary evidence lends further support to the conclusion that Onionhead is a religion. The *Onionhead Dictionary of 150 Emotions: Teen and Adult Edition* (Jt. Ex. G) — which was, defendants concede, used in workshops at CCG while Honohan, Pegullo, Pabon, Josey, Diaz, and Benedict were employed (Pl. 56.1 at ¶ 20; Def. 56.1 Resp. at ¶ 20) — contains references to divinity, spirituality, souls, and heaven. The dictionary contains, *inter alia*, the following statements:

- "We enter and leave this world with only our souls, therefore, we must learn to live THROUGH our souls."
- "When light and love control our lives, we are Masters. Our Divine spark is re-ignited and we re-claim our authenticity and electricity."
- "A spiritual person often appears as a fool to the eyes of the world, because their ways and rules are very different from the world at large .... [T]he destiny of heaven on earth begins and ends with our own personal behavior."
- "In its full sense, [love] denotes something deeply spiritual .... One single act of love bears the imprint of heaven on earth."

(Jt. Ex. G.)

Another Onionhead document is referred to as the *Declaration of Virtues for Empowerment*, though it is not clear whether this document was available in the workplace. (Jt. Ex. K.) The document lists 12 virtues, and an acrostic formed from the first letters of each of the virtues spells out "Garden of Eden." (*Id.*) The document provides: "Because the road to Heaven is paved with the power of what is good in us, we have devised The Declaration of Virtues for Empowerment .... Onionhead's goal is to help transform negative thought forms into positive thought forms, thereby co-creating a new loving, wondrous garden for us all to thrive in." (*Id.*) The document also contains the following statements:

- "The virtue of respect elevates us from a human presence to an angelic performance."
- "When we 'opt' to view things from a place of possibilities, we are truly showing our commitment to the Universal Plan."
- "[Faith] holds within it the pulse of the Universe and the promise of the Heavens..... Faith is the constant reminder that there is a union between ourselves and the Universal

> Realm. Remember: The virtue of faith is a belief that needs no evidence."

(*Id.*) A similar document, called *The 13 Codes of Caring for Teens and Adults*,[17] describes one code, "Creative," as follows: "To be creative is to be incredibly connected to the Creator." (Jt. Ex. L.)

A further document, referred to as the *Onionhead Keys and Codes to Living Good* — which defendants appear to concede was used in workshops while Honohan, Pegullo, Pabon, Josey, Diaz, and Benedict were employed (Pl. 56.1 at ¶ 41; Def. 56.1 Resp. at ¶ 41) — contains, but is not limited to, the following religious and spiritual language:

- "Keys and codes have been a part of the Divine Plan from the beginning of time. Every sacred tribe and religion have codes hidden within their scripts, books and scrolls. It was, and still is, a way to integrate our heavenly nature into our human nature."
- "The Onionhead program is designed to transform negative thoughts and behaviors into positive thoughts and behaviors.... Choice, not chance, determines human destiny and only moral code determines the state of Heaven on Earth."
- "Our soul is our constant reminder of our higher self. It stays with us in order to keep us on the track of what is right and righteous."

(Jt. Ex. M.)

Testimonial evidence from claimants further underscores the religiosity of Onionhead and Harnessing Happiness. Claimants describe Jordan and others repeatedly referencing God and other spiritual matters in the workplace, often in a manner directly connected to Onionhead. Maldari testified that Jordan, referring to CCG employees, stated that "God loves us all" and spoke about "demons and angels." (Tab M, Maldari Dep. at 68, 71-72, 85, 102, 160.) Maldari also testified that she and other employees "were told [by Hodes] that we were chosen." (*Id.* at 73–74.) Safara testified that Jordan sent emails including spiritual texts that she felt compelled to read. (Tab R, Safara Dep. at 66.) Pennisi testified that Onionhead "makes you believe in things religiously that you may not have believed in before .... [I]t made you question maybe something that you thought all your life was how it was supposed to be when you were in religious class or things like that." (Tab Q, Pennisi Dep. at 118.) Pennisi also testified that she believed Onionhead was "the way of [Jordan's] life." (*Id.* at 192 ("[Jordan's] way of explaining Onionhead was always some sort of religious experience ...."); *see also id.* at 193 (explaining that Jordan described Onionhead as "here to help everybody, you know, connect, whether it be emotionally or within feelings or spiritually, religiously, it was set to be under one — one thing.").) Diaz described Harnessing Happiness content as involving references to angels. (*See* Tab E, Diaz Dep. at 80.)

Many of the claimants also described being told to pray in the workplace. (*E.g.*, Tab M, Maldari Dep. at 67, 79-80, 103-07; Tab B, Benedict Dep. at 157-559 (describing prayers being read from a set of cards referred to as Universal Truth Cards); Tab R, Safara Dep. at 60-61 ("[Jordan] would just sit there and we would have to sit there and hold hands and close our eyes and she'd like chant and she would just, you know, pray to these spirits, whoever they were, to keep us safe ....").)

17. Certain claimants testified that "Keys and Codes" workshops were conducted in the workplace. (*See* Tab I, Josey Dep. at 127; Tab H, Honohan Dep. at 27.)

The Onionhead system of beliefs and practices described above is "more than intellectual." *Barber*, 650 F.2d at 440. It can fairly be characterized as involving the kinds of "ultimate concern[s]" signifying religiosity described by the Second Circuit in *Barber*. The chants and prayers, mentions of God, transcendence, and souls, and the strong emphasis on spirituality very closely resemble the twelve-step Alcoholics Anonymous program found by the Second Circuit to be religious in *Warner*. *See* 115 F.3d at 1075 (describing how participants were told to pray to God, meetings opened and closed with prayer, and highlighting the "heavy emphasis on spirituality and prayer, in both conception and in practice"). Onionhead's system of beliefs also appears no more or less religious than the arguably less coherent systems of beliefs held to be religious in *Sherr* and *Berger*. *See Sherr*, 672 F.Supp. at 92 (parents refused to submit their children to mandatory vaccinations because they believed vaccination interfered with their beliefs that "[a]ll things are part of one intimate universe, or whole" and that all persons must "live in harmony with the mutual world and its order"); *Berger*, 428 F.Supp. at 897 (plaintiffs believed "the use of social security numbers was a device of the Antichrist" and "feared the[ir] children, if numbered in this way, might be barred from entering Heaven").

As discussed earlier, defendants rely on a narrower definition of religion than the definition adopted by the Second Circuit. *See Patrick*, 745 F.2d at 156 & n.4, 158 (describing and disagreeing with the "narrow definition of 'religious belief' promulgated by the Third Circuit" and emphasizing the Second Circuit's adoption of an "expansive conception of religious belief"). Their contention that Onionhead was merely a "conflict resolution tool" (Def. Reply at 3) is belied by the ample documentary and testimonial evidence detailed above. Accordingly, the court concludes that Onionhead is a religion for purposes of Title VII.

II. Defendants' Motion for Summary Judgment

Having concluded that Onionhead is a religion, the court turns next to the individual claims asserted by claimants. Before analyzing the merits of the claims, however, the court must first resolve a dispute regarding whether certain claimants are entitled to participate in this action.

A. Pre-Suit Requirements

Defendants contend that the EEOC failed to fulfill certain administrative requirements with respect to Benedict, Josey, and Safara. (Def. Mem. 1-3.)

Before filing an action under Title VII, the EEOC must comply with a set of administrative obligations prescribed by statute. The EEOC must, before filing:

> (1) receive a formal charge of discrimination against the employer; (2) provide notice of the charge to the employer; (3) investigate the charge; (4) make and give notice of its determination that there was reasonable cause to believe that a violation of Title VII occurred; and (5) make a good faith effort to conciliate the charges.

EEOC v. Sterling Jewelers Inc., 801 F.3d 96, 100 (2d Cir. 2015) (citing 42 U.S.C. § 2000e–5(b)). In *Mach Mining, LLC v. EEOC*, ___ U.S. ___, 135 S.Ct. 1645, 1656, 191 L.Ed.2d 607 (2015), the Supreme Court held that federal courts are permitted to review whether the EEOC has complied with its pre-suit administrative obligations. In *Mach Mining*, an employer argued that the EEOC had failed to conciliate in good faith before filing suit. *Id.* at 1650–53. The parties disputed whether courts were permitted to review the

EEOC's conciliation efforts at all, and, if courts could conduct a review of the conciliation efforts, what the appropriate scope of judicial review would be. *Id.* at 1649. First, the Court determined that judicial review of the conciliation process was appropriate. *Id.* at 1652–53. Second, however, the Court held that "the scope of that review is narrow, reflecting the abundant discretion the law gives the EEOC to decide the kind and extent of discussions appropriate in a given case." *Id.* at 1656. "A sworn affidavit from the EEOC stating that it has [attempted to conciliate] but that its efforts have failed will usually suffice to show that it has met the conciliation requirement." *Id.*

More recently, in *Sterling Jewelers*, 801 F.3d at 99, the Second Circuit extended the holding of *Mach Mining*, which addressed only conciliation, to cover the EEOC's investigative efforts. In *Sterling Jewelers*, the Second Circuit addressed an employer's argument that the EEOC's pre-suit investigation of discrimination allegations had been insufficient. *Id.* at 100. The court held that the "sole question for judicial review is whether the EEOC conducted an investigation." *Id.* at 101. "[C]ourts may not review the *sufficiency* of an investigation — only whether an investigation occurred." *Id.*

Defendants argue that the EEOC failed to comply with steps three (investigation), four (reasonable cause determination), and five (conciliation) with regard to Benedict, Josey, and Safara before filing suit. (Def. Mem. at 1-3; Def. Reply at 18-20.) It is undisputed that the EEOC did not speak with Benedict, Josey, or Safara during the course of the investigation. (Def. 56.1 at ¶¶ 316-17.) The EEOC first sent letters to Benedict, Josey, and Safara notifying them of the lawsuit and asking whether they were interested in participating in December 2014 and January 2015, months after this action was filed in June 2014. (ECF No. 1; Jt. Exs. 70-72.)

The EEOC argues that it investigated religious discrimination and retaliation against a class of employees at CCG's single facility in 2007, and that the class identified in the investigation encompassed all current claimants, including Benedict, Josey, and Safara. (Pl. Mem. at 39-40.) Citing *Mach Mining LLC*, 135 S.Ct. at 1652, 1655–56, the EEOC asserts that it complied with its "minimal" obligations that it "tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." (*Id.* at 39.) The EEOC further contends that its pre-suit investigation of class allegations did not require that it interview each member of that class during the investigation so long as the members of the claimant class fall within the contours of the scope of the allegations in the suit. *Id.* (citing *Sterling Jewelers*, 801 F.3d at 102 n.2, 103–04). The EEOC thus asserts it can file suit on behalf of anyone "encompassed by the scope of the claims identified in the investigation, including individuals interviewed later." (*Id.* at 40 (citations omitted).) Effectively, the EEOC argues that it is permissible to identify new claimants after filing a Section 706 action so long as the new claimants' allegations are reasonably related to the allegations of the already-identified claimants, while defendants contend that the five-step administrative process must be followed with respect to each claimant in an action under Section 706.

[17] The court concludes that, at least under the circumstances present in the instant case, the EEOC was not precluded from identifying new claimants (whose claims were effectively identical to the claims of the pre-existing claimants) after filing this action. Courts have permitted the EEOC to add new claimants identified

during discovery even when the EEOC is asserting claims under Section 706 of Title VII rather than exclusively under Section 707, which permits "pattern or practice" actions. *See EEOC v. Mr. Gold, Inc.*, 223 F.R.D. 100, 103 (E.D.N.Y. 2004) (permitting the EEOC to add additional claimants identified during discovery in a hybrid 706/707 action, but affirming magistrate judge's decision to place a deadline on the addition of new claimants); *see also EEOC v. Evans Fruit Co., Inc.*, 872 F.Supp.2d 1107, 1111 (E.D. Wash. 2012) ("The undersigned is not persuaded ... that the EEOC must specifically identify, investigate and conciliate each alleged victim of discrimination before filing suit."); *EEOC v. Bass Pro Outdoor World, LLC*, 1 F.Supp.3d 647, 664 (S.D. Tex. 2014) ("[T]he EEOC is not obligated to provide the identities of all § 706 class members." (internal quotation marks and citation omitted)).

Defendants have cited no binding authority requiring dismissal of claimants first identified after the EEOC files a Section 706 action. Defendants rely heavily on *EEOC v. CRST Van Expedited Inc.*, 679 F.3d 657, 674 (8th Cir. 2012). In *CRST*, the EEOC filed a Section 706 action on behalf of a single named individual. *Id.* The EEOC waited two years after filing suit to name 67 additional allegedly aggrieved persons, whose allegations the EEOC admitted it had not investigated until after the complaint was filed. *Id.* at 669, 673. For years after the complaint was filed, the employer-defendant did not know if the "Section 706 lawsuit involved two, twenty or two thousand allegedly aggrieved persons." *Id.* at 669 (internal quotation marks and citation omitted). The district court held, *inter alia*, that under the circumstances, dismissal of the complaint as to the 67 individuals was appropriate. *Id.* at 677. Reviewing the dismissal for abuse of discretion, the Eight Circuit affirmed. *Id.* The court held that the EEOC failed to adequately investigate because "the EEOC did not investigate the specific allegations of *any* of the 67 allegedly aggrieved persons ... until *after* the Complaint" was filed. *Id.* at 675–76 (emphasis in original) (internal quotation marks and citation omitted).

The EEOC's attempt in *CRST* to add 67 claimants to an EEOC action filed two years earlier and naming a single individual is a far cry from the situation presented in this action, where the EEOC's investigation undisputedly encompassed seven of the ten claimants and the additional three claimants' allegations arise out of the same alleged course of conduct, in the same office, by the same individuals, and during a time period already covered by the charges in the initial complaint.[18] Even in *EEOC v. Bloomberg L.P.*, 967 F.Supp.2d 802, 816 n.14 (S.D.N.Y. 2013), another decision involving an action under Section

18. The Second Circuit recently distinguished *CRST* on a similar basis. In *Sterling Jewelers*, the Second Circuit characterized *CRST* as a case addressing the "EEOC's fail[ure] to take *any* steps to investigate." 801 F.3d at 102 (emphasis added). In *Sterling Jewelers*, even where the investigative file revealed that the EEOC had only interviewed a single claimant (out of 19 claimants across nine states), the court held that the investigation — which had uncovered company-wide policies, witness statements, and, *inter alia*, personnel documents — was sufficient. *Id. Sterling Jewelers* does not definitely resolve the issues presented by the pre-suit investigation in this action, however, because each claimant in *Sterling Jewelers* had apparently been identified before the EEOC filed its action. Still, defendants' attempt to distinguish *Sterling Jewelers* on the ground that it involved nationwide pattern-or-practice class claims under Section 707 is unavailing because *Sterling Jewelers* involved claims under both Section 706 and 707. *See EEOC v. Sterling Jewelers, Inc.*, No. 08–CV–706, 2010 WL 86376, at *1 (W.D.N.Y. Jan. 6, 2010) ("[T]he EEOC commenced this gender

706 upon which defendants rely, the court explicitly acknowledged that the EEOC need not always "identify each and every potential claimant before filing a lawsuit." Accordingly, and particularly in light of the narrow scope of review courts are permitted in reviewing the sufficiency of EEOC investigations, *see Sterling Jewelers*, 801 F.3d at 101–04, the court concludes that dismissal of Benedict, Josey, and Safara would be inappropriate, and denies defendants' request for their dismissal on procedural grounds.

The court next considers the merits of the defendants' motion for summary judgment. First, the court addresses the reverse religious discrimination claims. Second, the court addresses the conventional religion-based discrimination and retaliation claims.

B. Reverse Religious Discrimination

[18, 19] Claimants Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo bring reverse religious discrimination claims based on disparate treatment and a hostile work environment.[19] Disparate treatment claims for employment discrimination under Title VII are assessed under the burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, a plaintiff must establish a *prima facia* case of discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The plaintiff's burden in establishing a *prima facie* case is "minimal." *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (internal quotation marks and citation omitted). If the plaintiff successfully establishes a *prima facie* case, the burden shifts to the defendants to establish a "legitimate, nondiscriminatory reason" for its actions. *See Hicks*, 509 U.S. at 506–07, 113 S.Ct. 2742.

[20] Should the employer meet its burden, "the inquiry then returns to the plaintiff, to demonstrate that the proffered reason is a pretext for discrimination." *United States v. City of New York*, 717 F.3d 72, 102 (2d Cir. 2013). Defeating summary judgment requires only that a plaintiff present evidence from which a reasonable jury could find "that the defendant was in fact motivated *at least in part* by the prohibited discriminatory animus." *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 156 (2d Cir. 2010); *see also Univ. of Texas Sw. Med. Ctr. v. Nassar*, —— U.S. ——, 133 S.Ct. 2517, 2522–23, 186 L.Ed.2d 503 (2013) ("An employee who alleges status-based discrimination under Title VII ... [must] show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.").

i. *Claimants'* Prima Facie *Cases of Reverse Religious Discrimination*

[21] The parties agree that a modified version of the framework established in

discrimination action pursuant to Sections 706 and 707 ....").

19. In the reverse religious discrimination context, a plaintiff need not establish that she is a member of a "protected class," as is required in a more straightforward Title VII discrimination claim. *See Shapolia*, 992 F.2d at 1038 ("First, use of the 'protected class' factor in this case would be misleading because it suggests some identifiable characteristic of the plaintiff in order to give rise to Title VII protection. However, in this case, it is the religious beliefs of the employer, and the fact that [the plaintiff] does not share them, that constitute the basis of the claim. Where discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class factor is inappropriate.").

McDonnell Douglas governs claimants' *prima facie* case on the reverse religious discrimination claims. (Def. Mem. at 9; Pl. Mem. at 8.) *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (observing that *McDonnell Douglas*'s suggested *prima facie* case framework "was never intended to be rigid, mechanized, or ritualistic"). Where a claimant avers that she was discriminated against because she rejected her employer's religious beliefs, she must establish that: (1) she was qualified for the position at the time of her termination; (2) her employer subjected her to an adverse employment action; and (3) some additional evidence supports the inference that the adverse action was taken because of a discriminatory motive based on the employee's failure to adopt or follow the employer's religious beliefs. *See Shapolia*, 992 F.2d at 1038; *see also Noyes*, 488 F.3d at 1168. The Second Circuit has provided that the *prima facie* case requirement is a "low threshold." *Holcomb*, 521 F.3d at 139.

(a) Qualification

[22, 23] In establishing qualification for a position, claimants must show that they were qualified for their positions at the time their employment ended. *See Kovaco v. Rockbestos–Surprenant Cable Corp.*, 834 F.3d 128, 136–37 (2d Cir. 2016). A claimant may "satisfy this burden by showing that she possesses the basic skills necessary for performance of the job." *Id.* (internal quotation marks and citation omitted). "Therefore, especially where discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult to draw." *Id.* (internal quotation marks and citation omitted); *Gregory v. Daly*, 243 F.3d 687, 696 (2d Cir. 2001), *as amended* (Apr. 20, 2001) ("[B]y hiring the employee, the employer itself has already expressed a belief that she is minimally qualified.").

[24] Defendants argue that claimants were required to be "*satisfactorily performing their jobs* at the time of their terminations." (Def. Reply at 7-8 (emphasis added).) The Second Circuit has explicitly distinguished between establishing performance that is satisfactory to the employer (which is not required for a *prima facie* showing) and establishing qualification for purposes of Title VII. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001), *as amended* (June 6, 2001) ("[A]ll that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer."). Accordingly, to the extent defendants argue that claimants must have been performing in a manner that satisfied them, they are incorrect as a matter of law.

[25] Here, defendants contend that none of the claimants were qualified. The court disagrees, and finds, based on evidence in the record that the claimants were hired by and worked for defendants, that a reasonable jury could find that each claimant was qualified. Jordan stated that Benedict "did a good job" on the "jobs that [she] did commit to"; "[i]t was more what she wasn't available for that created the challenges." (Tab I, Jordan Dep. at 109.) Honohan worked for defendants for over 20 years. (Def. 56.1 at ¶ 157.) In 2007, Honohan received a performance review that rated her exceptional (the highest level possible) in nearly all of the 20 different areas evaluated. (Jt. Ex. 112.) Although defendants claim that Josey caused billing errors (Def. Mem. at 12), Josey contends that supervisor April Levine — who terminated Josey — refused to show Josey evidence of the errors. (Pl. 56.1 Resp. ¶ 189.) Genuine issues of material fact preclude a determination at this stage of the litigation that Josey was not qualified.

Finally, defendants discuss purported disobedience by Diaz, Ontaneda, Pennisi, Pabon, and Pegullo (Def. Mem. at 11) that do not speak to their basic qualifications for their positions. "While performance may in some cases be so poor as to render a plaintiff unqualified, 'the qualification prong must not be interpreted in such a way as to shift into the plaintiff's prima facie case an obligation to anticipate and disprove the employer's proffer of a legitimate, non-discriminatory basis for its decision.'" *Payne v. New York City Police Dep't*, 863 F.Supp.2d 169, 180 (E.D.N.Y. 2012) (quoting *Gregory*, 243 F.3d at 696 & n. 7). On the record before the court, a reasonable jury could find that each plaintiff was qualified for her position.

(b) Adverse Employment Action

[26, 27] Claimants must next establish that they suffered an adverse employment action. An adverse employment action is defined as a "materially adverse change in the terms and conditions of employment." *Sanders v. N.Y.C. Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004) (internal quotations omitted). "Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation." *Terry v. Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003) (internal quotation marks and citation omitted). A mere inconvenience or alteration of job responsibilities does not constitute an adverse employment action. *See Sanders*, 361 F.3d at 755.

[28] Defendants concede that Diaz, Honohan, Josey, Pegullo, and Pennisi were terminated (Def. Mem. at 36 n.27), which constitutes an adverse employment action. *See Terry*, 336 F.3d at 138. Defendants contend, however, that Benedict, Ontaneda, and Pabon were not subjected to an adverse employment action. (Def. Mem. at 9-11.) First, the circumstances of Benedict's departure from defendants' employment raise a genuine issue of material fact as to whether she was subjected to an adverse employment action. The parties dispute whether Benedict was terminated or whether she quit. Benedict, who worked for defendants from September 2011 until March 2012, contends that CCG initially permitted her to work from her home in New Jersey for three weeks per month. (Tab B, Benedict Dep. at 72.) Jordan transferred Benedict from working for defendants to working for Onionhead while Benedict was employed by defendants, and her job included "evangelizing and marketing" Onionhead. (Pl. 56.1 ¶¶ 153-54.) According to Benedict, Jordan received a message from the universe or from God that Benedict needed to move her family to Long Island. (Tab B, Benedict Dep. at 163.) Benedict claims that Jordan told Benedict that she should allow Jordan and Hodes to be her family and that Hodes was the father of Benedict's daughter. (*Id.* at 38, 127, 162—63.) Defendants dispute Benedict's stated reasons for refusing to move to Long Island. After Benedict refused to move to Long Island, which defendants contend was a job requirement all along (Def. 56.1 ¶ 111), supervisor Lane Michel and Jordan told her that she was being terminated. (Tab B, Benedict Dep. at 121.) Under the circumstances, a reasonable jury could find that Jordan was subjected to an adverse employment action by being terminated. *See Fornah v. Cargo Airport Servs., LLC*, No. 12–CV–3638, 2014 WL 25570, at *12 (E.D.N.Y. Jan. 2, 2014) ("There are copious factual disputes surrounding the discontinuance of Plaintiff's employment with Defendant. Plaintiff claims that she was terminated ... on the

same day that she refused the transfer to the night shift position ....").

Second, Ontaneda claims that Hodes expelled her from a private office where she had been working as an account manager and sent her to "the pit," a large open square area with cubicles in the center of the office. (Tab N, Ontaneda Dep. at 225; Pl. 56.1 ¶ 272.) In the "pit," Ontaneda testified that she was told to work alongside customer service representatives and take customer service calls, for which she lacked training. (Pl. 56.1 ¶¶ 56, 271-72.) A reasonable jury could find that the transfer was an adverse employment action. *See Dillon v. Morano*, 497 F.3d 247, 254–55 (2d Cir. 2007) ("[T]ransfer from an 'elite' unit to a 'less prestigious' unit could constitute adverse employment action ...."). The circumstances of the end of Ontaneda's employment also present a genuine dispute of material fact as to whether she was terminated or whether she resigned.

Finally, in response to Pabon's application for unemployment insurance, CCG informed the Department of Labor that they terminated Pabon. (Jt. Ex. 115 (defendants checked "misconduct discharge" box as the "reason for separation" on an unemployment form for Pabon, and left the "voluntarily quit" box blank).) A reasonable jury could disagree with defendants' present view that "Pabon ... resigned or otherwise abandoned [her] employment." (Def. Mem. at 10.)

Each plaintiff has made a *prima facie* showing that she suffered, or that a reasonable jury could find that she suffered, an adverse employment action.

(c) Motivated by Discrimination

[29] The final element of claimants' *prima facie* case, an inference of discrimination, is a "flexible one that can be satisfied differently in differing factual scenarios." *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996). The inference can be taken from circumstances including the employer's criticism of the plaintiff's performance in religiously degrading terms, more favorable treatment to employees subscribing to the religious beliefs of the employer, or the "sequence of events leading to the plaintiff's [adverse employment action]." *Abdu–Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001) (internal quotation marks and citation omitted).

[30] Viewing the evidence in the light most favorable to claimants, a reasonable jury could find that the purported adverse actions were motivated, at least in part, by religious discrimination. Plaintiffs assert the following facts:

- Benedict claims that her termination by defendants from her duties for both defendants and Onionhead was based on her refusal to adhere to Jordan's "religious dictate" that she move to Long Island and allow Jordan and Hodes to be her family. (Pl. 56.1 ¶¶ 147, 156-162.)
- Diaz testified that although she participated in Onionhead for a time, she began to withdraw after the late-night spiritual activity at the spa weekend and Jordan's suggestion that Diaz leave her husband to cure her headache. (Tab E, Diaz Dep. at 48, 50, 133-34.) Diaz testified that a week before her termination, Diaz spoke to coworkers and her trainees about Jordan's preaching and that she was not comfortable with it and felt it was a cult. (*Id.* at 142–46.) When supervisor Levine discovered Diaz was making what were considered "disparaging" comments [20] about Onionhead, Diaz

20. Under the employment policy in place at the time of Diaz's termination, "insubordina-

was terminated. (Pl. 56.1 at ¶¶ 187, 190, 192.)

- Honohan testified that she resisted Onionhead for much of her employment, and refused Jordan's repeated requests for a picture of her child [21] because she did not care for Jordan's teachings, her meetings, or her workshops. (Tab H, Honohan Dep. at 36; Pl. 56.1 ¶¶ 225-26.) Shortly before Honohan's employment ended, Jordan sent an email indicating that on February 3, 2012, "planets are aligned" in a manner similar to the time of the "dawning of Christ" and the "dawning of Islam," and that a "new era" was coming, "an era of truth or consequences." (Pl. 56.1 ¶ 229.) Honohan was terminated on February 3, 2012. (*Id.* ¶ 232.)
- Josey testified that she initially participated in Onionhead, and Jordan told her that she he had a "good aura." (Tab J, Josey Dep. at 90.) Josey also testified that Jordan "held a lot of weight when it came to people and their employment" and that Josey did not want to go against the grain. (*Id.* at 88.) Josey claims that group meetings discussing highly personal topics in the workplace were mandatory. (*Id.* at 71–72.) Josey also claims that she had approximately three or four one-on-one meetings with Jordan. (*Id.* at 82.) In a highly personal, one-on-one meeting (in which Josey claims Jordan "pulled [Josey] into [a] room"), Jordan told Josey to leave Josey's husband, which was something Josey's "mother ha[d] never even told [her]." (*Id.* at 87–88.) Josey did not leave her husband and began to withdraw from spiritual activity in the workplace, after which she claims that she was terminated. (Pl. 56.1 ¶¶ 251-52.)
- In July 2010, Ontaneda and Pennisi, in a group with other employees, told Jordan and Levine that they were Catholic and did not want to be involved in Onionhead. (Pl. 56.1 ¶ 269.) Defendants offer no contrary evidence but object that the depositions are speculative, self-serving, and conclusory. (Def. 56.1 Resp. ¶ 269.) While they were being removed from the private office they shared and were sent to the "pit" with nine other employees to take customer service calls, Jordan was allegedly staring at them and yelling that "the demons must be so angry right now" and "all the demons are going to get out of here and we're going to win." (*Id.* ¶ 273.) Defendants offer no contrary evidence, but lodge evidentiary objections. (Def. 56.1 Resp. ¶ 273.) Ontaneda and Pennisi both testified that they were terminated the following month, during Jordan's first trip back to New York after their statements during a group meeting with Jordan and Levine regarding their religious objections to Onionhead practices in the workplace. (Pl. 56.1 ¶¶ 279, 281.)
- Pabon testified that she was terminated shortly after Jordan's memo to Bourandas and Levine describing Pabon's "insubordination" during a spa weekend retreat with defendants' employees, the main purpose of which was described by Jordan as "spiritual enlightenment." (Tab O, Pabon Dep. at 96.) During the weekend, Jordan led chanting and discussions of religious and spiritual matters, and Pabon

tion" and "disrespectful conduct" are grounds for termination. (Jt. Ex. 6.)

21. Jordan sought pictures of employees' children for Jordan to hang on Jordan's office wall. (Jt. Ex. 36-37)

refused to participate in a late night spiritual activity involving prayer. (Pl. 56.1 ¶¶ 284-97.) Defendants offer no contrary evidence.

- Pegullo testified that she was initially in the Onionhead inner circle and was given the title "Messenger" by Jordan, who said Pegullo was a messenger from God, and gave her the Biblical name of "Leah." (Pl. 56.1 ¶¶ 302-03.) Pegullo was named "Employee of the Month" in May 2008. (*Id.* ¶ 306.) It is not disputed that Jordan assigned Pegullo to work on Onionhead duties at defendants' office. (*Id.* ¶¶ 307-09.) A few days after Pegullo shared an email she and others received in which Jordan expressed her desire, couched in spiritual language, to oust Hodes from the company because he had demons (Pl. 56.1 ¶ 319), Pegullo was terminated. Before she was terminated, Pegullo and other employees told Hodes that Jordan made them uncomfortable and shared with Hodes Jordan's email regarding demons. Pegullo also shared Jordan's emails with her supervisor with whom she had discussed problems with Jordan and how the workplace changed. (Pl. 56.1 ¶¶ 321-23.)

ii. Legitimate, Non-Discriminatory Reasons

Because plaintiffs have presented sufficient evidence to establish a prima facie case of reverse religious discrimination, the burden shifts to defendants to articulate a legitimate, nondiscriminatory reasons for the employment actions. "The defendant's burden is not a particularly steep hurdle." *St. Juste v. Metro Plus Health Plan*, 8 F.Supp.3d 287, 304 (E.D.N.Y. 2014) (internal quotation marks and citation omitted).

[31] In their memorandum, defendants offer deposition testimony that:

- Benedict was terminated because she refused to "be[ ] in the office to do her work," which defendants claim was a job requirement, instead of telecommuting three weeks per month.
- Diaz was terminated because she lied about having another job.
- Honohan's employment ended because "her data entry tasks became obsolete in light of CCG's switch to an electronic accounting/payroll system and because she was unwilling to enhance her accounting skills and/or assume additional human resources duties."
- Josey's employment ended because Levine "discovered [Josey] had not been doing her job."
- Ontaneda and Pennisi's employment ended because of their "collective decision not to report on the same day, without [sufficient] explanation."
- Pabon's employment ended "after she refused to accept constructive criticism from her supervisor regarding her inappropriate behavior at the spa weekend, effectively stated that she would not make any effort to address the stated concerns, and then walked out of the meeting."
- Pegullo was terminated because she "inappropriately shared a personal e-mail . . . with multiple people in the office, causing disruption."

(Def. Mem. at 11-12.) The court finds, even in light of the low threshold for articulating a legitimate, non-discriminatory explanation for an employment action, that there are disputed issues of material fact as to the reasons for claimants' terminations.

iii. Evidence of Pretext

[32, 33] Although the parties have proffered conflicting evidence as to whether the defendants had legitimate nondiscriminatory reasons for their employment actions, the court will examine evidence regarding pretext. "To avoid summary judgment at this stage, [a] plaintiff must offer evidence from which a reasonable jury could conclude by a preponderance of the evidence that religious discrimination played a role in the adverse actions taken against plaintiff." *St. Juste*, 8 F.Supp.3d at 313; *see also Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013) (in Title VII retaliation context, where higher but-for causation requirement applies, mentioning that plaintiffs may prove causation by "demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action"). Claimants' proffer of evidence regarding pretext, however, is sufficient for a reasonable jury to find that religious discrimination played a role in the purported adverse employment actions they suffered:

- Although defendants proffered testimony that Benedict was terminated because she would not adhere to the requirement that she be present in the office rather than telecommute, Benedict contends that she was successfully telecommuting to work for multiple months, and that multiple other employees also telecommuted or lived away from Long Island, including Hodes, Jordan, and supervisor Lane Michel. (Pl. 56.1 ¶ 149.) According to Benedict, as she began to resist Jordan's directive that she move to Long Island, defendants made her work unpleasant. Defendants told Benedict in March 2012 that if she did not move, she would be terminated. Once Benedict made clear that she would not be moving, she told Jordan she would apply for unemployment. Jordan told Benedict that Jordan "would damn [Benedict] to hell" if Benedict "applied for unemployment." (Tab B, Benedict Dep. at 120-27.)
- Defendants offer testimony that Diaz was terminated because she lied about training for another job. Diaz testified that she was terminated after telling employees she was uncomfortable with Jordan's practices. (Def. 56.1 ¶¶ 183-87.) Jordan learned from Diaz that she had been terminated and Diaz asked Jordan for help with unemployment and to stay in touch with her. (Def. 56.1 ¶¶ 151-53; Tab E, Diaz Dep. at 195-200.) Jordan sent Diaz a check from Harnessing Happiness after her termination for $333 and wrote "For Resurrection" on the memo line. (Pl. 56.1 ¶ 190; Tab E, Diaz Dep. at 200-01.)
- Although defendants submit testimony that Honohan's job became obsolete and she was unwilling to assume additional duties (Def. 56.1 ¶ 172), plaintiffs assert that after another individual who participated in and did work for Onionhead began to perform many of Honohan's human resources responsibilities (Tab S, Sarpa Dep. at 22-29; Pl. 56.1 Resp. ¶ 172), they did not become more complex. (Pl. 56.1 ¶¶ 233.)
- Although defendants submit testimony that Josey was terminated because she had failed to complete certain work, defendants do not dispute that they have not provided evidence of Josey's purportedly incomplete work or a record of any accounting errors that resulted from Josey's purported shortcomings. (Pl. 56.1 ¶¶ 253-54; Def. 56.1 Resp. ¶¶ 253-54.)

- Although defendants provide testimony that Ontaneda and Pennisi's employment ended because they failed to report to work, plaintiffs presented undisputed evidence that at least one other employee who participated in Onionhead was not terminated in spite of her repeated absenteeism, her insubordinate manner to Levine and Bourandas, and two events during which she exhibited loud, inappropriate behavior at work. (Pl. 56.1 ¶¶ 379-83.) Further, Ontaneda and Pennisi's purported terminations occurred during Jordan's first return to the office after both Ontaneda and Pennisi voiced their opposition to Onionhead.
- Although defendants presented testimony that Pabon quit after she refused to accept constructive criticism about her behavior at the spa weekend, defendants informed the Department of Labor that Pabon was terminated. (Pl. 56.1 ¶ 299.) Further, defendants admit that they did not terminate Grace Durso — an employee who participated in Onionhead — despite multiple undisputed instances of insubordination and loud behavior. (Pl. 56.1 ¶ 379; Def. 56.1 Resp. ¶ 379.)
- Although defendants characterize Jordan's email that Pegullo forwarded as "personal" and state that Pegullo caused "disruption" by sharing the email, it is not clear from the record whether Pegullo forwarded Jordan's email to anyone except Hodes and her former supervisor. (Pl. 56.1 ¶ 323.) Jordan sent her emails to others in the office including Bourandas, Lane Michel, and Guylene Sookhu. (Jt. Ex. 85, 89; Tab P, Pegullo Dep. at 206, 282-85.)

[34] The court must examine the totality of the record and cannot isolate each piece of evidence. *See Friedman v. Swiss Re Am. Holding Corp.*, 643 Fed.Appx. 69, 72 (2d Cir. 2016) (finding that district court failed to consider "the record as a whole, just as a jury would, to determine whether a jury could reasonably find an invidious discriminatory purpose on the part of an employer," and instead "viewed each piece of evidence in isolation" (internal quotation marks and citation omitted)). Considering the unique circumstances of this case together with the claimants' individual *prima facie* cases as well as their evidence of pretext, a reasonable jury could find that defendants' proffered reasons were pretextual.

Defendants contend that Jordan was not directly involved in many of the claimants' terminations. *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998), on which defendants rely to establish that Jordan's lack of direct involvement in their terminations precludes liability (Def. Mem. at 13, 18, 23), instead supports claimants. In *Sattar*, the court held that the plaintiff's purported harasser was not directly linked to his discharge, which was effectuated by two other individuals. *Id.* at 1171. The court ultimately granted summary judgment to the employer. *Id.* The court's explanation for its holding, however, is significant here. The court explained that the plaintiff had failed to establish a link between her harasser and her discharge because "[n]othing indicates [the individuals involved in the plaintiff's termination] harbored any animus toward [the plaintiff]," that the harasser "was some kind of Svengali controlling their actions" or that the harasser "infected" the decision to terminate the plaintiff *Id.*

In essence, claimants here assert the precise type of direct or indirect involvement by Jordan in employment decision-making that the *Sattar* court held might be sufficient to link a harasser's conduct to

a termination. Jordan's purported role in Pabon's departure provides perhaps the most straightforward example. After the spa weekend, Jordan wrote a memo to Bourandas and Levine about Pabon:

> I am sorry to report that what I had hoped would help the situation, through the trip with [Pabon], did not work. On the weekend she was insubordinate, rude, [and] gossipy .... We cannot have someone working at cross purposes to us. I would suggest firing her today, but I am concerned that the others, who were on this trip would see it as a direct result of the trip. Therefore I think we should be truthful with her and then tell her that she is on a two week probation. This will tell the final tale. Thank you for your patience in this matter. One thing great about this company, when we fire someone, we know we gave it everything, and I mean everything we could to help the person.

(Jt. Ex. 47.) Further, Benedict testified that Jordan was, at least for a time, her "boss," and that Jordan appeared in a conference room to discuss her termination. (Tab B, Benedict Dep. at 121, 126.) Defendants also placed Jordan just below Hodes (and next to Bourandas) on a corporate hierarchy chart. (Jt. Ex. 90.) Defendants brought Jordan into the office to conduct group and individual meetings, for which employees were directed to sign up. Defendants also received and acted upon Jordan's personnel recommendations. A reasonable jury could find that Jordan exercised a sufficient degree of control over employment decisionmaking (including hiring, discipline, and termination) to justify imputing her motives to defendants. *See Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (applying "cat's paw" theory of liability — in which an employee is fired or subjected to adverse action by a supervisor who has no discriminatory motive, but "who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action" — in Title VII retaliation context). Accordingly, defendant's motion for summary judgment on the claimants' reverse religious discrimination disparate treatment claim is denied.

C. Reverse Religious Discrimination – Hostile Work Environment

[35] Title VII bars employers from requiring employees to work in a hostile or abuse environment. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

i. Timeliness

Defendants argue that hostile work environment claims asserted by Maldari, Ontaneda, Pennisi, and Safara are time-barred. (Def. Mem. at 26.) Plaintiffs counter that claims asserted by Maldari, Ontaneda, Pennisi, and Safara are timely under the continuing violation doctrine. (Pl. Mem. at 27-28.)

[36, 37] Generally, and as relevant here, an individual must file a charge with the EEOC within 300 days of an alleged unlawful employment practice. *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994). An exception exists, however, where a defendant has allegedly engaged in a continuous policy of discrimination. "Under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, *all claims of acts of discrimination under that policy will be timely* even if they would be untimely standing alone." *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 155–56 (2d Cir. 2012) (emphasis added) (internal quotation

marks, citation, and alteration omitted). The continuing violation doctrine's operation in a multi-plaintiff case is particularly relevant here. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), the Supreme Court held that multiple plaintiffs' Fair Housing Act claims under a purported "continuing pattern, practice, and policy of unlawful racial steering" were timely because "at least one [incident] (involving [a single plaintiff]) [was] asserted to have occurred" within the limitations period. *Id.* at 381, 102 S.Ct. 1114; *see also Conn. Light & Power Co. v. Sec'y of U.S. Dep't of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) (applying *Havens* in employment context).[22]

[38] The earliest charges in this action were filed by Ontaneda and Pennisi on June 7, 2011. (Def. 56.1 ¶ 313.) Ontaneda and Pennisi's charges — which were made within 300 days of their termination — referenced the " 'Onionhead' way of life," and described a "cult-like quasi religious movement," "prayer sessions" in the workplace, and termination and retaliation based on a refusal to participate in the religious activities. (Jt. Exs. 61-62.) The allegations in the charges filed by Ontaneda and Pennisi mirror the allegations of other claimants central to this case and put defendants on notice of the possibility of additional Title VII claims by others based on the same conduct.

Defendants argue that because certain components of Onionhead or Harnessing Happiness were not in place during the tenures of Maldari, Safara, Ontaneda, and Pennisi, they cannot establish a "continuing violation because there is not one component of the alleged '[Onionhead]-related religious practices' that occurred within their respective tenures with UHP/CCG." (Def. Mem. at 26-27; Def. Reply at 9.) As noted, however, Ontaneda and Pennisi explicitly complained about Onionhead practices in their EEOC charges, which were filed within 300 days of their termination. As to Maldari, although she conceded that during her employment with defendants, she did not hear the terms "Onionhead" or "Harnessing Happiness" (Tab M, Maldari Dep. at 51-54) and her employment with CCG ended fairly early in Jordan's tenure, she described a work environment similar in many respects to the one described in Ontaneda and Pennisi's complaint.

Maldari testified to being given a book by Bourandas of quotes and a journal to record her thoughts about how the quotes affected her each day, prayer in the workplace, working by lamplight, directed hand-holding, hugging, and kissing of coworkers, a shrine-like room in a utility closet into which she was "summoned," and one-on-one as well as group meetings in which she felt prodded to discuss her personal life. Jordan started meetings in the quiet room with general questions about the sales department, then directed the employees to hold hands while she said a prayer over them, and told them that God loved them and to be patient, kind and express love. Jordan also walked around the office talking about demons and angels, and referring to employees as angels

22. Plaintiffs argue that Maldari and Safara "cannot piggyback onto Ontaneda's and Pennisi's Charges because their employment with UHP/CCG ended in 2008, which is more than 300 days before the filing of such charges." (Def. Mem. at 27 n.17.) The continuing violation doctrine is not so limited, however. *See Chin*, 685 F.3d at 155-56 ("Under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, *all claims of acts of discrimination under that policy will be timely* even if they would be untimely standing alone." (emphasis added) (internal quotation marks and citation omitted)).

chosen to work there. The CEO, Hodes, also told employees that they were chosen and he hugged and kissed them. (*See id.* at 53–58, 64–68, 71–74, 85–86, 111–12.) Maldari also testified that she was driven to tears in a group meeting in the conference room with Jordan after Jordan asked Maldari questions regarding Maldari's "children, [her] ex-husband, [and her] life." (*Id.* at 78.) Similarly, Safara testified that Jordan sent out emails including spiritual texts that she felt obligated to read, that Safara felt obligated to pray in the workplace, and that Jordan discussed spirits and demons and told employees to dim lights in order to "keep[ ] the spirits happy." (Tab R, Safara Dep. at 41, 54, 60, 66.) Whether Maldari and Safara *understood* the above-described practices to be connected to Onionhead is irrelevant, because there is a strong nexus between the practices complained of by each claimant and the workplace environment complained of in Pennisi and Ontaneda's EEOC charge.

Accordingly, the court concludes that all of the claimants' hostile work environment claims are timely. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) ("We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period.").

ii. Merits

[39] "In order to make out a hostile work environment claim, a plaintiff must demonstrate: (1) that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile work environment to the employer." *Shan v. New York City Dep't of Health & Mental Hygiene*, 316 Fed.Appx. 23, 24 (2d Cir. 2009) (internal quotation marks and citation omitted); *Ennis v. Sonitrol Mgmt. Corp.*, No. 02–CV–9070, 2006 WL 177173, at *8 (S.D.N.Y. Jan. 25, 2006) (same).

[40, 41] In establishing the first element, a plaintiff must show both that the misconduct was severe or pervasive enough to create an objectively hostile or abusive working environment and that she subjectively perceived the environment to be hostile or abusive. *See Redd v. New York Div. of Parole*, 678 F.3d 166, 175 (2d Cir. 2012) (stressing that "a plaintiff need not show that her hostile working environment was both severe *and* pervasive; only that it was sufficiently severe *or* sufficiently pervasive" (emphasis in original)). The religious hostility must be directed at the individual "because of such individual's ... religion." 42 U.S.C. § 2000e–2(a)(1). Significantly, for purposes of the hostile work environment claim premised on reverse religious discrimination, the requirement that the harassment be based on religion "can be satisfied regardless of whether the harassment is motivated by the religious belief or observance – or lack thereof – of either the harasser or the targeted employee." EEOC Compliance Manual Section 12-III-A-2-a. Courts must look to the totality of the circumstances in determining whether a workplace environment is sufficiently hostile or abusive to be actionable, but certain factors guide the analysis:

[42] These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course,

> relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris, 510 U.S. at 23, 114 S.Ct. 367. Although isolated incidents will usually fall short of establishing a hostile work environment, a single incident can create a hostile work environment if the incident is sufficiently "severe." *See Redd*, 678 F.3d at 175–76.

[43] The second element of a hostile work environment claim requires a plaintiff to provide a specific basis for imputing to the employer the conduct that created the hostile work environment. *See Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996). "An employer is presumptively liable for [ ] harassment in violation of Title VII if the plaintiff was harassed not by a mere coworker but by someone with supervisory (or successively higher) authority over the plaintiff, although in certain circumstances an affirmative defense may be available." *Redd*, 678 F.3d at 182. "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

"The Second Circuit has cautioned that the existence of a hostile work environment is a mixed question of law and fact. These kinds of questions are especially well-suited for jury determination and summary judgment may be granted only when reasonable minds could not differ on the issue." *Preuss v. Kolmar Labs., Inc.*, 970 F.Supp.2d 171, 185 (S.D.N.Y. 2013) (internal quotation marks, citation, and alterations omitted).

(a) Pervasive or Severe

[44] Here, the court concludes that a reasonable jury could find that the purportedly "hostile work environment was ... sufficiently severe *or* sufficiently pervasive ... to have altered [claimants'] working conditions." *Redd*, 678 F.3d at 175.

Plaintiffs here describe repeated and consistent coercive efforts by supervisors to impose Onionhead beliefs on them. Pennisi testified that she attended at least 20 workshops. (Tab Q, Pennisi Dep. at 85; Tab B, Benedict Dep. at 97 (at least nine workshops); Tab N, Ontaneda Dep. at 90-91 (workshops once a month for three years).) Honohan explained that between December 2010 and December 2011, she believed that every single employee of CCG attended Onionhead workshops. (Tab H, Honohan Dep. at 28; *see also* Tab N, Ontaneda Dep. at 92 ("During my time there everybody attended.").) Ontaneda further stated that Onionhead was mentioned in every one of the workshops she attended. (Tab N, Ontaneda Dep. at 93.) Honohan explained that "[y]ou had to attend" and that "you were told which group you were going to be in, what day it was meeting, what time, and you showed up." (Tab H, Honohan Dep. at 30; *see also* Tab N, Ontaneda Dep. at 90 ("Q: You went to every single [workshop]? A: Yeah, I had to. Q: Why do you say you had to? A: Because they were mandatory. Q: How do you know they were mandatory? A: We were told. We were sent emails and given times that we had to go to the workshop.").) [23]

23. Defendants' statement in their memorandum of law that "OH and HH workshops were indisputably voluntary" (Def. Mem. at 29) is not merely stretching the record. It is an affirmative misrepresentation of the evi-

Numerous religious practices purportedly permeated the office environment. Virtually every claimant described prayer, sometimes mandatory, in the workplace. (*E.g.*, Tab H, Honohan Dep. at 113; Tab N, Ontaneda Dep. at 213; Tab R, Safara Dep. at 60-61; Tab O, Pabon Dep. at 119, 125; Tab J, Josey Dep. at 119.) Pegullo testified that when "Denali felt that there was an evil spirit" she would have to "use sage, incense, and candles, and garlic" to perform a "cleansing" of the workplace. (Tab P, Pegullo Dep. at 126-27.) Employees were expected to hold hands, hug, kiss and express love, at workplace meetings with Jordan and encounters with Hodes. (*E.g.*, Tab M, Maldari Dep. at 58, 74-75, 79, 86, 88; Tab H, Honohan Dep. at 61.) Diaz, describing one night of the work-sponsored spa weekend, which occurred on March 17 and 18, 2012, explained that "[a]t the end of the meeting we all had to hold hands in a circle. We had to lift up our hands three times and chant love, love, love. That was a big thing at the end. Everybody had to hug and kiss as usual and say it to Denali." (Tab E, Diaz Dep. at 63, 122-23.) The claimants reported feeling "uncomfortable" and that the practices were inappropriate for an office, and religious in nature. The employees were expected to use pins and candles regularly and directed to think about feelings and meaning. (*E.g.*, Tab N, Ontaneda Dep. at 95; Tab P, Pegullo Dep. at 126, 168, 249; Tab E, Diaz Dep. at 46, 87-88.)

Finally, some claimants have explicitly testified to damage to their psychological well-being. *See Harris*, 510 U.S. at 23, 114 S.Ct. 367 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive."). Ontaneda described how she observed people exit one-on-one meetings with Jordan in tears. (Tab N, Ontaneda Dep. at 218) ("All I know is that when people came out of those sessions, they would come out hysterical[ly] crying.") Maldari claims that she was one of the individuals who left a meeting with Jordan, which involved probing questions about her personal life, in tears. (Tab M, Maldari Dep. at 78.) Pegullo explained that she is "so depressed and ... out of it sometimes" because she was "so hurt that [she] was influenced by Denali." (Tab P, Pegullo Dep. at 175-76.) Josey described how she believed she had cried "a couple of times" during workshops and that she had "seen women cry in there." (Tab J, Josey Dep. at 77.)

The court must consider the totality of the circumstances in evaluating whether a reasonable jury could believe that claimants were subjected to a hostile work environment. The Second Circuit has instructed that evidence of hostility or harassment need not be directed at a particular plaintiff to be relevant to her claim. *See Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) ("The mere fact that Schwapp was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim. Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment, the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment." (citations omitted)). Under the record outlined above, a reasonable jury could find that claimants' "workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment." *Shan*, 316 Fed.Appx. at 24.

dence to argue that the workshops were "indisputably" voluntary.

(b) Imputing

[45] Turning to the second element of plaintiffs' hostile work environment claims, a jury could find by a preponderance of the evidence in the record that there is a basis for imputing liability to defendants. As discussed earlier, an "employer is presumptively liable for [ ] harassment in violation of Title VII if the plaintiff was harassed not by a mere coworker but by someone with supervisory (or successively higher) authority over the plaintiff, although in certain circumstances an affirmative defense may be available." *Redd*, 678 F.3d at 182. A "supervisor" is someone who can effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Vance v. Ball State Univ.*, ___ U.S. ___, 133 S.Ct. 2434, 2443, 186 L.Ed.2d 565 (2013) (internal quotation marks and citation omitted).

[46] Here, it is undisputed that Bourandas, Levine, and Hodes were supervisors. (Def. Reply at 11.) The parties strongly dispute, however, whether Jordan was a supervisor. Jordan was imbued with certain indicia of, at the very least, *apparent* supervisory responsibilities. For example, a corporate hierarchy chart in the record contains four tiers, with Hodes at the top in the first tier, the second tier occupied only by Bourandas and Jordan, and nine supervisors including Levine in the third tier. (Jt. Ex. 90.) Levine, a supervisor, testified that when she needed to make "difficult" decisions and would need a "sounding board," she would consult with Bourandas, Jordan, or "any other manager," though Levine also testified that she did not consider Jordan a manager. (Tab L, Levine Dep. at 64-65.) Honohan testified that Jordan instructed employees to come to Jordan with "complaints" rather than Hodes. (Tab H, Honohan Dep. at 107-08, 110; *see also* Tab G, Hodes Dep. at 332 ("[C]ertainly over the years [employees have] been able to complain to Denali.").) Benedict testified that she "took direction from" Jordan. (Tab B, Benedict Dep. at 59.) Benedict explained that Jordan and Lane Michel, another supervisor, both informed her that she would be terminated if she did not move to Long Island. (*Id.* at 121.) Jordan also had authority to reassign Benedict from her duties on behalf of defendants to work on behalf of Onionhead and Harnessing Happiness at defendants' office. (Tab B, Benedict Dep. at 35, 126; Pl. 56.1 ¶ 153.) At the very least, there is a factual dispute regarding whether Jordan qualifies as a supervisor within the meaning of Title VII. *See Vance*, 133 S.Ct. at 2450 (recognizing that there may be circumstances "where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions)"); *Lolonga-Gedeon v. Child & Family Servs.*, 144 F.Supp.3d 438, 441 (W.D.N.Y. 2015) ("[A]n issue of fact exists as to Wright's status as a supervisor, and the Court cannot resolve it as a matter of law.").[24]

Although, as noted above, employers are "presumptively liable for all acts of harassment perpetrated by an employee's super-

24. Defendants assert that Jordan did not participate in termination decisions by emphasizing that she "recommended to Bourandas and Levine that Pabon receive counseling" instead of being terminated. (Def. 56.1 Resp. ¶ 70.) Defendants' argument inadvertently undermines their position. If Jordan had the power to make recommendations to Bourandas and Levine in favor of counseling, it suggests she played a role, at least, in termination decisions. *See Vance*, 133 S.Ct. at 2446 n.8 (recognizing that "tangible employment actions can" be "subject to approval by higher management").

visor, ... the employer can avoid liability if it can prove that: (1) the employer exercised reasonable care to prevent and promptly correct any harassment by such a supervisor, and (2) the employee unreasonably failed to avail [her]self of any corrective or preventative opportunities provided by the employer or to avoid harm otherwise." *Duviella v. Counseling Serv. of E. Dist. of New York*, No. 00–CV–2424, 2001 WL 1776158, at *10 (E.D.N.Y. Nov. 20, 2001) (describing the *Faragher/Ellerth* defense). In establishing whether an employer exercised reasonable care, proof "that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, [but] the need for a stated policy suitable to the employment circumstances may appropriately be addressed." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Here, although it is defendants' burden to establish the *Faragher/Ellerth* defense, they have failed to produce a written policy of any kind that was in place any time before August 2011. (Def. 56.1 ¶¶ 45-47; Pl. 56.1 Resp. ¶¶ 45-47; Def. 56.1 Resp. at p. 49 n.2, ¶ 392.) *See Fierro v. Saks Fifth Ave.*, 13 F.Supp.2d 481, 491 (S.D.N.Y. 1998) ("[I]n determining whether an employer has met the first element of the *Faragher/Burlington* affirmative defense ... the employer's promulgation of an 'an antiharassment policy with complaint procedure' is an important, if not dispositive, consideration." (quoting *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275)). Further, it is undisputed that defendants conducted no training for supervisors or human resources regarding discrimination issues. (Def. 56.1 Resp. at ¶ 397.) The court simply cannot determine as a matter of law whether defendants "exercised reasonable care to prevent and promptly correct any harassment by such a supervisor." *Duviella*, 2001 WL 1776158, at *10 (internal quotation marks and citation omitted). Defendants have therefore failed to establish the first element of the *Faragher/Burlington* affirmative defense.

Accordingly, genuine disputes of material fact preclude entry of summary judgment against claimants on the hostile work environment claims premised on reverse religious discrimination.[25] Having addressed the group of claims premised on reverse religious discrimination, the court next addresses the conventional religion-based discrimination and retaliation claims.

D. Conventional Religious Discrimination and Retaliation Claims

Claimants assert that they were discriminated against on the basis of their *own* sincerely held beliefs, as distinct from their failure to adhere to Onionhead beliefs. As discussed earlier, claimants assert four types of claims under the traditional religious discrimination rubric:

(1) Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo claim that they were subjected to religious discrimination on the basis of their religious beliefs.

(2) All claimants aver that they were subjected to a hostile work environment on the basis of their religious beliefs.

(3) All claimants claim that defendants failed to accommodate their religious beliefs.

(4) Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo claim that they were retaliated

25. The court notes that claimants have not asserted claims for failure to accommodate or retaliation under a reverse religious discrimination theory.

against after engaging in protected activity.

For the reasons that follow, the court concludes that no reasonable jury could find that the claimants (with the exception of Pennisi) were discriminated against on the basis of their personal religious beliefs. Just as the court was obligated to view the totality of the circumstances in addressing claimants' reverse religious discrimination claims, the court must examine the totality of the circumstances and cannot isolate the evidence in addressing claimants' conventional religious discrimination and retaliation claims. *See Friedman*, 643 Fed.Appx. at 72 (holding that district court neglected to evaluate "the record as a whole, just as a jury would, to determine whether a jury could reasonably find an invidious discriminatory purpose on the part of an employer," and instead "viewed each piece of evidence in isolation" (internal quotation marks and citation omitted)).

[47] Each of the four varieties of claims at issue require claimants to establish a causal link between *their* religious beliefs and the discrimination or retaliation. Title VII, as relevant here, provides that employers may not "discharge any individual, or otherwise ... 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) (emphasis added). The retaliation claims require that claimants' protected activity (here, their expressed opposition to Onionhead based on their asserted religious beliefs or their request for accommodation based on their religious beliefs) be the but-for cause of their terminations. *See Nassar*, 133 S.Ct. at 2533 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation ....").

As an initial matter, in support of their conventional religious discrimination and retaliation claims, claimants' briefing principally directs the court to the exact same evidence supporting their reverse religious discrimination claims. (Pl. Mem. at 32-33, 35, 38-39.) Aside from pointing the court to the very limited references in the deposition testimony to claimants' own religious practices and beliefs (*e.g.*, Pl. Mem. at 32 (citing Pl. 56.1 ¶¶ 375-76)), claimants have, with the notable exception of Pennisi, failed to present a sufficient evidentiary link between their personal religious beliefs or lack thereof, and the purported discrimination and retaliation to defeat summary judgment. As the deposition excerpts below establish, each claimant, with the exception of Pennisi, either: (1) testified during her respective deposition that she was not discriminated against or retaliated against on the basis of her *own* beliefs and/or (2) failed to provide testimony or other evidence indicating that she had been discriminated against on the basis of her *own* beliefs.

i. Diaz

Diaz testified as follows:

Q: Do you practice a particular religion?

A: I'm Catholic.

Q: Did [Jordan] ever try to dissuade you from being Catholic?

A: I wouldn't say that she told me not to be Catholic. But she tried to *push her beliefs a lot on us.*

(Tab E, Diaz Dep. at 47 (emphasis added).) Diaz only discussed her Catholicism on one other occasion in her deposition. (*Id.* at 88.)

Diaz's testimony resembles much of the additional testimony of other claimants discussed below, insofar as she distinguished between reverse discrimination ("she tried to push her beliefs ... on us") and conventional discrimination, which to be action-

able would require that she be treated differently on the basis of her own religious beliefs. *See Lampros*, 2012 WL 6021091, at *6 n.3 ("Title VII has been interpreted to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs." (quoting *Shapolia*, 992 F.2d at 1036)).

ii. Benedict

Q: What religion are you?

A: I don't really go by any religion.

. . .

Q: [W]hatever religious beliefs you have, have you ever expressed them in the workplace.

. . .

A: No.

. . .

Q: Did you ever request any accommodation during your employment because of a conflict between your employment and your religious beliefs?

A: No.

(Tab B, Benedict Dep. at 9, 14, 16.)

iii. Honohan

Q: Did anyone – Rob [Hodes], Tracy [Bourandas], Denali [Jordan], April [Levine] – ever seem to have a problem with you being Catholic?

A: No.

(Tab H, Honohan Dep. at 96-97.)

iv. Josey

Q: Did your co-workers know that you were a Christian?

A: I didn't really discuss my religion with coworkers . . .

Q: Did any of your co-workers or anybody at UHP ever ask you about your religion?

A: Not that I can remember. . . .

Q: Are you aware of anybody who ever requested an accommodation for their religious beliefs?

. . .

A: Not that I can remember.

(Tab J, Josey Dep. at 125-26.)

v. Maldari

Q: Do you have a religion?

A: I'm Catholic.

. . .

Q: Did anyone ever criticize you for being Catholic?

A: No.

. . .

Q: [Y]ou don't recall any conversation or any statement Denali made that was denigrating [to] [C]atholicism?

A: Correct

(Tab M, Maldari Dep. at 80-82.)

vi. Ontaneda

Q: [D]id you ever tell [Bourandas] that you were Catholic?

. . .

A: I would say so, yes.

Q: Did she seem to have any problem with that?

A: No.

. . .

Q: In what ways were your Catholic beliefs not accommodated by [CCG]?

A: For me personally, I didn't have issues with that.

(Tab N, Ontaneda Dep. at 28-29, 222.)

vii. Pabon

A: I was brought up with no religion at all.

Q: Do you practice any religion currently?

A: No.

(Tab O, Pabon Dep. at 63-64.)

Although claimants contend that Pabon had sincerely held beliefs that conflicted with Onionhead (Pl. 56.1 ¶ 376), they direct the court to no testimony from Pabon indicating that she was discriminated against or retaliated against because of *her* sincerely held religious beliefs or lack thereof.

viii. Pegullo

Pegullo testified that she "do[esn't] practice religion" and that she "can't say [she is] spiritual," but she also stated that she "do[es] have [her] beliefs." (Tab P, Pegullo Dep. at 132.) Claimants point to no evidence in the record, however, indicating that Pegullo was terminated or retaliated against on the basis of *her* beliefs.

ix. Safara

Q: [D]o you believe that you were discriminated against at UHP or treated differently at UHP or treated differently at UHP because of your Lutheran background.

A: No. I don't think it was basically like, oh, she's Lutheran, let's try to push this on her.... *[T]hey only believed what they believed and they thought everyone should believe it.*

(Tab R, Safara Dep. at 58-59 (emphasis added).)

Safara's testimony underscores the nature of claimants' assertions regarding Onionhead, and echoes Diaz's testimony excerpted above. With the exception of Pennisi, none of the claimants present evidence that they were treated differently or retaliated against because of *their* beliefs or religion, or lack thereof.

x. Pennisi

Pennisi, however, made explicit allegations that she held strong Catholic beliefs and that she was discriminated against as well as retaliated against on the basis of her Catholic beliefs. She asserts four claims deriving from discrimination and retaliation purportedly based on her Catholicism: (1) failure to accommodate; (2) retaliation; (3) disparate treatment; and (4) hostile work environment. The court addresses Pennisi's claims in turn.

(a) Failure to Accommodate

[48] "To establish a prima facie case of religious discrimination based on failure to accommodate, a plaintiff must prove that: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *St. Juste*, 8 F.Supp.3d at 315 (internal quotation marks and citation omitted). "*After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation*, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices." 29 C.F.R. § 1605.2(c)(1) (emphasis added).

[49] Here, Pennisi's failure to accommodate claim fails because she testified that she never sought any accommodation on the basis of her Catholicism:

Q: Did you ever ask anybody at UHP in management, Rob [Hodes], Tracy [Bourandas] or April [Levine], for any kind of a religious accommodation?

A: No.

Q: Did you ever ask Denali for a religious accommodation?

A: No.[26]

26. Pennisi did apparently ask for Good Friday off on at least one occasion, a request which was granted. (Tab Q, Pennisi Dep. at 20-21.)

(Tab Q, Pennisi Dep. at 196.) Claimants appear to contend that Pennisi sought an accommodation on the basis of her Catholicism in July 2010 during a manager's meeting. (Pl. Mem. at 35.) Because the meeting occurred over 300 days prior to June 7, 2011, when she filed her charges with the EEOC (Tab Q, Pennisi Dep. at 190) (manager's meeting occurred in mid-July 2010); Jt. Ex. 61 (Pennisi EEOC charge filed June 7, 2011), her request is time-barred and not subject to the continuing violation doctrine. *See Elmenayer v. ABF Freight Sys., Inc.*, 318 F.3d 130, 134–35 (2d Cir. 2003) ("[A]n employer's rejection of an employee's proposed accommodation for religious practices does not give rise to a continuing violation.").

(b) Retaliation

[50] "To establish a prima facie case of retaliation under Title VII, a plaintiff must show (1) that she was engaged in protected activity by opposing a practice made unlawful by Title VII; (2) that the employer was aware of that activity; (3) that she suffered adverse employment action; and (4) that there was a causal connection between the protected activity and the adverse action." *Galdieri–Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998) (citation omitted).

[51] Here, Pennisi engaged in protected activity of which defendants were aware when she complained in a July 2010 meeting to Jordan and others that Onionhead beliefs conflicted with her Catholicism. (Tab Q, Pennisi Dep. at 191-92.) *See Lewis v. New York City Transit Auth.*, 12 F.Supp.3d 418, 449 (E.D.N.Y. 2014) (recognizing that "protesting a discriminatory employment practice ... constitute[s] [a] protected activit[y]"); *see also Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000) ("Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity."). Pennisi claims that she was terminated, which constitutes an adverse employment action, during Jordan's first return to the office after she voiced her religious objections to Onionhead. Her purported termination occurred in August 2010, approximately one month after she engaged in protected activity in July 2010. *See Treglia v. Town of Manlius*, 313 F.3d 713, 721 (2d Cir. 2002) (prima facie retaliation case established where approximately one month had elapsed between protected activity and adverse employment action). As discussed earlier (*see* supra Discussion Part II.B.iii), a reasonable jury could find that defendants' purportedly legitimate non-discriminatory reason for allegedly terminating Pennisi was pretextual. A reasonable jury could conclude that Pennisi was retaliated against on the basis of her religious beliefs.

(c) Disparate Treatment

[52] For similar reasons, a reasonable jury could find that Pennisi was discriminated against on the basis of her religion (a claim governed by the traditional *McDonnell Douglas* burden-shifting framework outlined *supra*). "[A]ll plaintiffs who seek to make out a prima facie case of religious discrimination must show that (1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; [27] and (3) they were disciplined for

27. Claimants argue that the second requirement described in *Baker* did not survive *EEOC v. Abercrombie & Fitch Stores, Inc.*, ___ U.S. ___, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015). Here, there is no need to address the viability of the second requirement because Pennisi testified that she informed Jordan of

failure to comply with the conflicting employment requirement." *Baker v. The Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006) (internal quotation marks and citation omitted).

[53] As described above, Pennisi and others provided testimony that they believed Onionhead-related activities were mandatory. (Tab Q, Pennisi Dep. at 89, 93-94, 125, 136.) Pennisi testified that she informed CCG that Onionhead conflicted with her Catholicism, and was terminated soon after. Although defendants contend that Pennisi was terminated for failing to report to work, a reasonable jury could find that their asserted justification for her termination was pretextual.

(d) Hostile Work Environment

[54] As noted above, to "state a hostile work environment claim, a plaintiff must plead facts tending to show that the complained of conduct: (1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment *because of the plaintiff's ... protected characteristic.*" *Robinson v. Harvard Prot. Servs.*, 495 Fed. Appx. 140, 141 (2d Cir. 2012) (emphasis added) (internal quotation marks and citation omitted).

[55] Pennisi's claim that she was subjected to a hostile work environment falls short because she cannot establish the third requirement, that her work environment was hostile because of her religion. She claims that she informed defendants that she was Catholic in the July 2010 meeting and was terminated in August 2010. By claimants' own admission, Jordan was absent during much of the time between the July 2010 meeting and Pennisi's purported August 2010 termination. Accordingly, the vast majority of the allegations Pennisi levels against defendants in support of her hostile work environment claim occurred before she claims that defendants knew of her religion. She does not establish that she was subjected to a hostile work environment because of her religion in the brief window between when she claims defendants learned of her religion and when she was terminated. By contrast, as discussed earlier, her reverse hostile work environment may proceed because the reverse hostile work environment claim is not dependent on defendants' knowledge of her sincerely held Catholic beliefs.

CONCLUSION

Accordingly, claimants' motion for partial summary judgment is GRANTED. Defendants' motion for summary judgment is GRANTED in part and DENIED in part. Specifically:

(1) Defendants' motion for summary judgment on Benedict, Diaz, Honohan, Josey, Ontaneda, Pennisi, Pabon, and Pegullo's reverse religious discrimination claims is DENIED.

(2) Defendants' motion for summary judgment on all claimants' hostile work environment claims premised on reverse religious discrimination is DENIED.

(3) Defendants' motion for summary judgment is DENIED with respect to Pennisi's disparate treatment and retaliation claims premised on her Catholicism, but is GRANTED with respect to Pennisi's hostile work environment and failure to accommodate claims premised on her Catholicism.

her Catholicism. (Tab Q, Pennisi Dep. at 191-92.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **ABDI MOHAMED, et al.,** **Plaintiffs/Intervenors,** **FARHAN ABDI, et al.,** **Plaintiffs/Intervenors,** **vs.** **JBS USA, LLC, f/k/a JBS SWIFT & CO., a/k/a SWIFT BEEF COMPANY,** **Defendant.**	**CASE NO. 8:10CV318** **MEMORANDUM AND ORDER**

This matter is before the Court on the Motion for Summary Judgment (Filing No. 342) filed by Defendant JBS USA, LLC f/k/a JBS Swift & Co., a/k/a Swift Beef Company ("JBS"), and the Motion for Partial Summary Judgment (Filing No. 343) filed by Plaintiff Equal Employment Opportunity Commission ("EEOC"). The parties have filed briefs and indexes of evidence in support of their respective positions. For the reasons stated below, JBS's Motion will be granted in part and denied in part. The EEOC's Motion will be denied.

PROCEDURAL HISTORY

The EEOC alleged in its initial Complaint (Filing No. 1) that JBS engaged in a pattern or practice of discrimination against Somali Muslim employees at its Grand Island, Nebraska, facility. In its Amended Complaint (Filing No. 99), the EEOC identified 153 individuals for whom it seeks relief. Two groups of allegedly aggrieved

employees[1] filed Complaints in intervention, but no class has been certified pursuant to Fed. R. Civ. P. 23.

On April 15, 2011, the parties entered into a bifurcation agreement (Filing No. 76-1) that Magistrate Judge Gossett adopted and approved (Filing No. 81). The agreement divided the discovery and trial into two phases: Phase I relates to pattern-or-practice claims to be addressed using the *Teamsters* method of proof,[2] and to employment practices and workplace events leading up to and encompassing Ramadan 2008. The parties have agreed that Phase I should be tried to the Court and not a jury. (Filing No. 403.) Phase II relates to individual claims and relief and any claims for which no pattern or practice liability was found in Phase I. The Intervenors have been precluded from participating as parties during Phase I; their participation during Phase I is limited to the role of fact witnesses. (Filing Nos. 296, 338.)

The present Motions relate only to the three Title VII, pattern-or-practice claims the EEOC is pursuing in Phase I of this lawsuit: (1) unlawful denial of religious accommodations concerning break times for prayers[3]; (2) unlawful termination based on religion and/or national origin; and (3) unlawful retaliation for engaging in a protected activity. (*See* Filing No. 76-1 at 2.) The unlawful retaliation claim includes adverse

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[1] Referred to herein as the "Intervenors".

[2] So called for the decision in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), laying out a framework for analysis of claims when the government seeks to remedy systematic practices of employment discrimination.

[3] The EEOC alleges that JBS failed to accommodate the allegedly aggrieved Somali Muslim employees (1) by failing to grant their requests to leave the meat processing line to pray despite granting non-Somali Muslim co-workers' requests to leave the line to use the bathroom, and (2) by, during Ramadan 2008, refusing to move the B Shift dinner break to a time that would have met the Somali Muslim employees' prayer needs.

employment actions such as termination and discipline, but specifically excludes any alleged harassment or hostile work environment claims, which will be tried in Phase II. (*Id.*) In its Motion, JBS seeks the dismissal of all three of these claims. The EEOC, in its Motion, seeks to establish as a matter of law that JBS engaged in a pattern or practice of denying reasonable accommodations to its aggrieved Somali Muslim employees' requests for break times to pray.

FACTUAL BACKGROUND

Unless otherwise indicated, the following facts are stated in the briefs and supported by pinpoint citations to admissible evidence in the record, that the parties have admitted, and that the parties have not properly resisted as required by NECivR 56.1[4] and Fed. R. Civ. P. 56. The undisputed fact derive from both parties' Motions:

I. JBS Operations and Background

A. JBS's Grand Island Facility and Operations

JBS, at all relevant times, owned and operated a beef slaughter and fabrication facility in Grand Island (the "Facility). The United Food and Commercial Workers Union Local 22, which merged with Local 293 in the summer of 2011 (the "Union"), represented all of the hourly production and maintenance employees at the Facility. A collective bargaining agreement entered into by JBS and the Union (the "CBA") governed the terms and conditions of employment for the hourly production and maintenance employees. The CBA required JBS to provide two paid rest periods, and an unpaid meal period. The precise timing of the rest periods was to vary according to production needs or emergencies. The CBA also expressly prohibited strikes or work

[4] "Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response." NECivR 56.1(b)(1).

stoppages by the Union or its members, and gave JBS the right to determine the appropriate discipline for any employee in breach of this provision. The CBA also had a non-discrimination clause, and required JBS and the Union to provide religious accommodations based upon employees' religious tenets. The CBA required employees to make written requests for religious accommodation, and to cooperate with JBS and the Union to explore reasonable alternatives.

In 2007 and 2008, the Facility operated three shifts: two production shifts and a clean-up shift. One of the production shifts ran from 6:00 a.m. to 2:30 p.m. (the "A Shift"), and the other production shift ran from 3:00 p.m. to 11:30 p.m. (the "B Shift"). (Dep. of Mary Chmelka, Filing No. 347-1 at 92:4-22; Dep. of Cindy Davis, Filing No. 347-4 at 85:10-86:20.)[5] A majority of Somali Muslim employees working at the Facility worked in fabrication on the B Shift.

Under the CBA, the B Shift's first scheduled break occurred between 5:00 p.m. and 6:00 p.m., and the lunch or meal break occurred between 7:30 p.m. and 8:30 p.m., with employees beginning these breaks on a "rolling basis." That is, employees would leave the production line to go on these breaks once they finished processing the meat in front of them and no more meat was coming down the line. As a result, employees at the beginning of the line went on their thirty-minute meal break first while those at the end of the line went on their thirty-minute meal break last. Twenty to thirty minutes could elapse between the time the first employee left the production line to start his or her break to the time the last employee left the production line for the break. If the

[5] References to depositions in this Memorandum and Order will note the CM/ECF filing number ("Filing No.") and deposition page number.

employees were to take a "mass break" instead of taking their breaks on a "rolling basis," all employees would leave the production line at the same time and meat would remain on the line. Mass breaks were unpopular, because when all employees left the production line at once, there was insufficient time for everyone to go to the cafeteria, eat, use the restroom, and get back to the line before the break is over.

In addition to the regularly scheduled rest and meal breaks, an employee could make a request to his or her supervisor for an unscheduled break. For example, an employee could request to leave the production line to use the restroom. The EEOC presented evidence that in 2007 and 2008, there was no authorized unscheduled break policy to allow a person to pray, as opposed to using the restroom.[6] The only authorized unscheduled break was for restroom use. (Filing No. 344-2 at 247:15-248:10.) Under the informal break policy, employees could ask for time to go to the restroom, and such breaks had no specific set time limit and could last up to fifteen minutes. (*Id.* at 33:14-22, 34:24-35:6.) The company's "standard practice" was not to allow employees to leave the line, other than for physical needs. (Filing No. 344-2 at 259:21-260:6.)

The Facility's operations were divided into two separate areas: slaughter and fabrication. Both areas operated on a production-line basis. That is, a "chain" moved beef, in one direction, from slaughter to a cooler, then from the cooler through

[6] JBS does not dispute that witnesses testified to many facts, but disputes that this testimony establishes a pattern or practice of discriminatory behavior, or that the EEOC's characterization of the testimony demonstrates corporate policy or a standard practice. (*See generally* Filing No. 429 at 7-17.)

fabrication,[7] and then from fabrication into packaging. The chain could stop for various reasons, such as mechanical failure, cattle grade changes, a cattle abscess, or employee fights. It also could be set to move at varying speeds, calculated on a "head per hour basis." Working on the production line consisted of hard, manual labor, and required employees to wear safety equipment that included a frock, hair net, beard net, hard hat, ear protection, gloves, and steel toed boots. It usually took at least two to three minutes for an employee to don or doff this equipment, which the employee had to do to leave the production line to go on or return from a break.

B. JBS's Discrimination Policies and Training

The Facility had an employee handbook that included policies that prohibited discrimination, retaliation, and harassment. (Filing No. 356-1.) JBS also had separate policies, a Harassment and Retaliation Policy (Filing No. 356-2) and a Zero-Tolerance Policy (Filing No. 356-3), that prohibited discrimination and retaliation. These separate policies were disseminated and posted at the Facility. During orientation, representatives from the Union also mentioned that, in general terms, discrimination was prohibited at the Facility.

C. JBS's Industry and Employee Break Schedules

JBS is in a competitive industry with very low margins, and having employees off the production line had an adverse financial impact on JBS. The negative financial impact increased the longer an employee was off the line and with each additional employee that stepped off the line. An employee leaving the production line for an unscheduled break could affect other employees and production levels depending on

[7] Different lines of employees perform different jobs on the beef as it moves through fabrication.

the number of employees leaving the line at one time and whether or not there were other employees available to cover for those leaving. For example, those who remained on the line needed to work harder and faster when someone stepped off the line. There is evidence that meat piled up when employees stepped away from the production line for restroom breaks.

Rigid break schedules would prevent the Facility from minimizing the disruption of mechanical breakdowns. Flexible breaks would minimize such disruptions by allowing employees to go to break when machinery was inoperable and being repaired. Equipment breakdowns and cattle-grade changes are unpredictable. If an equipment breakdowns occur during the flexible window of time for a rest or meal break, employees may go on a break while the equipment is repaired.

D. General Tenets of the Muslim Faith & Intervenors' Varied Beliefs

Muslims believe the Qur'an is the literal word of God. They also believe that they should pray in accordance with the Prophet Muhammad's teachings, which call for five prayers a day: (1) morning, referred to as the fajr prayer; (2) noon, referred to as the dhur or zuhr prayer; (3) afternoon, referred to as the asr prayer; (4) evening/sunset, referred to as the maghrib prayer; and (5) night, referred to as the isha prayer. Ramadan is one month of the year in which Muslims are expected to, among other things, fast from dawn to dusk. Muslim prayer requirements, however, are year round.

The individual Intervenors in this case have varied beliefs with respect to: (1) the window of time within which they must recite their daily prayers; (2) the length of time required to complete their daily prayers; (3) the prayer schedule that should be followed; (4) the exact time at which each of the five daily prayers should be recited; (5) when it is

permissible to skip a payer, combine prayers, or pray late. For example, while some of the Intervenors believe there is no permissible window of time (the prayer must be performed at an exact time), others believe it is permissible to perform the prayers within five, ten, or fifteen minutes--and depending on the prayer, within certain hours--of a specified prayer time. With respect to all of the prayers except the morning prayer, the time it takes the Intervenors to perform their prayers can be anywhere from less than five minutes to up to fifteen minutes.

In 2007 and 2008, JBS permitted its employees to pray in the Facility, at least during regularly scheduled breaks, except in areas that posed a safety risk. The EEOC presented testimony that the company's policy was that Muslim employees could only pray on regularly scheduled breaks, which were the first break and the meal break. (Filing No. 344-3 at 131:14-17.) "They were not allowed to use what you call an informal break to pray. It was only for restroom breaks." (*Id.* at 131:24-132:3.)

II. Events Leading To EEOC's Charge

A. 2007

In Spring of 2007, a group of Somali Muslim employees took part in a "walk out" due to break-time issues with their sunset prayer. In an attempt to avoid a possible work conflict with sunset prayer practices, management at the Facility told some of the Somali Muslim employees they could request a transfer to the A Shift. Four or five Somali Muslim employees so requested, and were transferred to the A Shift.

In July 2007, JBS began to analyze the impact of accommodating prayer requests. As part of this process, JBS requested that the average cost of one minute of down time be calculated for both the slaughter and fabrication areas of the Facility. The

calculation revealed that down time necessary to accommodate prayer requests would result in a cost that JBS considered significant.

B. 2008

In September 2008, JBS sought to determine whether it should adjust meal breaks to coincide with the evening prayers, and JBS compared production and break schedules with Islamic prayer times throughout the year. JBS also considered the possibility of a mass break during Ramadan, and analyzed the cost impact of such breaks.

On September 10, 2008, during the B Shift, a trainer at the Facility grabbed a Somali Muslim woman's shoulder after he had instructed the woman to move her position on the production line. Some of the other Somali Muslim women on the line felt the trainer had mistreated the woman by grabbing her shoulder. Several of those women left the production line and met with Mary Chmelka, a JBS human resources manager, to discuss the incident. Those women returned to the production line and, soon thereafter, went to pray in a storage area.

Some of the women placed cardboard pieces on the floor to kneel for prayer. The operations manager and superintendent for the B Shift both entered the storage area where the women were praying. Some of the women felt the operations manager and superintendent had interrupted their prayer. As the women left, the superintendent picked up the cardboard on which some of the women had prayed. One of the women believed the superintendent kicked her cardboard piece, thereby showing disrespect for her prayer. Because of the perceived interruption and disrespect, the women became upset. Thereafter, the operations manager and superintendent escorted the women to

Chmelka's office. Chmelka perceived them to be very emotional, so she sent the women home. Chmelka told them she would investigate the incident, and asked that they return to work on September 12, 2008. That night, after those women had been sent home, the rest of the production line worked until 3:00 a.m. or 4:00 a.m., resulting in JBS incurring overtime expenses.

On September 11, 2008, a group of Somali Muslim employees met with the Union regarding break times and prayer issues. After meeting with the Union, the group of employees approached Chmelka about the incident that occurred the previous day. Chmelka arranged to have a meeting the next day with JBS's management, the Union, and some of the Somali Muslim employees to discuss that incident and "prayer issues."

On September 12, 2008, the Facility's manager, Dennis Sydow, began the meeting by quashing a rumor to the effect that some of the Somali Muslim women involved in the incident had been fired. The parties then began to discuss prayer breaks. One of the six Somali Muslim employees present at the meeting, acting as a translator for the other five Somali Muslim employees, asked whether they would be allowed to leave the production line to pray "on time." The Somali employees suggested that they be allowed to leave the production line for five minutes, one by one, to pray while someone covered for them on the line. (Filing No. 356-7 at CM/ECF p. 2.) Sydow indicated that he and others had considered the idea, but had concluded it was not a good solution because it would affect productivity and quality if people went back and forth on the production floor. Sydow also mentioned that moving the meal break earlier would cause problems due to constraints in the CBA. The translator inquired about receiving prayer accommodations throughout the year. Sydow indicated the

meeting only related to prayer accommodations for Ramadan. The participants agreed to meet again on September 15, 2008, so that the six Somali Muslim employees would have a chance to discuss the meeting with other Somali Muslim employees. Chmelka concluded the meeting, stating that the Somali Muslim employees could pray during their scheduled breaks anywhere in the Facility.

On September 13, 2008, JBS's corporate vice president, Jack Shandley, sent an email inquiring whether a prayer accommodation that allowed employees to leave the line within ten minutes of sunset could be accomplished. In that email, Shandley indicated to Sydow and Chmelka that supervisors needed to be consistent with how they handled prayer issues on the production floor.

On September 15, 2008, Union officials met with a group of Somali Muslim employees at the Union's office to discuss prayer breaks at the Facility. That same day, JBS's corporate director of finance, Heather Skinner, received directions to analyze the cost of providing JBS's employees an additional ten-minute break. According to Skinner, the costs "add[ed] up quickly." (Filing No. 361-3 at CM/ECF p. 2.) JBS management also held its second meeting with certain Somali Muslim employees to discuss their prayer issues in more depth.

At the meeting, Sydow noted that JBS received information the previous year indicating that there was a forty-five minute window for Muslim prayer before and after sunset. He asked the Somali Muslim employees present at the meeting why the window was different in 2008. After "some discussion among the group" (Filing No. 356-8 at CM/ECF p. 1), the individual acting as the translator for the Somali Muslim employees answered that the correct window of time for the prayer at sunset was within

ten or fifteen minutes of sunset. Two of the employees, one of whom was the translator, asked that JBS allow its Muslim employees to leave the production line to pray for five minutes at a time while others covered for those who left the line. Chmelka replied that there would not be enough time to relieve the approximately 200 Muslim employees within a ten-minute prayer window. Sydow also indicated that the accommodation the Somali Muslim employees proposed could create safety and quality issues. Sydow then raised the possibility of accommodating the Somali Muslim employees by moving them to the A Shift, noting that "[i]t would take a bit of time while someone is trained to replace you," and that it did not "answer the immediate [n]eed but over a period of time that [he] [believed] [it] would solve the problem." (Filing No. 356-8 at CM/ECF p. 2.) Before the meeting adjourned, Sydow reiterated that the employees could "pray wherever they want and no one will bother them." (Filing No. 356-8 at CM/ECF p. 3.)

After the meeting, a group of approximately 150 Somali Muslim employees gathered outside the Facility and chose to "strike." Pursuant to this strike, most of these 150 employees did not go to work the evening of September 15, 2008. During the strike, Union officials told the 150 employees that they had to go back to work, and advised them to submit written requests for religious accommodation.

On September 16, 2008, some of the 150 Somali Muslim employees returned to work, while others continued to strike. JBS management, Union officials, and certain individuals acting as representatives for the Somali Muslim employees met again. JBS offered to move the meal break to approximately fifteen minutes earlier in the evening and, at that time, have a fixed mass break, and also to shorten the shift by fifteen

minutes for the remainder of Ramadan. The Somali Muslim employees and Union officials present at the meeting agreed to JBS's proposal. Those Somali Muslim employees agreed that the employees would return to work and that a disciplinary notice would be added to the files of those employees who went on strike. Many of the Somali Muslim employees who were not at the meeting with JBS management and the Union officials learned of the agreement while they were at a park where they were striking. Sydow memorialized the agreement in a letter he sent to the Union.

Either after the B Shift on September 16, 2008, or some time on September 17, 2008, an unknown person posted signs around the Facility that, in Spanish, encouraged employees to "fight for [their] rights." (*See* Filing No. 423-5.) The sign also referenced the 7:45 p.m. meal break and requested that employees meet by the personnel office at 3:00 p.m. before the B Shift. (*See* Filing No. 423-5.) Many of JBS's Hispanic employees incorrectly assumed that JBS had given every Somali employee a dollar raise. Tension increased throughout the day, and after hearing rumors about the 7:45 p.m. mass break, a group of over 100 employees, composed of both A and B Shift workers, the majority of whom were Hispanic, refused to go to the production floor and walked off the job. This group of over 100 employees moved outside the Facility.

JBS managers, including Sydow and Chmelka, went outside to try to talk to those 100 employees. Union representatives also attempted to talk to the 100 employees and get them to return to work. The JBS managers and Union representatives learned that the 100 employees were upset about the change in the B Shift meal break and the shortening of the B Shift. The managers and Union representatives informed the 100 employees that they were engaging in a work stoppage for which they could be

terminated. The crowd dispersed, and JBS decided to send home the employees who had not walked off the job because there were no longer enough employees on duty to continue with production on the B Shift. Fabrication workers stayed to perform their jobs, but were only able to process a reduced number of cattle compared to the previous night. Due to the work disruptions, overall production for the week was significantly less than average.

On September 18, 2008, non-Muslim employees continued to protest outside the Facility and refused to return to work. In order to get the non-Muslim employees to return to work so the Facility could operate again, JBS management decided to return to its original meal break time and shift length. Chmelka informed some of the Somali Muslim employees involved in the previous meetings that JBS had decided to change the meal-break time back to how it was before. Those Somali Muslim employees said they would inform the other Somali Muslim employees.

Prior to the start of the B Shift meal break on September 18, 2008, at around 7:45 p.m. or 7:50 p.m., several Somali Muslim employees stepped off the production line without permission. Those employees were sent to Chmelka's office for doing so, and Chmelka prepared a written disciplinary notice for one of those employees before allowing him to go to the cafeteria for a meal break so he could break his fast. Chmelka planned to write disciplinary notices for the other employees who stepped off the production line without permission after their meal break. Subsequent events in the cafeteria, however, interrupted her plans.

In the cafeteria, some Somali Muslim employees were yelling, slamming their hard hats on the table, and banging their food trays. Sydow attempted to calm people

and told them to return to work. A Union representative also encouraged employees to go back to work. At least one Somali Muslim employee heard a manager instructing employees to "go back to work or leave." (*See* Filing No. 350-2 at 236:5-20.) Another Somali Muslim employee heard Chmelka say "if you guys need to work, go back to the job, if you don't want to work, you can leave your badge and can leave without trouble, without yelling." (Filing No. 351-2 at 174:3-12.) At some point, someone called the police and informed them of a disturbance at the Facility that might escalate to something beyond a verbal confrontation. By the time the police arrived, the crowd in the cafeteria had dispersed.

Approximately eighty Somali Muslim employees left the Facility and did not return. JBS management met that night and decided to terminate the employees who left the Facility instead of returning to work. The next morning, September 19, 2008, when those employees arrived at the Facility, they learned of their termination and received their final paychecks. Some of the Intervenors did not leave the facility during their shift and were not terminated.

III. Charges of Discrimination and the Investigation

After Ramadan 2008, the Nebraska Equal Opportunity Commission ("NEOC") received calls from some of JBS's Somali Muslim employees, although the NEOC does not have any records of those calls. In response to those calls, the NEOC organized a mass intake process at a hotel in Grand Island.

Approximately eighty charges were received on October 2 and 3, 2008, at the hotel. The charges were in English. Contrary to the NEOC's usual practice, the NEOC did not record the intake meetings conducted at the hotel. After the mass intake

meetings, the NEOC interviewed seven of JBS's management employees; four non-Muslim, non-management JBS employees; and none of JBS's management employees from JBS's corporate office in Greeley, Colorado. At least one of the three NEOC investigators assigned to investigate the Somali Muslim employees' charges believed that Muslim prayer times were universal and made no effort to determine how many Muslims were on each production line at the Facility. At some point in 2009, the NEOC transferred all its charge files to the EEOC.

Prior to August 30, 2010, no one from the EEOC was involved in the investigation of any charge forming the basis of this lawsuit, except for Hassan Duwane's charge. The EEOC is relying on the NEOC's investigation to satisfy its obligation to investigate the charges that form the basis of this lawsuit. The EEOC and NEOC are parties to a worksharing agreement that references their defined agency relationship. In the worksharing agreement entered into by the EEOC and the NEOC for fiscal year 2008, the EEOC and NEOC agreed to "each designate the other as its agent for purpose of receiving and drafting charges." (Filing No. 356-14 at CM/ECF p. 2 ¶ II.A.) The worksharing agreement references § 706, subsections (c) and (d), of Title VII when describing how the EEOC and NEOC agreed to divide the primary responsibility for resolving charges. (Filing No. 356-14 at CM/ECF p.2 ¶ III.)

In August 2009, the EEOC issued determination letters including a "cause" finding for each of the eighty-four or eighty-five pending charges. The letters are identical to each other except for the charging party's name, address, and charge number. Those letters state: "The evidence obtained during the investigation establishes that Respondent failed to accommodate the religion of Charging Party and

the class of Somali Muslim employees and that such accommodation would not have posed an undue hardship to Respondent." (*See, e.g.*, Filing No. 358-12.)

In early September 2009, the EEOC began conciliation efforts with JBS. An EEOC conciliation conference memo noted that the EEOC indicated that, although it would help JBS do so, JBS needed to develop the plan for providing reasonable accommodations to its Somali Muslim employees because JBS knew the details of the situation. That memo also noted that the EEOC considered the reasonable accommodations issue to be an individual issue; that is, it would differ among Muslim employees. In a letter dated September 2, 2009, EEOC proposed that JBS promptly develop and implement an effective plan for providing religious accommodation. The conciliation efforts were unsuccessful, and on August 30, 2012, the EEOC filed suit against JBS.

IV. JBS's Current Practices

In 2009, JBS issued written guidelines that addressed its Muslim employees' requests for unscheduled breaks for prayer. The written guidelines implemented in August 2009 provided that supervisors could allow unscheduled breaks for the restroom and for prayer, at least during the month of Ramadan. (Filing No. 344-2 at 259:21-260:6; Filing No. 344-12, Guidelines for Unscheduled Work Breaks.) These guidelines instruct JBS supervisors to grant prayer requests in the order received and as operations permit and give requests to use the restroom priority over prayer requests due to safety and occupational concerns. Employees can leave the production line only to the extent that it does not interfere with production. Sydow said the change in policy was associated with the prayer break issues that occurred during Ramadan in

September 2008. (Filing No. 344-5 at 239:22-240:16, 242:9-243:6.) JBS disputes that the prayer policy was even a change, noting that Sydow merely testified he personally associated the change in policy with the events of Ramadan in 2008. (Filing No. 429 at 15; Filing No. 344-5 at 242:9-243:3.) Further, JBS notes that the new break guidelines state they are "intended to confirm the practice already in place." (Filing No. 344-12 at 1.) Doug Schult, JBS's head of labor relations, testified that the new guidelines changed the "standard practice" of not allowing people to leave the line for reasons "other than physical needs." (Filing No. 344-2 at 260:2-4; 344-12.) Schult also testified that there would have been no huge hurdles to implementing the guidelines in 2007 and 2008. (*Id.* at 260:7-13.)

STANDARD

"Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Gage v. HSM Elec. Prot. Serv., Inc.,* 655 F.3d 821, 825 (8th Cir. 2011) (citing Fed. R. Civ. P. 56(c)). The court will view "all facts in the light most favorable to the non-moving party and mak[e] all reasonable inferences in [that party's] favor." *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811, 819 (8th Cir. 2011). However, "'facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts.'" *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris,* 550 U.S. 372, 380 (2007)).

In response to the movant's showing, the nonmoving party's burden is to produce "evidentiary materials that demonstrate the existence of a 'genuine issue' for trial." *Id.*

"[T]he absence of an adequate response by the nonmovant, even after the moving party has carried its initial burden of production, will not automatically entitle the movant to entry of summary judgment." *Lawyer v. Hartford Life & Acc. Ins. Co.*, 100 F. Supp. 2d 1001, 1008 (W.D. Mo. 2000) (citing *Celotex*, 477 U.S. at 331). Instead, "the moving party must show that the evidence satisfies the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Id.* (citing *Celotex*, 477 U.S. at 331). In other words, where the Court finds that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party"–where there is no "'genuine issue for trial'"–summary judgment is appropriate. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 289 (1968)).

DISCUSSION

JBS argues that summary judgment should be entered in its favor because the EEOC failed to satisfy certain conditions precedent--investigation and conciliation--prior to filing this lawsuit. With respect to the EEOC's pattern-or-practice claim based on alleged denial of religious accommodations, JBS also contends that summary judgment should be entered in its favor because the EEOC has failed to present sufficient evidence to support its claim that JBS failed to accommodate prayer requests. Further, JBS contends that the only accommodations the EEOC alleges JBS failed to provide were not reasonable and would have posed an undue burden on JBS. With respect to the EEOC's pattern-or-practice claim based on alleged unlawful terminations, JBS argues that summary judgment should be entered in its favor because the terminations were a one-time event and, therefore, cannot be the basis for a pattern-or-practice

claim; JBS had a legitimate, nondiscriminatory reason for terminating the aggrieved employees' employment; and the EEOC has failed to point to any evidence that indicates similarly situated employees were treated more favorably than the aggrieved Muslim employees. Finally, with respect to the EEOC's pattern-or-practice claim based on alleged unlawful retaliation, JBS asserts that summary judgment should be entered in its favor because the EEOC has failed to point to any evidence indicating that JBS had a policy, or that there was a pattern, of retaliation against Somali Muslim employees, and the EEOC has failed to point to any evidence indicating that the aggrieved employees engaged in protected activity.

The EEOC argues that it has satisfied all conditions precedent to filing this lawsuit. It contends that it was authorized to rely on the NEOC's investigation, the sufficiency of which the EEOC contends is not subject to judicial review. Even if the NEOC's investigation were subject to judicial review, the EEOC asserts that evidence in the record supports the conclusion that the investigation was sufficient to meet Title VII's requirements. The EEOC also argues that the evidence in the record is not only sufficient to support all three of its pattern-or-practice claims, thereby precluding the entry of summary judgment in JBS's favor, but that there is sufficient evidence in the record to establish the prima facie case of its religious accommodation claim as a matter of law.

I. Preconditions to Suit

Title VII requires the EEOC to satisfy two conditions before it brings suit against an employer: First, there must be an administrative investigation of the charges. *EEOC v. Shell Oil. Co.*, 466 U.S. 54, 63-64 (1984). Second, if the investigation establishes

reasonable cause to believe discrimination has occurred, the EEOC must attempt to eliminate the alleged discriminatory conduct through informal conciliation efforts. *Id.*, *see also EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974). JBS claims the EEOC failed to satisfy the requisite preconditions because it failed to investigate the claims itself, instead relying on the investigations performed by the NEOC; and failed to engage in good faith conciliation efforts. For the reasons discussed below, the Court concludes that the preconditions to suit have been satisfied.

A. Investigation

1. The EEOC Can Rely On The NEOC's Investigation

The Court has previously found that the EEOC's pattern-or-practice claims arise under 42 U.S.C. § 2000e-6 ("Section 707"), not 42 U.S.C. § 2000e-5 ("Section 706"). (*See* Filing Nos. 296, 338.) JBS now argues that Section 707, unlike Section 706, authorizes only the EEOC to investigate charges of discrimination, and therefore the EEOC's claims cannot proceed because it relied on the investigations performed by the NEOC. The EEOC argues that Title VII, its implementing regulations, and the worksharing agreement between the EEOC and the NEOC (Filing No. 356-14), authorize the EEOC to rely on the investigation conducted by the NEOC. The parties agree that Section 706 authorizes the EEOC to delegate its duty to investigate charges of discrimination to state agencies. *See* § 2000e-5(c), (d), (e)(1). Section 707 states that the EEOC "shall have the authority to investigate and act on a charge of a pattern or practice of discrimination [and] such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 [§706]." §707(e), 42 USC §2000e-6(e).

The Court concludes that § 707 of Title VII permits the EEOC to rely on the NEOC's investigation as a precedent to suit. "[A]s with any question of statutory interpretation, the court begins its analysis with the plain language of the statute." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011). JBS argues that § 707(e) makes a distinction between "investigations" and "actions", and only "such actions" must be conducted according to the procedures in § 706. Further, JBS argues that Congress intentionally omitted any express reference to state and local Fair Employment Practices Agencies ("FEPAs") in § 707. In contrast, the EEOC argues that the reference to "such actions" encompasses both the authority to act and to investigate, and that § 707 should be read to include a procedural mandate to follow § 706.

The parties' interpretations illustrate an ambiguity that is resolved by the overall statutory scheme of Title VII and evidence of Congressional intent. Other sections within Title VII expressly contemplate the EEOC's cooperation with state and local agencies charges with the administration of a state's fair employment practices in carrying out the EEOC's functions and duties under Title VII. *See, e.g.,* 42 U.S.C. § 2000e-8(b). Further, § 705 broadly gives the EEOC authority "to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals[.]" The implementing regulations permit the investigation of a charge to be made by the EEOC, "its investigators, or any other representative designated by the Commission. " 29 C.F.R. § 1601.15(a). The regulations expressly state that "[d]uring the course of such investigation, the [EEOC] may utilize the services of State and local agencies which are charged with the administration of fair

employment practice laws or appropriate Federal agencies, and may utilize the information gathered by such authorities or agencies." *Id.*

In the legislative history most closely on point, the House Committee on Education and Labor described the applicable language as "[a]ssimilat[ing] procedures for new proceedings brought under § 707 to those now provided for under Section 706 so that the Commission may provide an administrative procedure to be the counterpart of the present Section 707 action." H. Rep. No. 92-238, reporting H.R. 1746, 92d Cong., 2d Sess., 1972 U.S.Code Cong. & Admin.News 2137, at 2164 (reporting § 707(f) of H.R. 1746).

The parties cite to no case or authority expressly stating whether the EEOC is entitled to rely on the investigation of a FEPA such as the NEOC. However, courts have interpreted Title VII generally as promoting cooperation between the EEOC and state and local authorities. The United States Supreme Court has noted that "Congress envisioned that Title VII's procedures and remedies would 'mes[h] nicely, logically, and coherently with the State and city legislation,' and that remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively.'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63-64 (1980) (citing 110 Cong.Rec. 7205 (1964) (remarks of Sen. Clark)). In referring to the relationship between the procedures describes in § 706 as they apply to § 707, the Fifth Circuit has stated that "Congress apparently intended that the EEOC have investigative and conciliatory authority in 'pattern or practice' situations comparable to its existing powers in § 706 cases." *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 844 (5th Cir. 1975). The Supreme Court has recognized that

Title VII supports worksharing between the EEOC and state and local agencies, and is designed to promote "unnecessary duplication of effort or waste of time." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122 (1988). The Court agrees that the overall promotion of cooperation between agencies, and avoidance of duplicative effort suggests § 707 allows the EEOC to rely on the investigation performed by the NEOC. Accordingly, the EEOC has satisfied the procedural requirement of conducting an investigation of the charges.

2. The Court Cannot Review The Sufficiency Of The Investigation

The Court will not review the sufficiency of the EEOC's pre-suit investigation because the existence of the investigation satisfies the pre-suit requirements. Both parties agree that "[a]s a statutory prerequisite to suit, the EEOC must perform an investigation, and [c]ourts will review whether an investigation occurred." *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 272 (D. Minn. 2009). JBS argues that the Court must also determine whether the investigation was incomplete, careless, or one-sided, or whether the investigation was "a sham enterprise undertaken to reach a predetermined conclusion." (Filing No. 442 at 69.) However, courts "have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation." *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (Posner, J.). For this reason, "as a general rule, 'the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency.'" *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (quoting *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir.1984)); *see also Caterpillar*, 409 F.3d at 833 (stating "The existence of probable cause to sue is

generally and in this instance not judicially reviewable.") (citing *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 242-43 (1980)).

JBS claims that the Eighth Circuit's recent decision in *EEOC v. CRST Van Expedited, Inc.*, permits the Court to review the sufficiency of pre-suit investigations. In *CRST,* the EEOC received charges of sex discrimination against the defendant trucking company, based on allegations of sexual harassment of female drivers/employees by two male drivers. During its pre-suit investigation, the EEOC discovered complaints against other male drivers, leading the EEOC to investigate the entire trucking company. The EEOC brought a lawsuit under § 706 of Title VII on behalf of the charging employee, and "similarly situated female employees." *CRST*, 679 F.3d at 664. The EEOC identified a total of 270 aggrieved individuals during pre-trial discovery, and later narrowed the number to 67. The district court dismissed each of the EEOC claims for failure to comply with the pre-suit requirements.

The Eighth Circuit affirmed the district court's decision with respect to the EEOC's inability to recover an award for the 67 aggrieved individuals. The undisputed facts in *CRST* demonstrated that the EEOC did not investigate allegations of 67 allegedly aggrieved persons until after the complaint had been filed; did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's "class" until after it filed the Complaint; did not make a reasonable-cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint; and did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved persons prior to filing the Complaint. *Id.* at 673. The Eighth Circuit concluded that the EEOC thus failed to satisfy all of its pre-suit obligations for each

individual claim. *Id.* The Eighth Circuit reasoned that there was an important distinction between facts gathered during a pre-suit investigation and facts gathered during the discovery stage of an already filed lawsuit. *Id.* (citing *EEOC v. Dillard's Inc.,* No. 08–CV–1780–IEG (PCL), 2011 WL 2784516, at *5 (S.D.Cal. July 14, 2011) (slip op.).

Contrary to JBS's assertion, *CRST* is not an expansion of the Court's ability to review the substantive findings of the investigation. In *CRST*, the issue was not whether the investigation was substantively sufficient, but whether the EEOC performed the investigation and conciliation steps before filing suit. Here, JBS does not argue that it lacked notice of the individual claims or that an investigation was not performed. Instead, JBS argues that that the investigation was flawed and substantively inadequate. As noted in *CRST* and other authorities, the EEOC enjoys wide latitude to investigate charges of discrimination and to allege claims based on its findings in the investigation. *Id.* at 675. The nature and extent of the investigation is within the discretion of the EEOC, and the Court may not limit the suit to claims that the Court finds to be supported by the evidence obtained in the Commission's investigation. *See CRST*, 679 F.3d at 674; *Caterpillar, Inc.*, 409 F.3d at 833. Accordingly, as a general matter, the Court cannot review the sufficiency of the EEOC's investigation as a means of limiting the EEOC's claims.

3. Charge of Hassan Duwane

The EEOC argues that even if it could not rely on the investigation performed by the NEOC, it satisfied the precondition through its own investigation of the charge filed by Charging Party Hassan Duwane ("Duwane"). JBS argues that the EEOC's investigation of Duwane's charge is invalid because there is no direct evidence that

Duwane ever field a charge and, even if there was, the EEOC failed to investigate Duwane's charge. Because the Court finds the EEOC could rely on the investigation performed by the NEOC, it need not address the validity of the charge filed by Duwane for purposes of the EEOC's pattern-and-practice claims, and need not address whether the investigation satisfies the precondition of filing suit.

B. Conciliation

The Court concludes that the EEOC has made sufficient attempts to conciliate as a prerequisite to filing suit and, at the very least, its efforts preclude dismissal. "The EEOC may bring a direct suit against an employer only after it has attempted to conciliate in good faith but failed to reach an agreement." *EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 996 (8th Cir. 2006) (citing 42 U.S.C. § 2000e–5(f)(1); *Johnson v. Nekoosa–Edwards Paper Co.*, 558 F.2d 841, 848 (8th Cir.1977)). "Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement." *EEOC v. Hickey–Mitchell Co.*, 507 F.2d 944, 948 (8th Cir.1974) (citing 118 Cong.Rec. 7563 (1972) (remarks of Congressman Perkins)). "To satisfy the statutory requirement of good faith conciliation, the EEOC must '(1) outline to the employer the reasonable cause for its belief that the law has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.' " *EEOC v. UMB Bank, N.A.*, 432 F.Supp.2d 948, 954 (W.D.Mo. 2006) (quoting *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003)). "Whether the EEOC has adequately fulfilled its obligation to conciliate is dependent upon the 'reasonableness and responsiveness of the [EEOC's] conduct under all the circumstances.'" *Id.* "The

EEOC's efforts should be considered sufficient if it made a sincere and reasonable attempt to negotiate by providing [the employer] with an 'adequate opportunity to respond to all charges and negotiate possible settlements.'" *Id.* (quoting *EEOC v. One Bratenahl Place Condominium Assoc.*, 644 F.Supp. 218, 220 (N.D.Ohio 1986)).

When a court determines that the EEOC has attempted conciliation, but has not done so in good faith, the Court may stay the proceedings for conciliation efforts to resume. *Hibbing Taconite Co.*, 266 F.R.D. at 273. *Cf. EEOC v. Die Fliedermaus*, 77 F.Supp.2d 460, 467–68 (S.D.N.Y.1999) (court stayed proceedings for thirty days due to a failure to conciliate in good faith where the EEOC had refused to inform the employer of how the EEOC had calculated compensatory damages; court noted that preferred remedy for failure to conciliate is not dismissal but instead a stay to permit such conciliation); *McGee Bros. Co.*, 2011 WL 1542148, at *7 (appropriate remedy for an alleged defect in the conciliation process is an additional opportunity to conciliate). Dismissal may only be an appropriate sanction under extreme circumstances. *Hibbing Taconite*, 266 F.R.D. at 273. *Cf. CRST*, 679 F.3d at 677 (affirming dismissal of the EEOC's complaint for a total failure to investigate, issue reasonable cause finding, or conciliate, and noting that "[h]ad the EEOC not wholly abdicated its role in the administrative process, the court might have stayed the instant action for further conciliation in lieu of dismissal.").

The Court concludes that the EEOC has completed the procedural requirement of conciliation. JBS argues that the EEOC's conciliation letters never identified a discriminatory policy or practice at the Grand Island Facility, and never identified or evaluated what sort of accommodation, if any, might be possible. However, JBS does

not dispute that conciliation efforts took place. The record shows that the EEOC sent a conciliation letter to JBS demanding a monetary settlement and development of an effective plan for religious accommodation. (Filing No. 417 at 98-99.) These letters outlined the EEOC's reasons for its belief that the law had been violated. The letters noted that JBS failed to accommodate the religion of the charging party for each individual claimant, and that such accommodations would not have posed an undue hardship to JBS. (*See* Filing Nos. 346 at 50-51; 358-12.) JBS argues that this description falls short of advising JBS of any meaningful notice of facts underlying the EEOC's determination that Title VII had been violated. However, the determination of whether the EEOC has fulfilled its obligation to conciliate is dependent upon the "reasonableness and responsiveness of the [EEOC's] conduct under all the circumstances." *Asplundh Tree Expert Co.*, 340 F.3d at 1259. The record shows that the parties engaged in a conciliation conference that included discussions about JBS developing an accommodation plan, and that JBS knew the facts and issues and was expected to formulate the detail of the plan. (Filing Nos. 346 at 51; 417 at 98; Filing No. 357-2 at 2.) Thus, the parties have attempted conciliation; no evidence suggests that these circumstances are sufficiently extreme to merit dismissal due to lack of conciliation; and JBS has not sought a stay to conduct further conciliation. Accordingly, the Court concludes that the EEOC has satisfied the pre-condition of conciliation.

II. Religious Accommodation Pattern-or-Practice Claim

A. Application of the *Teamsters* Framework to EEOC's Phase I Claims

JBS argues that because of the multiple individualized issues inherent in a religious accommodation claim, the method of proof articulated in *Int'l Bhd. of*

Teamsters v. United States, 431 U.S. 324 (1977), is inappropriate for this case, and the EEOC's religious accommodation pattern-or-practice claim should be dismissed.[8] (Filing No. 442 at 89.) Specifically, JBS argues that religious accommodation claims are inappropriate for pattern-or-practice treatment because in order to show unlawful discrimination occurred, a plaintiff must make an individualized prima facie showing that the plaintiff had a sincerely held religious belief. JBS points to two cases holding that the *Teamsters* framework is at least partly inapplicable to sexual harassment and disability discrimination claims. *See e.g., EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 934 (N.D. Iowa 2009) (collecting cases and noting that sexual harassment pattern or practice cases are special because, "the *Teamsters* pattern or practice model breaks down when the unlawful employment practice at issue is sexual harassment based on a hostile work environment."); *Hohider v. United Parcel Serv., Inc*, 574 F.3d 169, 197–200 (3d Cir. 2009) (Rule 23 class could not be certified utilizing the *Teamsters* method of proof because class members ADA claims required individualized determination of whether each member was qualified under the statute).

The Court first notes that neither case cited resulted in dismissal of the applicable case. For example, the district court in *CRST*, noted that the *Teamsters* model "breaks down" if the sexual harassment pattern or practice at issue is based on a hostile work environment. *CRST*, 611 F. Supp. 2d at 934. The district court in *CRST* concluded that if it found that it was "CRST's 'standard operating procedure' to tolerate sexual

[8] The parties agreed that the claims arising in Phase I would be litigated under the *Teamsters* framework, though they retained the right to challenge whether harassment/hostile work environment claims are amendable to a pattern or practice method of proof. (Filing No. 76-1 at 2.)

harassment in its workplaces, the court must apply the *Teamsters* burden-shifting framework as modified by [*Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 875-76 (D. Minn. 1993)]." *Id.* at 937. Thus, even though the *Teamsters* model "broke down," the court used a modified *Teamsters* analysis. Accordingly, even if the *Teamsters* model does not apply to pattern-or-practice claims based on religious accommodation, JBS has not explained why dismissal would be the appropriate remedy.

JBS does not suggest that the Court should follow a modified *Teamsters* model, or that another framework should be used. The Court notes JBS's concerns about the evidence showing that the religious beliefs of the claimants in this case may vary. However, these concerns can be addressed within the *Teamsters* framework. Title VII's implementing regulations require employers "to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b)(1), (2). Thus, to the extent the individual workers' beliefs vary, JBS can present this evidence during Phase I of the trial as part of proving its hardship defense. *See EEOC v. JBS USA, LLC*, No. 10-CV-02103-PAB-KLM, 2011 WL 3471080, at *7 (D. Colo. Aug. 8, 2011). Further, to the extent the workers' varied beliefs related to prayer requests could affect Phase I of the trial, JBS has not requested that the Court reconsider bifurcation. In short, even if the evidence suggests that the workers' beliefs vary widely, the Court can find no reason that the *Teamsters* framework should not be applied, and no alternative framework has been set forth. Accordingly, the Court will apply the *Teamsters* framework to Phase I of the trial, unless the evidence demands that another standard must be applied.

B. *Teamsters* Standard in the Pattern-or-Practice Claim

JBS assets that even if the Court proceeds under the *Teamsters* framework, the EEOC cannot meet its heavy burden. Under the *Teamsters* framework "[a] pattern-or-practice lawsuit proceeds in two phases. First, during the 'liability phase,' the plaintiffs are required to establish 'a prima facie case of a policy, pattern, or practice of intentional discrimination against [a] protected group.'" *Reynolds v. Barrett*, 685 F.3d 193, 203 (2d Cir. 2012) (quoting *Robinson v. Metro-North Commuter R.R. Co*, 267 F.3d 147, 158 (2d Cir. 2001)). To make out a *prima facie* case, "a plaintiff must prove that the employer 'regularly and purposefully,' treated members of the protected group less favorably and that unlawful discrimination was the employer's 'regular procedure or policy.'" *EEOC v. McDonnell Douglas Corp.,* 191 F.3d 948, 951 (8th Cir. 1999) (internal citations omitted) (quoting *Teamsters,* 431 U.S. at 360). "During the first stage of a pattern-or-practice case, for example, a summary judgment motion (whether filed by plaintiffs or defendants) must focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant limitations period." *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1109 (10th Cir. 2001). A pattern or practice exists when "the discriminatory acts were not isolated, insignificant, or sporadic, but were repeated, routine, or of a generalized nature; in other words, discrimination must have been 'the company's standard operating procedure—the regular rather than the unusual practice.'" *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1265 (8th Cir. 1987) (quoting *Teamsters*, 431 U.S. at 336 & n. 16).

"Once the plaintiffs make out a prima facie case of discrimination in a pattern-or-practice case, the burden of production shifts to the employer to show that the evidence proffered by the plaintiffs is insignificant or inaccurate." *Reynolds*, 685 F.3d at 203. "Typically, this is accomplished by challenging the 'source, accuracy, or probative force' of the plaintiffs' statistics." *Id.* (quoting *Robinson*, 267 F.3d at 159 (internal quotation marks omitted)). "If the defendant satisfies its burden of production, the trier of fact must then determine, by a preponderance of the evidence, whether the employer engaged in a pattern or practice of intentional discrimination." *Id.*

1. Sufficiency of the EEOC's Proof of Pattern or Practice

JBS's arguments regarding the sufficiency of the EEOC's evidence are noted, but are not appropriate for summary judgment. As stated above, the EEOC bears the initial burden of coming forth with sufficient evidence to show that intentional discrimination was the defendant's "standard operating procedure." *Teamsters*, 431 U.S. at 336. To establish that discrimination was a standard operating procedure, "[n]ormally, the plaintiff will produce statistical evidence showing disparities between similarly situated protected and unprotected employees with respect to hiring, job assignments, promotions, and salary, supplemented with other evidence, such as testimony about specific incidents of discrimination.'" *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 470 (8th Cir. 1984).

JBS concedes that statistical evidence is not always necessary to establish a prima facie case of discrimination. However, JBS states that the Court should take into account the lack of statistical evidence in making its determination. (*See* Filing No. 442 at 91 (citing *Craik*, 731 F.2d at 470)). The Court notes the lack of statistical evidence

supporting the EEOC's claims, but concludes that disposal of the EEOC's claims on that basis is insufficient for purposes of summary judgment. The EEOC relies on the testimony of JBS's human resources generalist, supervisors, superintendents, and the business agent for the Union. JBS argues that much of the testimony is inaccurately cited, taken out of context, and otherwise misrepresented. (Filing No. 442 at 98.) Much of JBS's challenge to the EEOC's characterization of the evidence is not centered on the content of the testimony, but relates to whether such testimony establishes a pattern or practice. (*See e.g.* Filing No. 442 at 37, 39-57; *see also* Filing No. 429 at 7-15.) The Court cannot conclude as a matter of law that the testimony cited by the EEOC fails to establish a pattern or practice, and factual issues remain about the sufficiency of the EEOC's evidence.

2. Merits of the EEOC's Religious Accommodation Claim

JBS's argues that if even if the EEOC's evidence is sufficient to survive summary judgment, the EEOC cannot establish that JBS engaged in a pattern or practice of denying claimants a reasonable religious accommodation. JBS argues that it provided Somali Muslim employees with a reasonable accommodation and that JBS had no policy of denying employees unscheduled breaks to pray. JBS further argues that the EEOC cannot base its religious accommodation pattern-or-practice claim on changes to the meal break time; cannot demonstrate that unscheduled prayer breaks are reasonable; and cannot show that unscheduled prayer breaks would not pose an undue hardship. The EEOC argues that it is entitled to judgment as a matter of law on its pattern-or-practice claim regarding JBS's denial in 2007 and 2008 of reasonable

accommodation of the aggrieved Somali Muslim employees' requests for unscheduled breaks to pray. (Filing No. 343.)

The Court has thoroughly reviewed the arguments and evidence submitted by both parties and concludes that material issues of fact remain for trial on the EEOC's religious accommodation claim. Such issues of fact may include, but are not limited to the following:

- The EEOC submitted evidence that JBS's corporate office set company-wide polices regarding the permissibility of unscheduled prayer breaks. The EEOC cited the depositions of JBS human resources generalist Doug Schult, supervisor Salvador Prado, superintendent Roger Cooper, and Union business agent Terry Mostek, supporting to the proposition that JBS's corporate office set the policies regarding breaks for prayer. (*See* Filing No 417 at 112-13.)

- JBS presented controverting evidence that JBS did not have a corporate policy for unscheduled prayer breaks for Somali Muslims. (See e.g. Filing No. 442 at 42.) JBS asserts that the company had no regular policy or practice in place concerning prayer during unscheduled breaks. (*See* Filing No. 346 at 25.) JBS cites the deposition testimony of several JBS representatives and employees to the effect that supervisors had discretion to permit unscheduled breaks depending on a number of factors, and that the witnesses were not aware of a company-wide policy regarding unscheduled prayer breaks. (*See e.g.* Filing No. 347-1 at 127:4-128:14, 131:7-16, 232:14-21; Filing No. 347-2 at 58:17-59:3; Filing No. 347-4 at 92:24-:93-12, 123:6-16, 128:11-21; Filing No. 348-2 at 178:8-179:12.)

- JBS presented evidence that supervisors occasionally allowed people to leave the line for unscheduled breaks to pray and use the restroom, so long as the departure from the line did not create safety issues or cause product flow issues. (See *e.g.* Filing No. 348-3 at 31:3-15.) At least one supervisor testified that in 2007 and 2008, JBS management directed him to allow a Somali Muslim to break for prayer if possible. (Filing No. 348-4 at 124:15-21, 55:12-23, 61:1-62:8, 152:9-19, 153:2-5.)

- JBS presented evidence establishing issues of fact with respect to whether JBS's corporate office knew about religious accommodation requests and how the corporate office responded to such requests. (Filing No. 420 at 142:13; 144:23.) JBS argues that the testimony cited by the EEOC does not establish the existence of a policy or regular practice related to supervisors granting or denying unscheduled prayer breaks. (*See e.g.* Filing No. 350-3 at 57:3-59:19.)

- The EEOC argues that even if JBS did not have a company policy regarding breaks, JBS's break policy in 2007 and 2008 did not allow a person to be permitted to use a bathroom break to pray. (*See* Filing No. 417 at 117, 118-120.) Further, the EEOC presented evidence that Muslim employees could only pray on official breaks—the scheduled breaks or the meal breaks—under the CBA. (*Id.* at 117.) The EEOC argues that this evidence demonstrates that even though the CBA required JBS to provide reasonable accommodation to employees based on religious tenets, Somali Muslims were not allowed to use informal breaks to pray. (*Id.*; *see also* Filing No. 419-5 at 131:24-132:3.)

- The EEOC presented evidence that at some point JBS discussed changing the bathroom break policy to allow Muslim employees to pray during bathroom breaks and to honor that request just like a bathroom break request. (Filing No. 419-5 at 172:21-173:6.) The EEOC asserts that JBS changed the guidelines on August 10, 2009, to allow unscheduled breaks for prayer, at least during Ramadan; and that there were no hurdles to implementing the new guidelines in 2007 and 2008. (Filing No. 419-4 at 259:21-260:13; Filing No. 420-2.)

- JBS contends that the "new policy" regarding unscheduled breaks was intended to confirm the policy already in place. (Filing No. 358-13 at CM/ECF p. 5.) Further, JBS produced evidence that accommodation would create an undue burden on production at the Grand Island Facility. JBS presented testimony that it is in a competitive industry with low margins, and the more employees off the line and the longer they are away from the line, the greater the financial impact on JBS. (Filing No. 349-5 at 165:16-20, 197:18-22; 198:3-6.) In other words, the larger the number of employees seeking to leave the production line to pray, the harder it could be to accommodate them. (Filing No. 354-5 at 113:9-14, 114:4-24, 116:1-6.) The parties' conflicting evidence creates factual issues about the burden on JBS to accommodate the requests.

- The EEOC disputes the sufficiency and reliability of this evidence. (Filing No. 417 at 179.) The EEOC also submitted evidence that competitors in JBS's industry have accommodated unscheduled prayer breaks. (See Filing No. 417 at 137.)

- The parties dispute whether any action was taken to make sure that supervisors handled prayer issues on the production floor. JBS asserts that after the incidents of Ramadan 2008, JBS's Vice President of HR Jack Shandley advised Chmelka and Sydow that supervisors needed to be consistent when handling prayer issues, but that there was no evidence either of them took any action in response to Mr. Shandley's note. (Filing No. 346 at 15.) The EEOC argues that either Sydow or Chmelka told Union representative Terry Mostek that employees will be written up the first time they walk off the line for an unscheduled prayer break, and the second time, they would be terminated. (Filing No. 417 at 26.)

- The parties also disagree about whether JBS knew whether Somali Muslims believed there was less than a 45 minute window for praying after sunset. (*See* Filing No. 346 at 15; Filing No. 417 at 27.)

It is not feasible or advisable to outline every disputed material fact that remains at issue in the EEOC's reasonable accommodation claim. In support of their respective motions and responses, the parties have submitted over 600 "statements of undisputed facts," many of which rely on the credibility of dozens of deposed witnesses, and the weighing of a large amount of evidence. Where such credibility issues are key factors, summary judgment is generally inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Keys v. Lutheran Family & Children's Services of Missouri*, 668 F.2d 356, 358 (8th Cir. 1981). Courts do not treat summary judgment as if it were a paper trial. *Archer Daniels Midland Co. v. Eco, Inc.*, 821 F. Supp. 2d 1083, 1093 (S.D. Iowa 2011). Thus, a "district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). The Court's job is only to decide, based on the evidence submitted, whether there really is any material dispute of fact that still requires a trial. *See id.* (citing *Anderson*, 477 U.S. at 249, and 10 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2712 (3d ed. 1998)). The Court concludes that issues of fact remain about the EEOC's reasonable accommodation claim. Accordingly, JBS's Motion for Summary Judgment on this issue is denied, and the EEOC's Motion for Summary Judgment is denied in its entirety.

III. Pattern or Practice of Unlawful Termination and Retaliation

The Court concludes that the EEOC cannot establish a pattern or practice of unlawful termination or retaliation based on JBS's isolated termination of 80 Somali Muslim employees. To succeed on a pattern-or-practice claim, the EEOC is required "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336. In other words, in order to prove a pattern or practice of discrimination, plaintiffs must prove that unlawful discrimination is "the company's standard operating procedure," *Teamsters,* 431 U.S. at 336. As the Supreme Court has explained, "it must be established by a preponderance of the evidence that '[the impermissible] discrimination was the company's standard operating procedure-the regular rather than the unusual practice." *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 875 (1984). Multiple courts have recognized that multiple acts of discrimination are required to establish a pattern or practice. For example, in *Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1364 (D.N.J. 1996), the court determined that no reasonable jury could find that an employer engaged in a pattern or practice of discrimination under the ADEA in conducting a one-time mass reduction in force. The court reasoned that "pattern-or-practice claims are only appropriate where the class plaintiffs seek to enjoin the defendant from engaging in existing or threatened discriminatory behavior and because a "one-shot" event cannot constitute a pattern or practice of discrimination." *Id.* Similarly, in *Oinonen v. TRX, Inc.*, 3:09CV1450-M, 2010 WL 396112 (N.D. Tex. Feb. 3, 2010), the plaintiffs provided allegations related to a single mass layoff. The court concluded that a single event was insufficient to demonstrate that unlawful discrimination was the company's standard

operating procedure rather than an isolated event. *Id.* (citing *Cooper*, 467 U.S. 867, 875).

The Court finds the reasoning in these cases persuasive as applied to the undisputed facts in this case. The EEOC does not allege that JBS adopted a declared, discriminatory termination policy, nor does it adequately connect the terminations to an unstated discriminatory policy. The mass termination of 80 Somali Muslims serves as the sole basis for the EEOC's pattern-or-practice claims of unlawful termination and unlawful retaliation. Although the EEOC refers to the mass termination as "eighty decisions to terminative eighty Somali Muslim employees," it is undisputed that mass termination was a single action in response to the events of September 18, 2008. Nevertheless, the EEOC claims that JBS had a pattern and practice because "[t]his decision-making is repeated and consistent discriminatory treatment that qualifies as a pattern or practice—regardless whether it happened in a single day or over several days or weeks." (Filing No. 417 at 186). However, the EEOC provides no evidence that JBS terminated Somali Muslims as a matter of pattern or practice. The Court concludes as a matter of law that the single mass termination is insufficient to establish a pattern or practice of unlawful termination or retaliation.

The EEOC attempts to interject evidence of mass terminations that occurred at JBS's Greely, Colorado, Facility a few days before the mass terminations at the Grand Island Facility, suggesting that the multiple mass terminations demonstrate a pattern. The incidents in the Greely, Colorado, Facility are the subject of a parallel case in the United States District Court, District of Colorado. *See generally EEOC v. JBS USA,*

LLC, No. 10-CV-02103-PAB-KLM, at Filing No. 1(D. Colo. Aug. 8, 2011).[9] The EEOC's Amended Complaint does not reference JBS's Greely, Colorado, facility, and the basis for its claims arise exclusively in the Grand Island Facility. (*See* Filing No. 99.) The EEOC chose to bring separate actions for each facility in separate forums, and now apparently seeks to use evidence from the Colorado action to support its pattern-or-practice claims in this case. The Court concludes that its analysis should not include evidence from the Greely, Colorado Facility. As of the writing of this Memorandum and Order, the case in Colorado remains in the discovery phase. The EEOC has not provided sufficient evidence to show that the events in Greely, Colorado, occurred under the same circumstances as the events in Grand Island. Allowing the EEOC to proceed to trial based in part on evidence from pertaining to the Colorado case before such evidence has been fully developed would be unfairly prejudicial to JBS, particularly where JBS had no notice that it would need to defend against claims in the Colorado case in this action. Accordingly, the Court will not consider evidence from the facility in Greely, Colorado.

The EEOC also cites *Ste. Marie v. E. R. Ass'n*, 650 F.2d 395, 406 (2d Cir. 1981), for the proposition that it can sustain its pattern or practice claims based on a single occurrence. In *Ste. Marie*, the court held that two alleged instances of sex discrimination by an employer when hiring for managerial positions was insufficient to support inference of pattern or practice. *Id.* The court noted that while "[w]hile the definition of a pattern or practice is not capable of a precise mathematical formulation, .

[9] On its own motion, the Court takes judicial notice of the parallel proceedings before the District of Colorado.

. . more than two acts will ordinarily be required." *Id.* (internal citations omitted). Despite the holding, the EEOC points to the court's statement that "[i]f there were evidence that a policy of discrimination had been adopted, perhaps two or even one confirmatory act would be enough." *Id.*

The EEOC alleges that JBS "made a policy choice at the corporate level to terminate dozens of Somali Muslims who engaged in work stoppages over the prayer issue but not to terminate dozens, even hundreds, of Hispanic/Catholic employees who engaged in the same or similar conduct -- work stoppages." Even if JBS's actions were discriminatory, the EEOC has not demonstrated that the terminations were more than a single event. Such a one-time occurrence is insufficient to demonstrate JBS's standard operating procedure, or show a pattern or practice. Such a ruling does not preclude arguments in Phase II that JBS's actions were discriminatory. Accordingly, the Court concludes the EEOC has not established a pattern or practice of unlawful termination, or unlawful retaliation.

CONCLUSION

For the reasons stated above, the Court concludes that the EEOC has met the procedural requirements for bringing suit. Material issues of fact remain concerning whether JBS engaged in a pattern or practice of denying reasonable accommodation to its aggrieved Somali Muslim employees' requests for break times to pray. Finally, the Court concludes the EEOC has failed as a matter of law to establish a pattern or practice of unlawful termination or retaliation in violation of Title VII. Accordingly,

IT IS ORDERED:

1. The Motion for Summary Judgment (Filing No. 342) filed by Defendant JBS USA, LLC f/k/a JBS Swift & Co., a/k/a Swift Beef Company ("JBS") is granted in part, as follows:

   a. The Equal Employment Opportunity Commission's ("EEOC") claims that JBS engaged in a pattern or practice of unlawful termination based on religion and/or national origin are dismissed, with prejudice;

   b. The EEOC's claims that JBS engaged in a pattern or practice of unlawful retaliation for engaging in protected activity in violation of Title VII are dismissed, with prejudice;

   c. JBS's Motion is otherwise denied; and

2. The Motion for Partial Summary Judgment (Filing No. 343) Filed by Plaintiff Equal Employment Opportunity Commission, is denied.

Dated this 12th day of April, 2013.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge

700 F.3d 944 (2012)

Latice PORTER, Plaintiff-Appellant,

v.

CITY OF CHICAGO, Defendant-Appellee.

No. 11-2006.

United States Court of Appeals, Seventh Circuit.

Argued September 11, 2012.
Decided November 8, 2012.

948 *948 Matthew P. Weems (argued), Attorney, Law Office of Matthew Weems, Chicago, IL, for Plaintiff-Appellant.

Suzanne M. Loose (argued), Attorney, City of Chicago Law Department, Chicago, IL, for Defendant-Appellee.

Before BAUER, POSNER, and WOOD, Circuit Judges.

BAUER, Circuit Judge.

Latice Porter sued the City of Chicago, alleging that the City failed to accommodate her religious practice, discriminated against her on the basis of her religion, and retaliated against her for engaging in protected activity in violation of Title VII, 42 U.S.C. § 2000e *et seq.* The district court granted the City's motion for summary judgment and denied Porter's motion for partial summary judgment, and Porter appealed. For the reasons that follow, we affirm.

I. BACKGROUND

As this is an appeal from an award of summary judgment to the City, we must construe the facts in the light most favorable to Porter. *See Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010). Porter has been employed by the City in the Field Services Section ("FSS") of the Records Services Division of the Chicago Police Department since June 10, 1991. The FSS receives and responds to information requests from police personnel and other law enforcement agencies. The FSS staff includes sworn police sergeants, police officers, and civilian employees. Since January 1, 2001, Porter has been a Senior Data Entry Specialist, which is a civilian position. Porter was most recently assigned to the "auto desk," where employees process information in various electronic databases about towed, stolen, repossessed, or recovered vehicles.

The FSS operates twenty-four hours a day, seven days a week. FSS employees are divided into "watches" for purposes of scheduling: the first watch runs from 11:30 p.m. to 7:30 a.m.; the second watch runs from 7:30 a.m. to 3:30 p.m.; and the third watch runs from 3:30 p.m. to 11:30 p.m. Employees are also assigned to groups for their days off; certain employees are assigned to the Friday/Saturday days-off group or the Saturday/Sunday group, and others are assigned to other days-off groups.

During Porter's employment in the FSS, several people were involved in determining or approving FSS employees' work schedules. Joseph Perfetti was the manager of the FSS from April 2002 until August 2008. As manager, Perfetti supervised several sergeants who served as watch commanders and ran the day-to-day operations of the FSS, including determining employees' schedules. Sergeants Geraldine Sidor, Wanda Torres, and H.A. McCarthy served as watch commanders in the FSS and had the authority to change the days-off schedules of FSS employees at various times between 2004 and 2009. Marikay Hegarty was the Director of Records from late 2004 until late 2006, and, in this capacity, had the authority to determine and approve FSS

949 employees' work *949 schedules. Perfetti assumed the role of Acting Director of the Records from November 2006 untii August 2008.

Porter identifies herself as Christian, and she attends church services, bibie studies, and prayer services at the Apostoiic Church of God. Sunday church services are heid at 9:00 a.m., 11:45 a.m., and sometimes 4:00 p.m. Porter has aiso attended services on Friday nights, Wednesday night bible study, and prayer services on Tuesdays.

Before 2005, Porter worked in a different section of the FSS and had a scheduie that required her to work the second watch. She initiaiiy had a rotating-weekend days-off scheduie, which was changed to an aiternating-weekend days-off schedule. This meant that Porter had every other Saturday and Sunday off.

On March 18, 2005, Sergeant Sidor assigned Porter to the Friday/Saturday days-off group beginning March 31, 2005. That same day, Porter sent a memorandum to Hegarty requesting to be assigned to the Sunday/Monday days-off group. She aiso informed Sergeant McCarthy that she wanted Sundays off because she was invoived in her church and sang in the church choir. Sergeant McCarthy approved Porter's request and reassigned her to the Sunday/Monday days-off group effective March 27, 2005.

in August 2005, Porter sent a ietter to her supervisors requesting to work a iater shift on Saturdays so she couid attend ciasses as a student minister. Sergeant Torres approved Porter's request, and she was assigned to work from 1:30 p.m. to 8:30 p.m. on Saturdays for the duration of the ciass, approximateiy ten weeks. Porter remained on the second watch scheduie for the other days of the week.

in October 2005, Porter took ieave pursuant to the Famiiy and Medicai Leave Act ("FMLA") due to a car accident and pregnancy compiications. Foiiowing her three months of FMLA ieave, Porter took a medicai ieave of absence for another six months. She returned to the FSS on Juiy 16, 2006.

Upon Porter's return, Sergeant Sidor recommended assigning Porter to the Friday/Saturday days-off group, and Perfetti approved the assignment. Porter remained on the second watch. According to Sergeant Sidor and Perfetti, Porter's assignment was based on "operationai needs" to "balance the workforce" because more civilian employees were in the Sunday/Monday days-off group than the Friday/Saturday group at the time of Porter's return. Sergeant Sidor was not aware that Porter preferred Sundays off in order to attend church services.

After receiving her assignment, Porter met with Perfetti and asked to be reassigned to the Sunday/Monday days-off group because of her church invoivement. On July 24, 2006, following the advice of her union president, Porter submitted a Request for Change of Job Assignment Form asking for a change to the Sunday/Monday days-off group. Perfetti told Porter that her request would be accommodated when an opening became available in the Sunday/Monday group. Perfetti also asked a sergeant in the FSS to find out if any other employee assigned to the auto desk would be willing to switch days-off groups with Porter. Sergeant McCarthy asked the auto desk employees if anyone would switch with Porter; no one volunteered.

Porter also communicated with Hegarty regarding her request to change her schedule. Hegarty said she wanted to help Porter and mentioned the option of Porter "going to 3:00 to 11:00" on Sundays. Porter did not follow up with Hegarty about that option.

950 *950 Porter contends that she was intimidated and harassed by her supervisors at the FSS, both before and after she returned from medical leave. According to Porter, the sergeants and other supervisors in the FSS yelled at her and taunted her, calling her "church girl." She was also threatened with being written up in a complaint register by Sergeant McCarthy for coming to work on a day that she was scheduled to have off. When Porter complained to Perfetti, Perfetti refused to change her days-off schedule. As a result of these incidents, Porter filed internal grievances.

On August 25, 2006, Porter filed a Chicago Commission on Human Relations ("CCHR") complaint alleging religious discrimination against the City, Sergeant Sidor, and Perfetti.[1] She also filed a charge alleging religion-based discrimination with the Equal Employment Opportunity Commission ("EEOC") on September 14, 2006.

Between the time Porter returned to the FSS on July 16, 2006, and November 12, 2006, Porter was absent from work on some or all of thirty-four days. Sixteen of these days were Sundays. On November 12, 2006, Sergeant Patrick Chambers issued Porter a "counseling session report" regarding her pattern of taking Sundays off. The report contains preprinted text stating that it "is not a disciplinary action," and that its purpose is "to identify concerns or poor performance" and to "advise[ ] the [employee] that continued action of this kind is unacceptable and may result in either more formalized counseling or intervention." The report also sets forth the reasons Porter provided Sergeant McCarthy for failing to report to work on Sundays: that her "chest hurts after working (5) days" and that she "has a (7) month old baby she has to hold which she holds in a special way." Porter also said that her absences were not intentional.

On November 14, 2006, Porter requested medical leave "due to chronic pain and physical therapy." She took a leave of absence on November 16, 2006, and has not returned to the FSS.

Porter filed suit on December 12, 2008, alleging that the City violated Title VII by failing to accommodate her religious practices, discriminating against her based on her religion, and retaliating against her for requesting an accommodation and complaining of religious discrimination. Following discovery, Porter moved for summary judgment as to her failure-to-accommodate claim, and the City moved for summary judgment on all claims.[2] The district court denied Porter's motion and granted summary judgment in favor of the City, concluding that the City had reasonably accommodated Porter's religious practice, and that Porter had failed to put forth sufficient evidence in support of her claims that the City discriminated and retaliated against her.

II. DISCUSSION

We review the grant of summary judgment de novo. *MMG Fin. Corp. v. Midwest Amusements Park, LLC*, 630 F.3d 651, 656 (7th Cir.2011). In doing so, we construe all the relevant facts and inferences in the non-moving party's favor. *Id.* We will affirm only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

951 *951 Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to [sic] an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e-(j). These provisions of Title VII prohibit an employer from intentionally discriminating against an employee based on the employee's religion, and require an employer to make reasonable efforts to accommodate the religious practices of employees unless doing so would cause the employer undue hardship. *See Reed v. Great Lakes Cos.*, 330 F.3d 931, 934-35 (7th Cir.2003) (citations omitted). Additionally, under Title VII employers may not retaliate against an employee who "opposed any practice" that is unlawful under the statute, or who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the statute]." 42 U.S.C. § 2000e-3(a). On appeal, Porter contends that there are disputed questions of fact regarding whether the City failed to accommodate her religious practice, discriminated against her based on her religion, and retaliated against her for engaging in activity protected under Title VII. We discuss each of Porter's claims in turn.

A. Failure to Accommodate

In order to make out a prima facie case of religious discrimination based on an employer's failure to provide reasonable accommodation, a plaintiff "must show that the observance or practice conflicting with an employment requirement is religious in nature, that she called the religious observance or practice to her employer's attention, and that the religious observance or practice was the basis for her discharge or other discriminatory treatment." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir.1997) (citations omitted). Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any reasonable accommodation would result in undue hardship. *Id.* at 1575-76. Here, the City does not dispute that Porter has put forth sufficient evidence to defeat summary judgment as to her prima facie case. Our inquiry therefore focuses on whether there is a genuine issue of material fact regarding whether the City satisfied its duty to reasonably accommodate Porter's religious practices or established that doing so would result in undue hardship.

The reasonable accommodation requirement of Title VII is meant "to assure the individual additional opportunity to observe religious practices, but it [does] not impose a duty on the employer to accommodate at all costs." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)). This means that a "reasonable accommodation" of an employee's religious practices is "one that `eliminates the conflict between employment requirements and religious practices.'" *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir.1993) (quoting *Philbrook*, 479 U.S. at 70, 107 S.Ct. 367). It need not be the employee's preferred accommodation or the accommodation most beneficial to the employee. *Philbrook*, 479 U.S. at 69, 107 S.Ct. 367. Accordingly, "[o]nce
952 the employer has offered *952 an alternative that reasonably accommodates the employee's religious needs ... `the statutory inquiry is at an end[.]'" *Ilona*, 108 F.3d at 1576 (citations omitted).

The City contends that it attempted to accommodate Porter's religious practices in several ways. Specifically, the City points to Hegarty's suggestion of a change to a later watch; Perfetti's offer to give Porter the next available opening in the Sunday-Monday days-off group; and Sergeant McCarthy's request for volunteers to switch days-off groups with Porter. We begin and end with Hegarty's suggestion of a watch change as we conclude that the undisputed facts establish that this was a reasonable accommodation.

In her interrogatory answers, deposition testimony, and declaration, Porter stated that she spoke with Hegarty about changing her schedule after returning to work and being assigned to the Friday/Saturday days-off group. [3] According to Porter, Hegarty, who had the authority to determine and approve the schedules of FSS employees at the time, wanted to help her and suggested that she could switch from her current 7:30 a.m. to 3:30 p.m. watch to the 3:30 p.m. to 11:30 p.m. watch.[4] As Porter sought to attend church services on Sunday mornings, this change in Porter's schedule would have eliminated the conflict between her work schedule and her religious practice, and there is no evidence that this change would have impacted Porter's pay or benefits in any way. Given these undisputed facts, Hegarty's offer of a watch change was a reasonable accommodation. *See Wright*, 2 F.3d at 217; *see also Rodriguez v. City of Chi.*, 156 F.3d 771, 776 (7th Cir.1998) (listing cases and noting that "it is a reasonable accommodation to permit an employee to exercise the right to seek job transfers or shift changes, particularly when such changes do not reduce pay or cause loss of benefits"). In fact, Porter had previously received a similar accommodation in August 2005 in order to attend ministry classes on Saturday mornings.

Porter's deposition testimony makes clear that she did not want to work the later watch and instead preferred to be returned to the Sunday/Monday days-off group she was in prior to taking medical leave. Nevertheless, "it is well settled that `Title VII ... requires only reasonable accommodation, not satisfaction of an employee's every desire.'" *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir.2001) (quoting *Rodriguez*, 156 F.3d at 776). Had changing watch groups affected Porter's pay or other benefits, a much more rigorous inquiry

would be required. That is not the case before us, however. Porter simply did not want to work the later watch,
953 but that does not make the proposed accommodation unreasonable. *See* Wright, 2 F.3d at 217 (noting *953 that accommodation offered was reasonable even though it required the plaintiff "to take a job that most people did not want").

Porter does not dispute that changing to a later watch would have eliminated the conflict with the Sunday morning church services she wanted to attend. Instead, she maintains that Hegarty's suggestion was insufficient to meet the City's burden because Hegarty "merely mentioned the possibility of shifting Porter's hours" and Porter "denies she was invited to apply or even informed how to make such a request." We reject these arguments.

In requiring employers to "offer reasonable accommodations," we have encouraged "bilateral cooperation" between the employee and employer and recognized that employers must engage in a dialogue with an employee seeking an accommodation. *See* Rodriguez, 156 F.3d at 777-78 (citing *Philbrook*, 479 U.S. at 69, 107 S.Ct. 367). We have not demanded the hand-holding Porter argues was lacking here, however, for an offer of an accommodation to be sufficient under Title VII. In *Rodriguez,* for example, Officer Rodriguez sent a memorandum to his commander seeking to be exempted from future assignments at abortion clinics because of his religious beliefs; his commander never responded to that request. *Id.* at 773-74. Although this failure concerned us, we held that the City nonetheless satisfied its duty "to open a dialogue with Officer Rodriguez on the question of reasonable accommodation" by engaging in the collective bargaining process with Officer Rodriguez's union, which resulted in a collective bargaining agreement that provided Officer Rodriguez with the option to transfer districts and avoid assignments at abortion clinics. *Id.* at 778. Because Officer Rodriguez was aware of this provision in the collective bargaining agreement, we held that his commanding officer's failure to respond to his request did not prejudice him and was not a violation of Title VII. *Id.*

Here, the undisputed facts give us even less pause than the facts In *Rodriguez*. When Porter went to Hegarty to discuss her schedule, Hegarty proposed the watch change as a possible remedy. Porter, however, expressed no interest In that option and did not pursue it further.[5] We cannot find fault with the City for failing to take further steps to change Porter's watch given these undisputed facts. Additionally, Porter's complaints regarding the City's failure to Inform her as to how to execute a schedule change ring hollow In light of the fact that these requests can be made on the same form that Porter used to request a change of days-off groups, and Porter had successfully changed the hours she worked on Saturdays In August 2005 by requesting the change In a letter to her supervisors. We conclude, as the district court did, that the City discharged its obligation under Title VII by offering Porter an accommodation that would have eliminated the conflict between her work schedule and her religious practice of attending church services on Sunday morning.

B. Disparate Treatment

954 Porter also alleged a disparate treatment claim under Title VII, claiming *954 that she was subjected to adverse employment actions because of her religion. As discussed above, in addition to requiring employers to reasonably accommodate the religious practices of its employees, Title VII also prohibits employers from discriminating against an employee on the basis of the employee's religion. 42 U.S.C. § 2000e-2(a)(1). To defeat an employer's motion for summary judgment on a claim of intentional discrimination under Title VII, a plaintiff can proceed under either the "direct" or "indirect" method of proof. Under the direct method, the method under which Porter proceeds, a plaintiff must marshal sufficient evidence, either direct or circumstantial, that an adverse employment action was motivated by discriminatory animus. Coleman v. Donahoe, 667 F.3d 835, 845 (7th Cir.2012). We have indicated some flexibility in how to approach cases presenting complaints of religious discrimination, but we have consistently required that the employee have been subjected to an adverse employment action in order to maintain a disparate treatment claim. *E.g.,* Sattar v. Motorola, Inc., 138 F.3d 1164, 1169-70 (7th Cir.1998) (citing with approval the approach for a religious discrimination claim set forth in Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir.1993),

requiring that the plaintiff show "(1) that he was subjected to some adverse employment action; (2) that ... the employee's job performance was satisfactory; and (3) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow his or her employer's religious beliefs"); *Venters v. City of Delphi*, 123 F.3d 956, 972-73 (7th Cir.1997). We, like the district court, conclude that Porter failed to put forth sufficient evidence to create a triable issue of fact as to the adverse employment action element.

Although we have defined adverse employment actions "quite broadly," *Oest v. Ill. Dep't of Corrections*, 240 F.3d 605, 612 (7th Cir.2001), an adverse action must materially alter the terms or conditions of employment to be actionable under the antidiscrimination provision of Title VII. *See Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (explaining that the terms of the antidiscrimination provision of Title VII "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace"). This means that the action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1120 (7th Cir.2009) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). For example, a "materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady*, 993 F.2d at 136 (citations omitted). We have cautioned, however, that "not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that `an ... employee did not like would form the basis of a discrimination suit.'" *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir.1996) (citation omitted).

On appeal, Porter contends that her placement in the Friday/Saturday days-off group upon her return from medical leave in July 2006 and the issuance of the counseling session report in November 2006 were adverse
955 employment actions. Porter fails, however, to put forth evidence *955 that either of these actions materially altered the terms or conditions of her employment. Absent such evidence, these actions are indistinguishable from the schedule changes and reprimands without material consequences that we have held generally do not constitute adverse employment actions. *See Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 602 (7th Cir. 2009) ("[W]ritten reprimands without any changes in the terms or conditions of ... employment are not adverse employment actions.") (citations omitted); *Oest*, 240 F.3d at 613 (finding that written reprimands received under progressive discipline policy were not adverse employment actions); *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 728 (7th Cir.2001) (rejecting the plaintiff's constructive discharge claim and observing that "[the employer's] decision to change [the plaintiff's] working hours certainly does not rise to the level of an adverse employment action" because the plaintiff's "pay and job title remained the same, and she suffered no significantly diminished job responsibilities").

Nonetheless, as Porter points out, these are not hard and fast rules. We held in *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir.2005), that given the plaintiff's unique circumstances, a reasonable jury could conclude that the alteration of her work schedule constituted an adverse employment action for purposes of her retaliation claim. Specifically, we noted the evidence suggesting that in altering the plaintiff's schedule, the employer sought to exploit a known vulnerability of the plaintiff — her reliance on her previously established flex-time schedule so she could care for her son, who had Down's syndrome. *Id.* Additionally, the evidence indicated that the schedule change "caused a significant (and hence an actionable) loss" to the plaintiff because she was forced to use leave for two hours per day, causing her vacation and sick leave to drain away. *Id.* at 662-63.

Washington is clearly distinguishable from the case before us, however. Porter has failed to point to any evidence in the record suggesting that her assignment to the Friday/Saturday days-off group in July 2006 after her nine-month leave was meant to exploit "a known vulnerability," namely, her practice of attending church on Sunday mornings. Instead, in testimony that remains uncontradicted, Sergeant Sidor and Perfetti stated that Porter was placed in that group to balance the days-off groups, and as discussed above, Hegarty tried to

resolve the conflict between Porter's work and church schedules. Furthermore, although Porter claims she suffered an economic loss when she had to use her vacation and sick days, and ultimately unpaid time, to take Sundays off, the undisputed evidence — including Porter's own statement in the counseling session report — indicates that she took those days off for medical reasons, not to attend church. Although Porter now argues that a jury could infer the contrary, she cites no evidence in support of that inference.

Porter also contends that her disparate treatment claim is actionable because she was subjected to a hostile work environment. This theory fares no better. To prevail on a hostile work environment claim, Porter must demonstrate that: "(1) her work environment was both objectively and subjectively offensive; (2) the harassment complained of was based on her [religion]; (3) the conduct was either severe or pervasive; and (4) there is a basis for employer liability." *Scruggs v. Garst Seed Co.*, 587 F.3d 832, 840 (7th Cir.2009) (citing *Dear v. Shinseki*, 578 F.3d 605, 611 (7th Cir.2009)). In determining whether the evidence in support of a hostile work
956 environment claim meets this standard, we consider the totality of the circumstances, *956 *Venters*, 123 F.3d at 975, including "the severity of the allegedly discriminatory conduct, its frequency, whether it is physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with an employee's work performance." *Scruggs*, 587 F.3d at 840 (citation omitted).

Here, the only specific instances of harassment Porter has alleged are being called "church girl," being told to sit down "in a high-pitched voice" by her supervisor, being threatened with a "CR complaint" when she showed up to work on one of her days off, and receiving the counseling session report in November 2006. Even assuming that Porter can show that this conduct was based on her religion, we agree with the district court that it was not severe or pervasive enough to fall within Title VII's purview. Porter's vague and conclusory allegations of being "harassed" and "intimidated" by her supervisors do not change our conclusion; without more detail, a reasonable jury could not find that the conduct was objectively offensive, severe, or pervasive. *See Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir.2010) ("We often call summary judgment the `put up or shut up' moment in litigation, by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case. And by evidence, we mean evidence on which a reasonable jury could rely." (internal citations omitted)); *Payne v. Pauley*, 337 F.3d 767, 772-73 (7th Cir.2003) ("[T]he Federal Rules of Civil Procedure require the nonmoving party to `set forth specific facts showing that there is a genuine issue for trial.' Conclusory allegations, unsupported by specific facts, will not suffice." (quoting Fed.R.Civ.P. 56(e))). Viewing the record before us in the light most favorable to Porter, the most we can say is that she was subject to sporadic inappropriate and rude comments by her supervisors, but "[o]ffhand comments, isolated incidents, and simple teasing do not rise to the level of conduct that alters the terms and conditions of employment." *Scruggs*, 587 F.3d at 840-41 (citation omitted). Because Porter failed to put forth evidence from which a reasonable jury could conclude that her work environment was objectively offensive and that the conduct complained of was severe or pervasive, summary judgment was appropriate on this claim.

C. Retaliation

Porter's final claim is that the City retaliated against her for engaging in protected activity under Title VII. In addition to prohibiting discrimination, Title VII "forbids retaliation against anyone who `has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].'" *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 314 (7th Cir.2011) (quoting 42 U.S.C. § 2000e-3(a)). The purpose of this antiretaliation provision is to "prevent employer interference with `unfettered access' to Title VII's remedial mechanisms ... by prohibiting employer actions that are likely `to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Burlington N. and Santa Fe Ry. Co.*, 548 U.S. at 68, 126 S.Ct. 2405 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). Because of this purpose and the textual distinction between the antiretaliation provision and the

antidiscrimination provision, the Supreme Court has held that "Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct ... and [it] is not limited to discriminatory actions that
957 affect the terms *957 and conditions of employment." *Thompson v. N. Am. Stainless, LP*, ___ U.S. ___, 131 S.Ct. 863, 868, 178 L.Ed.2d 694 (2011) (internal quotation marks and citations omitted). Under this broad construction of the antiretaliation provision, the pertinent inquiry is whether an employer has acted in a way that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (citation omitted).

As with discrimination claims, a plaintiff may establish retaliation under the direct or indirect method of proof. *See Weber v. Univs. Research Ass'n, Inc.*, 621 F.3d 589, 592 (7th Cir.2010). On appeal, Porter has not pointed to evidence of any similarly-situated employees not subjected to the same adverse action she alleges, so we assume she is proceeding only under the direct method of proof. *See Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 741 (7th Cir.2011). "To avoid summary judgment on a retaliation claim under the direct method, [the plaintiff] must produce evidence from which a jury could conclude: (1) that she engaged in a statutorily protected activity; (2) that she suffered a materially adverse action by her employer; and (3) there was a causal link between the two." *Benuzzi v. Bd. of Educ. of City of Chi.*, 647 F.3d 652, 664 (7th Cir.2011) (internal quotation marks and citation omitted).

We assume, as the parties do, that Porter engaged in statutorily protected activity, including her request to have Sundays off in March 2005, her request for a schedule adjustment to attend ministry classes in August 2005, her requests for a days-off change following her return to work in July 2006, and her CCHR and EEOC charges in August and September 2006. Our inquiry accordingly focuses on the second and third elements of Porter's claim. As to the second element, the only potentially retaliatory action Porter points to in her brief is her assignment to the Friday/Saturday days-off group upon her return from leave in July 2006. Even though the category of "materially adverse actions" under Title VII's antiretaliation provision "sweeps more broadly than the `adverse employment actions' required to sustain a discrimination claim," *id.* at 665 (citation omitted), we doubt that Porter's assignment to the Friday/Saturday days-off group was a materially adverse action for purposes of her retaliation claim. In *Burlington Northern,* the Supreme Court made clear that context matters to the determination of what constitutes a materially adverse action. 548 U.S. at 69, 126 S.Ct. 2405. Here, Porter's assignment to the Friday/Saturday days-off group came after her nine-month leave and with a subsequent offer to accommodate her Sunday morning church attendance — albeit not the exact accommodation she sought — and the promise that she would receive the next opening in the Sunday/Monday days-off group. In this context, we do not think the treatment Porter received would dissuade a reasonable worker from seeking an accommodation.

Even assuming, however, that Porter's assignment to the Friday/Saturday days-off group in July 2006 constituted a materially adverse action, Porter failed to adduce any evidence from which a reasonable jury could find a causal connection between that assignment and her requests for accommodations in March and August 2005. Instead, the evidence indicates that she received the accommodations she sought in March and August 2005, and nearly a year passed between those requests and her July 2006 assignment to the Friday/Saturday days-off group. Given this time lapse, the fact that the assignment to the Friday/Saturday
958 group came after her successful requests for accommodations *958 does not suffice to show a causal connection. *See, e.g., Kidwell v. Eisenhauer*, 679 F.3d 957, 967 (7th Cir.2012) (finding that periods of five weeks and two months between alleged retaliatory actions and protected activities "militate against" inference of causation based solely on suspicious timing); *Healy v. City of Chi.*, 450 F.3d 732, 741 n. 11 (7th Cir.2006) (finding no suspicious timing when events were separated by more than one year); *Wallscetti v. Fox*, 258 F.3d 662, 669 (7th Cir. 2001) ("[T]he length of time between the protected speech and the adverse employment action is at least four months, which, without more, is too long to support a reasonable inference of causation."). Additionally, the evidence indicates that Sergeant Sidor, who made the recommendation to put Porter in the Friday/Saturday days-off group upon her return from leave, did so to balance days-off groups and did not know that Porter wanted Sundays off to attend church. *See Leitgen v. Franciscan Skemp Healthcare,*

Inc., 630 F.3d 668, 675 (7th Cir.2011) ("A claim of retaliation based on suspicious timing depends on what the relevant decision-makers knew and when[.]"). Accordingly, the district court appropriately granted summary judgment on Porter's retaliation claim.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

[1] The CCHR issued an order finding "substantial evidence of discrimination based on religion" on October 2, 2008.

[2] Porter also moved for a declaratory judgment that the City's policy regarding religious accommodations violates Title VII, which the district court denied. Porter does not appeal this ruling.

[3] Porter's amended answers to the City's interrogatories state that she met with Hegarty and had this conversation on July 19, 2006. In her deposition, however, Porter identified the time period in which this conversation occurred as sometime between July and November.

[4] Specifically, Porter testified at her deposition that when she spoke with Hegarty, "[Hegarty] mentioned ... they could have put me on midnights. Something about me going 3:00 to 11:00. Her saying something about maybe helping me to do something about going to 3:00 to 11:00." Porter's interrogatory answers state that she spoke with Hegarty on July 19, 2006, and that "Ms. Hegarty said something about trying to help me. She also said something about me working `3:30-11:30[.]'" Porter's declaration also states that she "had a conversation with Marikay Hegarty where she mentioned the possibility of helping me switch watches to 3:30 to 11:30."

[5] During Porter's deposition, after she testified that Hegarty mentioned the option of working from 3:00 to 11:00, the following exchange occurred:

Q: Did you tell Marikay [Hegarty] that you would work 3:00 to 11:00?

A: No, I did not tell her that.

Q: Did you tell her you wouldn't?

A: No, I did not tell her I would or would not. I think it was a thought that maybe I should consider that. I have a baby, No. 1. No. 2, that wasn't my battle right there to try to switch myself to nothing.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 13-CV-21666-WILLIAMS

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

NORMA RODRIGUEZ,
MAYKEL RUZ, ROMMY SANCHEZ
and YANILEYDIS CAPOTE,

Intervening Plaintiffs,

vs.

DYNAMIC MEDICAL SERVICES,
INC.

Defendant.

_____/

ORDER APPROVING CONSENT DECREE AND DISMISSING CASE

THIS MATTER is before the Court on Plaintiff Equal Employment Opportunity Commission and Defendant Dynamic Medical Services, Inc.'s Joint Motion for Approval of Consent Decree [D.E. 51]. The Court having reviewed the pleadings and papers filed in this cause, and the Motion for Approval of Consent Decree and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that:

a. The Consent Decree [see attached] is APPROVED and ENTERED. The Court shall retain jurisdiction over this matter for the purpose of enforcing the Consent Decree.

b. Because the consent decree resolves all claims asserted by Plaintiff in their entirety, the above-styled cause is hereby DISMISSED WITH PREJUDICE.

c. To the extent not otherwise disposed of herein, all pending motions are hereby DENIED or moot and the case is CLOSED.

DONE AND ORDERED in Chambers in Miami, Florida, this 18 day of December, 2013.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 13-CV-21666-WILLIAMS

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

NORMA RODRIGUEZ,
MAYKEL RUZ, ROMMY SANCHEZ
and YANILEYDIS CAPOTE,

Intervening Plaintiffs,

vs.

DYNAMIC MEDICAL SERVICES,
INC.

Defendant.

_____/

CONSENT DECREE

The Consent Decree ("Decree") is made and entered into by and between Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") and Defendant Dynamic Medical Services, Inc. ("Dynamic"). EEOC and Dynamic are collectively referred to as the "Parties" throughout this Decree.

INTRODUCTION

1. EEOC filed this action on May 8, 2013, and filed an Amended Complaint on September 30, 2013, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. ("Title VII"), and Title I of the Civil Rights Act of 1991, 42 U.S.C. §1981a, alleging unlawful employment practices on the basis of religious discrimination and retaliation and to provide appropriate relief to Norma Rodriguez, Maykel Ruz,

Rommy Sanchez, Yanileydis Capote and to a class of current and/or former employees of Dynamic ("Class Members").

2. EEOC alleged four counts of discrimination: (1) failure to accommodate the requests of Norma Rodriguez, Maykel Ruz, Rommy Sanchez, Yanileydis Capote, and Class Members, that they not be required to participate in Scientology religious practices and teachings on the grounds that Dynamic's mandatory religious employment practices conflicted with employees' sincerely held religious beliefs, their conscience and/or religious sensibilities as non-Scientologists; (2) subjecting Norma Rodriguez, Maykel Ruz, Rommy Sanchez, Yanileydis Capote and Class Members to a religiously hostile work environment; (3) terminating Norma Rodriguez and Rommy Sanchez based on their failure to conform to employer's religious practices and beliefs; and (4) terminating Norma Rodriguez and Rommy Sanchez in retaliation for opposing unlawful employment practices.

3. Dynamic denies the central factual allegations of wrong-doing asserted in the EEOC's complaint. Dynamic asserts that it neither terminated nor caused the termination of any employee for religious or any other prohibited reasons, nor that any religious practice, procedure or requirement was present in the workplace, nor that it engaged in any other wrong-doing asserted in the EEOC's complaint.

4. On June 14, 2013, Plaintiff-Intervenors Norma Rodriguez, Maykel Ruz, Rommy Sanchez, Yanileydis Capote filed their complaint in intervention. On October 4, 2013, Plaintiff-Intervenors filed an amended complaint. Dynamic also denies the central factual allegations of wrong-doing contained in the Intervenor's complaint. Dynamic asserts that it neither terminated nor caused the termination of any employee for

religious or any other prohibited reasons, nor that any religious practice, procedure or requirement was present in the workplace, nor that the Intervening Plaintiffs made the alleged complaints.

5. In the interest of resolving this matter, to avoid further costs and the time commitments related to litigation, and as a result of having engaged in comprehensive settlement negotiations, the Parties have agreed that this action should be finally resolved by entry of this Decree. This Decree is final and binding on the Parties, their successors, and assigns.

6. No waiver, modification or amendment of any provision of this Decree will be effective unless made in a writing evidencing an intent to modify this Consent Decree and signed by an authorized representative of each of the Parties. By mutual agreement of the Parties, this Decree may be amended or modified in the interests of justice and fairness in order to effectuate the provisions of this Decree.

7. If one or more of the provisions are rendered unlawful or unenforceable, the Parties shall make good faith efforts to agree upon appropriate amendments to this Decree in order to effectuate the purposes of the Decree. In any event, the remaining provisions will remain in full force and effect unless the purposes of the Decree cannot, despite the Parties' best efforts, be achieved.

8. This Decree fully and finally resolves any and all claims asserted by EEOC in the Complaint filed by EEOC in this action styled *EEOC et al. v. Dynamic Medical Services, Inc.*, Case No. 1:13-CV-21666-KMW in the United States District Court, Southern District of Florida on May 8, 2013. Such action arose from individual and class claims raised in EEOC Charge Numbers 510-2011-02608 (*Rommy Sanchez*

v. Dynamic Medical Services), 510-2011-02609 (*Norma Rodriguez v. Dynamic Medical Services*), 510-2011-02610 (*Yanileydis Capote v. Dynamic Medical Services*), and 510-2011-02082 (*Maykel Ruz v. Dynamic Medical Services*).

9. The Parties acknowledge that this Decree does not resolve any Charges of Discrimination that may be pending with EEOC against Dynamic other than the Charges referred to in paragraph 8. This Decree in no way affects the EEOC's right to bring, process, investigate or litigate other charges that may be in existence or may later arise against Dynamic in accordance with standard EEOC procedures.

FINDINGS

10. Having carefully examined the terms and provisions of this Decree, and based on the pleadings, record and stipulations of the Parties, the Court finds the following:

a. This Court has jurisdiction over the subject matter of this action and the Parties.

b. No party shall contest the jurisdiction of this Federal Court to enforce this Decree and its terms or the right of EEOC to bring an enforcement suit upon alleged breach of any term(s) of this Decree.

c. The terms of this Decree are adequate, reasonable, equitable and just and the rights of the Parties, Class Members, and the public interest are adequately protected by this Decree.

d. This Decree conforms with the Federal Rules of Civil Procedure and Title VII, and is not in derogation of the rights or privileges of any person. The entry of this Decree will further the objectives of

Title VII and will be in the best interests of the Parties, Class Members, and the public.

e. Nothing in this Consent Decree constitutes an admission nor shall it be construed as an admission by any party as to the claims or defenses of another party. Specifically, Dynamic is denying the allegations contained in the Complaints.

f. The terms of this Decree are and shall be binding upon the present and future representatives, agents, directors, officers, successors and assigns of Dynamic.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

DURATION OF THE DECREE & RETENTION OF JURISDICTION

11. All provisions of this Decree shall be in effect (and the Court will retain jurisdiction of this matter to enforce this Decree) for a period of four (4) years immediately following entry of the Decree, provided, however, that if, at the end of the four (4) year period, any disputes under Paragraphs 37-38, remain unresolved, the term of the Decree shall be automatically extended (and the Court will retain jurisdiction of this matter to enforce the Decree) until such time as all such disputes have been resolved.

MONETARY CONSIDERATION

12. Dynamic shall pay total monetary relief totaling $170,000.00 to settle claims asserted by EEOC. Dynamic and Plaintiff-Intervenors have entered into a separate agreement to resolve related claims not asserted by the EEOC and to which

EEOC is not a party. The division of the total monetary relief among the Plaintiff-Intervenors and Class Members is as follows:

Plaintiff-Intervenor or Class Member	Back Pay [for which an IRS W-2 shall issue]	Compensatory Damages [for which an IRS Form 1099 shall issue]
Rommy Sanchez	$4,400	$50,000
Norma Rodriguez	$1,000	$50,000
Maykel Ruz	None	$18,700
Yanileydis Capote	None	$37,400
Class Fund (Class Members)	None	$8,500

13. Dynamic shall pay a total of $161,500.00 to Plaintiff-Intervenors. Payment shall be made within twenty-one (21) calendar days following the Court's approval of this Decree. Payment shall be made in three (3) separate checks as follows:

a. One check shall be made payable to "Rommy Sanchez" in the amount of $4,400.00. This check shall be for back-pay amount owed and shall include payroll deductions and other applicable deductions.

b. One check shall be made payable to "Norma Rodriguez" in the amount of $1,000.00. This check shall be for back-pay amount

owed and shall include payroll deductions and other applicable deductions.

c. One check shall be made payable to "Zandro E. Palma, P.A., Trust Account" in the amount of $156,100.00.

d. All three checks shall be delivered, via overnight delivery service with signature requested to: Zandro E. Palma, 3100 South Dixie Highway, Suite 202, Miami, FL 33133.

14. Dynamic shall pay $8,500.00 to settle claims brought by EEOC on behalf of Class Members. Payment shall be made within twenty-one (21) calendar days following the Court's approval of this Decree. The checks shall be delivered, via overnight delivery service with signature requested to: EEOC Regional Attorney, Robert E. Weisberg, Re: Dynamic Medical Services Consent Decree, at United States Equal Employment Opportunity Commission, Miami Tower, 100 SE 2nd Street, Suite 1500, Miami, Florida 33131. Checks made payable to the following individuals for the following amounts:

Class Member	Compensatory Damages
Melissa Ferrer	$3,200.00
Ariel Alom	$3,200.00
Gustavo Panesso	$1,600.00
Yanela Blanco	$500.00

15. Copies of the checks and related documents (including copies of I.R.S. Form W-2's) that are sent to Plaintiff-Intervenors shall be sent contemporaneously to the attention of "EEOC Regional Attorney, Robert E. Weisberg, Re: Dynamic Consent Decree," at United States Equal Employment Opportunity Commission, Miami Tower, 100 SE 2nd Street, Suite 1500, Miami, Florida 33131.

16. Plaintiff-Intervenors and Class Members who receive monetary compensation under this Consent Decree shall execute a Release. The Release form to be signed by Plaintiff-Intervenors and Class Members who receive monetary compensation under this Consent Decree is attached to this Consent Decree as **Attachment A**. The EEOC shall obtain Releases from Class Members prior to distributing the monetary amounts, and shall forward copies of the signed Releases to Dynamic's attorney. Further, EEOC shall obtain Releases from Plaintiff-Intervenors prior to the twenty-one (21) calendar-day deadline (referred to in Paragraphs 13) for Dynamic to distribute payment to Plaintiff-Intervenors and shall forward copies of the signed Releases to Dynamic's attorney.

17. If Plaintiff-Intervenors and/or Class Members fail to timely receive the payments described in Paragraphs 12-14 above, the total amount of monetary relief that remains outstanding at the time of Dynamic's failure to make timely payment shall become due, and judgment shall be entered against Dynamic for the total amount of unpaid monetary relief.

18. If Plaintiff-Intervenors and/or Class Members fail to timely receive the payments described in Paragraphs 12-14 above, then Dynamic shall pay interest on the defaulted payments at a rate calculated pursuant to 26 U.S.C. §6621(b) until the same

is paid, and bear any additional costs incurred by the EEOC caused by the non-compliance or delay, including but not limited to any and all costs arising out of EEOC's efforts to enforce this decree in federal court.

INJUNCTIVE PROVISIONS

19. Without admitting that it previously failed to do so, Dynamic shall conduct all employment practices at each of its places of business in a manner which does not subject any employee to discrimination based upon religion, as prohibited under Title VII.

20. Without admitting that it previously failed to do so, Dynamic shall not discriminate against any employee because of his or her sincerely held religious belief or because he or she does not hold any specific religious belief, such as Scientology.

21. Without admitting that it previously failed to do so, Dynamic shall not discriminate against any employee based on his or her failure to conform to, adopt, or participate in employer's religious practices and beliefs, including but not limited to, Scientology.

22. Without admitting that it previously failed to do so, Dynamic shall not subject any employee to a hostile work environment based on religion by unwelcome imposition upon them of religious views, practices, proselytization of any religion, including but not limited to Scientology.

23. While denying that any of its workplace activities involved any Scientology religious practices or teachings, or any other religious practices, Dynamic shall accommodate requests of its employees that they not be required to participate in workplace activities involving Scientology religious practices and teachings on grounds

that those religious practices and teachings conflict with employees' sincerely held religious beliefs, their conscience and/or religious sensibilities as non-Scientologists.

24. In the event Dynamic offers its employees courses based on and organized around written materials published by the Hubbard College of Administration International ("Courses"), an employee's terms and conditions of employment – such as continued employment, wages, promotions, and ability to perform the duties and responsibilities of employment, among others – shall not be conditioned upon mandatory attendance and/or participation at these Courses. An employee may request an accommodation to be excused from attending and/or participating in the Courses on grounds that the Courses conflict with his or her sincerely held religious belief, his or her conscience and/or religious sensibilities as a non-Scientologist.

25. An employee can make a request for accommodation described in paragraphs 23 and 24, in writing or verbally to any supervisor or Course instructor. Upon receiving such a request for accommodation, Dynamic shall grant that accommodation and not require that employee's attendance at the Courses and/or shall not require employee to participate in Scientology religious practices and teachings. During the pendency of this Decree, Dynamic shall report such requests for accommodation to EEOC as set forth in paragraph 27.

26. Dynamic shall not make employment contingent on applicant or new hire agreeing to attend mandatory Courses and/or workplace activities involving Scientology religious practices and teachings.

COMPLAINT REPORTING AND INVESTIGATION

27. If any employee requests a reasonable accommodation they not be required to attend or participate in Courses, and/or participate in workplace activities involving Scientology religious practices and teachings, on grounds that those religious practices and teachings conflict with employees' sincerely held religious beliefs, their conscience and/or religious sensibilities as non-Scientologists, during the term of this Decree, including but not limited to requests as described above in paragraphs 23 through 25, Dynamic shall notify EEOC in writing within ten (10) days with the following information: (1) the identity and job title of the requestor, (2) address and current telephone number(s) of requestor, (3) the person to whom the request was being made, (4) the date of the request, (5) the nature and/or description of the request, and (6) the response to the request.

28. The Commission may review compliance with this Decree. As part of such review, the Commission may inspect Defendant's facilities, interview employees and examine and copy documents. Defendant agrees that it will make all employees available to the Commission for interviewing in connection with this compliance review.

29. Any notices to EEOC required by this Decree shall be sent to the attention of "EEOC Regional Attorney, Robert E. Weisberg, Re: Dynamic Medical Services Consent Decree," at United States Equal Employment Opportunity Commission, Miami Tower, 100 SE 2nd Street, Suite 1500, Miami, Florida 33131.

30. Nothing contained in this Decree will be construed to limit any obligation Defendant may otherwise have to maintain records under Title VII or any other law or regulation.

ADOPTION AND DISTRIBUTION OF POLICY AGAINST RELIGIOUS HARASSMENT, RELIGIOUS DISCRIMINATION, AND RETALIATION

31. Within 10 days of approval of this Decree by the Court, Defendant will draft a discrimination policy ("Anti-Discrimination Policy") that includes the following terms and/or provisions:

a. Prohibit all forms of discrimination under Title VII, including, but not limited to discrimination based on religion.

b. The Anti-Discrimination Policy will state that employees who complain about discrimination, oppose discrimination, and/or engage in any other protected activity will be protected against retaliation.

c. The Anti-Discrimination Policy will state that employees who request an accommodation on grounds that employment practices or conduct conflict with employee's sincerely held religious belief, his or her conscience and/or religious sensibilities as a non-Scientologist, will be protected against retaliation.

d. The Anti-Discrimination Policy shall inform all employees of their right to request a reasonable accommodation that they not be required to attend or participate in Courses, and/or participate in workplace activities involving Scientology religious practices and teachings, on grounds that those religious practices and teachings conflict with employees' sincerely held religious beliefs, their conscience and/or religious sensibilities as non-Scientologists.

e. The Anti-Discrimination Policy will also contain a procedure by which employees who feel they have been subjected to discrimination, harassment, retaliation, or who seek a religious accommodation, including but not limited to accommodation requests described above in paragraphs 23 through 25, can report the discrimination, harassment, retaliation, or the request for accommodation. This reporting procedure will clearly state that employees may report actions they believe constitute discrimination, harassment, or retaliation verbally or in writing and that employees may request an accommodation, including but not limited to accommodation requests described above in paragraphs 23 through 25, in writing or verbally. This reporting procedure will otherwise comply with terms of paragraph 27 above.

32. The Anti-Discrimination Policy shall be written and posted in both English and Spanish language. Dynamic shall post copies of the Anti-Discrimination Policy (both the Spanish and English versions) on all employee bulletin boards.

33. Dynamic's agreement to adopt the Anti-Discrimination Policy described above is not an admission that Dynamic's current Anti-Discrimination Policy does not contain these provisions.

34. Dynamic must forward a copy of the Anti-Discrimination Policy to EEOC within ten (10) calendar days following the Court's approval of this Decree. The Anti-Discrimination Policy is subject to EEOC's review and approval. Dynamic will translate the Anti-Discrimination Policy into Spanish within fourteen (14) calendar days of

receiving EEOC's approval of the English Anti-Discrimination Policy. The Spanish translation will also be provided to EEOC for review and approval. Within five (5) days of receiving EEOC's approval of the Spanish version of the Anti-Discrimination Policy, Dynamic shall post the English and Spanish versions of the Anti-Discrimination Policy according to Paragraph 32 above.

35. EEOC's review of the Policy is not a representation by EEOC that Dynamic has been or is compliant with federal anti-discrimination laws.

TRAINING

36. For each year that this Consent Decree is in effect, Dynamic shall conduct training for all employees, including supervisors, managers and non-managers, and hourly workers. The trainings will cover the following information:

a. Advise employees of the requirements and prohibitions of Title VII of the Civil Rights Act of 1964.

b. Inform employees of the procedures for reporting discrimination, harassment, and retaliation.

c. Inform employees of procedures for requesting a religious accommodation, including but not limited to accommodation requests described above in paragraphs 23 through 25.

d. The training shall include a specific discussion or instruction relating to the issue of religious discrimination and accommodation.

e. The training shall be at least two hours in duration. No less than 10 days before the training is conducted, Dynamic agrees to give written notice to the EEOC as to the date and location of the

training, the name of the person providing the training, and the substance of the training.

f. All materials used in conjunction with the training shall be forwarded to the EEOC. Within 10 days following the training, Dynamic shall submit to the EEOC confirmation that the training was conducted, and a list of all attendees.

DISPUTE RESOLUTION

37. No party will contest the jurisdiction of the federal court to enforce this Decree and its terms or the right of any party to bring an enforcement suit upon breach of any of the terms of this Decree by any other party. Breach of any term of this Decree should be deemed to be a substantive breach of this Decree. The Court will retain jurisdiction over any such enforcement proceedings during the duration of this Consent Decree. Nothing in this Decree will be construed to preclude EEOC from bringing proceedings to enforce this Decree in the event that Defendant fails to perform any of the promises and representations contained herein.

38. In the event that either party believes that the other party has failed to comply with any provisions of the Decree, the complaining party shall notify the alleged non-complying party in writing of such non-compliance and afford the alleged non-complying party fifteen (15) calendar days to remedy the non-compliance or satisfy the complaining party that the alleged non-complying party has complied. If the alleged non-complying party has not remedied the alleged non-compliance or satisfied the complaining party that it has complied within fifteen (15) calendar days, the complaining party may apply to the Court for appropriate relief.

NOTIFICATION OF SUCCESSORS

39. During the term of this Decree, Defendant shall provide prior written notice to any potential purchaser of Defendant's business, a purchaser of all or a portion of Defendant's assets, or to any other potential successor of the Commission's lawsuit, of the allegations raised in the Commission's complaint, and the existence and contents of the Decree.

NO CONDITIONAL RECEIPT

40. Dynamic will not condition the receipt of individual relief on an individual's agreement to (a) maintain as confidential the terms of this Consent Decree, (b) waive her statutory right to file a charge with any federal or state anti –discrimination agency, or (c) waive her right to apply for a position with Defendant, recognizing that DMS has no obligation to create positions for them or to consider them for positions for which they are not qualified.

DONE AND ORDERED in Chambers in Miami, Florida, this ___ day of December, 2013.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

[Final Signature Page to Follow]

AGREED TO:

FOR PLAINTIFF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:

By: _____ Date: _____

ROBERT E. WEISBERG
Regional Attorney
U.S. EEOC
Miami District Office
100 S.E. 2nd Street, Suite 1500
Miami, Florida 33131
Tel: 305-808-1753
Fax: 305-808-1835

Attorney for Plaintiff U.S. EEOC

AGREED TO:

FOR DEFENDANT DYNAMIC MEDICAL SERVICES, INC.:

By: _____ Date: _____

Dr. Dennis Nobbe

Owner, Dynamic Medical Services, Inc.

Attachment A

RELEASE

In consideration for $ _____, paid to me by my employer/former employer Dynamic Medical Services, Inc. ("Dynamic"), in connection with the resolution of the action styled EEOC et al. v. Dynamic Medical Services, Inc., Case No. 1:13-CV-21666-KMW in the United States District Court, Southern District of Florida, I hereby waive my right to recover for any claims against Dynamic arising under Title VII, and based on religious discrimination, religious harassment, failure to accommodate a religious practice or belief, or retaliation for complaining about same, that I had prior to the date of this Release and that were included in the claims alleged in the amended complaint filed in this case.

Printed Name: _____

Signature: _____

Date: _____

2011 WL 1458167
Only the Westlaw citation is currently available.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Patience N. CHIKURI, Plaintiff,
v.
ST. VINCENT NEW HOPE, INC., Defendant.

No. 1:10-cv-1097-RLY-DML.
|
April 15, 2011.

Attorneys and Law Firms

Gail M. Flatow, Flatow Law Firm, Indianapolis, IN, for Plaintiff.

Craig M. Williams, John Patrick Ryan, Jr., Hall Render Killian Heath & Lyman, Indianapolis, IN, for Defendant.

ENTRY ON DEFENDANT'S MOTION TO DISMISS

RICHARD L. YOUNG, Chief Judge.

***1** On August 31, 2010, Patience N. Chikuri ("Plaintiff") filed a Complaint against her former employer, St. Vincent New Hope, Inc. ("Defendant"), alleging that she was terminated from her employment as a result of religious discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). On December 6, 2010, Defendant filed the instant Motion to Dismiss, alleging that Plaintiff failed to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b) (6). Based on the foregoing reasons, the court **GRANTS** Defendant's Motion.

I. Plaintiff's Affidavit

As a preliminary matter, Defendant argues that the court should not consider Plaintiff's Affidavit, which is attached to Plaintiff's Response, because it contradicts allegations contained in the Complaint. When evaluating a motion to dismiss, the court may look to allegations made outside the complaint, "so long as those allegations are consistent with the complaint." *Lang v. TCF Nat. Bank,* 249 Fed.Appx. 464, 465 (7th Cir.2007) (citing *Help and Home, Inc. v. Med. Capital, L.L.C.,* 260 F.3d 748, 752–53 (7th Cir.2001)).

The Complaint states that at the time the events giving rise to this lawsuit occurred, Plaintiff was "exploring becoming a Muslim." (Complaint ¶ 17). Plaintiff's Affidavit provides that her "[t]ransition to Muslim was quick" and that it was her "new found religion." (Affidavit of Patience Chikuri ("Plaintiff Aff.") ¶ 7). The Affidavit also provides, in the following paragraph, that she "started learning Muslin [sic] but that [her] excitement was cut short" because neither her friends or family would accept her new found religion. (*Id.* ¶ 8).

The court finds that Plaintiff's Affidavit does not contradict Plaintiff's allegation that she was "exploring" her religion. Although she states that Islam was her new found religion, she also states that she was in the process of learning it, and that she does not practice it because her friends and family do not approve. Accordingly, the court may consider Plaintiff's Affidavit in ruling on the present Motion to Dismiss.

II. Factual Background

Defendant is a facility that provides services to mentally and physically disabled clients. (*Id.* ¶ 8). Plaintiff began working for Defendant in January 2004. (Complaint ¶ 7). As an employee of Defendant, Plaintiff's job duties required her to provide direct assistance to individuals living at the facility, which included taking individuals on various errands, as well as assisting with household chores and other personal needs. (*Id.* ¶ 9).

On several occasions, Plaintiff was asked by her supervisor to drive one particular resident to church services at the Church of the Nazarene. (*Id.* ¶ 10). Each time Plaintiff's supervisor directed her to drive the resident to church, Plaintiff complained that she was uncomfortable with the beliefs and practices of the Church of the Nazarene. (*Id.* ¶ 11). In addition, Plaintiff asked to be "accommodated" by being released from the duty of driving the resident to church. (*Id.*). Plaintiff's supervisor did not approve Plaintiff's request. (*Id.* ¶ 12).

***2** On February 10, 2008, Plaintiff's supervisor asked Plaintiff to drive the resident to the Church of the Nazarene, but Plaintiff refused to do so. (*Id.* ¶ 13). On February 12, 2008, Plaintiff was terminated from her position for failing to follow her supervisor's instructions. (*Id.* ¶ 15).

Plaintiff alleges that she was terminated based on her religious beliefs. Plaintiff claims that she does not currently practice a

particular religion, but at the time of her termination, Plaintiff was exploring becoming a Muslim. (*Id.* ¶ 17). Plaintiff alleges that Defendant engaged in religious discrimination [1] and failed to accommodate her religious beliefs, in violation of Title VII. (*Id.* ¶¶ 16–26).

III. Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) permits the dismissal of a claim for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint, not the merits of the lawsuit. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–76 (7th Cir.2001). In ruling on a motion to dismiss, the court construes the allegations of the complaint in the light most favorable to the plaintiff, and all well-pleaded facts and allegations in the complaint are aecepted as true. *Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.1993). A motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

IV. Discussion

Title VII makes it unlawful for an employer "to fail or refuse to hire or discharge any individual, or to otherwise 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. § 2000–2(a)(1). Under the statute, 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 ... religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). In order to establish a claim for religious discrimination under Title VII, Plaintiff must show that: (1) her bona fide religious practice conflicted with an employment requirement; (2) she notified the employer of the practice; and (3) the practice was the basis for an adverse employment action. *Adams v. Retail Ventures, Inc.*, 325 Fed.Appx. 440, 443 (7th Cir.2009) (citing *E.E.O. C. v. Ilnoa of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir.1997)). If Plaintiff establishes the elements of a *prima facie* claim for religious discrimination, then "the burden is on the employer to show that a reasonable accommodation of the religious practice was made or that any accommodation would result in undue hardship." *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir.2001) (citing *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir.1986)).

***3** Here, Plaintiff cannot establish the first element of her *prima facie* religious discrimination claim because she does not allege a bona fide religious practice. Plaintiff merely alleges that she was "exploring" becoming a Muslim, and that she was in the process of learning Islam. (Complaint ¶ 17; Plaintiff Aff. ¶ 7). Moreover, Plaintiff fails to allege a specific religious practice or belief held by her that was used as a basis for her termination. Instead, Plaintiff alleges that the patient's religious practices of attending the Church of the Nazarene made Plaintiff uncomfortable. Title VII provides a cause of action where a plaintiff's own religious beliefs lead to an adverse employment action, but not where another individual's religious practices and beliefs merely make a plaintiff uncomfortable. *See Kreilkamp v. Roundy's, Inc.*, 428 F.Supp.2d 903, 908 (W.D.Wis.2006) ("[A]n employee cannot redefine ... [an] aversion as a religious belief" (citing *Reed v. Great Lakes Cos., Inc.*, 330 F.3d 931 (7th Cir.2003)).

Even if Plaintiff had properly alleged a religious practice, the Complaint contains no allegation that Plaintiff ever informed Defendant of her religious beliefs or practices. In fact, Plaintiff specifically states that she kept her religious beliefs private, and did not openly practice Islam. (Plaintiff's Aff. ¶¶ 7–8). Thus, because Plaintiff fails to allege the elements of a *prima facie* religious discrimination claim, both her religious discrimination claim and her failure to accommodate claim must be dismissed for failure to state a claim upon which relief can be granted. *Anderson*, 274 F.3d at 475 (citations omitted); *E.E. O. C.*, 108 F.3d at 1575.

V. Conclusion

Based on the foregoing reasons, the court **GRANTS** Defendant's Motion to Dismiss (Docket # 10).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1458167, 94 Empl. Prac. Dec. P 44,164

Footnotes

1 Count II of Plaintiff's Complaint alleges a claim of retaliation under Title VII. As Defendant properly notes, the retaliation claim is more properly analyzed as part of the religious discrimination claim because the Complaint fails to allege that Plaintiff engaged in protected activity. (Defendant Moving Brief at 3 n. 1). Plaintiff does not contest Defendant's argument.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60378

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2015
Lyle W. Cayce
Clerk

KELSEY NOBACH,

Plaintiff - Appellee Cross-Appellant

v.

WOODLAND VILLAGE NURSING CENTER, INCORPORATED,

Defendant - Appellant Cross-Appellee

v.

LOCOCO ; LOCOCO, P.A.,

Appellee

Consolidated w/ 13-60397

KELSEY NOBACH,

Plaintiff - Appellee Cross-Appellant

v.

WOODLAND VILLAGE NURSING CENTER, INCORPORATED,

Defendant - Appellant Cross-Appellee

Appeals from the United States District Court
for the Southern District of Mississippi

No. 13-60378

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JOLLY, SMITH and SOUTHWICK, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Kelsey Nobach was a nursing home activities aide who was discharged by Woodland Village Nursing Center ("Woodland") because she refused to pray the Rosary with a patient. Nobach contends, and the jury found, that Woodland violated Title VII of the Civil Rights Act of 1964 by unlawfully discharging her for exercising her religious beliefs. On appeal, the determinative question is whether Nobach failed to produce sufficient evidence from which a jury could infer that Woodland was motivated by Nobach's religious beliefs before it discharged her. In an earlier opinion, we concluded that there was no such evidence anywhere in the record and held that a reasonable jury would not have had a legally sufficient basis to find that Woodland violated Title VII by discharging Nobach. *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 762 F.3d 442 (5th Cir. 2014). Consequently, we reversed and vacated the judgment of the district court and remanded for entry of judgment. *Id.*

Nobach petitioned for a writ of certiorari. The Supreme Court granted the writ and vacated and remanded the case for reconsideration in the light of *EEOC v. Abercrombie & Fitch Stores*, 575 U. S. ___, 135 S. Ct. 2028 (2015). *See Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 135 S. Ct. 2803 (2015). We requested and received supplemental letter briefs addressing the impact of *Abercrombie* on Nobach's case. After considering the Supreme Court's decision in *Abercrombie* and the parties' briefing, we again REVERSE the district court's denial of Woodland's motion for judgment as a matter of law, VACATE the judgment, and REMAND for entry of judgment consistent with this opinion.

I.

We begin with the relevant facts and consider them in the light most favorable to the jury verdict. Woodland first hired Nobach as an activities aide in August 2008. During her thirteen-month employment, Nobach received four negative employment write-ups: two for continual tardiness, one for making a false accusation against a co-worker, and one for stealing a resident's nail polish. Each write-up is recorded in Nobach's employment record.

On September 19, 2009, Nobach was called to work an unscheduled shift in the facility's main hall where she did not usually work. Early in her shift Nobach began a transfer of a resident from the main hall back to the resident's room, one of her normal duties as an activities aide. A certified nurse's assistant ("assistant"), a non-supervisory employee with no responsibilities over Nobach, told Nobach that a particular resident had requested that the Rosary be read to her. Nobach told the assistant that she could not because it was against her religion. Although she did not explain her religious beliefs to the assistant, or to anyone for that matter, Nobach later explained—after she had been discharged—that she is a former Jehovah's Witness who had been disfellowshipped (expelled) from the church following her refusal to repent for her sins when she was sixteen years old.[1]

After telling the assistant that she would not read the Rosary, Nobach said to the assistant: "[I]f you would like to perform the Rosary, you're more than welcome to." The assistant remained silent. Nobach testified that she no longer thought anything of the conversation; neither did she make any effort

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[1] Nobach further testified at trial that she had been baptized into the church at the age of nine and regularly attended services. Although she is no longer a member of the church, she testified that she still holds many of the Jehovah's Witnesses' beliefs and adheres to many of its central tenets, such as avoiding symbolism and, relevant here, not praying repetitive prayers. None of this information was provided to administrators at Woodland before her discharge.

to see that the resident's request was fulfilled. The Rosary was not read to the resident that day.

The resident later complained to Lynn Mulherin, Woodland's activities director and Nobach's head supervisor, about this failure of the staff. Mulherin then consulted with James Williams, Woodland's Director of Operations. Williams investigated and ensured the resident that her requests would be promptly addressed in the future. After determining who was "on the floor" that day, Williams met with Mulherin and instructed her to write up both Nobach and Lorrie Norris, an activities supervisor and Nobach's immediate superior, for the incident. Following the meeting with Williams, Mulherin advised Williams that she had decided to discharge Nobach.[2]

On September 24, 2009, five days after Nobach refused the request, Mulherin called Nobach into her office along with Norris (who, along with Nobach, testified at trial about the events of Nobach's discharge).[3] Upon entering the office, Mulherin told Nobach that she was fired. When Nobach asked the reason, Mulherin said that Nobach had been written up for the incident and was now fired for failing to assist a resident with the Rosary, which was a regularly scheduled activity when requested by a resident. Mulherin told Nobach: "I don't care if it's your fifth write-up or not. I would have fired you for this instance alone." Then, for the first time, Nobach informed Mulherin that performing the Rosary was against her religion, stating: "Well, I can't pray the Rosary. It's against my religion." Mulherin's response was "I don't care if it is against your religion or not. If you don't do it, it's insubordination."

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[2] Mulherin was unavailable to testify at trial. Williams and Norris were the only two of Nobach's superiors to testify.

[3] There were no material inconsistencies between Norris's testimony and Nobach's testimony concerning what transpired during the meeting between the three women.

During the meeting Mulherin handed two papers to Nobach, which had apparently been prepared before the meeting.[4] The first paper was an employee reprimand which said, "See attached. This is Ms. Nobach's 5th write up!" Attached to the employee reprimand was a second sheet of paper titled "Employee Termination Report," which stated, "The employee has been written up 5xs. The last write up on 9-24-09 for not doing [R]osary with resident is what brought forth termination. She has refused to sign write up."

After her discharge, Nobach filed a charge against Woodland with the EEOC, alleging religious discrimination. In due course the EEOC issued Nobach a right to sue letter, and Nobach filed this suit. In her complaint she alleged that she had been fired because of her religion in violation of Title VII of the Civil Rights Act of 1964. The case was tried to a jury, which returned a verdict in Nobach's favor. Woodland moved for judgment as a matter of law. The district denied the motion, and Woodland filed this appeal.

II.

Woodland raises three issues on appeal. First, it argues the district court erred by denying its renewed motion for judgment as a matter of law for insufficiency of the evidence to support a Title VII violation. Second, Woodland alleges that the district court submitted an erroneous instruction to the jury that substantially affected the outcome of the case. Third and finally, Woodland contends that the evidence does not support the verdict of $55,200 for emotional distress injuries and mental anguish. Nobach cross-appeals. She contends that the district court erred by refusing to give the jury a punitive damage instruction.

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[4] The record is unclear at which point during the meeting they were given to Nobach.

We need not reach the second and third issues raised in Woodland's appeal, nor do we find it necessary to address Nobach's cross-appeal. Instead, we hold that the district court erred when it denied Woodland's motion for judgment as a matter of law.

III.

A.

We review a district court's ruling on a motion for judgment as a matter of law de novo.[5] *Brown v. Bryan Cnty.*, 219 F.3d 450, 456 (5th Cir. 2000). When reviewing a district court's denial of a post-verdict Rule 50(b) motion, we "use[] the same standard to review the verdict that the district court used in first passing on the motion." *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995). Accordingly, the legal standard is whether "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1); *see also Foradori v. Harris*, 523 F.3d 477, 485 (5th Cir. 2008) (stating that when a case "is tried by a jury[,]" as it was in this case, "a Rule 50(a) motion is a challenge to the legal sufficiency of the evidence").

B.

On appeal, Woodland argues that the district court erred by denying its Rule 50 motion because Nobach failed to put on any evidence, direct or circumstantial, that Woodland was motivated by Nobach's religion or religious beliefs before it discharged her. Because Nobach did not introduce such

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[5] An appellant "who wishes to appeal on grounds of insufficient evidence must make a Rule 50(b) motion for judgment as a matter of law after the jury's verdict, even when the party has previously made a Rule 50(a) motion." *Downey v. Strain*, 510 F.3d 534, 543–44 (5th Cir. 2007). In this case, Woodland filed a post-verdict Rule 50(b) motion; thus, we have a basis "to review [its] challenge to the sufficiency of the evidence." *Id.* at 544.

evidence at trial, Woodland contends that the jury could not have had a legally sufficient basis to find that Woodland discriminated against Nobach in violation of Title VII. We agree.

Title VII makes it unlawful for an employer to discharge an individual "*because of* such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Supreme Court recently provided guidance on Title VII's "because of" causation standard, noting that it is broader than the typical but-for causation standard because it requires only that the religious practice be a "motivating factor" of the employer's employment decision. *See Abercrombie*, 135 S. Ct. at 2032. When evaluating causation in a Title VII case, the question is not what the employer *knew* about the employee's religious beliefs. *Id.* at 2033. Nor is the question whether the employer *knew* that there would be a conflict between the employee's religious belief and some job duty. *Id.* Instead, the critical question is what *motivated* the employer's employment decision. *Id.*

Nobach contends that she offered direct evidence of Woodland's discriminatory animus that motivated her discharge.[6] She relies primarily on Woodland's acknowledgements that (1) it fired Nobach for not praying the Rosary with a resident and (2) her head supervisor, Mulherin, said that she did not care if performing the Rosary was against Nobach's religion and she would have fired Nobach in any event because refusing to perform the Rosary constituted insubordination.[7]

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[6] An employee may prove intentional discrimination "through either direct or circumstantial evidence." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001).

[7] Although Nobach does not argue the point, other circuits have held that an employer has no obligation to withdraw its termination decision under Title VII based on information supplied *after* that termination decision has been made. *See Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 319 (3d Cir. 2008) (holding that no duty to accommodate arises under Title VII when the employee fails to inform the employer that a requirement conflicts with his or her religious beliefs); *accord Chalmers v. Tulon Co. of Richmond*, 101

We, of course, fully accept Nobach's version of her discharge as the view that most favorably supports the jury verdict. In doing so, we have carefully searched the record for evidence of such support. We simply cannot find evidence that, before her discharge, Nobach ever advised anyone involved in her discharge that praying the Rosary was against her religion. Nor can we find evidence that anyone involved in her discharge suspected that Nobach's refusal to pray the Rosary was motivated by a religious belief. *Accord id.* (holding that actual knowledge of a religious belief is not required and noting that "[a] request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability"). According to the record, Nobach did not even tell the assistant that she was a Jehovah's Witness. Nobach acknowledges that the only time she made any mention of her religious belief was when she told the assistant: "I can't do the Rosary with [the resident]. I'm not Catholic, and it's against my religion." Nobach has never claimed that the assistant told anyone of her reason for refusing to aid the resident. In sum, Nobach has offered no evidence that Woodland came to know of or suspect her bona-fide religious belief until after she was actually discharged.

Woodland must admit, as it does, that Nobach's failure to perform the Rosary with the resident was the factor that precipitated her discharge. If Nobach had presented any evidence that Woodland knew, suspected, or reasonably should have known the cause for her refusing this task was her conflicting religious belief—and that Woodland was motivated by this knowledge or suspicion—the jury would certainly have been entitled to reject

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F.3d 1012, 1020 (4th Cir. 1996) ("Giving notice to co-workers [of one's religious beliefs] at the same time as an employee violates an employment requirement is insufficient to provide adequate notice to the employer and to shield the employee's conduct."); *Johnson v. Angelica Unif. Grp., Inc.*, 762 F.2d 671, 673 (8th Cir. 1985).

Woodland's explanation for Nobach's termination. But, no such evidence was ever provided to the jury.

We hold, therefore, that a reasonable jury would not have had a legally sufficient evidentiary basis to find that Woodland intentionally discriminated against Nobach because of her religion.[8]

IV.

To sum up, we hold that the district court erred by not granting Woodland's Rule 50(b) motion for judgment as a matter of law because Nobach failed to put forth evidence that, before her termination, Woodland knew or suspected that her religious belief needed an accommodation, which necessarily means that there was no evidence that Nobach's religious belief was the motive for Woodland's termination decision. Without evidence of an impressible motive in Woodland's termination decision, "a reasonable jury would not have had a legally sufficient evidentiary basis" to find for Nobach on her claim of religious discrimination under Title VII. Accordingly, the denial of Woodland's motion for judgment as a matter of law is REVERSED, the judgment is VACATED, and the case is REMANDED for entry of judgment consistent with this opinion.

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[8] With regard to Nobach's allegation of Woodland's failure to accommodate her religious beliefs, her claim fails for essentially the same reason—the failure to advise Woodland of her religious belief and the conflict with her job duties and Woodland's lack of knowledge or suspicion of any such conflict.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1230

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff - Appellee,

v.

CONSOL ENERGY, INC.; CONSOLIDATION COAL COMPANY,

Defendants - Appellants.

No. 16-1406

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff - Appellant,

v.

CONSOL ENERGY, INC.; CONSOLIDATION COAL COMPANY,

Defendants - Appellees.

Appeals from the United States District Court for the Northern District of West Virginia, at Clarksburg. Frederick P. Stamp, Jr., Senior District Judge. (1:13-cv-00215-FPS)

Argued: December 7, 2016 Decided: June 12, 2017

Before NIEMEYER, TRAXLER, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Niemeyer and Judge Traxler joined.

ARGUED: Jeffrey Alan Holmstrand, GROVE, HOLMSTRAND & DELK, PLLC, Wheeling, West Virginia, for Appellants/Cross-Appellees. Philip Matthew Kovnat, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellee/Cross-Appellant. **ON BRIEF**: Jeffrey A. Grove, GROVE, HOLMSTRAND & DELK, PLLC, Wheeling, West Virginia, for Appellants/Cross-Appellees. P. David Lopez, General Counsel, Jennifer S. Goldstein, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, Elizabeth E. Theran, Office of General Counsel, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellee/Cross-Appellant.

PAMELA HARRIS, Circuit Judge:

For 37 years, Beverly R. Butcher, Jr. worked without incident as a coal miner at the Robinson Run Mine, owned by appellant Consol Energy, Inc. But when Consol implemented a biometric hand scanner to track its employees, Butcher, a devout evangelical Christian, informed his supervisors that his religious beliefs prevented him from using the system. And although Consol was providing an alternative to employees who could not use the hand scanner for non-religious reasons, it refused to accommodate Butcher's religious objection. Forced to choose between his religious commitments and his continued employment, Butcher retired under protest.

The United States Equal Employment Opportunity Commission (EEOC) sued on behalf of Butcher, alleging that Consol violated Title VII by constructively discharging Butcher instead of accommodating his religious beliefs. After trial, the jury returned a verdict in favor of the EEOC. Butcher was awarded compensatory damages and lost wages and benefits, but not punitive damages; the EEOC's evidence, the district court ruled, could not justify an award of punitive damages under the standard set out in Title VII. The district court subsequently denied Consol's post-verdict motions seeking judgment as a matter of law, a new trial, and amendment of the district court's findings regarding lost wages.

We agree with the district court that Consol is not entitled to judgment as a matter of law: The evidence presented at trial allowed the jury to conclude that Consol failed to make available to a sincere religious objector the same reasonable accommodation it offered other employees, in clear violation of Title VII. And we find no error in the host

of evidentiary rulings challenged by Consol in its motion for a new trial, nor in the district court's determinations regarding lost wages and punitive damages. Accordingly, we affirm the district court judgment in all respects.

I.

A.

Butcher began work with Consol in April of 1975, and in September of 1977 started at Consol's Robinson Run Mine, in West Virginia. For almost 40 years, Butcher by all accounts was a satisfactory employee, with no record of poor performance or disciplinary problems. Butcher also is a life-long evangelical Christian. An ordained minister and associate pastor, he has served in a variety of capacities at his church: as a member of the board of trustees, as part of the church's worship team, as a youth worker, and as a participant in mission trips.

For 37 years, Butcher's employment with Consol posed no conflict with his religious conduct and beliefs. But in 2012, a change to the daily operations of the Robinson Run Mine put Butcher's religious beliefs at odds with his job. In the summer of 2012, Consol implemented a biometric hand-scanner system at the mine, in order to better monitor the attendance and work hours of its employees. The scanner system required each employee checking in or out of a shift to scan his or her right hand; the shape of the right hand was then linked to the worker's unique personnel number. As compared to the previous system, in which the shift foreman manually tracked the time

worked by employees, the scanner was thought to allow for more accurate and efficient reporting.

For Butcher, however, participating in the hand-scanner system would have presented a threat to core religious commitments. Butcher, who testified that his religious beliefs are grounded in the "authenticity . . . [and] authority of the scriptures," J.A. 675, believes in an Antichrist that "stands for evil," J.A. 676, and that the Antichrist's followers are condemned to everlasting punishment. Butcher's understanding of the biblical Book of Revelation is that the Mark of the Beast brands followers of the Antichrist, allowing the Antichrist to manipulate them. And use of Consol's hand-scanning system, Butcher feared, would result in being so "marked," for even without any physical or visible sign, his willingness to undergo the scan – whether with his right hand or his left – could lead to his identification with the Antichrist. That Butcher is sincere in these beliefs is not disputed.[1]

Butcher brought his concerns to his union representative, who alerted Consol's human resources department. According to Butcher, he was then instructed by Consol to provide "a letter from my pastor explaining why I needed a religious accommodation." J.A. 692. Butcher obtained a letter from his pastor vouching for Butcher's "deep dedication to the Lord Jesus Christ." J.A. 1174. He also prepared his own letter, citing verses from the Book of Revelation and explaining his view that the hand scanner would

[1] Indeed, this is not the first time that Butcher has requested an exemption from a scanner system. In 2011, Butcher sought to exclude his grandchildren from a new finger-scanning system for school lunches, given his concerns about the Mark of the Beast.

associate him with the Mark of the Beast, causing him through his will and actions to serve the Antichrist. Butcher ends the letter by stating:

> As a Christian I believe it would not be in the best interest of a Christian believer to participate in the use of a hand scanner. Even though this hand scanner is not giving a number or mark, it is a device leading up to that time when it will come to fruition, and in good faith and a strong belief in my religion, I would not want to participate in this program.

J.A. 1173.

In June of 2012, Butcher met with Mike Smith, the mine's superintendent, and Chris Fazio, a human resources supervisor, to discuss his situation. Butcher provided Smith and Fazio with the letter from his pastor as well as his own letter, and explained that the hand-scanner system was not one that he "could or would want to participate in," as a Christian. J.A. 694. According to Butcher, and consistent with the religious beliefs described above, the objection he described extended to the scanning of either hand, and was not limited to use of his right hand. Unaware of any other means of accommodating his religious concerns, Butcher offered to check in with his shift supervisor or to punch in on a time clock, as he had in the past while working at the mine.

In response, Fazio gave Butcher a letter written by the scanner's manufacturer, offering assurances that the scanner cannot detect or place a mark – including the Mark of the Beast – on the body of a person. Offering its own interpretation of "[t]he Scriptures," the letter explained that because the Mark of the Beast is associated only with the right hand or the forehead, use of the left hand in the scanner would be sufficient to obviate any religious concerns regarding the system. J.A. 1175. Fazio and Smith

asked that Butcher review this information with his pastor, and, if he continued to object, provide a letter attesting to his church's opposition to the scanner system.

At roughly the same time, and unbeknownst to Butcher, Consol was providing an accommodation to other employees that allowed them to bypass the new scanner system altogether. As of July 2012, Consol had determined that two employees with hand injuries, who could not be enrolled through a scan of either hand, instead could enter their personnel numbers on a keypad attached to the system. According to Consol's own trial witness, this accommodation imposed no additional cost or burden on the company, and allowing Butcher to use the keypad procedure would have been similarly cost-free.

Nevertheless, Consol continued to resist making the same accommodation for Butcher, and instead decided that Butcher would be required to scan his left hand. The disparity in treatment was highlighted by a single email dated July 25, 2012, simultaneously authorizing the keypad accommodation for the two employees with physical injuries and denying that accommodation to Butcher: "[L]et's make our religious objector use his left hand." J.A. 1192.

Butcher was notified of Consol's decision at a meeting with Smith and Fazio on August 6, 2012. At Butcher's request, the meeting was deferred until August 10, 2012, so that Butcher could consider the option of using his left hand in the scanner. Butcher used that time, he testified, to go "back to the scriptures again" and to "pray[] very hard" about his dilemma. J.A. 708. On August 10, Butcher told Smith and Fazio that "in good conscience [he] could not go along with this system of scanning [his] hand in and out." J.A. 709. Smith promptly handed Butcher a copy of Consol's disciplinary procedures

regarding the scanner, with the promise that it would be enforced against him if he refused to scan his left hand. According to the policy, an employee's first and second missed scans each would result in a written warning; the third would result in a suspension; and a fourth would result in suspension with intent to discharge. Butcher believed the message was clear: "If I didn't go along with the hand scan system, their intent . . . was to fire me." J.A. 711.

Butcher responded to this ultimatum by tendering his retirement. According to Butcher, he emphasized that he did not want to retire: "I didn't have any hobbies, I wasn't ready to retire . . . . I reiterated again, you know, that I really believed and tried to live by the scriptures and, well, almost practically just begged them to find a way to keep my job." J.A. 711. But when Consol remained unsympathetic, Butcher felt he had no choice but to retire under protest.

Shortly after retiring, Butcher learned from his union, the United Mine Workers of America ("UMWA"), about the keypad accommodation Consol had offered other employees. The union then filed a grievance on behalf of Butcher pursuant to its collective bargaining agreement with Consol, based on Consol's failure to accommodate Butcher's religious beliefs. The UMWA subsequently withdrew the grievance, however, when it determined that its agreement with Consol did not require religious accommodations.

In the meantime, Butcher, facing what he viewed as pressing financial need, sought new employment. In the summer and fall of 2012, he attended job fairs; looked for job postings; and applied for various jobs, including a position at the one coal mine he

knew to have a vacancy. After several months of unsuccessful job-hunting, Butcher was hired by a temporary employment agency in October of 2012 to work as a carpenter helper. In September of 2013, Butcher accepted a better-paying construction position at another company, and he remained at that company for the duration of the trial.

B.

The EEOC brought an enforcement action against Consol on behalf of Butcher, alleging that Consol violated Title VII of the Civil Rights Act of 1964 by failing to accommodate Butcher's religious beliefs and constructively discharging him. *See* 42 U.S.C. §§ 2000e to 2000e-6 (2012). It sought compensatory and punitive damages, back and front pay and lost benefits, and injunctive relief.

The case was tried before a jury in January of 2015. At the close of the EEOC's evidence, the district court granted Consol's Rule 50(a) motion for judgment as a matter of law on the issue of punitive damages. As the district court explained, punitive damages are available under Title VII only if a defendant employer has acted "with malice or with reckless indifference" to a plaintiff's protected rights. 42 U.S.C. § 1981a(b)(1). Here, the district court concluded, the EEOC's evidence was insufficient to meet that standard; no reasonable jury could find "malice or reckless indifference to the rights of Mr. Butcher." J.A. 903.

The jury ultimately returned a verdict in favor of the EEOC, finding Consol liable for failing to accommodate Butcher's religious beliefs. The jury made findings as to each of the three elements of a Title VII reasonable accommodation claim: that Butcher had sincere religious beliefs in conflict with Consol's requirement that he use the hand

scanner; that Butcher had informed Consol of this conflict; and that Consol constructively discharged Butcher for his refusal to comply with its directions.

The district court had instructed the jury on its authority to award compensatory damages in the event that it found a Title VII violation, distinguishing compensatory damages from lost wages and emphasizing that the jury "should not consider the issue of lost wages in [its] deliberations." J.A. 1140. Nevertheless, in the blank on the jury form for compensatory damages, the jury wrote in "salary plus bonus & pension, court cost." J.A. 357. After conferring with the parties, the district court reinstructed the jury on compensatory damages and sent the jury back for further deliberations, clarifying that "[t]he fact that I am sending you back does not indicate my feelings as to the amount of damages or whether damages . . . should be awarded." J.A. 1162–63. Ten minutes later, the jury returned a second verdict, this time awarding $150,000 in compensatory damages. In response to a poll requested by Consol, each member of the jury confirmed that no portion of the $150,000 award consisted of lost wages.

After briefing by the parties, the court held an evidentiary hearing on equitable remedies, including front and back pay and lost benefits, and on the EEOC's request for a permanent injunction against Consol, prohibiting further violations of Title VII's reasonable accommodation provision. With respect to lost wages and benefits, the parties differed on two main issues: whether Butcher's post-retirement job search satisfied his duty to mitigate his damages, and whether the pension benefits Butcher received after retiring should be offset from any award. The district court determined that Butcher properly mitigated his damages and that Butcher's pension benefits were a "collateral

source" that should not be deducted from a damages award. The court awarded Butcher $436,860.74 in front and back pay and lost benefits, and issued a permanent injunction against Consol, requiring Consol to refrain from future violations of Title VII's reasonable accommodation provision and to provide management training on religious accommodations.

After judgment was entered, Consol filed three post-verdict motions that are the subject of this appeal. In a renewed motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure, Consol argued that there was insufficient evidence to support the jury's verdict against it. In a Rule 59 motion for a new trial, Consol raised multiple challenges to rulings made by the district court during the course of trial, and argued that the jury's compensatory damages award was unsupported by the evidence. And in a Rule 59 motion to amend the district court's findings and conclusions on equitable remedies, Consol took issue with the court's award of front and back pay and lost benefits.

In a comprehensive and carefully reasoned opinion, the district court denied all three motions. Consol timely appealed, and the EEOC filed a timely cross-appeal of the district court's ruling on punitive damages.

II.

Consol first challenges the denial of its renewed motion for a judgment as a matter of law, arguing that the district court erred in concluding that there is sufficient evidence to support the jury's verdict against it. We review de novo the district court's denial of

Consol's motion. *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999). In so doing, we give the non-movant – here, the EEOC – the "benefit of every legitimate inference in [its] favor." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998). So long as there exists "evidence upon which a jury could reasonably return a verdict for [the EEOC]," we must affirm. *Id.* (internal quotation marks omitted).

Title VII makes it an unlawful employment practice "to discharge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Under that provision, an employer must "make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977)); *see also* 42 U.S.C. § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief," unless employer can show that accommodation of employee's religion would impose an "undue hardship on the . . . employer's business"). To show a violation of this "reasonable accommodation" duty, as the district court explained, an employee must prove that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement." J.A. 1678 (quoting *Firestone Fibers*, 515 F.3d at 312).

On appeal, as before the district court, Consol argues primarily that the evidence presented at trial was legally insufficient to support the jury's specific findings under the first and third of these elements: that there was a conflict between a bona fide religious

belief held by Butcher and the requirement that Butcher use the hand scanner, and that Butcher was constructively discharged as a result. We agree with the district court that the evidence fully supports the jury's verdict on both these points, and therefore affirm the court's denial of Consol's motion for judgment as a matter of law.[2]

A.

The core of Consol's defense is that it did not fail to reasonably accommodate Butcher's religious beliefs because there was in fact no conflict between Butcher's beliefs and its requirement that Butcher use the hand scanner system. Highlighting the fact that Butcher testified – consistent with his letter to Consol, *see* J.A. 1173 – that the system would not imprint a physical mark on his hand, Consol argues that the EEOC failed to establish that Butcher could not use the scanner system without compromising his beliefs regarding the Mark of the Beast.

The district court disagreed, and properly so. In both his letter to Consol and his trial testimony, Butcher carefully and clearly laid out his religious objection to use of the scanner system, notwithstanding the fact that it would produce no physical mark. As the

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[2] Consol also renews its argument that there is insufficient evidence that Consol actually functioned as Butcher's employer for purposes of Title VII, given that the Robinson Run Mine was owned by a Consol subsidiary during the relevant time period. The district court rejected that contention. As evidence that Consol "control[led] the subsidiary's employment decisions" sufficient to make it a Title VII employer, *see Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980 (4th Cir. 1987), the district court pointed to the fact that the hand scanner policy (and attendant progressive disciplinary procedure) was established by Consol; that Butcher's request for an accommodation was considered and denied by Consol personnel; and that Butcher's retirement and benefits documents were issued by Consol employees. We find no error in the district court's ruling on this point.

district court explained, there was ample evidence from which a jury could conclude that Butcher sincerely believed "participation in this system" – with or without a tangible mark – "was a showing of allegiance to the Antichrist," inconsistent with his deepest religious convictions. J.A. 1679. That is all that is required to establish the requisite conflict between Butcher's religious beliefs and Consol's insistence that he use its scanner system.

At bottom, Consol's failure to recognize this conflict – in its dealings with Butcher as well as its litigation of this case – appears to reflect its conviction that Butcher's religious beliefs, though sincere, are mistaken: that the Mark of the Beast is not, as Butcher believes, associated with mere participation in a scanner identification system, but instead manifests only as a physical mark, placed upon the right and not the left hand; and that as a result, allowing Butcher to scan his left hand through the system would be more than sufficient to obviate any potential conflict. Thus, Consol relied in its discussions with Butcher and again in litigation on the letter from the manufacturer of the scanner system, which interpreted scripture to find that the Mark of the Beast is identified only with the right hand. It points to evidence that Butcher's pastor does not share Butcher's belief that there is a connection between the scanner and the Mark of the Beast. Indeed, Consol opened its oral argument before this court with quotations from scripture purporting to demonstrate that the Mark of the Beast can be imprinted only on the right hand.

But all of this, of course, is beside the point. It is not Consol's place as an employer, nor ours as a court, to question the correctness or even the plausibility of

Butcher's religious understandings. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."). Butcher's religious beliefs are protected whether or not his pastor agrees with them, *cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981) (protection of religious beliefs not limited to beliefs shared by religious sect), and whether or not Butcher's pastor – or Consol, or the manufacturer of Consol's scanning system – thinks that Butcher, in seeking to protect his religious conscience, has drawn the line in the right place, *see id.* at 715 ("[I]t is not for us to say that the line [the religious objector] drew was an unreasonable one.").[3] So long as there is sufficient evidence that Butcher's beliefs are sincerely held – which the jury specifically found, and Consol does not dispute – and conflict with Consol's employment requirement, that is the end of the matter.

Indeed, once we take out of this case any suggestion that Butcher may have misunderstood the Book of Revelation or the significance of the Mark of the Beast, there is very little left. This case does not present, for instance, the complicated questions that sometimes arise when an employer asserts as a defense to a religious accommodation claim that the requested accommodation would not be feasible, and would instead impose an "undue hardship" on its operations. *See Firestone Fibers*, 515 F.3d at 311–12; *Trans*

[3] The EEOC's regulations interpreting Title VII reflect this well-established law: "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." 29 C.F.R. § 1605.1.

World Airlines, 432 U.S. at 79–85 (considering whether requested religious accommodation was feasible). Quite the contrary: Consol expressly conceded that allowing Butcher to bypass the scan by entering his identification number into a keypad would impose no additional burdens or costs on the company. And Consol knew this, of course, because it had provided precisely that accommodation to two other employees who needed it for non-religious reasons – and then, in the very same email, refused to give equal regard to Butcher's request for a religious accommodation. In light of all of this evidence, we have no reason to question the jury's determination that Consol should be held liable for its response to a conflict between Butcher's sincere religious beliefs and its scanner system requirements.

B.

Consol also argues that the EEOC failed to establish the third element of a failure to accommodate claim: that Butcher suffered some adverse employment action as a result of his failure to comply with Consol's employment requirements. *See Firestone Fibers*, 515 F.3d at 312. According to Consol, Butcher was not disciplined or terminated but instead voluntarily retired, and the jury's contrary finding of constructive discharge cannot be sustained on the evidence introduced at trial.

The district court rejected that claim. Under our precedent, it explained, an employee is constructively discharged – satisfying the third element of a failure to accommodate claim – when "an employer deliberately makes the working conditions of the employee intolerable." J.A. 1680 (quoting *Whitten v. Fred's, Inc.*, 601 F.3d 231, 248 (4th Cir. 2010), *overruled on other grounds by Vance v. Ball State Univ.*, 133 S. Ct. 2434

(2013)). As to the deliberateness prong, the district court found that evidence of Consol's "complete failure to accommodate, in the face of repeated requests," combined with evidence that Consol was aware of a costless accommodation but nevertheless refused to make it available to Butcher, was sufficient to support the jury's verdict. J.A. 1680–81 (quoting *Johnson v. Shalala*, 991 F.2d 126, 132 (4th Cir. 1993)). And the district court dismissed Consol's argument that Butcher's working conditions could not have been "intolerable" as a matter of law because he had recourse to a grievance procedure under his union's collective bargaining agreement, holding that there was sufficient evidence for the jury to find that Consol had left Butcher with no choice but to retire.

Before our court, Consol originally emphasized the "deliberateness" prong of this analysis, arguing that there is insufficient evidence to support a showing that Consol denied Butcher an accommodation in an effort to provoke his retirement. But as a result of intervening Supreme Court case law, "deliberateness" is no longer a component of a constructive discharge claim. After the district court's order – but before appellate briefing had concluded – the Supreme Court revisited the standard for constructive discharge in *Green v. Brennan*, 136 S. Ct. 1769 (2016), and expressly rejected a "deliberateness" or intent requirement:

> The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him. We do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along.

Id. at 1779–80 (internal citations omitted); *see also id.* at 1788 (Alito, J., concurring) ("It is abundantly clear that the majority has abandoned the discriminatory-intent requirement[.]"). The Supreme Court now has clearly articulated the standard for constructive discharge, requiring objective "intolerability" – "circumstances of discrimination so intolerable that a reasonable person would resign," *id.* at 1779 – but not "deliberateness," or a subjective intent to force a resignation. In its reply brief, Consol recognizes as much, dropping its deliberateness argument and contesting only the intolerability of Butcher's working conditions under *Green.*

We note that even before *Green* was decided, our court had questioned whether a "deliberateness" requirement could be squared with evolving Supreme Court case law on constructive discharge. In *Whitten*, we observed that "[o]ur requirement that the plaintiff prove the employer intended to force the plaintiff to quit is arguably in some tension" with *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), which defined constructive discharge in terms of objectively intolerable working conditions without applying a deliberateness test. 601 F.3d at 248–49 n.8. But because we believed ourselves bound by circuit precedent, we continued to apply the deliberateness requirement, pending further direction by the Supreme Court. *Id.* Now that direction has come. *Green*'s express holding abrogates our prior case law to the extent it is to the contrary, and under *Green*'s objective standard for constructive discharge, whether

Consol refused to accommodate Butcher in "an effort to force Butcher to quit," Br. of Appellant at 34, is no longer relevant.[4]

That leaves only the question of "intolerability," or, more specifically, whether there is sufficient evidence that as a result of Consol's discriminatory conduct, Butcher was subjected to circumstances "so intolerable that a reasonable person would resign." *Green*, 136 S. Ct. at 1779. We agree with the district court that there exists substantial evidence that Butcher was put in an intolerable position when Consol refused to accommodate his religious objection, requiring him to use a scanner system that Butcher sincerely believed would render him a follower of the Antichrist, "tormented with fire and brimstone." J.A. 683–84. This goes well beyond the kind of run-of-the-mill "dissatisfaction with work assignments, [] feeling of being unfairly criticized, or difficult or unpleasant working conditions" that we have viewed as falling short of objective intolerability. *Cf. Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994) (internal quotation marks omitted). And like the district court, we do not think that the future prospect of a successful grievance under a collective bargaining agreement – even assuming, contrary to the union's determination, that the collective bargaining agreement at issue here

[4] We also agree with the district court that the evidence at trial was sufficient to support a finding of deliberateness under our prior precedent, which allowed deliberateness to be inferred at least in part from "a complete failure to accommodate, in the face of repeated requests." *See Johnson v. Shalala*, 991 F.2d 126, 132 (4th Cir. 1993). Whether under *Green* or under our prior precedent, in other words, Consol cannot prevail as to deliberateness.

allowed for a grievance based on a right to religious accommodation – would do anything to alleviate the immediate intolerability of Butcher's circumstances.

III.

We turn now to the district court's denial of Consol's motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure. A district court may grant a new trial only if the verdict: (1) is against the clear weight of the evidence; (2) is based upon false evidence; or (3) will result in a miscarriage of justice. *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996). On appeal, we respect the district court's decision absent an abuse of discretion, and will disturb that judgment only "in the most exceptional circumstances." *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 346 (4th Cir. 2014) (internal quotation marks omitted). When, as here, a new trial is sought based on purported evidentiary errors by the district court, a verdict may be set aside only if an error is so grievous as to have rendered the entire trial unfair. *See Creekmore v. Maryview Hosp.*, 662 F.3d 686, 693 (4th Cir. 2011) (holding that judgment will not be set aside based on erroneous admission of evidence unless "justice so requires or a party's substantial rights are affected").

In its motion for a new trial and again on appeal, Consol objects primarily to the district court's exclusion of evidence regarding the availability of the UMWA's grievance process and to the court's decision to continue jury deliberations on compensatory damages after the jury's first verdict. Finding no error in the district

court's determinations, we affirm the district court's denial of Consol's motion for a new trial.

A.

As noted above, shortly after Butcher's retirement, the UMWA filed a grievance on behalf of Butcher under its collective bargaining agreement with Consol, and then withdrew the grievance after determining that the agreement did not require religious accommodations. Prior to trial, the EEOC filed a motion in limine seeking to exclude all evidence regarding the grievance process, including the union's aborted effort to employ it on Butcher's behalf. The district court deferred judgment, and during the first day of trial, both the EEOC and Consol discussed the grievance process during their opening statements and questioned Butcher about it during his testimony.

On the second day of trial, the district court granted the EEOC's motion, reasoning that Butcher's failure to avail himself further of the grievance process was not relevant to his religious accommodation claim, that what might have happened had the process been completed was speculative, and that admission of evidence on the matter would "violate [Federal Rule of Evidence] 403's prohibition against unfair prejudice to a party or confusion to the jury." J.A. 845–46. Consol moved for a mistrial, arguing that the exclusion of evidence related to the grievance process after Consol had relied on it during the trial's opening day unfairly signaled to the jury that Consol's position was without support. The district court denied the motion, and instead gave curative instructions informing the jury that it should disregard any earlier testimony about the grievance process.

Consol argues, first, that the district court abused its discretion in its evidentiary ruling. According to Consol, evidence of Butcher's failure to complete the grievance process is relevant to whether Consol reasonably accommodated Butcher's religious beliefs, because an accommodation could have been reached at the conclusion of that process had Butcher given it a fair chance. Like the district court, we disagree. As the district court explained, "Title VII requires an employer to provide a reasonable accommodation when *requested* by the employee," not only after – and if – a successful grievance process leads to an order by an arbitrator. J.A. 1686 (emphasis in original). Similarly, the possibility of success in a subsequent grievance process has no bearing on constructive discharge: "To prove constructive discharge, a claimant is not required to endure an intolerable work environment" until a grievance process can be utilized and completed. *Id.* That is particularly so here, as the district court recognized, where the UMWA withdrew its grievance because its collective bargaining agreement did not cover religious accommodation claims, so the grievance process would have been unlikely to provide Butcher even with after-the-fact relief.[5]

Nor, we hold, did the district court abuse its discretion in denying Consol's motion for a mistrial after the court excluded evidence about the grievance process. Consol's

[5] We note that on appeal, Consol does not challenge the district court's determination – reiterated in its denial of Consol's motion for a new trial – that even if evidence related to the grievance process were deemed relevant, its probative value would be "substantially outweighed by the risk of confusing the issues and misleading [the] jury," rendering it inadmissible under Rule 403 of the Federal Rules of Evidence. J.A. 1688–89. That determination alone is sufficient to sustain the district court's ruling on this point.

theory, again, is that exclusion of the evidence only after Consol had relied on it during the first day of trial improperly conveyed to the jury that Consol's position was incorrect. But the district court, as it explained, made a judgment that "a curative jury instruction would adequately prevent unfair prejudice" to Consol. J.A. 1689. Accordingly, the court informed the jury only that it had "determined that [grievance-related] testimony and evidence is inadmissible because it is not relevant" to resolution of the Title VII claim. J.A. 855. It did not assign blame to either party for raising the issue, nor distinguish between Consol's grievance-related questioning and that of the EEOC. Instead, it directed the jury to disregard *all* testimony related to the grievance process. We presume that a jury follows a curative instruction like this one, *Hinkle v. City of Clarksburg*, 81 F.3d 416, 427 (4th Cir. 1996), and Consol offers no reason to believe that the jury here ignored the curative instruction or otherwise was confused, in a way that prejudiced Consol, by the grievance evidence introduced on the first day of trial.

B.

As described above, before jury deliberations began in this case, the district court instructed the jury that compensatory damages are "distinct from the amount of wages that [] Butcher would have earned . . . if he had continued in employment" with Consol, and that the jury "should not consider the issue of lost wages" in awarding compensatory damages. J.A. 1697. Nevertheless, on its initial verdict form, where directed to "[s]tate the amount of compensatory damages you award," the jury filled in "salary plus bonus & pension, court cost." *Id.* According to Consol, this answer indicates that the jury

intended to award no damages, a decision not inconsistent with its finding of liability, and the district court therefore erred in directing further deliberations on the question.

We disagree. As we have explained, even where an initial failure to award damages is not necessarily inconsistent with a finding of liability, a district court retains discretion under Rule 49(b)(3) of the Federal Rules of Civil Procedure to determine whether the damages verdict "reflects jury confusion or uncertainty," and, if it does, to "clarify the law governing the case and resubmit the verdict for a jury decision." *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 674 (4th Cir. 2015) (internal quotation marks omitted). And the district court here followed precisely the "sensible" procedure that we approved in *Jones*: Faced with a "discrepancy" between its original instructions to the jury and the jury's statement on compensatory damages, it "conferred with counsel, then administered a supplemental jury instruction and sent the jury back to redeliberate." *Id.* Moreover, the court emphasized that the jury was free to return no compensatory damages – "[t]he fact that I am sending you back does not indicate my feelings as to the amount of damages or whether . . . compensatory damages should be awarded," J.A. 1162–63 – and conducted a post-verdict poll of the jury to confirm that its award of $150,000 did not reflect any compensation for lost wages. We see no grounds for disturbing the district court's careful exercise of its discretion.[6]

[6] In its motion for a new trial, Consol also argued that the jury's award of $150,000 in compensatory damages is unsupported by the evidence. The district court rejected that claim, pointing to testimony by Butcher and his wife about the detrimental effects of Butcher's early retirement, including emotional strain, depression and a loss of relationships with former coworkers. And as the district court explained, although a (Continued)

C.

Finally, Consol raises a series of additional objections with which we may dispense more briefly. First, Consol argues that the district court erred by barring it from asking Butcher on cross-examination whether his pension benefits would have been suspended had he obtained a new coal industry job after retirement. But as the district court observed, "[t]he question sought to elicit only testimony about Butcher's financial incentives for seeking or not seeking employment in a coal mine" – an issue that bears on Butcher's duty to mitigate, which is reserved for the district court to assess in the course of awarding lost wages after the close of trial. J.A. 1701. And in any event, the district court concluded, even if the testimony somehow had been relevant to the jury's determination on liability, Consol failed to show that its exclusion resulted in the kind of manifest injustice that would warrant a new trial. We have no reason to disturb the court's judgment in this regard.

Second, Consol objects on appeal to the district court's failure to give three of its requested jury instructions: one cautioning the jury against second-guessing Consol's business judgment; one directing the jury to award only nominal damages if it found that the plaintiff had not proven actual damages; and one regarding intolerable work conditions and constructive discharge. The district court reviewed each of these claims at

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court may compare a jury award to awards in similar cases in evaluating whether it is excessive, *see Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 672–73 (4th Cir. 2015), we have not required that it do so. We find no error in the district court's analysis.

length in its decision denying Consol's motion for a new trial, finding as to each that the substance of Consol's instruction was included in the instructions given the jury, at least to the extent it was consistent with governing law. Moreover, the district court concluded, Consol had failed to show any prejudice arising from any of the instructions at issue. Again, we find no error in the district court's disposition of these claims.

IV.

Finally, we address the parties' objections to the district court's rulings on lost wages and punitive damages. Consol appeals the denial of its post-verdict motion challenging the court's award of back and front pay. And the EEOC cross-appeals, challenging the court's determination that the EEOC's evidence is insufficient to meet the statutory standard for punitive damages. We find no error in either of the district court's rulings, and accordingly affirm.

A.

We begin with Consol's appeal from the denial of its motion to amend the district court's findings and conclusions with respect to the award of back and front pay and lost benefits. We review the district court's award only for an abuse of discretion. *See Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). Findings of fact underlying the award are reviewed for clear error, *Taylor v. Home Ins. Co.*, 777 F.2d 849, 860 (4th Cir. 1985), and questions of law related to the award are subject to de novo review, *Jones*, 777 F.3d at 670.

1.

Consol's first argument is that the district court erred as a matter of law in determining that Butcher was not required to mitigate his damages. But that is not what the district court held. On the contrary, the district court correctly applied the governing law in this area, explaining that a successful Title VII plaintiff's presumptive entitlement to back pay is limited by the statutory duty to mitigate damages. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231–32 (1982). The burden is on the defendant, the district court recognized, to show that the claimant was not "reasonably diligent in seeking and accepting new employment substantially equivalent to that from which he was discharged." J.A. 1704 (quoting *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1273 (4th Cir. 1985)). And here, the district court found as a matter of fact that Butcher indeed had reasonably mitigated his damages, and thus that Consol had failed to meet its burden.

Consol disagrees, arguing that Butcher did not mitigate adequately because he failed to seek a new coal mining job in order to protect his pension benefits, and instead accepted a lower-paying construction position. But the district court found to the contrary, concluding that Butcher indeed had "searched for mining jobs at UMWA mines, attended job fairs in the mining industry . . . and applied for a mining job," and that Consol was relying for its claim on coal industry openings that became available only after Butcher already had found steady employment. J.A. 1706. As the district court recognized, "after an extended period of time searching for work without success," a claimant not only *may* but actually "*must* consider accepting suitable lower paying employment in order to satisfy the duty to mitigate damages." J.A. 1704–05 (quoting

Brady, 753 F.2d at 1275) (emphasis added). And here, taking into account both economic and personal circumstances, including the "rural economic climate" and Butcher's age and limited educational background, *see Lundy Packing Co. v. Nat'l Labor Relations Bd.*, 856 F.2d 627, 629 (4th Cir. 1988) (listing factors relevant to reasonable diligence in job search), the court determined that Butcher "reasonably took a position . . . with lower pay to obtain income at a time when he had none." J.A. 1705–06.

As we have explained, whether a worker acted reasonably in accepting particular employment is preeminently a question of fact. *See Lundy Packing*, 856 F.2d at 630. Reviewing for clear error only, *see Taylor*, 777 F.2d at 860, we have no ground to second-guess the district court's determination that Consol failed to meet its burden of showing that Butcher's mitigation efforts were unreasonable.

2.

Consol also contends that it was entitled to a setoff against the district court's damages award for the pension benefits received by Butcher after his retirement. As the district court explained, a defendant may offset damages with payments already received by a plaintiff as compensation for the injury in question. *See Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 390 (4th Cir. 2010). But benefits that are not provided as compensation, or to "indemnify . . . against liability" for the injury, are treated as coming from a "collateral source," and are not offset against a damages award. *See id.* at 389–90. That is so even where the benefits are provided by the defendant to the plaintiff; if by "their nature" they are not "double compensation for the same injury," then they will be deemed collateral and disregarded in calculating damages. *Id.* (internal quotation marks omitted).

We agree with the district court that under *Sloas*, the pension benefits at issue here come from a collateral source, so that no setoff against damages is appropriate. The benefits at issue in *Sloas* were mandatory employer contributions to a railroad employee disability pension fund – a "commingled pool" of contributions from all railroad employers – based on an employee's earnings and career service. *Id.* at 390–91 & n.10. Because it already had made contributions on Sloas's behalf to the disability pension fund, the employer argued, it was entitled to an offset against damages awarded against it in a negligence suit by Sloas, so as to avoid what effectively would be a "double payment." *Id.* at 386. We disagreed. Because employer contributions "were not undertaken voluntarily to indemnify . . . against possible liabilities" for negligence, *id.* at 391 (internal quotation marks omitted), we held they are a "collateral source that may not be considered" in determining a damages award, *id.* at 392.

Sloas resolves the setoff question before us today. Like the railroad employer in *Sloas*, Consol did not voluntarily make pension payments to indemnify itself against the liability at issue. Instead, Consol, along with other coal mine employers, was required by its collective bargaining agreement with the UMWA to contribute to a collective pension fund managed by the union, much like the "commingled pool" in *Sloas*. Consol's contributions, in other words, were a standard term of Butcher's employment, rather than compensation for or indemnification against a Title VII violation. Or as the district court explained, "Under *Sloas* a pension is better understood to be from a collateral source in a Title VII case because the employer 'does not provide the benefit to the plaintiff as compensation for his or her injury,' but is providing a contractual retirement benefit that

the employee was entitled to regardless of the Title VII violation." J.A. 1710 (quoting *Sloas*, 616 F.3d at 390 (internal quotation marks and citation omitted)).[7]

For its contrary position, Consol relies primarily on *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985), in which this court held that an employer-provided pension should be offset from a back pay claim in an age-discrimination suit, *id.* at 961. As the district court noted, the court in *Fariss* took the position that benefits provided by an employer defendant may never be deemed "collateral," *id.* at 966 n.10 – a position, read broadly, that would be at odds with our more recent holding in *Sloas* that a defendant-provided benefit may be treated as collateral, *see* 616 F.3d at 389 ("That a benefit comes from the defendant . . . does not itself preclude the possibility that it is from a collateral source.") (internal quotation marks omitted). But we need not resolve any tension here. As we explained in *Sloas*, the holding in *Fariss* is limited to payments "made *entirely* by the employer *directly* to the employee," and does not reach an employer contribution to a commingled fund. 616 F.3d at 390 n.10 (quoting *Fariss*, 769 F.2d at 966 n.10) (emphasis in original). And this case, like *Sloas*, involves not a *Fariss*-type direct payment from employer to employee, but instead an employer contribution to a collective fund managed by a third party. At least under these circumstances, as we held in *Sloas*, *Fariss* does not

[7] As the district court observed, this conclusion comports with the general rule, followed by many of our sister circuits, that pension benefits are considered a collateral source even where a defendant employer has helped to fund those benefits. *See, e.g.*, *U.S. Can. Co. v. Nat'l Labor Relations Bd.*, 254 F.3d 626, 634 (7th Cir. 2001); *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020–21 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 790 (5th Cir. 1972).

apply. *Sloas* governs here, and under *Sloas*, the district court properly declined to offset Butcher's collateral pension benefits against his damages award.[8]

B.

We turn finally to the EEOC's cross-appeal respecting punitive damages. According to the EEOC, the district court erred when it granted Consol's Rule 50(a) motion for judgment as a matter of law at the close of the EEOC's case-in-chief, on the ground that the EEOC's evidence could not sustain an award of punitive damages. We review the grant of Consol's motion de novo, viewing the evidence in the light most favorable to the EEOC, *see EEOC v. Fed. Express Corp.*, 513 F.3d 360, 370–71 (4th Cir. 2008), and we affirm.

Punitive damages are allowed in a Title VII action only under limited circumstances. First, Title VII makes punitive damages, and also compensatory damages, available only in cases of "intentional discrimination," as opposed to cases that proceed on a disparate impact theory. 42 U.S.C. § 1981a(a)(1); *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999). And second, the plaintiff must demonstrate that his or her employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1). Punitive damages, in other words, are authorized "in only a subset of cases involving intentional discrimination," *Kolstad*,

[8] Consol raises a final objection to the relief ordered by the district court, challenging the district court's grant of the EEOC's motion for a permanent injunction. But Consol's argument is not specific to the permanent injunction; instead, Consol returns to its argument that there is insufficient evidence to support the jury's verdict against it. We have rejected that argument already, and so have no basis for questioning the district court's entry of a permanent injunction.

527 U.S. at 534, in which the employer acts with the requisite state of mind, *see Fed. Express*, 513 F.3d at 371.

Focusing on the second of these mental states, the EEOC argues that the evidence it presented was sufficient to establish that Consol acted with "reckless indifference" to Butcher's religious accommodation rights. That is a high standard to meet. Reckless indifference under Title VII, the Supreme Court has held, means "recklessness in its subjective form," *Kolstad*, 527 U.S. at 536: that is, that an employer actually knew of or perceived the risk that its conduct would violate Title VII, and then acted despite that subjective knowledge. *See Fed. Express*, 513 F.3d at 371 (plaintiff "must establish that his employer 'at least discriminate[d] in the face of a perceived risk that its actions [would] violate federal law'" (quoting *Kolstad*, 527 U.S. at 536)); *Anderson v. G.D.C. Inc.*, 281 F.3d 452, 460 (4th Cir. 2002) (punitive damages available when an employer "has discriminated in the face of a known risk that his conduct will violate federal law").

The district court held that the EEOC's evidence was insufficient to show that kind of reckless indifference to Butcher's rights, and we agree. As we have explained, the EEOC did put forward sufficient evidence to establish that Consol's efforts to accommodate Butcher's religious beliefs – in particular, its offer to allow Butcher to use his left hand in the scanner – fell short of what is required by Title VII. But that is a different question than whether Consol's management subjectively appreciated that its efforts were inadequate, or at least that there was a risk of inadequacy. And on that point, the evidence, even construed most favorably to the EEOC, simply does not suggest that

the relevant Consol agents engaged in their long negotiations with Butcher in order to reach an agreement that they subjectively believed might violate Title VII.

To make its case, the EEOC rested entirely on evidence that Consol officials were generally "aware that Title VII imposes a duty under some circumstances for employers to give accommodations for religious beliefs." J.A. 791. And as the district court recognized, evidence that an employer has "'at least a rudimentary knowledge' of the import" of Title VII may in some cases give rise to a reasonable inference that the employer acted with reckless indifference in violating that statute. *See Fed. Express*, 513 F.3d at 372 (quoting *Anderson*, 281 F.3d at 460). But in cases like *Federal Express*, that basic knowledge of Title VII's requirements goes hand-in-hand with evidence of a repeated refusal to make any reasonable efforts to accommodate an employee, or to consult or comply with internal compliance policies that would have required more. *Id.* at 373–74. Here, as the district court found, "whatever inference" might arise from Consol's general awareness of its religious accommodation obligations, J.A. 903, there was no similar evidence to suggest that Consol subjectively appreciated a risk that it failed to meet those obligations by offering Butcher an alternative that did not require scanning of his right hand.

Nor, given Consol's efforts to accommodate Butcher, is this the kind of case in which employer conduct is so "egregious" that by itself it is evidence of reckless indifference to Title VII rights, *see Kolstad*, 527 U.S. at 535 ("[E]gregious misconduct is evidence of the requisite mental state[.]"); *Anderson*, 281 F.3d at 460 ("rank offensiveness" of employer conduct may demonstrate "deliberate disregard" for

plaintiff's rights in sexual harassment case) – and, indeed, the EEOC does not argue otherwise. To be sure, and as we explain above, Consol's apparent belief that it could rely on its own understanding of scripture to limit the scope of the accommodation it offered Butcher was mistaken, and the EEOC offered ample evidence in support of the jury's verdict that Consol violated Title VII's religious accommodation provision. But the district court did not err in concluding that the EEOC's evidence fell short of allowing for a determination that Consol's Title VII violation was the result of the kind of "reckless indifference" necessary to support an award of punitive damages.

V.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

KELSEY NOBACH **PLAINTIFF**

VS. **CIVIL ACTION NO. 1:11CV346-HSO-RHW**

WOODLAND VILLAGE NURSING HOME CENTER, INC. **DEFENDANT**

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTIONS FOR ATTORNEYS' FEES

This cause comes before the Court upon Plaintiff's Motion for Attorneys' Fees [76] filed by LoCoCo & LoCoCo on October 24, 2012, and Plaintiff's Motion for Attorneys' Fees [78] filed by Baker & Brewer on October 25, 2012. Defendant has filed Responses [82, 83] and Plaintiff a Reply [84]. The Court, having considered the pleadings on file, the briefs and arguments of counsel, and relevant legal authorities, finds that Plaintiff's Motions should be granted in part and denied in part to award Plaintiff attorneys' fees in the total amount of $53,505.00.

I. BACKGROUND

This dispute stems from Plaintiff Kelsey Nobach's ["Plaintiff"] termination from employment by Woodland Village Nursing Center, Inc. ["Defendant"]. Plaintiff filed her Complaint in this Court on September 16, 2011, asserting that, while employed by Woodland Village as an activity aid, she was discriminated against on the basis of her religion in violation of Title VII, 42 U.S.C. § 2000e, *et seq.* Compl. [1] at p. 6.

Plaintiff's claims were tried before the Court and a jury beginning on

October 9, 2012, and concluding on October 10, 2012. The jury returned a verdict in favor of Plaintiff, finding that Defendant terminated her because of her religious beliefs or practices. Special Verdict Form [71], at p. 1. The Court entered Final Judgment [75] on October 11, 2012, awarding Plaintiff damages in the total amount of $69,584.00. Plaintiff, by and through LoCoco & LoCoco, P.A. filed a Motion for Attorneys' Fees [76] on October 24, 2012.[1] In addition, Plaintiff, by and through Baker & Brewer, PLLC filed a Motion for Attorneys' Fees [78] on October 25, 2012. Plaintiff, as the "prevailing party," moves the Court to award her legal fees incurred in connection with the above captioned cause.

II. DISCUSSION

A. Legal Standard

In Title VII actions, the Court in its discretion, "may allow the prevailing party . . . a reasonable attorney's fee . . . ." 42 U.S.C. § 2000e-5(k); *see also Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). In determining whether a fee award is reasonable, courts employ the "lodestar" method, which is a two step procedure delineated by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The lodestar is presumptively reasonable, *Smith & Fuller, PA v. Cooper Tire & Rubber Co.*,685 F.3d 486, 490 (5th Cir. 2012) (quoting *Heidtman v. County of El Paso,* 171 F.3d 1038, 1044 (5th Cir. 1999)), and should be modified only in exceptional cases, *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

[1]Plaintiff was represented by Danielle Brewer who, at the onset of this litigation, was employed by LoCoco & LoCoCo. By the time of trial, Ms. Brewer, together with Ian Baker, had formed the firm of Baker & Brewer, PLLC.

The first step of this method requires the Court to calculate the "lodestar," which is equal to the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate for the participating lawyers. The resulting figure provides an objective basis upon which to make an initial assessment of the value of a lawyer's services. *Hensley*, 461 U.S. at 434. Plaintiff bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Id.* at 436. The Court should exclude from this initial fee calculation hours which were not "reasonably expended." *Id.* at 434. The Supreme Court has explained that:

> [c]ases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Id., at 434.

Once the lodestar figure is determined, the Court can accept it or adjust it upwards or downwards based upon the twelve factors announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of

the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley*, 461 U.S. at 430 n.3 (1983) (citing *Johnson*, 488 F.2d at 717–19).

The Supreme Court has cautioned that the lodestar method yields a fee that is presumptively sufficient to achieve the objective of providing a reasonable fee, and the presumption is a "strong one." *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1673 (2010). Many of the *Johnson* "factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensely*, 461 U.S. at 434 n.9. The fee-seeker must submit adequate documentation of the hours reasonably expended and of the attorney's qualifications and skill, while the party seeking reduction of the lodestar must show that a reduction is warranted. *Hensley,* 461 U.S. at 433; *Louisiana Power & Light Co. v. Kellstrom,* 50 F.3d 319, 329 (5th Cir. 1995).

Here, Plaintiff bears the burden of demonstrating the reasonableness of the amount of her attorneys' fees, including any adjustments or enhancements. *Blum v. Stenson*, 465 U.S. 886, 901–02 (1984). To obtain an enhancement, Plaintiff must produce "specific evidence" which supports the award. *Perdue*, 130 S. Ct. at 1673. "The lodestar may not be adjusted due to a *Johnson* factor, however, if the creation of the lodestar amount already took that factor into account; to do so would be impermissible double counting." *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006).

B. Analysis

1. Attorneys' Fees Incurred by LoCoco & LoCoco

Plaintiff, through LoCoCo & LoCoco, requests $7,245.00 in legal fees incurred by Danielle Brewer while she was employed as an associate with that firm. Mot. [76], at p. 2. In support of this Motion, Plaintiff has tendered her Contract of Employment with the firm. Employment Contract, att. as Ex. "1" to Pl.'s Mot. [76] at p. 1. An Affidavit executed by Ms. Brewer states that she entered into the Employment Contract with Plaintiff for payment of attorneys' fees at a rate of $225.00 per hour. Affidavit of Danielle Brewer, att. as Ex. "3" to Pl.'s Mot. [76] at p. 1. Plaintiff has also tendered time sheets prepared by her counsel. Itemized Time Sheets, att. as Ex. "2" to Pl.'s Mot. [76] at pp. 5-7.

Defendant responds that Plaintiff's requested fee award is based upon an excessive hourly rate, is unreasonable, and that certain of Plaintiff's expenses within the claimed amount were unnecessary. Resp. [83], at pp. 2-3. Alternatively, Defendant maintains that under the facts of this case, the attorneys' fee requested by LoCoCo and LoCoCo is excessive and unreasonable. *Id.* at pp. 1-2. Defendant maintains that the requested hourly rate of $225.00 is excessive and outside the general range of allowable fees in similar cases. *Id.* at p. 1. Defendant challenges the hours expended, arguing that certain hours were unnecessary and/or duplicative. *Id.* at 2.

The record submitted in connection with this Motion demonstrates that from October 16, 2009, through July 22, 2011, Ms. Brewer expended a total of 32.2 hours while at LoCoco & LoCoco in connection with her representation of Plaintiff. Ms.

Brewer's Affidavit avers that the standard rate charged in this matter was $225.00 per hour. *See* Ex. "C" to Pl.'s Mot. [76].

Having considered the record as whole in light of the foregoing authorities, the Court concludes that these figures are reasonable under the circumstances of this case. The Court is further of the opinion that the amount of attorneys' fees incurred, $7,245.00, is reasonable based upon the nature of this case. The Court finds no basis in the record for reducing or enhancing the lodestar; therefore Plaintiff, by and through LoCoco & LoCoco, should be awarded attorneys' fees in the amount of $7,425.00.

2. Attorneys' Fees Incurred by Baker & Brewer

Plaintiff, through Baker & Brewer, requests $51,400.00 in legal fees. Mot. [78], at p. 5. In support of this Motion, Plaintiff has tendered a Verification of her attorneys, Danielle Brewer and Ian Baker, detailing the costs, expenses, and fees incurred. Affidavit of Danielle Brewer, att. as Ex. "A" to Pl.'s Mot. [78]; Affidavit of Ian Baker, att. as Ex. "C" to Pl.'s Mot. [78]. Plaintiff has also submitted her attorneys' time sheets. Itemized Time Sheets, att. as Ex. "B" and "D" to Pl.'s Mot. [78]. Counsel assert in their affidavits that the rates charged are customary in this area for the same or similar services provided by attorneys with similar experience, reputation, and ability.

Once again Defendant responds that Plaintiff's requested fee award is unreasonable, and that certain of Plaintiff's expenses are unreasonable and

unnecessary. Resp. [83], at pp. 1-3. Specifically, Defendant takes issue with the potential duplication of efforts by both of Plaintiff's attorneys:

> [i]n the instant matter, duplication of effort is apparent in the time records submitted by Danielle Brewer and Ian Baker. Nearly all of the entries by Mr. Baker are for review or assisting in the preparation for Ms. Brewer. In addition, both lawyers charged full rate for time spent in conferences and in the courtroom. The time submitted must be edited for duplication of effort.

Id. at p. 2.

"Reasonable hourly rates are determined by looking to the prevailing market rates in the relevant legal community." *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 662 (5th Cir. 2002). The relevant legal community is the community in which the district court sits. *Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002). The burden of demonstrating the hourly rate lies with the party seeking attorneys' fees. *Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996). "Generally the reasonable hourly rate for a particular community is established through affidavits of other attorneys practicing there." *Tollett*, 285 F.3d at 368.

In the present case, Plaintiff has not provided affidavits from other attorneys regarding the reasonableness of their requested $250.00 hourly rate, and they have not provided information concerning their attorneys' respective levels of expertise and experience. However, the Court is familiar with Baker and Brewer, as well as the reasonable rate for similar services in this community based on other recent cases in which attorneys' fees were sought. The Court finds that a reasonable rate for Baker and Brewer would be $225.00 per hour, the rate Ms. Brewer set forth in

the Employment Contract for representing Plaintiff while she was at the LoCoco & LoCoco firm.

As for Defendant's allegations regarding duplication of effort, the docket reflects that during the period from August 2011 through October 2012, Plaintiff's counsel was required to conduct discovery, to defend the case against various dispositive motions, and to carry the case through a jury trial. During her time at both LoCoco & LoCoCo and Baker & Brewer firms, Ms. Brewer spent a total of 165.0 hours prosecuting this case, and Mr. Baker spent 40.6. The Court has reviewed the time sheets submitted by counsel and finds that their work was reasonable, necessary, and well-documented.

The hours incurred were reasonable under the circumstances of this case. At the hourly rate of $225.00, the Court finds that the lodestar fee applicable to Ms. Brewer is $37,125.00, and the lodestar fee applicable to Mr. Baker is $9,135.00. Therefore, the Court is of the opinion that based on the record the total amount of attorneys' fees incurred by Baker & Brewer, $46,260.00, as adjusted to reflect a $225.00 hourly rate, was reasonable based upon the nature of this case. The Court sees no reason to adjust the lodestar.

III. CONCLUSION

Based upon the foregoing, the Court will grant in part and deny in part Plaintiff's Motions for Attorney's Fees [76, 78]. Because the Court finds no basis for reducing or enhancing the lodestar, Plaintiff, by and through LoCoco & LoCoco will be awarded attorneys' fees in the total amount of $7,245.00. Similarly, Plaintiff, by

and through Baker & Brewer will be awarded attorneys' fees in the total amount of $46,260.00, as adjusted to reflect a $225.00 hourly rate pursuant to 42 U.S.C. § 2000e-5(k).

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons stated herein, the Motion for Attorney's Fees [76] filed by LoCoCo & LoCoCo on October 24, 2012, is **GRANTED**. Defendant Woodland Village Nursing Center, Inc. is **ORDERED** to remit in attorney's fees, the sum of $7,245.00, payable to Plaintiff, by and through LoCoCo & LoCoCo, within 30 days of the date of this Order.

IT IS, FURTHER, ORDERED AND ADJUDGED that, for the reasons stated herein, the Motion for Attorney's Fees [76] filed by Baker & Brewer, PLLC, on October 25, 2012, is **GRANTED IN PART AND DENIED IN PART.** Defendant Woodland Village Nursing Center, Inc., is **ORDERED** to remit in attorneys' fees, the sum of $46,260.00, payable to Plaintiff, by and through Baker & Brewer, within 30 days of the date of this Order.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Plaintiff is awarded post-judgment interest at the statutory rate as prescribed by 28 U.S.C. § 1961, using October 11, 2012, as the date of judgment.

SO ORDERED AND ADJUDGED, this the 15th day of May, 2013.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

562 F.3d 256 (2009)

Kimberlie D. WEBB, Appellant
v.
CITY OF PHILADELPHIA.

No. 07-3081.

United States Court of Appeals, Third Circuit.

Argued September 9, 2008.
Filed: April 7, 2009.

257 *257 Jeffrey M. Pollock, Esquire (Argued), Abbey T. Harris, Esquire, Fox Rothschild LLP, Lawrenceville, NJ, Seval Yildirim, Esquire, Costa Mesa, CA, for Appellant.

Eleanor N. Ewing, Esquire (Argued), City of Philadelphia Law Department, Philadelphia, PA, for Appellee.

John S. Ghose, Esquire, Fred T. Magaziner, Esquire, Dechert LLP, Philadelphia, PA, for Amici Curiae/Appellant, American Civil Liberties Union of Pennsylvania, American Civil Liberties Union, Council on American Islamic Relations, Majlis Ash'Shura, American Muslim Law Enforcement Officers Association, Islamic Society of North America, Muslim Public Affairs Council, Muslim Alliance in North America, Muslim American Society Freedom Foundation, The Sikh Coalition, and Shalom Center.

Before: SCIRICA, Chief Judge, McKEE and SMITH, Circuit Judges.

258 *258 **OPINION OF THE COURT**

SCIRICA, Chief Judge.

In this employment discrimination case, the issue on appeal is whether a police officer's request to wear religious garb with her uniform could be reasonably accommodated without imposing an undue burden upon the City of Philadelphia. On the facts presented, the District Court held it could not. *Webb v. City of Philadelphia*, No. 05-5283, 2007 WL 1866763, 2007 U.S. Dist. LEXIS 46872 (E.D.Pa. June 27, 2007). We agree.

I.

Kimberlie Webb is a practicing Muslim, employed by the City of Philadelphia as a police officer since 1995. On February 11, 2003, Webb requested permission from her commanding officer to wear a headscarf while in uniform and on duty. The headscarf (a khimar or hijaab) is a traditional headcovering worn by Muslim women. Webb's headscarf would cover neither her face nor her ears, but would cover her head and the back of her neck. Her request was denied in view of Philadelphia Police Department Directive 78, the authoritative memorandum which prescribes the approved Philadelphia police uniforms and equipment. Nothing in Directive 78 authorizes the wearing of religious symbols or garb as part of the uniform.[1]

On February 28, 2003, Webb filed a complaint of religious discrimination under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission. On August 12, 2003, while the matter was pending before the EEOC, Webb arrived at work wearing her headscarf. She refused to remove it when requested and was sent

home for failing to comply with Directive 78. The next two days' events were indistinguishable: Webb arrived at work in her uniform and her headscarf, which she refused to remove, and was then sent home. On August 14, Webb was informed her conduct could lead to disciplinary action. Thereafter, she reported to work without a headscarf. Disciplinary charges of insubordination were subsequently brought against Webb, resulting in a temporary thirteen-day suspension.

On October 5, 2005, Webb brought suit against the City of Philadelphia,[2] asserting three causes of action under Title VII — religious discrimination, retaliation/hostile work environment, and sex discrimination — and one cause of action under the Pennsylvania Religious Freedom Protection Act (RFPA), 71 Pa. Stat. Ann. § 2401. The District Court found that Directive 78 and "[its] detailed standards with no accommodation for religious symbols and attire not only promote the need for uniformity, but also enhance cohesiveness, cooperation, and the esprit de corps of the police force." *Webb*, 2007 WL 1866763, *4, 2007 U.S. Dist. LEXIS 46872, at *11-12. The District Court held the City would suffer an undue hardship if forced to permit Webb and
259 other officers to wear religious clothing or ornamentation *259 with their uniforms. The District Court granted summary judgment on all claims, finding Webb failed to exhaust her administrative remedies for the Title VII sex discrimination claim, failed to meet the statutory notice requirements for the RFPA claim, and failed to raise a genuine issue of material fact for the Title VII religious discrimination and retaliation/hostile work environment claims.

Webb appeals only the adverse judgments on the religious discrimination and sex discrimination claims. She also raises, for the first time on appeal, certain constitutional claims. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. We have jurisdiction under 28 U.S.C. § 1291.

"We undertake a plenary review of grants of summary judgment." *Huber v. Taylor*, 469 F.3d 67, 73 (3d Cir.2006). "We view all evidence and draw all inferences therefrom in the light most favorable to the non-movant, affirming if no reasonable jury could find for the non-movant." *Shelton v. Univ. of Med. and Dentistry of N.J.*, 223 F.3d 220, 224 (3d Cir.2000).

> [A]n appellate court may only review the record as it existed at the time summary judgment was entered. In reviewing a summary judgment order, an appellate court can consider only those papers that were before the trial court. The parties cannot add exhibits, depositions, or affidavits to support their position. Nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination.

Union Pac. R.R. Co. v. Greentree Transp. Trucking Co., 293 F.3d 120, 126 (3d Cir. 2002) (internal citations omitted).

II.

Title VII of the 1964 Civil Rights Act prohibits employers from discharging or disciplining an employee based on his or her religion. 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). To establish a prima facie case of religious discrimination, the employee must show: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement. *Shelton*, 223 F.3d at 224. Once all factors are established, the burden shifts to the employer to show either it made a good-faith effort to reasonably accommodate the religious belief, or such an accommodation would work an undue hardship upon the employer and its business. *Id.*

Title VII religious discrimination claims often revolve around the question of whether the employer can show reasonable accommodation would work an undue hardship. *United States v. Bd. of Educ.*, 911 F.2d 882, 886

260 (3d Cir.1990).[3] An accommodation *260 constitutes an "undue hardship" if it would impose more than a de minimis cost on the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). Both economic and non-economic costs can pose an undue hardship upon employers; the latter category includes, for example, violations of the seniority provision of a collective bargaining agreement and the threat of possible criminal sanctions. *Id.* at 83; *Bd. of Educ.*, 911 F.2d at 891.

We focus on the specific context of each case, looking to both the fact as well as the magnitude of the alleged undue hardship. *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134 (3d Cir.1986) (evaluating Volkswagen's claim of undue hardship when asked to accommodate a worker whose religious beliefs required her not to work on Saturdays). We need not "determine with precision the meaning of `undue hardship' under Title VII." *Bd. of Educ.*, 911 F.2d at 890. But *Hardison* "strongly suggests that the undue hardship test is not a difficult threshold to pass." *Id.*

In *Kelley v. Johnson*, the Supreme Court characterized a police department's "[c]hoice of organization, dress, and equipment for law enforcement personnel ... [as] a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1975). Almost ten years later, in *Goldman v. Weinberger*, the Court stated that the "desirability of dress regulations in the military is decided by the appropriate military officials." 475 U.S. 503, 509, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986). The Court also found "the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission." *Id.* at 508, 106 S.Ct. 1310.

Our most recent decision in this area is *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.1999). In *Fraternal Order of Police*, we held the government cannot discriminate between conduct that is secularly motivated and similar conduct that is religiously motivated. The Newark police department forbade police officers from growing beards but granted medical exceptions for beards as required by the Americans with Disabilities Act, 42 U.S.C. § 12112. Two Muslim police officers, whose religion required they grow beards, filed suit contending their First Amendment rights were infringed upon by the no-beards policy. We agreed, holding that the police department must create a religious exemption to its "no-beards" policy to parallel its secular one, unless it could make a substantial showing as to the hypothetical negative effects of a religious exemption.

In a similar case, a sister court of appeals determined "[a] police department cannot be forced to let individual officers add religious symbols to their official uniforms." *Daniels v. City of Arlington*, 246 F.3d 500, 506 (5th Cir.2001). In *Daniels*, a police officer refused to remove a gold cross pin on his uniform, in non-compliance with a no-pins official policy. *Id.* at 501. Because the "Supreme Court has upheld appropriate restrictions on the First Amendment rights of government employees, specifically including both military and police uniform standards," the Court of Appeals for the Fifth Circuit determined the City's uniform standards were proper and
261 the City was unable to reasonably accommodate the officer's religious needs *261 without undue hardship. *Id.* at 503. Other courts have recognized the interests of a governmental entity in maintaining the appearance of neutrality. *See, e.g., Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir.1998) (Posner, C.J., concurring) ("The importance of public confidence in the neutrality of its protectors is so great that a police department or a fire department... should be able to plead `undue hardship'...."); *Paulos v. Breier*, 507 F.2d 1383, 1386 (7th Cir.1974) (recognizing and protecting the interest of municipality in preserving nonpartisan police force and appearance thereof); *see also United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

III.

The District Court heid Webb estabiished a prima facie case of reiigious discrimination. We agree. Webb's religious beliefs are sincere, her employer understood the conflict between her beliefs and her employment requirements, and she was disciplined for failing to comply with a conflicting official requirement. Thus, the burden shifts and the City must establish that to reasonably accommodate Webb (that is, allow her to wear a headscarf with her uniform) would constitute an undue hardship. The City offered no accommodation, contending any accommodation would impose an undue hardship.

In the City's view, at stake is the police department's impartiality, or more precisely, the perception of its impartiality by citizens of all races and religions whom the police are charged to serve and protect. If not for the strict enforcement of Directive 78, the City contends, the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference would be severely damaged to the detriment of the proper functioning of the police department. In the words of Police Commissioner Sylvester Johnson, uniformity "encourages the subordination of personal preferences in favor of the overall policing mission" and conveys "a sense of authority and competence to other officers inside the Department, as well as to the general public."

Commissioner Johnson identified and articulated the police department's religious neutrality (or the appearance of neutrality) as vital in both dealing with the public and working together cooperatively. "In sum, in my professional judgment and experience, it is critically important to promote the image of a disciplined, identifiable and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias." Commissioner Johnson's testimony was not contradicted or challenged by Webb at any stage in the proceedings.[4]

262 Commissioner Johnson's reasoning is supported by *Kelley* and *Goldman.* As *262 a para-military entity, the Philadelphia Police Department requires "a disciplined rank and file for efficient conduct of its affairs." *Kelley,* 425 U.S. at 242, 96 S.Ct. 1440 (internal citations omitted); *see also* Thomas v. Whalen, 51 F.3d 1285, 1291 (6th Cir.1995) ("A paramilitary law enforcement unit, such as the police, has many of the same interests as the military in regulating its employees' uniforms."). Commissioner Johnson's thorough and uncontradicted reasons for refusing accommodations are sufficient to meet the more than *de minimis* cost of an undue burden. Hardison, 432 U.S. at 84, 97 S.Ct. 2264.

Despite Webb's assertions, *Fraternal Order of Police* is distinguishable from this case.[5] The focus of *Fraternal Order of Police* is the lack of neutrality in applying the no-beards regulation. As we explained, "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent." Fraternal Order of Police, 170 F.3d at 365. The Philadelphia Police Department's Directive 78, by contrast, contains no exceptions, nor is there evidence the City allows other officers to deviate from it. In other ways, our decision in *Fraternal Order of Police* buttressed the District Court's opinion. We recognized that "safety is undoubtedly an interest of the greatest importance" to the police department and that uniform requirements are crucial to the safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police. *Id.* at 366.

Webb argues summary judgment was improper because there were genuine issues of material fact, pointing to her affidavit and that of police officer Rochelle Bilal. Both officers claimed other police officers displayed religious symbols, such as cross pins on their uniforms, with no disciplinary repercussions. But neither officer presented any evidence of "who" or "when," nor did either know whether the police department authorized or was even aware of the alleged occurrences. These blanket assertions with no specific evidence do not create a genuine issue of material fact. *See, e.g.,* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 137 (1st Cir.2004) (finding, for these same reasons, evidence identical to the sort offered by Webb here to be "unpersuasive" in refuting employer's assertion of undue hardship and insufficient to defeat summary judgment). The District Court's grant of summary judgment was proper.

IV.

Before bringing suit under Title VII in federal court, a plaintiff must first file a charge with the EEOC. *See* Hicks v. ABT Assocs. Inc., 572 F.2d 960, 963 (3d Cir.1978); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir.1976). The purpose of this administrative exhaustion requirement is to put the EEOC on notice of the plaintiff's claims and afford it "the opportunity to settle disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court." Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir.1996); *see also* Hicks, 572 F.2d at 963. While we have recognized the "preliminary requirements for a Title VII action are to be
263 *263 interpreted in a nontechnical fashion," the aggrieved party "is not permitted to bypass the administrative process." Ostapowicz, 541 F.2d at 398. Accordingly, we have held "the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* at 398-99.

Webb only filed a charge of religious discrimination with the EEOC. The District Court found that her sex discrimination claim fell outside the scope of her religious discrimination claim or any investigation that reasonably would have arisen from it. Nothing in Webb's EEOC claim incorporated sex discrimination, or provided any indication to the EEOC that its investigation should encompass such a claim. For these reasons, Webb's claim of sex discrimination is not sufficiently related to her religious discrimination claim to give notice or to excuse her failure to administratively exhaust it. *See* Antol, 82 F.3d at 1296. Allowing her sex discrimination claim to go forward would amount to an administrative bypass. We will affirm the grant of summary judgment with respect to the sex discrimination claim.

V.

Webb did not raise her constitutional claims until appellate review. "Generally, failure to raise an issue in the District Court results in its waiver on appeal." Huber v. Taylor, 469 F.3d 67, 74 (3d Cir. 2006); *see also* Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). This general rule serves several important judicial interests, protecting litigants from unfair surprise, *see* Huber, 469 F.3d at 75 (citing Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941)); "promot[ing] the finality of judgments and conserv[ing] judicial resources," Richerson v. Jones, 572 F.2d 89, 97 (3d Cir.1978); and preventing district courts from being "reversed on grounds that were never urged or argued" before it, Caisson Corp. v. Ingersoll-Rand Co., 622 F.2d 672, 680 (3d Cir.1980). Neither Webb's first complaint nor her amended complaint presents a constitutional claim; nor was a constitutional claim raised before the District Court.[6]

We have recognized that we have "discretionary power to address issues that have been waived." Bagot v. Ashcroft, 398 F.3d 252, 256 (3d Cir.2005); *see also* Selected Risks Ins. Co. v. Bruno, 718 F.2d 67, 69 (3d Cir.1983) (noting that the decision to address a claim raised for the first time on appeal "is one of discretion rather than jurisdiction"). But we have limited our exercise of discretion to cases presenting "exceptional circumstances." Selected Risks, 718 F.2d at 69. In *Huber,* we indicated exceptional circumstances may exist when we are presented with "a pure question of law ... where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." 469 F.3d at 74-75 (quoting Loretangeli v. Critelli, 853 F.2d 186, 189-90 n. 5 (3d Cir.1988)). We are not presented with a pure question of
264 law here, nor are we faced with exceptional *264 circumstances. We do not reach the merits of Webb's constitutional claims.

The District Court correctly concluded the City would suffer undue hardship under Title VII if required to grant Webb's requested religious accommodation. We will affirm the judgment of the District Court.

[1] Directive 78 restricts what constitutes a permissible police officer uniform in specific detail. According to Philadelphia Police Commissioner Sylvester Johnson, "[o]ur dress code is very, very strict.... And it specifically tells you the things that you can wear. If those things are not on there, then it is prohibited based on our Directives."

[2] The Complaint identified three defendants: the City, the Philadelphia Police Department, and Police Commissioner Sylvester Johnson. The District Court granted Defendants' motions to dismiss the Police Department and Commissioner Johnson as defendants. These orders were not appealed.

[3] In *United States v. Board of Education,* suit was filed against the Philadelphia School District Board of Education under Title VII "to advance what would more commonly be a free exercise challenge." 911 F.2d at 884. The school board, which employed a teacher who wanted to wear a headscarf, was subject to Pennsylvania's Garb Statute, 24 Pa. Stat. Ann. § 11-1112, which prohibits teachers from wearing religious clothing or symbols. *Bd. of Educ.*, 911 F.2d. at 885. We determined that to expose the school administration "to a substantial risk of criminal prosecution, fines and expulsion ... would have been an undue hardship on it as it went about the business of running a school district." *Id.* at 891.

[4] Amici filed a Brief in Support of Reversal with a Supplemental Appendix containing articles regarding the policies and practices of other para-military organizations in the United States and the world which allow, to various degrees, religious symbols and garb as part of their uniforms. The City points out the "blatant hearsay nature" of this material and the fact it was not presented to the District Court. We do not consider material on appeal that is outside of the district court record. *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts,* 913 F.2d 89, 96 (3d Cir.1990).

[5] In her opening appellate brief, Webb raises for the first time her contention that the "scarf policy" in Directive 78 is a secular exception akin to the medical exception in *Fraternal Order of Police.* Directive 78 allows "Scarves — black or navy blue only," in a section that also permits sweaters and earmuffs. This matter was not raised before the District Court. On review of summary judgment, we generally review only the record and arguments presented to the District Court. *Union Pac. R.R. Co.*, 293 F.3d at 126.

[6] The District Court did not address constitutional claims because none were raised. The District Court cited *Goldman* and *Kelley* in its opinion to elucidate its Title VII analysis, not to perform a separate constitutional analysis. The mere reference in the parties' briefs and the District Court's opinion to *Goldman* and *Kelley* when addressing the Title VII claim did not put the City or the court on notice that any independent constitutional claims were being raised.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ABERCROMBIE & FITCH STORES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 14–86. Argued February 25, 2015—Decided June 1, 2015

Respondent (Abercrombie) refused to hire Samantha Elauf, a practicing Muslim, because the headscarf that she wore pursuant to her religious obligations conflicted with Abercrombie's employee dress policy. The Equal Employment Opportunity Commission (EEOC) filed suit on Elauf's behalf, alleging a violation of Title VII of the Civil Rights Act of 1964, which, *inter alia,* prohibits a prospective employer from refusing to hire an applicant because of the applicant's religious practice when the practice could be accommodated without undue hardship. The EEOC prevailed in the District Court, but the Tenth Circuit reversed, awarding Abercrombie summary judgment on the ground that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his need for an accommodation.

Held: To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need. Title VII's disparate-treatment provision requires Elauf to show that Abercrombie (1) "fail[ed] . . . to hire" her (2) "because of" (3) "[her] religion" (including a religious practice). 42 U. S. C. §2000e–2(a)(1). And its "because of" standard is understood to mean that the protected characteristic cannot be a "motivating factor" in an employment decision. §2000e–2(m). Thus, rather than imposing a knowledge standard, §2000e–2(a)(1) prohibits certain *motives*, regardless of the state of the actor's knowledge: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. Title VII contains no knowledge requirement. Furthermore, Title VII's definition of religion clearly in-

Syllabus

dicates that failure-to-accommodate challenges can be brought as disparate-treatment claims. And Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices. Pp. 2–7.

731 F. 3d 1106, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in part and dissenting in part.

SUPREME COURT OF THE UNITED STATES

No. 14–86

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 1, 2015]

JUSTICE SCALIA delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. The question presented is whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.

I

We summarize the facts in the light most favorable to the Equal Employment Opportunity Commission (EEOC), against whom the Tenth Circuit granted summary judgment. Respondent Abercrombie & Fitch Stores, Inc., operates several lines of clothing stores, each with its own "style." Consistent with the image Abercrombie seeks to project for each store, the company imposes a Look Policy that governs its employees' dress. The Look Policy prohibits "caps"—a term the Policy does not define—as too informal for Abercrombie's desired image.

Samantha Elauf is a practicing Muslim who, consistent

with her understanding of her religion's requirements, wears a headscarf. She applied for a position in an Abercrombie store, and was interviewed by Heather Cooke, the store's assistant manager. Using Abercrombie's ordinary system for evaluating applicants, Cooke gave Elauf a rating that qualified her to be hired; Cooke was concerned, however, that Elauf's headscarf would conflict with the store's Look Policy.

Cooke sought the store manager's guidance to clarify whether the headscarf was a forbidden "cap." When this yielded no answer, Cooke turned to Randall Johnson, the district manager. Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf.

The EEOC sued Abercrombie on Elauf's behalf, claiming that its refusal to hire Elauf violated Title VII. The District Court granted the EEOC summary judgment on the issue of liability, 798 F. Supp. 2d 1272 (ND Okla. 2011), held a trial on damages, and awarded $20,000. The Tenth Circuit reversed and awarded Abercrombie summary judgment. 731 F. 3d 1106 (2013). It concluded that ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation. *Id.*, at 1131. We granted certiorari. 573 U. S. ___ (2014).

II

Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, prohibits two categories of employment practices. It is unlawful for an employer:

"(1) to fail or refuse to hire or to discharge any indi-

vidual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a).

These two proscriptions, often referred to as the "disparate treatment" (or "intentional discrimination") provision and the "disparate impact" provision, are the only causes of action under Title VII. The word "religion" is defined to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j).[1]

Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.[2]

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[1] For brevity's sake, we will in the balance of this opinion usually omit reference to the §2000e(j) "undue hardship" defense to the accommodation requirement, discussing the requirement as though it is absolute.

[2] The concurrence mysteriously concludes that it is not the plaintiff's burden to prove failure to accommodate. *Post*, at 5. But of course that *is* the plaintiff's burden, if failure to hire "because of" the plaintiff's "religious practice" is the gravamen of the complaint. Failing to hire for

The disparate-treatment provision forbids employers to: (1) "fail . . . to hire" an applicant (2) "because of" (3) "such individual's . . . religion" (which includes his religious practice). Here, of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely believes that her religion so requires) Elauf's wearing of a head-scarf is (3) a "religious practice." All that remains is whether she was not hired (2) "because of" her religious practice.

The term "because of" appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. ___ (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a "motivating factor" in an employment decision. 42 U. S. C. §2000e–2(m). "Because of" in §2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.

It is significant that §2000e–2(a)(1) does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do. For example, the Americans with Disabilities Act of 1990 defines discrimi-

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that reason is *synonymous* with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other. If he is willing to "accommodate"—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary—adverse action "because of" the religious practice is not shown. "The clause that begins with the word 'unless,'" as the concurrence describes it, *ibid.*, has no function except to place upon the employer the burden of establishing an "undue hardship" defense. The concurrence provides no example, not even an unrealistic hypothetical one, of a claim of failure to hire because of religious practice that does not say the employer refused to permit ("failed to accommodate") the religious practice. In the nature of things, there cannot be one.

nation to include an employer's failure to make "reasonable accommodations to the *known* physical or mental limitations" of an applicant. §12112(b)(5)(A) (emphasis added). Title VII contains no such limitation.

Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

Abercrombie urges this Court to adopt the Tenth Circuit's rule "allocat[ing] the burden of raising a religious conflict." Brief for Respondent 46. This would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule. The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence. Its disparate-

treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.[3]

Abercrombie argues in the alternative that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim. We think not. That might have been true if Congress had limited the meaning of "religion" in Title VII to religious *belief*—so that discriminating against a particular religious *practice* would not be disparate treatment though it might have disparate impact. In fact, however, Congress defined "religion," for Title VII's purposes, as "includ[ing] all aspects of religious observance and practice, as well as belief." 42 U. S. C. §2000e(j). Thus, religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.

Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored

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[3] While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—*i.e.*, that he cannot discriminate "because of' a "religious practice" unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.

treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious . . . practice," it is no response that the subsequent "fail[ure] . . . to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

* * *

The Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment. We reverse its judgment and remand the case for further consideration consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 14–86

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 1, 2015]

JUSTICE ALITO, concurring in the judgment.

This case requires us to interpret a provision of Title VII of the Civil Rights Act of 1964 that prohibits an employer from taking an adverse employment action (refusal to hire, discharge, etc.) "against any individual . . . because of[1] such individual's . . . religion." 42 U. S. C. §2000e–2(a). Another provision states that 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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j). When these two provisions are put together, the following rule (expressed in somewhat simplified terms) results: An employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.

In this case, Samantha Elauf, a practicing Muslim, wore

[1] Under 42 U. S. C. §2000e–2(m), an employer takes an action "because of" religion if religion is a "motivating factor" in the decision.

a headscarf for a religious reason when she was interviewed for a job in a store operated by Abercrombie & Fitch. She was rejected because her scarf violated Abercrombie's dress code for employees. There is sufficient evidence in the summary judgment record to support a finding that Abercrombie's decisionmakers knew that Elauf was a Muslim and that she wore the headscarf for a religious reason. But she was never asked why she wore the headscarf and did not volunteer that information. Nor was she told that she would be prohibited from wearing the headscarf on the job. The Tenth Circuit held that Abercrombie was entitled to summary judgment because, except perhaps in unusual circumstances, "[a]pplicants or employees must initially inform employers of their religious practices that conflict with a work requirement and their need for a reasonable accommodation for them." 731 F. 3d 1106, 1142 (2013) (emphasis deleted).

The relevant provisions of Title VII, however, do not impose the notice requirement that formed the basis for the Tenth Circuit's decision. While I interpret those provisions to require proof that Abercrombie knew that Elauf wore the headscarf for a religious reason, the evidence of Abercrombie's knowledge is sufficient to defeat summary judgment.

The opinion of the Court states that "§2000e–2(a)(1) does not impose a knowledge requirement," *ante*, at 4, but then reserves decision on the question whether it is a condition of liability that the employer know or suspect that the practice he refuses to accommodate is a religious practice, *ante*, at 6, n. 3, but in my view, the answer to this question, which may arise on remand,[2] is obvious. I would

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[2] Cooke testified that she told Johnson that she believed Elauf wore a head scarf for a religious reason, App. 87, but Johnson testified that Cooke did not share this belief with him, *id.*, at 146. If Abercrombie's knowledge is irrelevant, then the lower courts will not have to decide whether there is a genuine dispute on this question. But if Abercrom-

hold that an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason. If §2000e–2(a)(1) really "does not impose a knowledge requirement," *ante* at 4, it would be irrelevant in this case whether Abercrombie had any inkling that Elauf is a Muslim or that she wore the headscarf for a religious reason. That would be very strange.

The scarves that Elauf wore were not articles of clothing that were designed or marketed specifically for Muslim women. Instead, she generally purchased her scarves at ordinary clothing stores. In this case, the Abercrombie employee who interviewed Elauf had seen her wearing scarves on other occasions, and for reasons that the record does not make clear, came to the (correct) conclusion that she is a Muslim. But suppose that the interviewer in this case had never seen Elauf before. Suppose that the interviewer thought Elauf was wearing the scarf for a secular reason. Suppose that nothing else about Elauf made the interviewer even suspect that she was a Muslim or that she was wearing the scarf for a religious reason. If "§2000e–2(a)(1) does not impose a knowledge requirement," Abercrombie would still be liable. The EEOC, which sued on Elauf's behalf, does not adopt that interpretation, see, *e.g.*, Brief for Petitioner 19, and it is surely wrong.

The statutory text does not compel such a strange result. It is entirely reasonable to understand the prohibition against an employer's taking an adverse action because of a religious practice to mean that an employer may

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bie's knowledge is relevant and if the lower courts hold that there is a genuine dispute of material fact about Abercrombie's knowledge, the question will have to be submitted to the trier of fact. For these reasons, we should decide this question now.

not take an adverse action because of a practice that the employer knows to be religious. Consider the following sentences. The parole board granted the prisoner parole because of an *exemplary* record in prison. The court sanctioned the attorney because of a *flagrant* violation of Rule 11 of the Federal Rules of Civil Procedure. No one is likely to understand these sentences to mean that the parole board granted parole because of a record that, unbeknownst to the board, happened to be exemplary or that the court sanctioned the attorney because of a violation that, unbeknownst to the court, happened to be flagrant. Similarly, it is entirely reasonable to understand this statement—"The employer rejected the applicant because of a *religious* practice"—to mean that the employer rejected the applicant because of a practice that the employer knew to be religious.

This interpretation makes sense of the statutory provisions. Those provisions prohibit intentional discrimination, which is blameworthy conduct, but if there is no knowledge requirement, an employer could be held liable without fault. The prohibition of discrimination because of religious practices is meant to force employers to consider whether those practices can be accommodated without undue hardship. See §2000e(j). But the "no-knowledge" interpretation would deprive employers of that opportunity. For these reasons, an employer cannot be liable for taking adverse action because of a religious practice if the employer does not know that the practice is religious.

A plaintiff need not show, however, that the employer took the adverse action because of the religious nature of the practice. Cf. *post*, at 4 (THOMAS, J., concurring in part and dissenting in part). Suppose, for example, that an employer rejected all applicants who refuse to work on Saturday, whether for religious or nonreligious reasons. Applicants whose refusal to work on Saturday was known

by the employer to be based on religion will have been rejected because of a religious practice.

This conclusion follows from the reasonable accommodation requirement imposed by §2000e(j). If neutral work rules (*e.g.*, every employee must work on Saturday, no employee may wear any head covering) precluded liability, there would be no need to provide that defense, which allows an employer to escape liability for refusing to make an exception to a neutral work rule if doing so would impose an undue hardship.

This brings me to a final point. Under the relevant statutory provisions, an employer's failure to make a reasonable accommodation is not an element that the plaintiff must prove. I am therefore concerned about the Court's statement that it "*is* the plaintiff's burden [to prove failure to accommodate]." *Ante,* at 3 n. 2. This blatantly contradicts the language of the statutes. As I noted at the beginning, when §2000e–2(a) and §2000e(j) are combined, this is the result:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of [any aspect of] such individual's . . . religious . . . practice . . . *unless an employer demonstrates that he is unable to reasonably accommodate to [the] employee's or prospective employee's religious . . . practice . . . without undue hardship on the conduct of the employer's business.*" (Emphasis added.)

The clause that begins with the term "unless" unmistakably sets out an employer defense. If an employer chooses to assert that defense, it bears both the burden of production and the burden of persuasion. A plaintiff, on the other hand, must prove the elements set out prior to the "unless" clause, but that portion of the rule makes no mention of accommodation. Thus, a plaintiff need not plead or prove that the employer wished to avoid making

an accommodation or could have done so without undue hardship. If a plaintiff shows that the employer took an adverse employment action because of a religious observance or practice, it is then up to the employer to plead and prove the defense. The Court's statement subverts the statutory text, and in close cases, the Court's reallocation of the burden of persuasion may be decisive.

In sum, the EEOC was required in this case to prove that Abercrombie rejected Elauf because of a practice that Abercrombie knew was religious. It is undisputed that Abercrombie rejected Elauf because she wore a headscarf, and there is ample evidence in the summary judgment record to prove that Abercrombie knew that Elauf is a Muslim and that she wore the scarf for a religious reason. The Tenth Circuit therefore erred in ordering the entry of summary judgment for Abercrombie. On remand, the Tenth Circuit can consider whether there is sufficient evidence to support summary judgment in favor of the EEOC on the question of Abercrombie's knowledge. The Tenth Circuit will also be required to address Abercrombie's claim that it could not have accommodated Elauf's wearing the headscarf on the job without undue hardship.

SUPREME COURT OF THE UNITED STATES

No. 14–86

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 1, 2015]

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with the Court that there are two—and only two—causes of action under Title VII of the Civil Rights Act of 1964 as understood by our precedents: a disparate-treatment (or intentional-discrimination) claim and a disparate-impact claim. *Ante,* at 3. Our agreement ends there. Unlike the majority, I adhere to what I had thought before today was an undisputed proposition: Mere application of a neutral policy cannot constitute "intentional discrimination." Because the Equal Employment Opportunity Commission (EEOC) can prevail here only if Abercrombie engaged in intentional discrimination, and because Abercrombie's application of its neutral Look Policy does not meet that description, I would affirm the judgment of the Tenth Circuit.

I

This case turns on whether Abercrombie's conduct constituted "intentional discrimination" within the meaning of 42 U. S. C. §1981a(a)(1). That provision allows a Title VII plaintiff to "recover compensatory and punitive damages" only against an employer "who engaged in unlawful intentional discrimination (not an employment

practice that is unlawful because of its disparate impact)." The damages award EEOC obtained against Abercrombie is thus proper only if that company engaged in "intentional discrimination"—as opposed to "an employment practice that is unlawful because of its disparate impact"—within the meaning of §1981a(a)(1).

The terms "intentional discrimination" and "disparate impact" have settled meanings in federal employment discrimination law. "[I]ntentional discrimination . . . occur[s] where an employer has treated a particular person less favorably than others because of a protected trait." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks and alteration omitted). "[D]isparate-impact claims," by contrast, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 52 (2003) (internal quotation marks omitted). Conceived by this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this "theory of discrimination" provides that "a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a disparate-treatment case," *Raytheon, supra,* at 52–53 (internal quotation marks and alteration omitted).

I would hold that Abercrombie's conduct did not constitute "intentional discrimination." Abercrombie refused to create an exception to its neutral Look Policy for Samantha Elauf's religious practice of wearing a headscarf. *Ante,* at 2. In doing so, it did not treat religious practices less favorably than similar secular practices, but instead remained neutral with regard to religious practices. To be sure, the *effects* of Abercrombie's neutral Look Policy, absent an accommodation, fall more harshly on those who wear headscarves as an aspect of their faith. But that is a

classic case of an alleged disparate impact. It is not what we have previously understood to be a case of disparate treatment because Elauf received the *same* treatment from Abercrombie as any other applicant who appeared unable to comply with the company's Look Policy. See *ibid.*; App. 134, 144. Because I cannot classify Abercrombie's conduct as "intentional discrimination," I would affirm.

II

A

Resisting this straightforward application of §1981a, the majority expands the meaning of "intentional discrimination" to include a refusal to give a religious applicant "favored treatment." *Ante,* at 6–7. But contrary to the majority's assumption, this novel theory of discrimination is not commanded by the relevant statutory text.

Title VII makes it illegal for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's . . . religion." §2000e–2(a)(1). And as used in Title VII, "[t]he 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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j). With this gloss on the definition of "religion" in §2000e–2(a)(1), the majority concludes that an employer may violate Title VII if he "refuse[s] to hire . . . any individual . . . because of such individual's . . . religious . . . practice" (unless he has an "undue hardship" defense). See *ante,* at 3–4.

But inserting the statutory definition of religion into §2000e–2(a) does not answer the question whether Abercrombie's refusal to hire Elauf was "because of her religious practice." At first glance, the phrase "because of

such individual's religious practice" could mean one of two things. Under one reading, it could prohibit taking an action because of the religious nature of an employee's particular practice. Under the alternative reading, it could prohibit taking an action because of an employee's practice that *happens* to be religious.

The distinction is perhaps best understood by example. Suppose an employer with a neutral grooming policy forbidding facial hair refuses to hire a Muslim who wears a beard for religious reasons. Assuming the employer applied the neutral grooming policy to all applicants, the motivation behind the refusal to hire the Muslim applicant would not be the religious nature of his beard, but its existence. Under the first reading, then, the Muslim applicant would lack an intentional-discrimination claim, as he was not refused employment "because of" the religious nature of his practice. But under the second reading, he would have such a claim, as he was refused employment "because of" a practice that happens to be religious in nature.

One problem with the second, more expansive reading is that it would punish employers who have no discriminatory motive. If the phrase "because of such individual's religious practice" sweeps in any case in which an employer takes an adverse action because of a practice that happens to be religious in nature, an employer who had no idea that a particular practice was religious would be penalized. That strict-liability view is plainly at odds with the concept of intentional discrimination. Cf. *Raytheon, supra,* at 54, n. 7 ("If [the employer] were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on [the applicant's] disability. And, if no part of the hiring decision turned on [the applicant's] status as disabled, he cannot, *ipso facto*, have been subject to disparate treatment"). Surprisingly, the majority leaves the door open to

this strict-liability theory, reserving the question whether an employer who does not even "suspec[t] that the practice in question is a religious practice" can nonetheless be punished for *intentional* discrimination. *Ante,* at 6, n. 3.

For purposes of today's decision, however, the majority opts for a compromise, albeit one that lacks a foothold in the text and fares no better under our precedents. The majority construes §2000e–2(a)(1) to punish employers who refuse to accommodate applicants under neutral policies when they act "with the motive of avoiding accommodation." *Ante,* at 5. But an employer who is aware that strictly applying a neutral policy will have an adverse effect on a religious group, and applies the policy anyway, is not engaged in intentional discrimination, at least as that term has traditionally been understood. As the Court explained many decades ago, "'Discriminatory purpose'"—*i.e.,* the purpose necessary for a claim of intentional discrimination—demands "more than . . . awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 279 (1979) (internal citation and footnote omitted).

I do not dispute that a refusal to accommodate can, in some circumstances, constitute intentional discrimination. If an employer declines to accommodate a particular religious practice, yet accommodates a similar secular (or other denominational) practice, then that may be proof that he has "treated a particular person less favorably than others because of [a religious practice]." *Ricci,* 557 U. S., at 577 (internal quotation marks and alteration omitted); see also, *e.g., Dixon* v. *Hallmark Cos.,* 627 F. 3d 849, 853 (CA11 2010) (addressing a policy forbidding display of "religious items" in management offices). But merely refusing to create an exception to a neutral policy

for a religious practice cannot be described as treating a particular applicant "less favorably than others." The majority itself appears to recognize that its construction requires something more than equal treatment. See *ante,* at 6–7 ("Title VII does not demand mere neutrality with regard to religious practices," but instead "gives them favored treatment"). But equal treatment is not disparate treatment, and that basic principle should have disposed of this case.

B

The majority's novel theory of intentional discrimination is also inconsistent with the history of this area of employment discrimination law. As that history shows, cases arising out of the application of a neutral policy absent religious accommodations have traditionally been understood to involve only disparate-impact liability.

When Title VII was enacted in 1964, it prohibited discrimination "because of . . . religion" and did not include the current definition of "religion" encompassing "religious observance and practice" that was added to the statute in 1972. Civil Rights Act of 1964, §§701, 703(a), 78 Stat. 253–255. Shortly thereafter, the EEOC issued guidelines purporting to create "an obligation on the part of the employer to accommodate to the religious needs of employees." 31 Fed. Reg. 8370 (1966). From an early date, the EEOC defended this obligation under a disparate-impact theory. See Brief for United States as *Amicus Curiae* in *Dewey* v. *Reynolds Metals Co.*, O. T. 1970, No. 835, pp. 7, 13, 29–32. Courts and commentators at the time took the same view. See, *e.g., Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346, 350 (CA6 1972); *Dewey* v. *Reynolds Metals Co.*, 300 F. Supp. 709, 713 (WD Mich. 1969), rev'd, 429 F. 2d 324 (CA6 1970), aff'd by an equally divided Court, 402 U. S. 689 (1971) (*per curiam*); 1 B. Lindemann & P. Grossman, Employment Discrimination Law

187–188 (3d ed. 1976).

This Court's first decision to discuss a refusal to accommodate a religious practice, *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), similarly did not treat such conduct as intentional discrimination. *Hardison* involved a conflict between an employer's neutral seniority system for assigning shifts and an employee's observance of a Saturday Sabbath. The employer denied the employee an accommodation, so he refused to show up for work on Saturdays and was fired. *Id.*, at 67–69. This Court held that the employer was not liable under Title VII because the proposed accommodations would have imposed an undue hardship on the employer. *Id.*, at 77. To bolster its conclusion that there was no statutory violation, the Court relied on a provision of Title VII shielding the application of a "'bona fide seniority or merit system'" from challenge unless that application is "'the result of an intention to discriminate because of . . . religion.'" *Id.*, at 81–82 (quoting §2000e–2(h)). In applying that provision, the Court observed that "[t]here ha[d] been no suggestion of discriminatory intent in th[e] case." *Id.*, at 82. But if the majority's view were correct—if a mere refusal to accommodate a religious practice under a neutral policy could constitute intentional discrimination—then the Court in *Hardison* should never have engaged in such reasoning. After all, the employer in *Hardison* knew of the employee's religious practice and refused to make an exception to its neutral seniority system, just as Abercrombie arguably knew of Elauf's religious practice and refused to make an exception to its neutral Look Policy.*

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*Contrary to the EEOC's suggestion, *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), did not establish that a refusal to accommodate a religious practice automatically constitutes intentional discrimination. To be sure, *Hardison* remarked that the "effect of" the 1972 amendment expanding the definition of religion "was to make it an unlawful employment practice under [§2000e–2(a)(1)] for an em-

Lower courts following *Hardison* likewise did not equate a failure to accommodate with intentional discrimination. To the contrary, many lower courts, including the Tenth Circuit below, wrongly assumed that Title VII creates a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact. See, *e.g.*, 731 F. 3d 1106, 1120 (2013) ("A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate" (internal quotation marks omitted)); *Protos* v. *Volkswagen of Am., Inc.*, 797 F. 2d 129, 134, n. 2 (CA3 1986) ("In addition to her religious accommodation argument, [the plaintiff] maintains that she prevailed in the district court on a disparate treatment claim"). That assumption appears to have grown out of statements in our cases suggesting that Title VII's definitional provision concerning religion created an independ-

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ployer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Id.*, at 74. But that statement should not be understood as a holding that such conduct automatically gives rise to a disparate-treatment claim. Although this Court has more recently described §2000e–2(a)(1) as originally creating only disparate-treatment liability, *e.g.*, *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009), it was an open question at the time *Hardison* was decided whether §2000e–2(a)(1) also created disparate-impact liability, see, *e.g.*, *Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 144 (1977); *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 153–155 (1976) (Brennan, J., dissenting). In fact, both the employee and the EEOC in *Hardison* argued before this Court that the employer had violated §2000e–2(a)(1) under a disparate-impact theory. See Brief for Respondent 15, 25–26, and Brief for United States et al. as *Amici Curiae* 33–36, 50, in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1976, No. 75–1126 etc. In any event, the relevant language in *Hardison* is dictum. Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an "undue hardship" defense—not the amended statutory definition. 432 U. S., at 76, and n. 11. *Hardison*'s comment about the effect of the 1972 amendment was thus entirely beside the point.

ent duty. See, *e.g.*, *Ansonia Bd. of Ed.* v. *Philbrook*, 479 U. S. 60, 63, n. 1 (1986) ("The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion"). But in doing so, the lower courts correctly recognized that a failure-to-accommodate claim based on the application of a neutral policy is not a disparate-treatment claim. See, *e.g.*, *Reed* v. *International Union, United Auto, Aerospace and Agricultural Implement Workers of Am.*, 569 F. 3d 576, 579–580 (CA6 2009); *Chalmers* v. *Tulon Co. of Richmond*, 101 F. 3d 1012, 1018 (CA4 1996).

At least before we granted a writ of certiorari in this case, the EEOC too understood that merely applying a neutral policy did not automatically constitute intentional discrimination giving rise to a disparate-treatment claim. For example, the Commission explained in a recent compliance manual, "A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." EEOC Compliance Manual §12–IV, p. 46 (2008). Indeed, in asking us to take this case, the EEOC dismissed one of Abercrombie's supporting authorities as "a case addressing intentional discrimination, not religious accommodation." Reply to Brief in Opposition 7, n. Once we granted certiorari in this case, however, the EEOC altered course and advanced the intentional-discrimination theory now adopted by the majority. The Court should have rejected this eleventh-hour request to expand our understanding of "intentional discrimination" to include merely applying a religion-neutral policy.

* * *

The Court today rightly puts to rest the notion that Title VII creates a freestanding religious-accommodation claim, *ante*, at 3, but creates in its stead an entirely new form of liability: the disparate-treatment-based-on-equal-treatment

claim. Because I do not think that Congress' 1972 redefinition of "religion" also redefined "intentional discrimination," I would affirm the judgment of the Tenth Circuit. I respectfully dissent from the portions of the majority's decision that take the contrary view.

Christopher Lee PETERSON, Plaintiff,

v.

WILMUR COMMUNICATIONS, INC., Defendant.

No. 01–C–0162.

United States District Court, E.D. Wisconsin.

June 3, 2002.

Employee brought suit against employer alleging that he was demoted because of his white supremacist religion in violation of Title VII. On cross-motions for summary judgment, the District Court, Adelman, J., held that: (1) white supremacist belief system called "Creativity" was a "religion" within meaning of Title VII, based on employee's undisputed statements that he had a sincere belief in the teachings of Creativity, and that he considered Creativity to be his religion, and (2) employee proved that he was demoted from supervisory position because of his white supremacist religious beliefs, in violation of Title VII, based on statements in supervisor's demotion letter.

Plaintiff's motion granted; defendant's motion denied.

1. Civil Rights ⇐151

Title VII imposes on an employer an affirmative duty to reasonably accommodate the religious observance and practices of its employees, unless the employer can demonstrate that such an accommodation would cause undue hardship to the conduct of its business. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j).

2. Civil Rights ⇐151

As a threshold matter, the plaintiff must show that his or her beliefs constitute a "religion" within meaning of Title VII. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j).

3. Civil Rights ⇐151

Test to determine whether beliefs are a "religion" for purposes of Title VII does not define religion according to its content, but takes a functional approach and asks whether a belief functions as religion in the life of the individual. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j); 29 C.F.R. § 1605.1.

4. Civil Rights ⇐151

To be a "religion" within meaning of Title VII, a belief system need not have a concept of a God, supreme being, or afterlife, or derive from any outside source; purely moral and ethical beliefs can be religious so long as they are held with the strength of religious convictions. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j); 29 C.F.R. § 1605.1.

5. Civil Rights ⇐151

So long as a belief is sincerely held and is religious in the plaintiff's scheme of things, the belief is religious for purposes of Title VII regardless of whether it is acceptable, logical, consistent, or comprehensible to others. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j); 29 C.F.R. § 1605.1.

6. Civil Rights ⇐151

When an employee shows that her employer took an adverse employment action against her on the basis of a religious observance or practice, the employer can avoid liability by showing either that it reasonably accommodated the employee's observance or practice, or that accommodation of the observance or practice would result in an undue hardship for the employer. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 2000e(j).

7. Civil Rights ⇐151

When an employee shows that her employer took an adverse action against her on the basis of her religious beliefs,

and not because of an observance or practice, the employer is liable for religious discrimination under Title VII, without consideration of reasonable accommodation or undue hardship. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 2000e(j).

8. Civil Rights ⇐151

White supremacist belief system called "Creativity" was a "religion" within meaning of Title VII, based on employee's undisputed statements that he had a sincere belief in the teachings of Creativity, and that he considered Creativity to be his religion, as evidenced by fact that he was a minister of the World Church of the Creator which espoused Creativity. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j); 29 C.F.R. § 1605.1.

See publication Words and Phrases for other judicial constructions and definitions.

9. Civil Rights ⇐151

Employee proved that he was demoted from supervisory position because of his white supremacist religious beliefs, in violation of Title VII, based on demotion letter in which supervisor stated that because employee was a member of white supremacist church other employees could not have confidence in his objectivity when he compared whites to non-whites, and thus he could no longer be a supervisor. Civil Rights Act of 1964, § 703(a, j), 42 U.S.C.A. § 2000e–2(a, j).

10. Federal Civil Procedure ⇐2545

Hearsay statements cannot be considered on motions for summary judgment.

Janet L. Heins, Milwaukee, WI, for Plaintiff.

Robert N. Meyeroff, Milwaukee, Wi, for Defendant.

DECISION AND ORDER

ADELMAN, District Judge.

I. FACTS AND BACKGROUND

Plaintiff, Christopher Lee Peterson, is a follower of the World Church of the Creator, an organization that preaches a system of beliefs called Creativity, the central tenet of which is white supremacy. Creativity teaches that all people of color are "savage" and intent on "mongreliz[ing] the White Race," that African–Americans are subhuman and should be "ship[ped] back to Africa"; that Jews control the nation and have instigated all wars in this century and should be driven from power, and that the Holocaust never occurred, but if it had occurred, Nazi Germany "would have done the world a tremendous favor." (R. 26 ¶ 2.) An introductory pamphlet about Creativity states:

> After six thousand years of recorded history, our people finally have a religion of, for, and by them. CREATIVITY is that religion. It is established for the Survival, Expansion, and Advancement of [the] White Race exclusively. Indeed, we believe that what is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin.
>
> We have come to hold these views by observing the Eternal Laws of Nature, by studying History, and by using the Logic and Common Sense everyone is born with: the highest Law of Nature is the survival of one's own kind; history has shown the United States that the White Race is responsible for all that which we call progress on this earth; and that it is therefore logical and sensible to place supreme importance upon Race and to reject all ideas which fail to do so.

(R. 20 Ex. 3.)

Creativity considers itself to be a religion, but it does not espouse a belief in a

God, afterlife or any sort of supreme being. "Frequently Asked Questions about CREATIVITY," a publication available on the World Church of the Creator's website, characterizes such beliefs as unsubstantiated "nonsense about angels and devils and gods and ... silly spook craft" and rejects them in favor of "the Eternal Laws of Nature, about which [Creators say] the White Man does have an impressive fund of knowledge." (R. 25 Ex. C at 8.) *The White Man's Bible*, one of Creativity's two central texts, offers a vision of a white supremacist utopian world of "[b]eautiful, [h]ealthy [white] people," free of disease, pollution, fear and hunger. (R. 29 Ex. 1 at 5–7.) This world can only be established through the degradation of all non-whites. *Id.* Thus, Creativity teaches that Creators should live their lives according to the principle that what is good for white people is the ultimate good and what is bad for white people is the ultimate sin. *Id.* at 3. According to *The White Man's Bible*, the "survival" of white people must be ensured "at all costs." (R. 26 ¶ 2.) Plaintiff holds these beliefs and, in June 1998, became a "reverend" in the World Church of the Creator.

In 2000, plaintiff was employed by defendant Wilmur Communications, Inc. as a Day Room Manager, a position which entailed supervising eight other employees, three of whom were not white. On Sunday, March 19, 2000, an article appeared in the *Milwaukee Journal Sentinel* discussing the World Church of the Creator, interviewing plaintiff, and describing his involvement in the church and beliefs. The article included a photograph of plaintiff holding a tee-shirt bearing a picture of Benjamin Smith, who, carrying a copy of *The White Man's Bible*, had targeted African–American, Jewish and Asian people in a two-day shooting spree in Indiana and Illinois before shooting himself in the summer of 1999. The caption under the photograph read "Rev. C. Lee Peterson of Milwaukee holds a T-shirt commemorating Benjamin Smith, who killed two people and wounded nine others before shooting himself in a two-day spree last summer." (R. 25 Ex. D at 3.)

When plaintiff arrived at work the next day, his supervisor and the president of the company, Dan Murphy, suspended him without pay. Two days later, plaintiff received a letter from Murphy demoting him to the position of "telephone solicitor," a position with lower pay and no supervisory duties. I restate the text of the letter in full:

> On Sunday, March 19, 2000, an article appeared in the *Milwaukee Journal/Sentinel* stating that you were a member of the World Church of the Creator, a White supremacist political organization. On Monday, March 20, 2000, the information in the newspaper article was known by everyone in our office.
>
> Our office has three out of eight employees who are not White. As of March 20, 2000, you were their supervisor. As a supervisor, it is your responsibility to train, evaluate, and supervise telephone solicitors. Our employees cannot have confidence in the objectivity of your training, evaluation, or supervision when you must compare Whites to non-Whites.
>
> Because the company, present employees, or future job applicants cannot be sure of your objectivity, you can no longer be a supervisor and you are hereby notified of your demotion to a telephone solicitor effective March 22, 2000.

(R. 20 Ex. C.) During his six years of employment at Wilmur Communications, plaintiff had been disciplined once for a data entry error but had never been disciplined for anything else.

Plaintiff has moved for summary judgment arguing that defendant demoted him

because of his religion in violation of Title VII of the Civil Rights Act of 1964. Defendant has filed a cross motion for summary judgment. These motions are before me now.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis deleted). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." *Id.*

The moving party bears the initial burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party seeks summary judgment on the ground that there is an absence of evidence to support the non-moving party's case, the moving party may satisfy its initial burden simply by pointing out the absence of evidence. *Id.* at 325, 106 S.Ct. 2548. Once the moving party's initial burden is met, the nonmoving party must "go beyond the pleadings" and designate specific facts to support each element of the cause of action, showing a genuine issue for trial. *Id.* at 322–23, 106 S.Ct. 2548. Neither party may rest on mere allegations or denials in the pleadings, *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505, or upon conclusory statements in affidavits, *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir.1989).

In evaluating a motion for summary judgment, the court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, it is "not required to draw every conceivable inference from the record—only those inferences that are reasonable." *Bank Leumi Le–Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1991).

When reviewing cross motions for summary judgment, I assess the merits of each summary judgment motion independently. *See* 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720 at 335 (3d ed.1998). Each party, as a movant for summary judgment, bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. *Id.* The fact that one party fails to satisfy that burden on its own motion does not automatically indicate that the opposing party has satisfied its burden and must be granted summary judgment on its motion. *Id.* I may grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law on the basis of the material facts not in dispute. *See Mitchell v. McCarty*, 239 F.2d 721, 723 (7th Cir.1957).

III. DISCUSSION

A. Applicable Law

[1] Title VII makes it unlawful for an employer 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). The statute defines "religion" to include "all

aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j). The definition imposes on an employer an "affirmative duty" to reasonably accommodate the "religious observance and practices of its employees, unless the employer can demonstrate that such an accommodation would cause undue hardship to the conduct of its business." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1574 (7th Cir.1997) (citing 42 U.S.C. § 2000e(j)).

[2] As a threshold matter, the plaintiff must show that his or her beliefs constitute a "religion" under the meaning of Title VII. *See id.* The determination of what is a religion or religious belief "is more often than not a difficult and delicate task." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *see also Africa v. Pa.*, 662 F.2d 1025, 1031 (3d Cir.1981) ("Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion."). Deciding how to distinguish a religion from other types of beliefs or belief systems has been a source of great controversy for courts and commentators. *See generally* Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional Modern, and Postmodern Religion in the United States*, 4 Ariz.L.Rev. 49 (1999); James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 Seton Hall Const.L.J. 23 (1995). In addition, the Supreme Court has noted the care that courts must exercise in this area to avoid making theological pronouncements that exceed the judicial ken. *See, e.g., Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (collecting cases).

[3] Nonetheless, a test has emerged to determine whether beliefs are a religion for purposes of Title VII. Rather than define religion according to its content, the test requires courts take a functional approach and ask whether a belief "functions as" religion in the life of the individual before the court. *See Redmond v. GAF Corp.*, 574 F.2d 897, 901 n. 12 (7th Cir. 1978) (citing *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) and *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970) and stating that they supply the test for determining what is a "religion" under Title VII); 29 C.F.R. § 1605.1 (same). Stated another way, the court should find beliefs to be a religion if they "occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified." *Seeger*, 380 U.S. at 184, 85 S.Ct. 850. To satisfy this test, the plaintiff must show that the belief at issue is " 'sincerely held' " and " 'religious' in [his or her] own scheme of things." *Redmond*, 574 F.2d at 901 n. 12 (quoting *Seeger*, 380 U.S. at 185, 85 S.Ct. 850). In evaluating whether a belief meets this test, courts must give " 'great weight' " to the plaintiff's own characterization of his or her beliefs as religious. *Seeger*, 380 U.S. at 184, 85 S.Ct. 850.

[4] To be a religion under this test, a belief system need not have a concept of a God, supreme being, or afterlife, *Welsh*, 398 U.S. at 339–40, 90 S.Ct. 1792; *United States v. Bush*, 509 F.2d 776, 780–84 (7th Cir.1975) (en banc) (finding religious the ethical beliefs of an atheist who did not believe in an afterlife), or derive from any outside source. Purely "moral and ethical beliefs" can be religious "so long as they are held with the strength of religious convictions." *Welsh*, 398 U.S. at 339–40, 90 S.Ct. 1792.

[5] Courts also should not attempt to assess a belief's "truth" or "validity." *Seeger*, 380 U.S. at 184–85, 85 S.Ct. 850; *see Thomas*, 450 U.S. at 714, 101 S.Ct.

1425 (Resolution of whether a belief is religious does "not turn upon a judicial perception of the particular belief or practice in question."); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 n. 9, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) (stating that truth of plaintiff's beliefs is irrelevant); *Seeger*, 380 U.S. at 185, 85 S.Ct. 850 ("[C]ourts ... are not free to reject beliefs because they consider them incomprehensible."). So long as the belief is sincerely held and is religious in the plaintiff's scheme of things, the belief is religious regardless of whether it is "acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714, 101 S.Ct. 1425.

Once a plaintiff establishes that his or her beliefs are a religion, the plaintiff must offer evidence that his or her religion "played a motivating role" in the adverse employment action at issue. *Venters v. City of Delphi*, 123 F.3d 956, 973 n. 7 (7th Cir.1997) (citing 42 U.S.C. § 2000e–2(m)). A plaintiff can meet this burden by presenting direct evidence of the defendant's discriminatory intent, the method that plaintiff has chosen here, or by the indirect method articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Id.* Direct evidence is evidence which, " 'if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.' " *Markel v. Bd. of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 910 (7th Cir.2002) (quoting *Randle v. La Salle Telecom. Inc.*, 876 F.2d 563, 565–69 (7th Cir.1989)). It includes "acknowledgment of discriminatory intent by the defendant," *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994), and "[r]emarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria," *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir.2001) (quoting *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir.1999)). The statements must also be "made by a decisionmaker ... [and] relate to the [employment] action at issue." *Sanghvi v. St. Catherine's Hosp., Inc.*, 258 F.3d 570, 574 (7th Cir.2001).

[6, 7] However, Title VII proscribes two different types of religious discrimination—discrimination on the basis of a religious observance or practice and discrimination on the basis of pure belief. *See* 42 U.S.C. § 2000e(j). These two types of discrimination are analyzed differently. *See id.* When an employee shows that her employer took an adverse employment action against her on the basis of a religious observance or practice, the employer can avoid liability by showing either that it reasonably accommodated the employee's observance or practice, or that accommodation of the observance or practice would result in an undue hardship for the employer. *Ilona of Hungary*, 108 F.3d at 1576. However, when an employee shows that her employer took an adverse action against her on the basis of her religious beliefs, and not because of an observance or practice, the employer is liable. *See* 42 U.S.C. § 2000e(j); *Venters*, 123 F.3d at 972–73. Explanation of the distinction between and origin of these two different types of cases requires some discussion of the structure of Title VII and the history of the provision barring religious discrimination.

In Title VII discrimination actions based on other protected criteria, such as race, sex or national origin, once the plaintiff proves that the proscribed criterion played a motivating role in the adverse employment action, the plaintiff has prevailed on the issue of liability. *See* 42 U.S.C. § 2000e–2(m). However, the provision relating to religion differs in some respects because of the manner in which the statute defines religion. Under Title VII, " 'religion' includes all aspects of religious ob-

servance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the employer's business." *Id.* § 2000e(j). In other words, if accommodating an employee's religious observances or practices would cause the employer undue hardship, those observances or practices are exempted from the definition of religion and can, therefore, lawfully motivate an adverse employment action. *See id.* Thus, where a plaintiff seeks accommodation of a "religious observance or practice," the defendant can avoid liability entirely by demonstrating either reasonable accommodation of the observance or practice, or that accommodation would result in an undue hardship. *Ilona of Hungary*, 97 F.3d at 211.

However, the accommodation clause of the definition applies only to "religious observance[s] or practice[s]," not religious belief. *See* 42 U.S.C. § 2000e(j). The language of the definition makes clear that the omission of "belief" from the accommodation clause was intentional. The first clause of the definition states that "religion" means "observance and practice, as well as belief." However, the second clause exempts from the definition "observance[s] or practice[s]" which would result in an undue hardship on the employer, but not beliefs. *Id.* Thus, under the canon of statutory interpretation *expressio unis*, I must conclude that a religious belief is never exempted from the definition of "religion" under Title VII and, therefore, cannot lawfully form the basis for an adverse employment action.

The precise meanings of "observance or practice" and "belief" require further explication. "Observance" means "something (as an act of religious or ceremonial nature) that is carried out in accord with prescribed forms; a customary practice, rite, or ceremony; ... an act or the practice of paying due heed to something established; ... an act or instance of observing." *Webster's Third New International Dictionary of the English Language Unabridged* 1558 (3d ed.1986). "Practice" means a "performance or operation of something; ... a mode of acting or proceeding; actual performance or application of knowledge as distinguished from mere possession of knowledge." *Id.* at 1780. Thus, a "religious observance or practice" requires at a minimum an act. "Belief," on the other hand, means "a state or habit of mind; ... a conviction of the truth of some statement [or] ... immediate assurance or feeling of the reality of something." *Id.* at 200. A "religious belief" does not require an act. Therefore, under Title VII, an employer can avoid liability for failing to reasonably accommodate religiously-motivated acts, but cannot avoid liability for taking an adverse employment action based on the employee's pure beliefs, unaccompanied by acts.

This reading of the statute is consistent with its legislative history. Prior to the amendment defining religion, which was added in 1972, many courts considered religion under the statute to mean only pure belief and not acts. *See* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 317 Tex.L.Rev. 317, 362–69 (1997). Thus, an employer was liable if it discharged an employee for his or her beliefs, but not liable if it discharged the employee for engaging in conduct pursuant to those beliefs, such as refusing to work on the Sabbath. *See, e.g., Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971) (per curiam), *aff'g by an equally divided court* 429 F.2d 324 (6th Cir.1970); *Riley v. Bendix Corp.*, 330 F.Supp. 583 (M.D.Fla. 1971). By adding a definition of religion,

Congress intended to reverse these cases and expand the coverage of the act to require employers to accommodate certain religiously-motivated acts. *See* 118 Cong. Rec. 705–06 (1972) (statement of Sen. Randolph) (stating that purpose of amendment is to expand religious non-discrimination right to encompass religious observances); *id.* at 706–13 (reprinting *Dewey*, 429 F.2d 324 and *Riley*, 330 F.Supp. 583 to demonstrate courts' prior interpretations of "religion" based on belief-act distinction); *id.* at 7,167 (stating that purpose of the amendment is to reverse decisions in cases such as *Dewey*, 429 F.2d 324). Thus, the amendment was intended to leave the prohibition of religious discrimination on the basis of pure belief unchanged.

In addition, the amendment was intended to make the Title VII religious discrimination analysis the same as the analysis of claims under the Free Exercise Clause, thereby providing private and public employees with the same rights to be free from religious discrimination. 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph). Under the Free Exercise Clause, it is well-established that pure belief is absolutely protected. *Employment Div.*, 494 U.S. at 877, 110 S.Ct. 1595 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.' "); *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *United States v. Ballard*, 322 U.S. 78, 86–88, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). Thus, legislative history reinforces the principle that under Title VII, an employer cannot lawfully take an adverse employment action against an employee based on pure belief.

Seventh Circuit precedent is to the same effect. The court has held that the accommodation analysis does not apply when an employee is discharged because she does not share her supervisor's religious beliefs. *See Venters*, 123 F.3d at 972; *see also Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1037 (10th Cir.1993). Because there was no evidence that the plaintiff employee in *Venters* sought to engage in any religiously-motivated act, the accommodations analysis did not apply. *Venters*, 123 F.3d at 972. Rather, the court held that proof of discrimination on the basis of pure belief compels a finding of liability, as proof of discrimination on the basis of race or sex would. *Id.* With these principles in mind I turn to the case before me.

B. Application of Law to Facts

I address plaintiff's motion for summary judgment first and take all the facts in the light most favorable to the defendant, *see Matsushita Elec. Indus.*, 475 U.S. at 587, 106 S.Ct. 1348. Further, because plaintiff does not discuss or present evidence concerning damages, I will treat his motion as one for summary judgment only on liability.

1. Creativity is a "Religion" under Title VII

[8] The parties hotly dispute whether Creativity is a religion under Title VII. Thus, as an initial matter, I must determine whether plaintiff's beliefs are "sincerely held" and "religious in his own scheme of things." *See Redmond*, 574 F.2d at 901 n. 12 (internal citations and quotation marks omitted).

Here, the first prong is undisputed. Plaintiff states that he has "a sincere belief" in the teachings of Creativity (R. 20 ¶ 4); and defendant offers no contrary evidence. Thus, plaintiff meets the first prong of the test.

The second prong is also undisputed. Plaintiff considers his beliefs religious and considers Creativity to be his religion. I must give "great weight" to that belief. *See Seeger*, 380 U.S. at 184, 85 S.Ct. 850. In addition, Creativity plays a central role in plaintiff's life. Plaintiff has been a minister in the World Church of the Creator for more than three years. Upon becoming a minister, he took the following oath:

> Having been duly accepted for the Ministry in The World Church of the Creator, I hereby reaffirm my undying loyalty to the White Race and The World Church of the Creator and furthermore swear allegiance unto Pontifex Maximus Matt Hale, and his duly appointed successors; that I will carry out all instructions assigned to me; that I will fervently promote the Creed and Program of Creativity as long as I live; that I will follow the Sixteen Commandments and encourage others to do the same; that the World Church of the Creator is the only pro-White organization of which I am a member so that my energies may not be divided; that I will remain knowledgeable of our sacred Creed, particularly of the books, Nature's Eternal Religion and The White Man's Bible; that I will always exhibit high character and respect; and lastly, that I will aggressively convert others to our Faith and build my own ministry.

(R. 20 Ex. 2.) Plaintiff states that he "work[s] at putting [the teachings of Creativity] into practice every day." (R. 20 ¶ 4.) Thus, all the evidence conclusively reveals that the teachings of Creativity are "religious" in plaintiff's "own scheme of things." These beliefs occupy for plaintiff a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions. Thus, Creativity "functions as" religion for plaintiff. Plaintiff has met his initial burden of showing that his beliefs constitute a "religion" for purposes of Title VII.

Rather than argue that plaintiff cannot meet the test for establishing that his beliefs are a religion, defendant argues that the World Church of the Creator cannot be a religion under Title VII because it is similar to other white supremacist organizations that have been found to be political organizations and not religions. *See Slater v. King Soopers, Inc.*, 809 F.Supp. 809 (D.Colo.1992) (finding that Klu Klux Klan is not a religion under Title VII); *Bellamy v. Mason's Stores, Inc.*, 368 F.Supp. 1025 (E.D.Va.1973) (same); *Augustine v. Anti–Defamation League of B'nai–B'rith*, 75 Wis.2d 207, 249 N.W.2d 547 (1977) (finding that National Socialist White People's Party does not fall within definition of "creed" under state anti-discrimination statute because it is not a religion). However, the cases defendant cites are of no assistance.

First, the fact that certain white supremacist organizations have been found not to be religions does not logically mean that Creativity also is not a religion for plaintiff, given that the test for what is a religion turns in part on subjective factors. Second, the courts in *Bellamy* and *Slater* provide little discussion as to how they reach their conclusions. The court in *Bellamy* simply stated that the KKK's "proclaimed racist and anti-semitic ideology ... takes on ... a narrow, temporal and political character inconsistent with the meaning of 'religion.'" *Bellamy*, 368 F.Supp. at 1026. The court in *Slater* quoted this passage in *Bellamy* and reached the same result without further discussion. *Slater*, 809 F.Supp. at 810. Thus, these cases do not assist me in determining how the World Church of the Creator might be similar to or different from the KKK.

The only case to discuss the KKK in any detail is a decision by the EEOC. *See* EEOC Dec. No. 79–06 (Oct. 6, 1978). The EEOC recounted the KKK's history and stated purposes and concluded that it con-

sidered itself to be a political and fraternal organization, and not a religion. *Id.* at 2–7. Given that evidence, the EEOC unsurprisingly concluded that the KKK was not a religion. *Id.* at 6–7. However, in the case before me, the World Church of the Creator plainly considers Creativity to be a religion. This assertion weighs heavily in favor of finding that the belief system is a religion. *Seeger*, 380 U.S. at 184, 85 S.Ct. 850. Thus, the EEOC decision does not support defendant's position either.

Augustine, also cited by the defendant, is of no assistance for the same reason. In *Augustine*, the Supreme Court of Wisconsin concluded that the National Socialist White People's Party is a political organization and not a religion because the party did not believe itself to be a religion. *Augustine*, 75 Wis.2d at 213, 249 N.W.2d 547 ("There is no contention that the philosophy of [the National Socialist White People's Party is] of a religious nature."). As stated previously, the World Church of the Creator plainly believes Creativity to be a religion.

To be sure, Creativity shares some of the white supremacist beliefs of the KKK and the National Socialist White People's Party. However, the fact that plaintiff's beliefs can be characterized as political does not mean they are not also religious. *See Welsh*, 398 U.S. at 342, 90 S.Ct. 1792 (finding conscientious objector's opposition to war religious even though it was also based in part on his views of world politics); *Rodriguez v. City of Chi.*, 156 F.3d 771, 775 (7th Cir.1998) (assuming without discussion that plaintiff's opposition to abortion was religiously-motivated even though it could also be characterized as political). Thus, plaintiff could share the beliefs of political organizations yet still establish that his beliefs function as religion for him. I have already determined that plaintiff has made that showing.

Defendant also argues that Creativity's beliefs cannot be religious because they are immoral and unethical, and EEOC regulations define religious beliefs as "moral or ethical beliefs as to what is right and wrong," 29 C.F.R. § 1605.1. However, defendant misinterprets the regulation. The regulation does not indicate that Title VII only protects beliefs which defendant, society, the court or some other entity considers moral or ethical in the subjective sense. Indeed, the question of whether I find a belief moral, ethical or otherwise valid in this subjective sense is decidedly not at issue when I am determining whether a belief is "religious." *See Thomas*, 450 U.S. at 714, 101 S.Ct. 1425 (Resolution of whether a belief is religious does "not turn upon a judicial perception of the particular belief or practice in question."); *Hobbie*, 480 U.S. at 144 n. 9, 107 S.Ct. 1046 (stating that truth of plaintiff's beliefs is irrelevant); *Seeger*, 380 U.S. at 185, 85 S.Ct. 850 ("[C]ourts ... are not free to reject beliefs because they consider them incomprehensible."). Rather, the EEOC regulation means that "religion" under Title VII includes belief systems which espouse notions of morality and ethics and supply a means from distinguishing right from wrong. Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. This precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means for determining right from wrong. Thus, defendant's argument must be rejected.

Similarly, defendant argues that the Court in *Seeger* and *Welsh* found the individuals' beliefs "religious" because they rested on notions of "goodness, morality, and living up to the highest ideals of society," not "separation, exclusion, repatria-

tion, hatred, or killing," like plaintiff in this case. (R. 23 at 4–5.) The court has no quarrel with defendant's subjective characterization of the plaintiff's belief system. However, as discussed previously, Title VII protects against discrimination on the basis of religion, regardless of the court's or any one else's opinion of the religion at issue. Plaintiff has shown that Creativity functions as religion in his life; thus, Creativity is for him a religion regardless of whether it espouses goodness or ill. Defendant's argument is again rejected.

2. Religion Played a Motivating Role in the Demotion

[9] Having established that Creativity is for plaintiff a religion, the plaintiff must offer evidence that his religion played a motivating role in the adverse employment action, in this case his demotion. *See Venters*, 123 F.3d at 973 n. 7. As discussed above, plaintiff can meet this burden by offering direct evidence or indirect evidence. *Id.* Plaintiff here has chosen the direct evidence method.

Plaintiff argues that Murphy's letter of demotion provides direct evidence that he was demoted because of his religion. The letter meets two requirements for direct evidence because it is from the decision-maker and relates directly to the adverse action at issue, the demotion. *See Sanghvi*, 258 F.3d at 574. Thus, to constitute direct evidence, it must also contain an "acknowledgment of discriminatory intent," *see Troupe*, 20 F.3d at 736, or reveal a propensity to make decisions based on unlawful criteria, *see Walker*, 241 F.3d at 888 (internal citations omitted). Here, the letter, which followed directly on the heels of the newspaper article discussing plaintiff's beliefs, contains an acknowledgment of discriminatory intent. Murphy states that because plaintiff is "a member of the World Church of the Creator, a White supremacist political organization ... employees cannot have confidence in the objectivity of [his] training, evaluation, or supervision when [he] must compare Whites to non-Whites." (R. 20 Ex. C.) This statement is an admission that Murphy demoted plaintiff because of his religion. Thus, plaintiff has met his burden.

However, to determine whether the defendant can avoid liability through an accommodation analysis, I must also determine whether plaintiff has shown that he was demoted because of a religious observance or practice, or because of his religious beliefs alone. *See* 42 U.S.C. § 2000e(j). Here, the evidence conclusively reveals that he was demoted because of his beliefs, not because of any act. The letter of demotion from Murphy plainly states that plaintiff was being demoted because of his membership in the World Church of the Creator and his white supremacist beliefs. The letter does not say that defendant could not accommodate any religious observance or practice. Indeed, plaintiff did not seek accommodation of any observance or practice. Thus, plaintiff's beliefs caused defendant to demote him and defendant is, therefore, liable. The accommodation analysis does not apply.

Nevertheless, defendant argues that plaintiff was not demoted only because of his beliefs, but also because of his religious practices.[1] Thus, according to defendant, the accommodation analysis does apply. However, for the analysis to apply, the record must contain evidence from which a

[1] I assume for purposes of addressing defendant's argument that for plaintiff, treating employees differently because of their races could be a religious "observance or practice" under Title VII. However, because the record does not contain sufficient evidence from which a jury could conclude that plaintiff engaged in such conduct, I need not decide whether this assumption is appropriate.

reasonable jury could find that plaintiff engaged or sought to engage in a religiously-motivated act and was demoted because of it. To show that plaintiff engaged in an act, defendant points to two pieces of evidence in the record. The first is a statement in an affidavit from Murphy in which he asserts, "[d]uring the time the plaintiff was a supervisor, Black employees complained ... that they were being disciplined for being late while White employees were not being disciplined for being late." (R. 24 ¶ 3.) The second is a letter from defendant's attorney submitted to the Wisconsin Equal Rights Division stating that Murphy told him that African–American employees had complained that plaintiff disciplined them unfairly, and that plaintiff's views "became a large problem when employees, especially the Black employees learned" of them. (R. 19 Ex. E.)

[10] However, these statements suffer from several evidentiary maladies. First, if offered to show that plaintiff actually engaged in some act pursuant to his beliefs, i.e. treating African–American and white employees unequally, the first statement is hearsay and the second statement is double hearsay. *See* Fed.R.Evid. 801(c). Hearsay statements cannot be considered on motions for summary judgment. *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir.2001); *Minor v. Ivy Tech State Coll.*, 174 F.3d 855, 856 (7th Cir.1999). In addition, under Fed.R.Civ.P. 56(e), affidavits supporting or opposing summary judgment must be made on personal knowledge and "show affirmatively that the affiant is competent to testify to the matters stated therein." Murphy's statements do not meet this standard. Thus, they are inadmissible.

Further, even if I considered the statements, they are so lacking in specificity that they fail to raise a genuine issue of material fact either as to whether plaintiff committed any acts or whether such acts caused his demotion. Rule 56(e) requires a party opposing a summary judgment motion to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Affidavits must set forth " 'specific concrete facts in support of the matter asserted' " or they should be disregarded. *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir.1998) (quoting *Hadley v. County of DuPage*, 715 F.2d 1238, 1243 (7th Cir.1983)) (upholding district court's decision to disregard statement by affiant that " '[e]very time' " African–American employees complained, defendant " 'would never conduct an investigation or take any action' " because affiant did not recount examples of this conduct).

Neither Murphy's nor the attorney's statement satisfies the specificity requirement. Murphy's statement is phrased in the passive voice and does not actually say that any employee complained about plaintiff. Moreover, his statement is utterly devoid of facts such as who complained, when they complained, whether plaintiff was informed of the complaints and what the result was. The lawyer's statement is equally lacking in specificity. Additionally, the assertion that defendant demoted plaintiff based on acts as opposed to beliefs is contradicted by the demotion letter, which mentions neither acts nor complaints. Thus, the statements fail to satisfy Rule 56(e) and are therefore insufficient to create a genuine issue of material fact either that plaintiff engaged in any racist practices or that defendant demoted him for doing so.

Based on the record before me, no reasonable jury could conclude that plaintiff committed any racially discriminatory acts or that defendant demoted him for committing such acts. A reasonable jury would be compelled to find that plaintiff was demoted solely because of his religious

beliefs. Therefore, the accommodation analysis is inapplicable. Further, based on the direct evidence of discrimination, plaintiff's motion for summary judgment on the issue of liability must be granted.

THEREFORE, IT IS ORDERED that defendant's motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment on liability is **GRANTED.**

FINALLY, IT IS ORDERED that the court will hold a telephonic status conference on June 17, 2002 at 11:00 am. The court will initiate the call.

ASHLEY COUNTY MEDICAL CENTER, et al., Plaintiffs,

v.

Tommy G. THOMPSON, Secretary, United States Department of Health and Human Services, Defendant.

No. 4:02CV00127 GTE.

United States District Court, E.D. Arkansas, Western Division.

May 13, 2002.

Hospitals and hospital associations brought action, under Administrative Procedure Act (APA), against Secretary of Health and Human Services (HSS), arising from Upper Payment Limit (UPL) regulations which would reduce upper limit on what states could reimburse locally-owned public hospitals for services to Medicaid beneficiaries. Plaintiffs moved for preliminary and permanent injunction and for summary judgment, and defendant moved for summary judgment. The District Court, Eisele, J., held that: (1) plaintiffs had standing and action was ripe; (2) replacement UPL rule satisfied basis and purpose requirement of Administrative Procedure Act (APA); (3) decision that prior UPL rule left room for abusive transactions and should be replaced was rational; (4) conclusion that UPL rule would assure adequate access to services was rational; (5) objective of restoring equity between state and private hospitals was rational; and (6) Secretary conducted final regulatory impact analysis, in compliance with Regulatory Flexibility Act (RFA).

Complaint dismissed.

1. Federal Civil Procedure ⚿103.2, 103.3

To have standing, plaintiffs must establish, among other things, that they face injury fairly traceable to the challenged action of the defendant; the injury must be actual or imminent and not merely conjectural or hypothetical.

2. Health ⚿510

Upper payment limit (UPL) regulation changes by Secretary of Health and Human Services (HSS) would have direct impact on hospitals and hospital associations, and thus hospitals and associations had standing and their action challenging the implementation of the regulation changes was ripe; although the regulation targeted locally-owned hospitals, and plaintiffs were not locally-owned hospitals, the hospitals were safety net hospitals that participated in Medicaid program and qualified for supplemental funds, and the regulatory change would automatically reduce compensation available to such hospitals. Social Security Act, § 1901, as amended, 42 U.S.C.A. § 1396; 42 C.F.R. §§ 447.272, 447.321.