No. 18- _____

In the Supreme Court of the United States

DARRELL PATTERSON, PETITIONER,

v.

WALGREEN CO.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321
mcfarlandt@gc.adventist.org

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

QUESTIONS PRESENTED

Title VII prohibits an employer from firing an employee for engaging in a religious practice—here, abstaining from work on his Sabbath—"unless [the] employer demonstrates that he is unable to reasonably accommodate to" the employee's "religious … practice without undue hardship …." 42 U.S.C. 2000e(j). This Court has not addressed the proper interpretation of the "reasonable accommodation" part of this test since *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60 (1986), or the "undue hardship" defense since *TWA* v. *Hardison*, 432 U.S. 63 (1977). The federal circuits are now split over what constitutes a "reasonable" accommodation and the evidence required to establish an "undue burden" under these decisions. The questions presented are:

1. Is an accommodation that merely lessens or has the *potential* to eliminate the conflict between work and religious practice "reasonable" per se, as the First, Fourth, and Eleventh Circuits hold, does it instead create a jury question, as the Eighth and Tenth Circuits hold, or must an accommodation fully eliminate the conflict in order to be "reasonable," as the Second, Sixth, Seventh, and Ninth Circuits hold?

2. Is speculation about possible future burdens sufficient to meet the employer's burden in establishing "undue hardship," as the Fifth, Sixth and Eleventh Circuits hold, or must the employer demonstrate an actual burden, as the Fourth, Eighth, Ninth, and Tenth Circuits hold?

3. Should the portion of *Hardison* opining that "undue hardship" simply means something more than a "*de minimis* cost" be disavowed or overruled?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Since its enactment in 1972, Title VII's religious accommodation protection has suffered from repeated judicial efforts to narrow its reach to something less than its text provides. This Court addressed one such effort in *EEOC* v. *Abercrombie & Fitch Stores,* 135 S.Ct. 2028 (2015)—Justice Scalia's last major religious-liberty opinion—which rebuffed an attempt by some circuits to narrow the reach of that provision through (as the Court held) an unduly stringent standard of causation. But that standard is only one of several judge-made barriers that have departed from Title VII's text—and in some cases from this Court's precedents—and have thus prevented the accommodation provision from reaching its intended potential in protecting the religious liberty of working Americans.

This case involves two such doctrinal barriers, each based on a misinterpretation of this Court's precedent, that have been adopted by some federal circuits but rejected by others. The first doctrine—squarely adopted in published decisions of the Eleventh Circuit and two other circuits—is that an employer's effort to "accommodate" an employee's religious practice is *per se* "reasonable" under Title VII if it merely lessens or has the potential to eliminate a work-religion conflict, without eliminating it. As other circuits have explained, this doctrine expands the "reasonableness" defense available to employers under this Court's 1986 decision in *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60 (1986), well beyond Title VII's text, thus eroding the protections for religious workers that the statute demands.

The second doctrine is the idea—also squarely adopted in published decisions of the Fifth and Sixth Circuits and the decision below—that an employer can

satisfy its statutory "undue hardship" defense, as a matter of law, by speculating about hardships that *might* occur if an accommodation were granted. This doctrine rests on a misinterpretation of *TWA* v. *Hardison*, 432 U.S. 63 (1977). Although that decision said that "undue hardship" simply means something more than a "de minimis cost," *id.* at 84, it did not state or suggest that this minimal standard can be satisfied by speculation about future costs.

Both doctrines are ripe for this Court's review: Most circuits have now addressed each doctrine—with the Eleventh Circuit in the minority on both. And the EEOC—the federal agency charged with enforcing Title VII—has squarely adopted and pressed the opposite position on both issues.

Hardison's "de minimis" standard—which has been interpreted as binding by all the lower courts—is also ripe for reconsideration. As Justice Thomas pointed out in his separate opinion in *Abercrombie, Hardison*'s discussion of "undue hardship" was dicta because the Court was construing the then-existing but since-revised EEOC guideline, not the statutory language. In any event, the majority's reasoning in that case falls far short of the Court's current standards of statutory interpretation. And if that reasoning is binding precedent, it can and should be overruled, consistent with sound principles of *stare decisis.*

OPINIONS BELOW

The Eleventh Circuit's decision is printed at 727 Fed. Appx. 581 and reprinted at 1a. The order denying rehearing *en banc* is reprinted at 18a. The district court's opinion granting summary judgment is reprinted at 19a.

JURISDICTION

The Eleventh Circuit issued its opinion on March 9, 2018. Rehearing *en banc* was denied on April 26, 2018, making this petition due on July 25, 2018. Justice Thomas granted two extensions, one to August 24, and the second to September 14, 2018. This Court has jurisdiction under 28 U.S.C.1254(1).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. 2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual … because of such individual's … religion.

42 U.S.C. 2000e(j) adds a definition of "religion":

> 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.

STATEMENT

A. Legal Framework

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer ... to discharge any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). Under the statute, subject to an "undue hardship" defense, an employer must "reasonably accommodate to" "*all* aspects" of an "employee's … religious observance or practice." 42 U.S.C. 2000e(j) (emphasis added). Otherwise, an employer's decision to discharge an employee for adhering to his or her religious practice constitutes a "discharge … *because of* such individual's … religion," and so violates the statute. *Abercrombie*, 135 S.Ct. at 2032.

As noted in *Abercrombie,* Title VII's religious-accommodation provision was enacted by Congress in 1972 in response to judicial decisions narrowing the 1964 Act's general prohibition on religious discrimination.[1] Those decisions held that Title VII's original prohibition on religion-based discrimination protected only religious *belief*, not religiously motivated conduct.[2] Those decisions thus suggested that Title VII's protection against religious discrimination in the private workplace was narrower than that provided to government workers by the First Amendment, which

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[1] See 118 Cong. Rec. 705–731 (1972); see also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 362–363, 368 (1997).

[2] *E.g., Riley* v. *Bendix Corp.,* 330 F. Supp. 583 (M.D. Fla. 1971); *Dewey* v. *Reynolds Metal Co.,* 429 F.2d 324 (6th Cir. 1970), *aff'd,* 402 U.S. 689 (1971).

had long been held to protect not just belief, but speech and, by extension, religiously motivated conduct. See, *e.g., Pickering* v. *Bd. of Ed. of Twp. High Sch.*, 391 U.S. 563 (1968); (protecting political speech by government employees); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (protecting religiously motivated conduct generally).

According to the chief Senate sponsor of the 1972 amendment, Jennings Randolph, the new accommodation provision was designed to make clear that Title VII's prohibition on religious discrimination "protect[s] the same rights in *private* employment as the Constitution protects in Federal, State, or local governments." 118 Cong. Rec. at 705. The new accommodation provision thus clarified that Title VII's prohibition on religious discrimination would require accommodation not only to religious belief, but also to religiously motivated conduct—such as declining to work on Sabbath.

Abercrombie relied on that history in holding that Title VII's accommodation provision requires more than mere neutrality toward religiously motivated conduct. The Court concluded that Title VII gives religious objectors "favored treatment," and that employers have an affirmative duty to try to resolve conflicts between an employer's standards and a worker's religious practices. *Abercrombie*, 135 S. Ct. at 2034. The *Abercrombie* Court's "favored treatment" holding, moreover, buttressed the suggestion in *Ansonia*, that an employer provides a "reasonable accommodation" as a matter of law *only* when it "*eliminate[s]* the conflict" between a work requirement or policy and an employee's religious practice. *Id.* at 70 (emphasis added).

B. Factual Background

The heart of this dispute is that Walgreens did not attempt to eliminate the conflict or even find a reasonable compromise when Darrell Patterson requested an ongoing accommodation for his religious practice.

1. Patterson's initial position was a low-level job that paid less than $20,000 per year—a Customer Care Representative (CCR)—in Orlando, Florida. Doc.60:13 (Patterson).[3] He received several promotions, ultimately becoming a trainer. Doc.60:23 (Patterson). Among those he trained were those who now had his original job—CCRs. Doc.60:23 (Patterson). His final annual salary was approximately $52,500. Doc.69-14:1.

As a Seventh-day Adventist, Patterson avoids work from sundown Friday to sundown Saturday, in observance of the biblical command to "Remember the Sabbath Day, to keep it Holy." Exodus 20:8-11; see also Doc.60:15 (Patterson). While an employee of Walgreens, Patterson consistently asserted he needed his Sabbath off. *Ibid.*

Throughout Patterson's employ, however, Walgreens undertrained—or mistrained—its employees on religious accommodation. For example, Patterson's immediate supervisor, Curline Davidson, testified that she believed Walgreens had *no* obligation

[3] Citations to the record are in the form Doc.XX:Y, where XX is the docket number and Y the page number. Unless otherwise indicated, a reference to a person's last name denotes that person's deposition testimony. All cited documents were in the Court of Appeals appendix and were cited in the same form in the briefing there, following Eleventh Circuit rules.

to accommodate Patterson's religious objection because the unit where Patterson worked supposedly operated twenty-four hours a day. Doc.62:1112.[4] And human resource manager Carol White flatly told Patterson that "the company was not required to honor [his] Sabbath observance[.]" Doc.60:28 (Patterson).

In early August 2011, Davidson also told Patterson he needed to be more "flexible" in his availability for work. Doc.60:42. Given that he was *already* available any hour of any day except Friday nights and Saturdays, Patterson understood this as a request to work during his Sabbath. Doc.60:42. He thus objected to Davidson's request, but Davidson did not relent. Doc.60:42.

2. Patterson was terminated just a few days later after a supposed regulatory "emergency." On Wednesday, August 17, 2011, Walgreens received a letter from the Alabama Board of Pharmacy stating that a Walgreens' call center in that state did not comply with state pharmacy laws and regulations. Doc.63:19 (Groft); Doc.63-1:1–2 (letter). So Walgreens set an internal deadline to transfer all calls from the Alabama facility to Patterson's Orlando facility by the next Tuesday, August 23. Doc.63:41 (Groft); Doc.68:37 (Williams). To prepare for that transfer, Walgreens instructed the Orlando center to schedule refresher trainings for CCRs.

The schedule for these trainings was set on Friday afternoon, August 19, just before Patterson's Sabbath.

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[4] Setting aside that *Patterson's* call center was not really open twenty-four hours a day, Doc 63:11 (Groft), Title VII does not automatically excuse employers who operate 24 hours a day from providing religious accommodations. See, *e.g.*, *Tabura* v. *Kellogg* 880 F.3d 544 (10th Cir. 2018).

The schedule informed Patterson he was to conduct training on Saturday at 11:30 a.m.—during his Sabbath. Doc.65:6–7 (Sheppard).

Recent statements by his supervisors also made it extremely difficult to arrange a swap with someone else: After learning of the need for weekend training but before receiving the schedule, Patterson had been told by Davidson that it would not be "fair" to have his co-trainer Alsbaugh work that weekend. Doc.60-1:128 (EEOC Statement); Doc.60:45 (Patterson). Patterson understood this as an instruction that he was *not* to swap with Alsbaugh—an understanding Davidson later verified. See Doc. 62:11 ("Darrell's supposed to be there."). Patterson also understood that, aside from Davidson, Alsbaugh was the only other employee who could substitute for him. Doc. 60:52

Nonetheless, once Patterson received the schedule and recognized his religious conflict, he attempted to resolve it by calling Alsbaugh. But Alsbaugh was unable to find child care. Doc.60:45–46 (Patterson); *accord* Doc.60-1:129–130 (EEOC Statement).

Left without options, Patterson repeatedly called his supervisor Davidson—who was qualified to conduct the training—and left messages explaining that he would not be able to conduct it. Doc.60:45–46 (Patterson). Although Davidson was in Atlanta during those calls, she soon returned to Orlando, arriving in time that she *could* have conducted the Saturday training. Doc.62:11, 26, 32 (Davidson). She also stated to another manager, Elizabeth Rodriguez, that she was willing to come in and conduct the training, which would have solved the problem. Doc.62:11, 26, 32 (Davidson). But Walgreens, through Rodriguez, instructed Davidson *not* to conduct the training, even

though she volunteered. Doc.62:26 (Davidson). Rodriguez said she would direct the class to do self-study instead. Doc.62:26 (Davidson).

3. The undisputed record shows that there was no hardship from Patterson's failure to conduct the training on Saturday, August 19. Indeed, when Patterson came in on Monday, he conducted the training that had originally been scheduled for Saturday. Doc.60:46–47 (Patterson). And by early Tuesday, Walgreens had begun transferring all of the Alabama calls to Orlando—thereby meeting its internal goal. Doc.63:41 (Groft); Doc.68:37 (Williams).

Nevertheless, that same day, Walgreens placed Patterson on administrative leave. Doc.60:48 (Patterson). Before doing so, his (and Davidson's) supervisor White asked if he wanted to transfer back to his original CCR position. Doc.60:47–48 (Patterson). That position had paid him less than half of what he made as a trainer, and according to White, there was *still* a possibility he would have to work on his Sabbath, Doc.60:47–48 (Patterson). Accordingly, Patterson declined the demotion. Doc.60:47–48 (Patterson).[5]

Two days later, on August 25, Walgreens terminated Patterson, claiming "gross negligence" because of his predictable and pre-disclosed failure to conduct two hours of training on his Sabbath. Doc.60-1:119 (Termination Letter). His firing, moreover, violated Walgreens' four-stage discipline policy, which called for, at most, a verbal warning for missing a scheduled

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[5] The opinion below erroneously rejected Patterson's undisputed explanation that his original pay rate was $9.75. Pet. 10a n.2. The panel ignored that if a material fact is not found in the record—but goes undisputed—the fact is taken as true. See Fed. R. Civ. Proc. 56(e).

shift. See Doc.60-1:36. And Davidson reiterated in Patterson's firing letter that even a transfer to a CCR position wouldn't assure Patterson his Sabbaths off. Doc.60-1:119 (Termination Letter); Doc.60:47–48 (Patterson).

C. Procedural History

Patterson sued Walgreens, claiming (as relevant here) a failure to accommodate him in violation of Title VII. Doc.1:6–8. Walgreens moved for summary judgment on reasonable accommodation and undue hardship. Walgreens claimed that it "accommodated" Patterson by offering him a demotion and pay cut—even though that change would leave him vulnerable to demands that he work on his Sabbath. Walgreens also claimed that allowing him Saturdays off in his job as a trainer would impose an undue burden because there *might* be a greater need for Saturday training in the future. See Pet. 12a, 32a.

1. The district court ruled for Walgreens. Without inquiring whether it had eliminated the conflict, the court held that Walgreens had offered two reasonable accommodations. Pet.31a–32a. First, because Patterson was able to swap on many *earlier* occasions, the court held that Walgreens had acted "reasonably," even though it hadn't eliminated Patterson's *later* work-religion conflict. Pet. 31a. Second, the court asserted that Walgreens' offer to demote Patterson to the lower-paying CCR position was itself a reasonable accommodation. Pet. 32a. The court also held that Patterson's continuing employment would cause undue hardship, based on Walgreens' speculation about the possible future impact of accommodating his religious practice. Pet. 32a.

2. The Eleventh Circuit's opinion largely followed the district court opinion. The panel held that both "accommodations" were reasonable as a matter of law—while conceding that neither would actually have accommodated his religious practice of not working on the Sabbath. Pet. 9a. Indeed, the court held that, "Walgreens met its obligations under Title VII by allowing Patterson to arrange a schedule swap with other employees *when they were willing to do so*." Pet. 9a (emphasis added). The court further acknowledged that the offer of a transfer to a CCR position would merely have "ma[d]e it easier" to get swaps, Pet. 9a, rather than eliminating the conflict.

Turning to undue hardship, the panel (like the district court) also focused on *future* possible issues—such as a planned reduction in staffing—to conclude that, if Walgreens fully accommodated Patterson, it could someday incur undue hardship. Pet. 12a–13a. Rather than requiring a demonstration of actual, concrete hardship, the panel accepted Walgreens' speculative claim that hardship "*would have been* required," Pet. 13a, if it continued to employ Patterson. Pet. 12a–13a.

REASONS FOR GRANTING THE PETITION

Review should be granted to resolve a 4-2-3 circuit split over whether an incomplete or uncertain accommodation that fails to eliminate the conflict between a work requirement and an employee's religious practice is nonetheless a "reasonable" accommodation, allowing the employee to be fired for the unresolved conflict. Review is also warranted to resolve a 4-3 split over whether an employer may prove undue hardship using speculation. And the Court should also revisit *TWA* v. *Hardison*, 432 U.S. 63 (1977), in light of Justice Thomas's concerns in *Abercrombie*, and because of its non-textual approach to interpreting Title VII.

These issues are important not only because they impact millions of religious employees and frequently find their way into court, but also because the Eleventh Circuit and some others are severely diminishing the protection for religious liberty that Congress enacted and intended. Such issues are important in both quantity and quality and, at a minimum, should be addressed uniformly throughout the country.

I. The decision below entrenches a 4-2-3 circuit split on when an employer provides a reasonable accommodation as a matter of law.

This Court's review of the "reasonableness" question is needed because the decision below (and prior published Eleventh Circuit precedent) joins two circuits in conflicting with the positions of *six* other circuits. These other circuits have held that an accommodation that only partially or occasionally resolves the conflict between a work requirement and a religious practice is not *per se* "reasonable." Four of these circuits have correctly held that an accommodation is not reasonable as a matter of law unless it eliminates the conflict fully. Two others have held that it is a factual question whether an accommodation is reasonable when it doesn't fully eliminate the conflict.

1. As noted, Title VII requires that an employer provide a "reasonabl[e] accommodat[ion] to an employee's or prospective employee's religious observance or practice" unless the accommodation would cause undue hardship. 42 U.S.C. 2000e(j). Interpreting this provision in *Ansonia*, this Court explained that an employer can provide such an accommodation by "*eliminat[ing]* the conflict between employment requirements and religious practices" thus "allowing the individual to observe *fully* religious holy days." *Id.* at 70 (emphasis added). Only one accommodation suggested there—unpaid leave—would have eliminated the conflict. *Ibid.* And that is the only one the Court endorsed as "reasonable." *Ibid.* ("We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one.")

Ansonia thus created a safe harbor for employers: If an employer eliminates the conflict between the employee's work requirements and his religious practice, the employer has "reasonably" accommodated the employee and is entitled to summary judgment.

2. Despite *Ansonia's* reference to "eliminating the conflict," a question has arisen that now divides the circuits: When an employer does *not* eliminate the conflict, under what conditions, if any, can the accommodation be "reasonable," either as a matter of law or as determined by a jury? On this point the circuits have scattered in three different directions.

Four circuits have correctly held that when an accommodation does not eliminate the conflict, the accommodation is *per se* unreasonable and therefore the employer does not fall within *Ansonia's* safe harbor. For example, in *Opuku-Boateng* v. *California*, a Seventh-day Adventist took a job in another town on the understanding that he would not have to work on Saturdays. 95 F.3d 1461, 1465 (9th Cir.1996). But once he had relocated his family, his request to not work Saturdays was denied, even though he offered to take undesirable shifts, swap shifts, or work at a different location. *Ibid.* The Ninth Circuit held that, if negotiations "do not produce a proposal by the employer that would *eliminate* the religious conflict," the employer can prevail only if it shows undue hardship. *Id.* at 1467 (emphasis added). The Ninth Circuit thus limited the employer's safe harbor to *Ansonia*'s terms, and held that the employee had established a prima facie case of non-accommodation. *Id.* at 1475.

In so holding, the Ninth Circuit built upon an earlier decision by the Sixth Circuit. In *Cooper* v. *Oak Rubber Company*, an employee wished to have her Sabbath (Friday nights and Saturdays) off. 15 F.3d

1375 (6th Cir.1994). The employer offered two accommodations: scheduling the shifts to avoid church meetings and allowing the employee to use vacation time to avoid Saturday work. *Id.* at 1377. The Sixth Circuit concluded that neither accommodation eliminated the conflict and therefore both were *per se* unreasonable. See *id.* at 1379. Although the Sixth Circuit ultimately ruled in favor of the employer on undue hardship grounds, the court clearly refused to extend *Ansonia*'s safe harbor to accommodations that did not eliminate the conflict.

The Seventh Circuit joined these circuits the following year, in a case involving a Jewish worker at a Chicago beauty salon who requested Yom Kippur off. *EEOC* v. *Ilona of Hungary*, 108 F.3d 1569 (7th Cir.1997). Ruling for the employee, the court held that the employer's proposed accommodation—offering to let the worker take a vacation on days *other* than Yom Kippur—did not fall within *Ansonia's* safe harbor. *Id.* at 1576. Offering employees a different day off, the Court held, "cannot be considered reasonable ... because it does not *eliminate* the conflict between the employment requirement and the religious practice." *Ibid.* (emphasis added).

Most recently, the Second Circuit reached a similar conclusion in *Baker* v. *Home Depot*, 445 F.3d 541 (2d Cir. 2006). There an employee transferring from a Boston store to a New York store made clear to his new managers that, for religious reasons, he would not work on Sundays. While this was acceptable for a time, eventually new management refused to accommodate him. *Id.* at 544–545. Instead, they offered him a Sunday shift that at least did not interfere with his religious service. *Ibid.*

The EEOC filed an amicus brief supporting the employee. Relying on *Ansonia*, *Cooper*, and *Ilona*, the EEOC urged that "an employer's suggestion is not a reasonable accommodation unless it *eliminates* the conflicts between the employee's work requirements and his religious practices." Br. of EEOC at 8-9, 11, *Baker* v. *Home Depot*, No. 05-1069 (2d Cir. 2006).

Ruling for the employee, the Second Circuit agreed: The court held that the employer's shift change proposal "was no accommodation at all because … it would not permit him to observe his religious requirement to *abstain from work totally on Sundays*." *Baker*, 445 F.3d at 547–548 (emphasis added). The Second Circuit further explained that, as a matter of law, "the offered accommodation cannot be considered reasonable … because it does not eliminate the conflict between the employment requirement and the religious practice." *Id.* at 548 (ellipsis in original; citation omitted).

The EEOC continues to agree with these circuits. In its current compliance manual, it explains that "[a]n accommodation is not 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship." EEOC Compliance Manual, Religious Discrimination, Section 12-IV, available at: https://www.eeoc.gov/policy/docs/religion.html.

3. Two other circuits have also rejected attempts by employers to enlarge *Ansonia*'s safe harbor—by authorizing juries to evaluate whether accommodations outside the safe harbor are reasonable.

The first to adopt this approach was the Eighth Circuit in *Sturgill* v. *UPS*, in which a Seventh-day Adventist was asked to deliver packages on a Friday after sundown. 512 F.3d 1024, 1028–1029 (8th Cir. 2008). While normally an employee who couldn't finish a shift for religious or other reasons could ask for another worker to take over, on this occasion no employee was available when the worker's Sabbath started. *Id.* at 1029. He was fired for not completing the shift. *Ibid.* At his trial, the jury instructions followed the Second, Sixth, Seventh, and Ninth Circuits—and the EEOC—in explaining that "an accommodation is reasonable if it eliminates the conflict between Plaintiff's religious beliefs and Defendant's work requirements and reasonably permits Plaintiff to continue to be employed by Defendant." *Id.* at 1030.

The Eighth Circuit rejected this standard and instead made it a jury question whether an accommodation was reasonable, even if it did not eliminate the conflict. The Eight Circuit held that "in close cases, that is a question for the jury" and a reasonable jury may find in many circumstances that the employee could be required to "compromise a religious observance or practice." *Id.* at 1033.[6]

The Tenth Circuit has recently followed the Eighth Circuit's approach. In *Tabura* v. *Kellogg*, the employer allowed two employees to swap shifts or use vacation time to avoid working on their Sabbaths. 880 F.3d 544, 555 (2018). Both employees struggled to find swaps and were eventually fired. The employer argued for a safe harbor—that is, "a per se rule that the

[6] The Eight Circuit upheld the jury verdict as harmless error with regard to liability and back pay but reversed on other grounds as to injunctive relief and punitive damages. *Id.* at 1036.

accommodations it offered Plaintiffs are reasonable as a matter of law," whether or not the conflict was eliminated. *Id.* at 555 n.11. The EEOC filed an amicus brief urging the Tenth Circuit to follow the majority rule limiting the employer's safe harbor as in *Ansonia*. See Br. of EEOC, *Tabura* v. *Kellogg*, No. 16-4135 (10th Cir. Oct. 21, 2016).

The Tenth Circuit rejected the employer's attempt to enlarge the *Ansonia* safe harbor, noting that "whether an accommodation is reasonable in a given circumstance is ordinarily a question of fact to be decided by the fact finder." *Tabura*, 880 F.3d at 555 & 555 n.11. The court therefore reversed the summary judgment in favor of the employer and remanded for a trial.

Because the Eighth and Tenth Circuits hold that the reasonableness of an incomplete accommodation is a factual question for the jury, employees who would prevail on this element in the Second, Sixth, Seventh, and Ninth Circuits only receive a trial on reasonableness in the Eighth and Tenth Circuits. Those circuits thus reject the majority rule that employees cannot be forced to accept an "accommodation" that requires them to violate their religious beliefs. In the Eighth and Tenth Circuits there is no such certainty: Both employee and employer must await a jury's determination as to what is reasonable.

As explained above, this latter approach is also contrary to the EEOC's guidance, which holds that an accommodation *cannot* "be 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work …" EEOC Compliance Manual, *supra* at 16.

4. In this case, by contrast, the Eleventh Circuit concluded as a matter of law that "Walgreens met its obligations under Title VII by allowing Patterson to arrange a schedule swap with other employees when they were willing to do so." Pet. 9a. But that incomplete and contingent accommodation gives employers a safe harbor well beyond that recognized in *Ansonia*: Whether such an arrangement avoids the conflict depends on the actions of third parties and may not work at all. Moreover, the panel opinion here conflicts even more squarely with the Tenth Circuit, which rejected a safe harbor when the employer authorized *both* shift swaps and vacation time as accommodations. *Tabura*, 880 F.3d at 555 & n.11.

Similarly, the decision below conflicts with the Eight Circuit in *Sturgill* because the Eleventh Circuit upheld summary judgment for the employer even though Patterson was fired based on a "specific, one-time failure to accommodate." By contrast, in *Sturgill,* the court upheld the jury verdict in the employee's favor based on a one-time failure to accommodate. *Sturgill*, 512 F.3d at 1033.

The split is even starker when the Eleventh Circuit's decision is compared with the Second, Sixth, Seventh and Ninth Circuits. As explained above, these four circuits have held that the *employee* is entitled to prevail on reasonable accommodation when the conflict is not eliminated. *Cooper*, 15 F.3d. at 1378 ("If the employer's efforts fail to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's beliefs without incurring undue hardship"); *Opuku-Boateng*, 95 F.3d at 1467 (same) ; *Ilona*, 108 F.3d at 1576 (accommodation "*cannot* be considered reasonable ... because it does not *eliminate*

the conflict between the employment requirement and the religious practice.") (emphases added); *Baker*, 445 F.3d at 547–548 ("[T]he shift change … was no accommodation at all because … it would not permit [the employee] to observe his religious requirement to abstain from work totally on Sundays.")

Here, while the Eleventh Circuit acknowledged *Ansonia*'s "elimination" language (as most circuits have done), it also recognized that the accommodations Walgreen's offered did *not* eliminate the conflict. The court noted that Walgreen's proposed accommodation of transferring to a different position would merely have "ma[d]e it easier" to get swaps, Pet. 9a. Likewise, the Eleventh Circuit's suggestion that "allowing Patterson to arrange a schedule swap" was sufficient as a matter of law, Pet. 9a, does not ensure that Patterson will—in the Second Circuit's words—be able to "abstain from work totally" every Saturday. The opinion below thus rejected the elimination standard that the Second, Sixth, Seventh, and Ninth Circuits have embraced, and gave a safe harbor to Walgreens that those Circuits and the Eighth and Tenth Circuits have rejected.

This is not the first time the Eleventh Circuit has enlarged *Ansonia's* safe harbor beyond its terms. In *Walden*, a counselor refused to provide relationship counseling for religious reasons. See 669 F.3d at 1280–1283. She was removed but was told she could "*retain her tenure* with [the employer] *if* she found" another position with the employer within a year. *Id.* at 1282 (emphasis added). The Eleventh Circuit held that, as a matter of law, the employer had reasonably accommodated the conflict between the employee's work and her religious beliefs. *Id.* at 1294. But the conflict wasn't eliminated: another job was not found, and the

employee was fired. In short, like the decision below, *Walden* enlarged *Ansonia*'s safe harbor to include unsuccessful *attempts* to eliminate the conflict.

4. Two other circuits—the First and Fourth—have likewise expanded *Ansonia*'s safe harbor beyond its terms, and the terms of Title VII. In *EEOC* v. *Firestone Fibers*, the employer offered an employee who objected to working on Saturdays several partial accommodations to reduce the number of required Saturday shifts. 515 F.3d 307, 316 (4th Cir.2008). The employee used these accommodations but was nonetheless fired when they proved insufficient to eliminate the work-religion conflict. *Id.* at 311. The Fourth Circuit ruled that "no reasonable juror could conclude that Firestone did not provide reasonable accommodation for Wise's religious observances," and affirmed summary judgment for the employer. *Id.* at 316. The court thus expanded *Ansonia*'s safe harbor, ruling for the employer without bothering to examine whether a complete accommodation would create undue hardship.

Similarly, in *Sánchez-Rodríguez* v. *AT&T Mobility,* when the employee declined to work on Saturday for religious reasons, the employer offered a series of partial accommodations that again proved insufficient to eliminate the conflict. 673 F.3d 1, 12 (1st Cir. 2012). Nonetheless, the First Circuit held that, as a matter of law, "the [combination of] efforts made by AT&T constituted a reasonable accommodation of Sánchez's religious beliefs," and thus affirmed a grant of summary judgment to the employer. *Id.* at 13. Thus, like the Eleventh and Fourth Circuits, the First Circuit has expanded *Ansonia*'s safe harbor to include "accommodations" that do not actually accommodate to the

religious practice at issue, and thus do not eliminate the conflict.

In sum, the circuits are overtly, widely and irreconcilably split on whether *Ansonia*'s safe harbor extends to "accommodations" that do not eliminate the conflict between an employee's work requirements and the employee's religious practice. While religious workers in six circuits either prevail on this prong or have the chance to make their argument to a jury, workers in three circuits, including the Eleventh Circuit below, face the prospect of losing on summary judgment even when the "accommodations" offered do not resolve the conflict between their religious practice and work requirements. It is important to resolve this conflict sooner rather than later, given that this recurring problem will only multiply with the increasing religious diversity in America. See *infra* Section III

II. The decision below joins the wrong side of a 4-3 split on the use of speculation to establish undue hardship.

The decision below also enlarges a pre-existing split on whether an employer can demonstrate undue hardship based on speculation about future events.

1. Although the district court and Eleventh Circuit briefly discussed (at Pet. 11a) the possible hardship from Patterson's August 20 absence, they *never* held that this specific absence created any hardship for Walgreens. See Pet. 11a. To the contrary, the record indicates that Walgreens was able to transfer all of its calls on the only schedule it ever established—by Tuesday, August 23. *E.g.* Doc. 63:41 (Groft). And any claim of urgency or hardship on August 20 would be disingenuous given that Patterson's supervisor volunteered to take the Saturday training shift but was told not to bother. Doc.62:26 (Davidson).

Instead, the Eleventh Circuit addressed a different question—whether Patterson's continued employment *could* create future hardship. And the court relied upon Patterson's single absence to conclude that "what Patterson insisted on would produce undue hardship for Walgreens *in the future*." Pet. 12a (emphasis added). Specifically, the panel credited Walgreen's speculation about what might "have been required" if and when Alsbaugh departed—the possibility of having to avoid Saturday trainings. Pet. 13a.

2. But this analysis contradicts the holdings of the Fourth, Eighth, Ninth and Tenth Circuits that an employer may not establish hardship through speculative evidence. *Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Tooley* v. *Martin-Marietta Corp.,* 648 F.2d 1239, 1243 (9th Cir. 1981); *Brown* v.

Gen. Motors, 601 F.2d 956, 961 (8th Cir. 1979); *Benton* v. *Carded Graphics*, 1994 WL 249221 (4th Cir. June 9, 1994) (unpublished). Specifically, these circuits have held that an employer may *not* rely on:

- "speculation" about possible hardships, *Toledo*, 802 F.2d at 1492; *Brown*, 601 F.2d at 961;
- merely "conceivable" or "hypothetical" hardships, *Toledo*, 892 F.2d at 1492; *Tooley*, 648 F.2d at 1243; *Benton*, 1994 WL 249221, or even
- "anticipated hardship," *Brown*, 601 F.2d at 961.

The EEOC has also condemned this sort of speculation. Its compliance handbook explains that "[a]n employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information." EEOC Compliance Manual, *supra* at 16. The EEOC thus agrees with the majority rule that rejects reliance on speculation.

3. In allowing speculative claims of hardship, the court of appeals below parroted the reasoning of a Fifth Circuit decision, *Weber* v. *Roadway Express, Inc.*, 199 F.3d 270 (2000). There, a trucker with a religious objection to being alone with a woman suggested that his boss skip over him when making assignments, pairing the next trucker on the rotation with the female trucker. *Id.* at 272. Given that the next worker's preferences as to the length of the shift and time between shifts were unknown, whether this schedule alteration would benefit or hurt the next worker was necessarily a matter of speculation. But the Fifth Circuit relied on this speculation to hold that not just an *actual* adverse impact on this next em-

ployee, but "[t]he *mere possibility* of an adverse impact," was enough to constitute undue hardship, not just for fellow employees, but by extension the employer as well. *Id.* at 274 (emphasis added).

The Sixth Circuit likewise followed *Weber* in a similar factual scenario. In *Virts* v. *Consolidated Freightways,* a male employee was fired for refusing on religious grounds to do overnight runs with a woman. 285 F.3d 508, 512–514 (6th Cir. 2002). *Virts* approvingly quoted and applied *Weber*'s holding that "[t]he *mere possibility* of an adverse impact" created undue hardship. *Id.* at 521 (quoting *Weber*, 199 F.3d at 572) (emphasis added).[7] But such reliance on "possible" impacts is likewise inconsistent with the majority rule, which forbids reliance upon any speculation.

4. Moreover, the approach of the Fifth, Sixth and Eleventh Circuits violates Title VII's text. By its terms Title VII requires an employer to "demonstrate[]" undue hardship. But it is well settled that, especially on a motion for summary judgment, speculation and hypotheticals simply do *not* demonstrate hardship. For example, in *Edenfield* v. *Fane*, this Court held that, to carry its burden on a Free Speech claim, a government must "*demonstrate* that the harms it recites are real." 507 U.S. 761, 770–771 (1993) (emphasis added). Accordingly, in the speech context, mere speculation is not sufficient for the government to carry its burden of establishing hardship.

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[7] The Third Circuit has embraced in *dicta* the rule adopted in the Fifth, Sixth, and Eleventh Circuits: It has interpreted *Hardison* to require the examination of the "*projected* number of instances of accommodation" to determine undue hardship. *Ward* v. *Allegheny Ludlum Steel Corp.*, 560 F.2d 579, 583 n.22 (3d Cir. 1977).

The same analysis applies, with even greater force, to Title VII: The statute's *text* places the burden on the employer to "demonstrate" undue hardship. And to carry its burden, the employer must establish what the Ninth Circuit has called "the *fact* of hardship." *Tooley*, 648 F.2d at 1243–1244.

This approach is also consistent with *Hardison*'s focus on hardships the employer "bears," 432 U.S. at 84, not "might bear," "may someday bear," or "speculates it might bear." By ruling otherwise, the Eleventh Circuit and its allies have made the employer's required burden on a hardship defense trivial.

5. The approach followed by the Fifth, Sixth and Eleventh Circuits also practically eviscerates the statute. As one commentator has noted, if undue hardships include hypothetical hardships, Title VII would "virtually never require accommodation."[8] The Fifth Circuit powerfully illustrates this danger: District courts in that circuit frequently grant summary judgment for the employer based on those courts' erroneous view that a speculative hardship is sufficient to be "undue."[9]

The rule also weights the dice further against the employee: Some circuits have held that no cause of action is available for a religious employee who resigns

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[8] Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 622 (2000).

[9] E.g., *Jones* v. *UPS*, 2008 WL 2627675 (N.D. Tex. June 30, 2008) (citing *Weber*'s mere possibility standard); *EEOC* v. *Dalfort Aerospace, L.P.*, 2002 WL 255486 (N.D. Tex. Feb. 19, 2002) (same); *George* v. *Home Depot*, 2001 WL 1558315 (E.D. La. Dec. 6, 2001) (same).

because he anticipates conflict between his religious beliefs and his job requirements.[10] To preserve his claim, he therefore must cooperate in an employer's effort to find an acceptable accommodation. Yet, in circuits that allow hardship to be shown by speculation, an employer may fire an employee based on an anticipated hardship—*without* making any effort to find an accommodation that will resolve the employer's concern. This combination creates an unfair asymmetry between the obligations of employees and employers, and further weakens Title VII's protections for religious workers.

In sum, as with the first question presented, the split on the second question regarding proof of undue hardship is broad and well-established, affects many cases, and presents an important question that will ultimately determine whether Title VII's workplace protections are rendered empty and ineffectual. For all these reasons, this Court should grant certiorari to resolve this split.

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[10] *E.g. Lawson* v. *Washington*, 296 F.3d 799, 805 (9th Cir. 2002); *Goldmeier* v. *Allstate Ins. Co.*, 337 F.3d 629, 636–637 (6th Cir. 2003).

III. *Hardison*'s definition of undue hardship should be revisited.

The Court should also use this dispute to revisit an important flaw in *Hardison* that is arguably a logical precursor to the second question presented. As Justice Thomas pointed out in his separate opinion in *Abercrombie* (135 S.Ct. at 2040 n.*) , *Hardison*'s discussion of "undue hardship" was technically dicta because the Court was construing the existing EEOC guideline, not the statute. But even if *Hardison's* analysis is treated as a holding as to Title VII, as it is by all lower courts, it is badly reasoned. Further, it is contrary to Congress's language and intent because it severely burdens the efforts of religiously diverse employees to negotiate reasonable accommodations.

1. Assuming the Court was construing the statute itself, *Hardison* defied Title VII's text and history when it defined undue hardship as merely something more than a "*de minimis* cost." 432 U.S. at 84. No pre-*Hardison* dictionary of which we are aware had ever defined "undue" as merely "more than *de minimis*." Rather, dictionaries at the time of the amendment's enactment defined undue primarily as "unwarranted," or "excessive." *E.g.* The Random House Dictionary of the English Language, College Edition 1433 (1968). By contrast, a *de minimis* burden was and is defined as one that is "trifling," "minimal," or "so insignificant that a court may overlook [it] in deciding an issue or case." *Black's Law Dictionary* 388 (5th ed. 1977).

As a textual matter, some burdens are surely more than "trifling" but less than "excessive." If that were not so, the importance of the very behavior protected by Title VII would be, by definition, "trifling" or insignificant—such that it can be outweighed by *any* employer burden greater than that. Thus, as a textual

matter, "undue" simply does not and cannot mean "more than de minimis," either now or in 1972.

Hardison is also incorrect if one assumes "undue hardship" was a term of art when the 1972 Amendments were adopted. The most relevant use of that term before 1972 was by the EEOC, which defined "undue hardship" as including situations "where the employee's needed work *cannot be performed* by another employee of substantially similar qualifications during the period of absence of the Sabbath observer"—a standard obviously more than de minimis, and one Walgreens could not possibly meet here. 29 C.F.R. 1605.1 (1968) (codifying 1967 Guidelines) (emphasis added)

Not surprisingly, then, *Hardison*'s crabbed understanding of undue hardship has been roundly criticized. For example, Justice Marshall dissented in part on the ground that "[a]s a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost[.]'" 432 U.S. at 92 n.6 (Marshall, J., dissenting). Other courts have likewise disagreed with the *Hardison* majority on that ground. *E.g.*, *Nakashima* v. *Bd. of Educ.*, 131 P.3d 749, 758 (Ore. App. 2006); *Anderson* v. *Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something *greater than* hardship.") (emphasis added). And *Hardison*'s definition contradicts the definition of "undue hardship" that Congress has employed in other contexts, such as the Americans With Disabilities Act.[11]

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[11] That statute, 42 U.S.C. 12101 et seq., defines "undue hardship" as an action requiring "significant" difficulty or expense. 42

2. Likewise, the history of Title VII shows that the undue hardship standard was not meant to be toothless. The record shows instead that Congress passed the 1972 accommodation amendments based on concern "for the individuals of all minority religions who are forced to choose between their religion and their livelihood.'" *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 454 n.11 (7th Cir. 1981) (quoting 118 Cong. Rec. at 705–706). A toothless standard of undue hardship—such as the "de minimis cost" test adopted in *Hardison*—leaves employees of faith in just that unacceptable predicament.

Hardison thus turns Title VII's history on its head. Rather than accepting the value Congress and the EEOC saw in a religiously diverse workforce, *Hardison* concluded that any more than *de minimis* harm to the employer outweighs the benefits of religious diversity.[12] Thus, far from correcting the erroneous decisions interpreting Title VII before the 1972 Amendment, *Hardison* has perpetuated and in some cases even increased those harms. That too is sufficient reason to revisit its analysis.

U.S.C. 12111(10)(A). The statute offers a list of factors to be considered in appraising whether there is undue hardship, including the cost of the accommodation, the overall financial resources of the company and the scope of the employer's operations. 42 U.S.C. 12111(10)(B).

[12] See Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 Ark. L. Rev. 515, 537 (2010) (noting that if *Hardison* were reversed, "employers would bear an extra cost in accommodating these employees, [but] that cost would be balanced by the benefit of having a workplace that respects religious pluralism.") (internal citation omitted).

3. *Hardison* has also proven unworkable. As the Appendix shows, in cases where a district or circuit court has addressed an undue hardship defense, the employer has prevailed in obtaining summary judgment on that issue far more frequently than the employee—more than twice as often in the district courts and infinitely more often on appeal, where employees have *never* won summary judgment on that defense. See Pet. 35a. That disparity is almost certainly attributable to *Hardison*'s employer-friendly "de minimis" standard. And especially in circuits where even speculative burdens are deemed sufficient, many cases undoubtedly never reach a formal judgment on the issue, as religious employees would have even less chance of success.

These statistics—and the stark disparity between outcomes for defendants and plaintiffs—make clear that *Hardison* eliminates the value of the accommodation requirement for many employees of faith. Rather than encouraging employers to compromise, *Hardison* tells them that the employee has no claim for accommodation if there is more than *de minimis* cost to the employer. And if the employer has no potential legal obligation, there is little incentive to engage in the "bilateral cooperation" contemplated in *Ansonia.* See 479 U.S. at 69 (citation omitted).

Indeed, as one commentator has put it, under *Hardison,* "little more than virtual identical treatment of religious employees [is] required."[13] Such equal treatment offers little protection to employees, since it allows the employer to deny an accommodation to

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[13] Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. Law & Pol. 107, 122 (2015).

everyone if it can show a more than *de minimis* hardship. For the same reason, an employer can often extract large burdens from employees as the price of living their religion—or simply fire them.

This is what happened to Patterson. The panel held that an incomplete accommodation involving a demotion and a large pay cut was *per se* "reasonable," and thus not even a question for a jury. Pet. 10a & n. 2. Patterson thus *lost* based on the panel's argument that it was a reasonable accommodation and a reasonable burden on him to take a demotion and pay cut that still would not fully eliminate the conflict with his religious practices. Yet Walgreens *won* on the ground that mere speculation regarding potential costs to the employer could establish an undue burden. The absurdity and hypocrisy of those countervailing standards, and their inconsistency with the statute, calls out for this Court's correction

Moreover, *Hardison*'s unworkability has increased as our nation has become more religiously diverse. While many past conflicts have involved Seventh-day Adventists and Orthodox Jews seeking to practice their beliefs about the Sabbath, the growing Muslim,[14] Sikh and other minority religious populations have distinctive worship, grooming and dress requirements that often conflict with job requirements. Indeed, an empirical study by Gregory C. Sisk and Michael Heise concluded that "American Muslims appear to be at a

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[14] *E.g.*, Besheer Mohamed, *New estimates show U.S. Muslim population continues to grow*, Pew Research (Jan. 3, 2018), http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/

pronounced disadvantage in obtaining accommodations for religious practices in federal court because they are Muslims[.]"[15] *Hardison* facilitates that disparity because it allows judges to dismiss accommodation claims for religious practices that are not ingrained in U.S. culture far too easily.

4. *Hardison* has also created needless conflicts between employers and employees. Armed with near-blanket permission to enforce rules that conflict with religious practices so long as they can assert a *de minimis* cost, employers have been allowed to burden minority religions through actions such as the following:

- rejecting a request by a Muslim teacher to wear a headscarf, on the theory that *state* law potentially forbade wearing the head scarf. *United States* v. *Bd. of Educ.*, 911 F.2d 882, 890–891 (3d Cir. 1990), and
- firing an Orthodox Jew for refusing to work on his Sabbath in part because other employees felt he was receiving "special treatment." *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143 (5th Cir. 1982).

And, of course, in this case the *de minimis* standard allowed an employer to fire a member of another minority religion—a Seventh-day Adventist—based on a bare assertion that retaining him would *someday* result in increased costs.

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[15] Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231, 262 (2011); see also, *e.g.*, *Basheeruddin* v. *Advocate Health & Hosps. Corp.*, 2016 WL 3520160 (N.D. Ill. June 27, 2016) (a leave of absence was a reasonable accommodation for a Muslim woman, even though a "return to her position was not guaranteed" after Ramadan).

Patterson and each of these other employees was thus faced with what then-Judge Alito called the "'cruel choice' between religion and employment" that Title VII sought to prevent. See *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring) (quoting *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting)). Foreshadowing Judge Alito, Justice Marshall's dissent in *Hardison* explained that "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting); *accord Jamil* v. *Sessions*, 2017 WL 913601 (E.D.N.Y. Mar. 6, 2017). And, as then-Chief Judge Boochever of the Alaska Supreme Court has explained, a loose application of Title VII results in the "drastic result of depriving [employees] of [their] employment" when they seek to live their religion. *Wondzell* v. *Alaska Wood Prods.*, 583 P.2d 860, 867 (Alaska 1978) (Boochever, C. J., dissenting).

In short, *Hardison*'s de minimis test—whether viewed as dicta or holding—must be corrected to ensure fairness to individual employees, and to facilitate religious diversity in the workforce.

IV. This case is an excellent vehicle.

Not only are all three questions presented worthy of certiorari, but this case is an excellent vehicle for resolving them.

First, this petition squarely presents questions regarding both of the key statutory terms—"reasonable" and "undue hardship" that have divided the lower courts. The presence of *both* recurring issues allows this Court to more squarely consider "the broader context of the statute as a whole." See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). By addressing the accommodation and hardship issues in unison, the Court will be able to provide clearer and more comprehensive guidance to lower courts, employers, and employees. By contrast, if the Court waits for some future vehicle, it may present only one of the questions presented here, and thus will not provide an opportunity to clarify the meaning of both terms.

Second, the facts of this case provide an especially good context in which to clarify the meaning of those provisions. For example, as explained above, Patterson's supervisors believed they weren't required to accommodate Patterson *at all*. The most generous reading of these statements is that the supervisors had (erroneously) been advised that any accommodation they offered would be *per se* reasonable. The other possible reading is simple ignorance, born of a company's indifference toward religious employees. See 7–9, *supra*. Either way, those statements—by senior employees of a major, well-counseled domestic company—illustrate the need for this Court to clarify employers' obligations toward employees' religious practices.

Moreover, in holding that an offer to transfer to an entry-level position that *still* wouldn't solve Patterson's work-religion conflict was "reasonable" as a matter of law, the Eleventh Circuit has all but vindicated the view of Patterson's supervisors that they had no obligation to accommodate him. But a reversal based on Questions 1 and 2, or 1 and 3, will correct both the widespread legal errors and the specific injustice to Patterson.

The facts also make this an excellent vehicle to clarify whether an employer may establish hardship through speculation. Here, Walgreens was unable to establish that it was harmed by Patterson's absence on August 20. So instead, it built its case around far-fetched speculation about possible future hardships. See *supra* 22. Both opinions below similarly relied on this speculation rather than any actual hardship, on August 20 or otherwise. Pet. 12a–13a, 32a–34a. So a favorable decision on the speculation issue will require, at a minimum, vacatur of the decision below.

Likewise, the facts make this an excellent vehicle to reevaluate *Hardison*. The indifference of Patterson's supervisors is part of a broader culture in which supervisors are often undertrained about their obligations to provide religious accommodations. And that further illustrates *Hardison*'s unworkability: It narrows the statute to the point that supervisors mistakenly believe Title VII doesn't protect religious workers.

Finally, there are no preliminary disputed issues that would prevent a resolution of these questions. And both the accommodation and speculation questions were squarely decided by both courts below, with virtually identical reasoning.

In short, this case comes in an ideal posture to address the three questions concerning Title VII's critical protections for religious workers.

CONCLUSION

This petition presents, in a clean and compelling vehicle, questions of great importance to all employees of faith—questions at the core of how to define "reasonable accommodation" and "undue hardship" in Title VII. Moreover, two of these questions divide the circuits—with every numbered circuit opining on at least one question.

The petition should therefore be granted. At a minimum, the Court should call for the views of the Solicitor General so that the EEOC and other interested federal agencies can express their views.

Respectfully submitted,

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321
mcfarlandt@gc.adventist.org

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-16923

D.C. Docket No. 6:14-cv-02108-GKS-GJK

DARRELL PATTERSON,

Plaintiff-Appellant,

versus

WALGREEN CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(March 9, 2018)

Before ED CARNES, Chief Judge, NEWSOM, and

SILER,* Circuit Judges. PER CURIAM:

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Darrell Patterson brought Title VII claims for religious discrimination, failure to accommodate religious practices, and retaliation against his former employer, Walgreen Company (Walgreens). He appeals the district court's order granting summary judgment to Walgreens and denying summary judgment to him.

I. BACKGROUND

A. Facts

Patterson began working for Walgreens in October 2005 as a customer care representative in Walgreens' Orlando Customer Care Center, a call center that operates seven days a week. As a Seventh Day Adventist, Patterson's religious beliefs prohibit him from working during his Sabbath, which occurs from sundown on Friday to sundown on Saturday. At the time he was hired Patterson communicated to Walgreens that he would not be available to work during his Sabbath, and Walgreens initially accommodated that request.

Patterson was promoted a number of times and ultimately became a training instructor. To work around Patterson's Sabbath observance, his supervisor agreed to schedule regular training classes between Sunday and Thursday. But on occasion, business needs required emergency trainings, which were scheduled on a case by case basis and sometimes included Friday nights or Saturdays. In an effort to further accommodate him, Patterson's supervisor allowed him to swap shifts with other employees when he was assigned a training class during the Sabbath, an option Patterson used on several occasions. There were times, however, where Patterson's scheduling requests could

not be accommodated due to business demands — especially when those demands required Patterson to attend (rather than teach) a training session. In 2008, for example, Walgreens' business needs required that Patterson attend a multi-week mandatory training that included Friday evening sessions. Patterson refused to do so and his absence during that period resulted in progressive discipline for each occurrence.

Then on August 19, 2011, Patterson was informed that he would need to conduct an emergency training session the next day, a Saturday. The urgent need for a session arose because the Alabama Board of Pharmacy had ordered Walgreens to shut down its call center activities at the Muscle Shoals Customer Care Center, and it gave Walgreens only two days to do so. As a result, Walgreens had only a few days to train its Orlando Customer Care Center employees to handle the approximately 50,000 phone calls per month that no longer could be handled in Alabama. Patterson's supervisor told him he would have to come up with a solution, which he took to mean he would need to find someone to cover the emergency training session for him if he wanted to avoid working on Saturday. She also told him it would not be fair to ask the Orlando Customer Care Center's only other training instructor, Lindsey Alsbaugh, to cover for him.

Nonetheless, Patterson called and asked Alsbaugh, but she could not conduct the Saturday training session because she had to care for her children. Although Patterson agrees that several other non-trainer employees at the Orlando facility could have conducted the training session, he did not attempt to contact any

of them.[1] Instead, Patterson left two phone messages for his supervisor advising her that he could not conduct the Saturday training session because he would be observing his Sabbath. Patterson did not report to work on Saturday to conduct the emergency training session. As a result, the training was delayed.

The following Tuesday Patterson met with his supervisor and a human resources representative to discuss his absence on Saturday. Patterson reaffirmed that he would not work on his Sabbath. The human resources representative suggested that Patterson consider returning to his prior position as a customer care representative or look for another job at Walgreens that had a large employee pool from which Patterson could more easily find employees to switch shifts with him when needed. Patterson asked if he would be guaranteed that he would not have to work on Friday nights or Saturdays, and he was told there could be no guarantee. Because Patterson was one of only two trainers at the Orlando facility, and the other trainer would soon be leaving the company, Walgreens concluded that it could not accommodate Patterson's request that he never be scheduled to work on a Friday night or Saturday.

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[1] At oral argument, Patterson's counsel asserted for the first time that Patterson's supervisor told him that he could swap only with Alsbaugh because she was the only employee at the Orlando center on the same level as Patterson. The record does not support that assertion. Patterson did testify at his deposition that in the past, his supervisor had allowed him to swap only with employees at his "same job level." But he testified that there were other employees besides Alsbaugh "who had that same level of expertise" who he had swapped shifts with in the past. And he testified that some of those employees could have covered the training session, but he contacted only Alsbaugh and his supervisor.

Because of his refusal to ever work on his Sabbath and his refusal to look for another position at Walgreens that would make it more likely that his unavailability could be accommodated, he was suspended and then terminated a couple of days later. Walgreens decided to take that action because it could not rely on Patterson if an urgent business need arose that required emergency training on a Friday night or a Saturday.

B. Procedural History

After Patterson filed suit, both parties moved for summary judgment. In ruling on the cross-motions for summary judgment, the district court determined that although Patterson's complaint contained counts alleging failure to accommodate, religious discrimination, and retaliation, all three counts in fact "center[ed] on Walgreens' alleged failure to accommodate Patterson's religious beliefs by scheduling Patterson to work the Saturday [s]ession and subsequently terminating Patterson's employment after he failed to report to work for the Saturday [s]ession." The district court focused its analysis on whether a genuine issue of material fact existed as to Walgreens' failure to accommodate Patterson's Sabbath observance.

The court concluded that: (1) Walgreens had reasonably accommodated Patterson's religious beliefs by permitting him to swap shifts with other employees when his scheduled shifts conflicted with the Sabbath and by offering him the possibility of transferring to other positions within Walgreens that would make it easier for him to swap shifts when needed; and (2) Walgreens would suffer an undue hardship if required to guarantee that Patterson never worked during

Sabbath hours given Walgreens' shifting and urgent business needs. It Walgreens' motion for summary judgment and denied Patterson's.

II. DISCUSSION

A. Religious Accommodation Claim

The district court did not err in granting summary judgment to Walgreens and denying it to Patterson on his Title VII religious accommodation claim.

Title VII prohibits an employer from discharging an employee on the basis of the employee's religion. 42 U.S.C. 2000e-2(a)(1). The word "religion" in the statute includes "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 . . . religious observance or practice without undue hardship on the conduct of the employer's business." at 2000e(j). Therefore, "[a]n employer has a 'statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship.'" *Walden* v. *Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012) (quoting *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 75, 97 S. Ct. 2264, 2272 (1977)).

"In religious accommodation cases, we apply a burden-shifting framework akin to that articulated in *McDonnell Douglas Corp.* v. *Green*." *Id.* (citation omitted). The plaintiff must first establish a *prima facie* case of discrimination based on failure to accommodate religious beliefs by showing that: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) he informed his employer of that belief;

and (3) he was discharged for failing to comply with the conflicting employment requirement. *Ibid.* If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to demonstrate that it either offered the employee a reasonable accommodation or could not do so without undue hardship. See *id.*; 42 U.S.C. 2000e(j).

No one disputes that Patterson established a *prima facie* case. The question is whether Walgreens has demonstrated that the evidence construed in the light most favorable to Patterson shows there is no genuine issue of material fact and it is entitled to judgment as a matter of law because it offered Patterson a reasonable accommodation or could not accommodate him without undue hardship.

According to the Supreme Court, "a reasonable accommodation is one that 'eliminates the conflict between employment requirements and religious practices.'" *Walden*, 669 F.3d at 1293 (quoting *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 70, 107 S. Ct. 367, 373 (1986)). The employer, however is not required to accommodate "at all costs." *Philbrook*, 479 U.S. at 70, 107 S. Ct. at 373. The Supreme Court has said that an "undue hardship" occurs when an employer must bear more than a "de minimis cost" in accommodating the employee's religious beliefs, and involves "not only monetary concerns, but also the employer's burden in conducting its business." *Beadle* v. *City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) (quoting in part *Hardison*, 432 U.S. at 84 n.15, 97 S. Ct. at 2277 n.15).

To comply with Title VII, an employer is not required to offer a choice of several accommodations or to prove that the employee's proposed accommodation

would pose an undue hardship; instead, the employer must show only "that the employee was offered a reasonable accommodation, 'regardless of whether that accommodation is one which the employee suggested.'" *Walden*, 669 F.3d at 1293–94 (quoting *Beadle* v. *Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994)). In other words, "any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Id.* at 1294 (quoting *Philbrook*, 479 U.S. at 68, 107 S. Ct. at 372) (alteration omitted). An employer may be able to satisfy its obligations involving an employee's Sabbath observance by allowing the employee to swap shifts with other employees, or by encouraging the employee to obtain other employment within the company that will make it easier for the employee to swap shifts and offering to help him find another position. See id.; *Morrissette-Brown* v. *Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322–24 (11th Cir. 2007). The other side of the equation is that the employee has a "duty to make a good faith attempt to accommodate [his] religious needs through means offered by the employer." *Walden*, 669 F.3d at 1294 (concluding that the district court properly summary judgment to the employer where the employee did not accept the employer's offer of help in applying for other positions within the company).

The undisputed facts show that Walgreens offered Patterson reasonable accommodations that he either failed to take advantage of or refused to consider, and that the accommodation he insisted on would have posed an undue hardship to Walgreens. Walgreens shifted the regular training schedule to Sunday through Thursday for Patterson. That minimized conflicts. For unusual training sessions that were conducted on his

Sabbath, Walgreens allowed Patterson to find other employees to cover his shifts, and he did so on several occasions. Patterson conceded that his supervisor had never refused one of his requests to swap a Sabbath shift with a willing employee.

Regarding the Saturday, August 20, 2011 emergency training session that Patterson was assigned to conduct, besides his supervisor, he called only one employee, Alsbaugh, who advised him that she could not cover for him because of her childcare obligations. Although Patterson thought that several other employees could have covered the training session for him, he did not attempt to contact any of them.

Walgreens met its obligations under Title VII by allowing Patterson to arrange a schedule swap with other employees when they were willing to do so. See *Morrissette-Brown*, 506 F.3d at 1322–24 (holding that an employer that allowed an employee to swap shifts and posted a shift schedule the employee could use to find others willing to swap shifts was a reasonable accommodation and that the employer was not required to actively assist the employee in arranging a shift swap). Walgreens was not required to ensure that Patterson was able to swap his shift, nor was it required to order another employee to work in his place. See *Hardison*, 432 U.S. at 80–81, 97 S. Ct. at 2275 (explaining that an employer is not required to accommodate an employee's religious observance at the expense of other employees who have other strong, but nonreligious, reasons for not working that shift).

Not only that, but after Patterson missed the training session that gave rise to this case, Walgreens' human resources manager encouraged him to seek a

different position within the company, including his former position as a customer care representative, where a larger pool of employees would make it easier for him to swap shifts in the future. Patterson did not want to pursue that option. But he had a duty to make a good faith attempt to accommodate his religious needs through the means offered by Walgreens. See *Walden*, 669 F.3d at 1294.

Patterson argues that returning to the customer care representative position would have been a demotion that lowered his pay. But he has not presented any evidence to support that assertion. Because he was not amenable to changing positions, there were no discussions about what his pay might have been had he transferred to a customer care representative position. There is no evidence he asked about that.[2]

Patterson also points out that Walgreens could not assure him that his schedule as a customer care representative would never conflict with his Sabbath. Guarantees are not required. And the record does show that even if moving to the customer care representative position did not completely eliminate the conflict, it would have enhanced the likelihood of avoiding it

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[2] Patterson's summary judgment brief stated that he began working as a customer care representative at $9.75 an hour in 2005, but his record citation (to his employment application attached as an exhibit to his deposition) does not support his statement about his pay at that time. Patterson has not pointed to any other evidence in the record of a customer service representative's rate of pay in either 2005, when Patterson was hired, or in 2011, when Walgreens offered to transfer him into the position. Nor has he shown that Walgreens would have insisted that he accept less pay than he was receiving in the position he held before any transfer.

because there were so many more employees with whom he could swap shifts, as he had done during his almost six years with the company.

Patterson argues that Walgreens could have scheduled training sessions on other days or required other employees to conduct training sessions during his Sabbath. But Walgreens was not required to give Patterson a choice of accommodations or his preferred accommodation. See *Walden*, 669 F.3d at 1293–1294. Under those circumstances, the district court did not err in granting summary judgment to Walgreens because it afforded Patterson reasonable accommodations, which he failed to take advantage of. See *Morrissette-Brown*, 506 F.3d at 1322 (explaining that the "inquiry ends when an employer shows that a reasonable accommodation was afforded the employee, regardless of whether that accommodation is one the employee suggested") (quotation marks omitted).

Because Walgreens reasonably accommodated Patterson's religious practice, we need not consider the issue of undue hardship. *Philbrook*, 479 U.S. at 68–69, 107 S. Ct. at 372 ("[W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship…[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."); see also *Walden*, 669 F.3d at 1294 (same); *Morrissette-Brown*, 506 F.3d at 1324 n.7 (same); *Beadle*, 29 F.3d at 592 (same). But even assuming the accommodations offered by Walgreens were not reasonable, allowing him to

retain his training instructor position with a guarantee that he would never have to work on Friday nights or Saturdays, which is what he insisted on, would have posed an undue hardship for Walgreens' business operations.[3]

Although Walgreens had previously changed the general training schedule to Sunday through Thursday in order to accommodate Patterson, it did not alter the scheduling of emergency training sessions. Walgreens' Orlando Customer Care Center operates seven days a week and sometimes needs emergency training for its employees based on business needs. The circumstances leading to the Saturday, August 21, 2011 training sessions were a true emergency. Because of the Alabama Board of Pharmacy's actions and the two days it gave Walgreens to effectively shut down its Customer Care Center operations in Alabama, the company was forced to redirect approximately 50,000 phone calls per month from the Alabama center to Orlando. The employees in Orlando had to be trained immediately so they could begin handling all of those calls. Patterson's adamant refusal to work on Saturday delayed the required training.

The discussions that Patterson's supervisor and a

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[3] There is no merit to Patterson's claim that the district court conflated the reasonable accommodation standard and the undue hardship standard. The district court's summary judgment order concluded that Walgreens' efforts to accommodate Patterson's Sabbath observance satisfied its duty to make reasonable accommodations and, alternatively, that delaying emergency training or scheduling other employees to cover all of Patterson's shifts during the Sabbath would require Walgreens to bear a greater than de minimis cost and thus would be an undue hardship.

human resources representative had with him the week after he refused to work as scheduled showed that what Patterson insisted on would produce undue hardship for Walgreens in the future. To ensure that Patterson received the time off for Sabbath observance that he was insisting on, Walgreens would have had to schedule all training shifts, including emergency ones, based solely on Patterson's religious needs, at the expense of other employees who had nonreligious reasons for not working on weekends. See *Hardison*, 432 U.S. at 80–81, 97 S. Ct. at 2275. In the immediate future, the burden to work all Friday night and Saturday shifts would have fallen on Alsbaugh, Walgreens' only other training instructor at the time. And it is undisputed that she was in the process of leaving the Orlando facility, which would have left Patterson as the only training instructor there. Walgreens then would have been required either to eliminate Friday night and Saturday training sessions altogether, regardless of its business needs, or to schedule less-effective non-trainers to train the untrained some of the time. Walgreens, like the employer in *Hardison*, was required to hold trainings on Saturdays at least occasionally because the Orlando facility operated every day and because business necessity — the sudden closing of the Muscle Shoals facility being a prototypical example — sometimes required urgent training. See *Hardison*, 432 U.S. at 80, 97 S. Ct. at 2275. Under those circumstances, the accommodation Patterson sought would have imposed an undue hardship on Walgreens just as it would have for the employer in *Hardison*. See *id.* at 84–85, 97 S. Ct. at 2276–2277.

B. Religious Discrimination and Retaliation Claims

The district court reasoned that Patterson's religious discrimination and retaliation claims were based on his accommodation claim and decided that they fell with it. Patterson contends that district court erred by not independently analyzing his discrimination and retaliation claims. We disagree.

Patterson's three causes of action were each based solely on Walgreens' alleged failure to accommodate his Sabbath observance. Specifically, Patterson's complaint relied on the same facts outlining the events leading up to his termination to allege: in Count One, titled "Title VII – Religious Discrimination," that Walgreens intentionally discriminated against him on the basis of religion because it forced him to choose between work and observing his Sabbath; in Count Two, titled "Title VII – Failure to Accommodate," that Walgreens failed to reasonably accommodate his religious belief prohibiting work on his Sabbath; and in Count Three, titled "Title VII – Retaliation," that Walgreens retaliated against him for requesting continued accommodation by giving him "the ultimatum" of violating his religious belief, resigning, or being terminated. He claimed that all three claims arose under 42 U.S.C. 2000e(j), which defines "religion" to include the "reasonable accommodation" and "undue hardship" standards.

The district court correctly identified the scope of Patterson's Title VII claims when it determined that all three of them turned on Walgreens' alleged failure to accommodate Patterson's religious need to observe his Sabbath. The evidence, viewed in the light most favorable to Patterson, shows that in the past Walgreens had allowed Patterson to swap shifts with other employees, changed its training schedule, and

offered him different employment opportunities to help him avoid potential conflicts with his religious practice. In this instance Patterson could have swapped shifts with some of the other employees who were capable of conducting the training session. And Walgreens decided to terminate his employment only after he failed to conduct the emergency training session, insisted that Walgreens guarantee that he would never have to work on his Sabbath, and refused to consider other employment options within the company without such a guarantee. Those facts are enough to foreclose any genuine issue of material fact as to his accommodation claim, his discrimination claim, and his retaliation claim. Because Patterson's discrimination and retaliation claims were bound up with his accommodation claim, the district court did not err in granting summary judgment to Walgreens on them.

In any event, we review *de novo* a district court's judgment, *Vessels* v. *Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th Cir. 2005), and we can affirm on any basis supported by the record, *Thomas* v. *Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007). It is clear from the record that there is no evidentiary basis for Patterson's discrimination and retaliation claims. As for his discrimination claim, Patterson points to evidence that his supervisor told him it would not be "fair" for him to ask Alsbaugh, who had to take care of her children that Saturday and was scheduled to conduct the Sunday training session, to swap with him, and that his supervisor had encouraged him to work on his Sabbath. That along with the other evidence in the record is not enough for a jury to find that religious bias motivated Walgreens' decision to fire him. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S.___, 135 S.

Ct. 2028, 2032 (2015). As a result, Patterson's evidence, without more, is not enough to create a genuine issue of material fact that his religion was a motivating factor in Walgreens' decision to fire him.[4] See *id.*

Patterson's retaliation claim fails for the same reason. Assuming that he could establish a *prima facie* case, Walgreens provided legitimate reasons for firing him, and Patterson failed to raise a genuine issue of material fact that those reasons were pretextual. *Shannon* v. *Bellsouth Telecomms., Inc.*, 292 F.3d 712, 715 (11th Cir. 2002); see *Nassar*, 570 U.S. at 362, 133 S. Ct. at 2534. The evidence shows that Walgreens occasionally had to schedule emergency training sessions based on urgent business needs. It shows that Walgreens fired Patterson because he insisted on an accommodation that would have forced Walgreens to schedule all of its training sessions (including emergency training sessions) around his schedule, and because he did not use or would not consider the

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[4] There is some confusion as to whether the but-for causation standard or the motivating factor causation standard applies to Patterson's discrimination claim. Compare *Abercrombie*, 135 S. Ct. at 2032 ("Title VII relaxes [the but-for causation] standard, however, to prohibit even making a protected characteristic a 'motivating factor' in an employment decision.") (quoting 42 U.S.C. 2000e–2(m)), and *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 343, 133 S. Ct. 2517, 2522–23 (2013) (stating that an "employee who alleges status-based discrimination under Title VII" need only show "that the motive to discriminate was one of the employer's motives"), with *Quigg* v. *Thomas Cty. School Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016) (stating in a Title VII case that "single-motive claims — which are also known as 'pretext' claims — require a showing that bias was the true reason for the adverse action"). But that confusion does not matter in this case because Patterson has not presented enough evidence to satisfy either causation standard.

accommodations Walgreens offered. The evidence does not even suggest that Walgreens acted with a retaliatory animus in firing Patterson. Patterson cannot turn down Walgreens' reasonable accommodations and then claim retaliation when it fires him for his unwillingness to use those accommodations. Summary judgment for Walgreens was appropriate on his retaliation claim.

For those reasons, we conclude that the district court did not err in granting summary judgment to Walgreens and denying it to Patterson on his discrimination and retaliation claims.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

Case: 16-16923 Date Filed:04/26/2018

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16923-GG

DARRELL PATTERSON,

Plaintiff-Appellant,

versus

WALGREEN CO.,

Defendant - Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, NEWSOM, and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DARRELL PATTERSON,

Plaintiff,

v. Case No: 6:14-cv-2108-Orl-18GJK

WALGREEN CO.,

Defendant.

ORDER

THIS CAUSE comes for consideration on the following:

1. Defendant Walgreen Co.'s ('Walgreens") Motion for Summary Judgment (Doc. 59), to which Plaintiff Darrell Patterson ("Patterson") filed a response in opposition (Doc. 74), and Walgreens filed a reply (Doc. 80).
2. Patterson's Motion for Summary Judgment (Doc. 69), to which Walgreens filed a response in opposition (Doc. 75), and Patterson filed a reply (Doc. 78).

For the reasons that follow, Walgreens' motion will be, and Patterson's motion will be denied.

I. FACTUAL BACKGROUND

In October 2005, Patterson commenced his employment with Walgreens' Customer Care Center in Orlando, Florida. (Doc. 1 ¶ 14; Patterson Dep., Doc. 60 at 52:3-11.) At the time of his hire, Patterson informed Roberto Lee, a Walgreens Human Resources representative, that he was a Seventh-day Adventist and that, based on his religious beliefs, he would be unable to perform secular work from sundown on Fridays until after sunset on Saturdays. (Patterson Dep. at 58:4-13.) On his employment application, dated October 18, 2005, Patterson indicated that he would not be available to work after sundown on Fridays and on Saturdays. (Doc. 60-l at 12; see Patterson Dep. at 55:2-56:1.) However, on the same date, Patterson signed an acknowledgment stating that, "[i]t has been explained to me during the interview process, that the Walgreens Customer Care Center is a 24 hour, 7 days a week operation and that I must be available to work any scheduled shift." (Doc. 60-1 at 13.) Via the acknowledgment, Patterson confirmed that he… understand[s] that the hours of operation and any scheduled shift is subject to change." (*Ibid.*; Patterson Dep. at 56:24-57:20.)

Throughout Patterson's employment, Walgreens maintained customer care centers ("CCCs") in Orlando, Florida (the "Orlando CCC") and Muscle Shoals, Alabama (the "Muscle Shoals CCC") that provided customer service for Walgreens' corporate clients and retail customers. (See Groft Deposition, Doc. 63 at 9: 14-25.) Two of the primary lines of business for the CCCs were Walgreens Health Initiative ("WHI") and Walgreens Mail Service ("WMS"). (Patterson Dep. at 50:18-51:14.) Through WHI, Walgreens administered

pharmacy benefit management plans. (*Id.* at 48:18-23.) By operating WMS, Walgreens contracted with corporate clients to perform call center services for mail-order prescriptions. (*Id.* at 47:12-48:17.) Primarily, the Orlando CCC handled calls related to WHI, while the Muscle Shoals CCC handled calls related to WMS. (*Id.* at 50:18-51:23.)

Ron Walker ("Walker") served as the General Manager for the Orlando CCC, and Bernard Groft ("Groft") served as the General Manager for the Muscle Shoals CCC. (Patterson Dep. at 9:14-25, 11:24-12:9, 22:23-23:10.) Walker supervised Operations Managers at the Orlando CCC, and he reported to Steven Needham ("Needham"). The Senior Director of the Orlando CCC. (*Id.* at 23:3-5.) Group Supervisors reported to the Operations Managers, while Customer Care Representatives ("CCRs") reported to the Group Supervisors. (*Id.* at 23:7-10.) Training Instructors, supervised by a Training Manager, were tasked with training CCRs, and they were typically assigned to training sessions based on the areas in which they were subject matter experts. (*Id.* at 23:12-16; Alsbaugh Dep., Doc. 61 at 72:6-24.) Training Managers scheduled training sessions in accordance with business needs and client demands, and training sessions were occasionally scheduled on an "urgent" or "emergency" basis. (Groft Dep. at 55:18-24, 64:22-65:1, 67:4-68:3.)

Patterson commenced his employment with Walgreens at the Orlando CCC as a CCR. (See Patterson Dep. at 52:3-11). While Patterson trained to become a CCR and while he worked as a CCR, he was never scheduled to train or work during Sabbath hours. (*Id.* at 68:11-69:4, 116:14-19.) Months after Patterson became a CCR, he was promoted to a consumer

relations position and, later, he was promoted to a Training Instructor position. (See *id.* at 99:9-20.) As a Training Instructor, Patterson's job duties included training newly hired employees "on systems, on mail service, fulfillment requirements." (*Id.* at 104:21-24.) At the time of Patterson's termination, Training Manager Curline Davidson ("Davidson") was the Training Manager for both Patterson and Lindsey Alsbaugh ("Alsbaugh"), the only Training Instructors employed at the Orlando CCC.[5] (Patterson Dep. at 167:15-25; Groft Dep. at 23:12-16, 64:22-65:1.)

On multiple occasions after Patterson became a Training Instructor, he was scheduled to work during Sabbath hours and was permitted to switch shifts with other employees to avoid doing so. (See Patterson Dep. at 102:13-18, 107:22-109:9, 125:1-126:9; Doc. 60-1 at 107-09.) However, in 2008, Patterson was issued multiple warnings after he missed portions of mandatory training sessions held on Friday evenings. (Doc. 60-1 at 107-09.)[6] In 2009, Walgreens adopted a Sunday through Thursday training schedule that resolved most of Patterson's scheduling conflicts. (See Patterson Dep. at 105:7-12.) Patterson admits that from October 2005 until August 2011, "Patterson was able to observe the Sabbath and ... [w]hile scheduling issues arose infrequently during his six years of employment, Patterson and Walgreens were able to work through

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[5] Alsbaugh testified that Patterson was a subject matter expert in WMS, and she was a subject matter expert in WHI. (Alsbaugh Dep. at 68:8-21.)

[6] Patterson also received a disciplinary warning in 2010 for failing to complete training tasks that went beyond sundown on Friday. (See Doc. 62-1 al 9; Doc. 69 at 4.)

each and every issue that arose." (Doc. 1 ¶¶ 20-21.)

In early August 2011, Patterson met with Davidson for his annual performance review. (Doc. 1 ¶ 22; Patterson Dep. at 165:15-22.) During the performance review, Davidson informed Patterson that Walgreens expected increased training activity, and she communicated that Walgreens entered into an agreement to sell WHI that would result in Alsbaugh leaving her employment and Patterson remaining as the only Training Instructor. (See Patterson Dep. at 166:9-20.) Additionally, on August 17, 2011, Groft received a letter from an attorney acting on behalf of the Alabama Board of Pharmacy (the "Board") demanding that Walgreens cease WMS operations at the Muscle Shoals CCC by August 19, 2011. (Groft Dep. at 72:6-19; Doc. 63-1 at 1-2.) Soon thereafter, the decision was made to shift Muscle Shoals CCC's WMS calls to the Orlando CCC. (See Groft Dep. at 91:22-92:7.) In efforts to timely transfer Muscle Shoals CCC's WMS calls to the Orlando CCC, approximately forty (40) CCRs were slated to be hired at the Orlando CCC, and additional training was scheduled to be provided immediately to new and existing CCRs. (*Id.* at 91:22-92:16, 110:8-22.) Conceivably, failure of CCRs at the Orlando CCC to effectively handle the high volume of transferred WMS calls would impede patients' access to their medication and subject Walgreens to the risk of breaching its contractual obligations and facing significant financial penalties. (*Id.* at 172:7-178:25).

On August 19, 2011, Patterson was informed that he was assigned to lead an emergency training session at the Orlando CCC scheduled to take place during Patterson's Sabbath on August 20, 2011 (the "Saturday Session"). (Doc. 1 ¶ 23; See Patterson Dep. at 173:10-

17.) The same day, Patterson communicated with Alsbaugh about covering the Saturday Session, but Alsbaugh was unable to cover for Patterson due to childcare issues. (Doc. 1 ¶ 24; Patterson Dep. at 174:17-175:13; Alsbaugh Dep. at 19:20-20:3, 30:4-24.) After speaking with Alsbaugh, Patterson attempted to contact Davidson via her cell phone and left Davidson a voicemail message indicating that he and Alsbaugh were not able to attend the Saturday Session. (Doc. 1 ¶ 25; Patterson Dep. at 175:15-21.) On the morning of August 20, 2011, Patterson left Davidson another voicemail message informing her that he would not be able to attend the Saturday Session because he was observing the Sabbath. (Doc. 1 ¶ 26, Patterson Dep. at 180:25-18, 1:12.) Davidson returned Patterson's call on Saturday after Patterson did not show up for the Saturday Session; however, Patterson did not receive the message until after the training was scheduled to have ended. (See Patterson Dep. at 181:15-182:6.)

Patterson subsequently reported to work on August 21, 2011, but he was promptly sent home after being informed that Alsbaugh would conduct the training session that day. (Doc. 1 ¶ 27; Patterson Dep. at 184:15, 85:15.) On August 22, 2011, Patterson met with Davidson to discuss his absence at the Saturday Session and, afterwards, Patterson trained the class that had been rescheduled from the previous Saturday. (Doc. 1 ¶ 29, Patterson Dep. at 186:16-20.) The next day, August 23, 2011, Patterson met with Davidson and Carol White ("White"), Walgreens' human resources manager, to further discuss his absence from the Saturday Session. (Doc. I ¶ 30, Patterson Dep. at 187:2-4, 22-23.) During said meeting, White spoke with Patterson about the option of transitioning back into a CCR role or looking

for jobs at a neighboring facility operated by Walgreens that may better accommodate his scheduling needs. (Patterson Dep. at 187:22-188:11, 206:1-14.) Following the discussion, Patterson was suspended from his employment with Walgreens, and on August 25, 2011, Patterson's employment was terminated. (Doc. 1 ¶ 31, Doc. 62-1.) Prior to Patterson's termination, WMS calls had been transferred to the Orlando CCC, and the Muscle Shoals CCC was able to cease handling WMS calls that required access to prescription records by conclusion of the day on August 22, 2011. (See Groft Dep. at 143:6-25, 159:11-24.)

On December 24, 2014, Patterson filed a three-count complaint against Walgreens alleging claims of religious discrimination, failure to accommodate a religious belief, and retaliation. (Doc. 1 ¶¶ 33-50.) Patterson alleges that Walgreens terminated his employment "because of his religious convictions, his requests for accommodation of the Sabbath, and in retaliation for having raised issues related to Walgreens' discrimination against him on the basis of his religion." (*Id.* ¶ 32.)

II. LEGAL STANDARD

A court may grant summary judgment "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). Material facts are those that may affect the outcome of the case under the applicable substantive law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputed issues of material fact preclude the entry of summary judgment, but factual disputes that are irrelevant or unnecessary do not. *Ibid.* "[S]ummary judgment will not lie if the

dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ibid.*

In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Matsushita Elec. Ind. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The moving party may rely solely on the pleadings to satisfy its burden. *Celotex Corp.* v. *Carrell*, 477 U.S. 317, 323-24 (1986). A non-moving party bearing the burden of proof, however, must go beyond the pleadings and submit affidavits, depositions, answers to interrogatories, or admissions that designate specific facts indicating there is a genuine issue for trial. *Id.* at 324. If the evidence offered by the non-moving party "is merely colorable, or is not significantly probative," the Court may grant summary judgment. *Anderson*, 477 U.S. at 249-250. Similarly, summary judgment is mandated against a party who fails to prove an essential element of its case "with respect to which [the party] has the burden of proof." *Celotex*, 477 U.S. at 323.

III. ANALYSIS

In Count I of the Complaint, titled "Title VII—Religious Discrimination," Patterson avers that "Walgreens intentionally discriminated against [him] by forcing him to choose between working on Friday evening and Saturday, as directed, and his sincerely held religious belief[s]." (Doc. 1 ¶ 35.) In Count II of the Complaint, titled "Title VII-Failure to Accommodate," Patterson alleges that "Walgreens failed to reasonably

accommodate [his] sincerely held religious belief[s]." (*Id.* ¶ 41.) In Count III of the Complaint, titled "Title VII-Retaliation," Patterson states that "following [his] requests for continued accommodation for his religious beliefs, Walgreens gave Patterson the ultimatum of either violating his sincerely held religious belief, resigning[,] or being terminated." (*Id.* ¶ 48.) Although titled differently, all three counts center on Walgreens' alleged failure to accommodate Patterson's religious beliefs by scheduling Patterson to work the Saturday Session and subsequently terminating Patterson's employment after he foiled to report to work for the Saturday Session. Accordingly, the scope of the Court's analysis is limited to determining whether there is a genuine issue of material fact with regard to Walgreens' alleged failure to accommodate Patterson's religious needs.[7]

Pursuant to Title VII, "[i]t shall be an unlawful employment practice 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)(I). 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 …employee's

[7] Additionally, the Court is not persuaded by Patterson's reliance on *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) in his efforts to expand his discrimination claims. The Court notes that the *Abercrombie* Supreme Court explicated that adverse employment action taken against an employee because of the employee's religious practice "is synonymous with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other." *Id.* at 2032 n.2 (emphasis in original).

religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* 2000eG). In order to establish a *prima facie* case of religious discrimination, a Title VII plaintiff must present sufficient evidence to show that "'(1) he had a bona fide religious belief that conflicted with an employment requirement; (2) he informed his employer of his belief; and (3) he was discharged for failing to comply with the conflicting employment requirement.'" *Morrissette-Brown* v. *Mobile lnfirmary Medical Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007) (quoting *Beadle* v. *Hillsborough Cnty. Sheriff's Dep 't*, 29 F.3d 589, 592 n.5 (11th Cir. 1994) (citation omitted)). After a Title VII plaintiff establishes a *prima facie* case of religious discrimination, the employer carries the burden of establishing that it provided a reasonable accommodation or that the employer "'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.'" *Morrissette-Brown*, 506 F.3d at 1321 (quoting 42 U.S.C. 2000e(j)) (citation omitted)); *Howard* v. *Life Care Ctrs. Of Am.*, No. 5:06-cv-276-Oc-l0GRJ, 2007 WL 5023585, at *4 (M.D. Fla. Oct. 26, 2007).

In Title VII discrimination cases, "the precise reach of the employer's obligation to [reasonably accommodate] its employee is unclear under the statute and must be determined on a case-by-case basis." *Beadle*, 29 F.3d at 592 (citation omitted). A reasonable accommodation "eliminates the conflict between employment requirements and religious practices," but Title VII "[does] not impose a duty on the employer to accommodate at all costs. " *Ansonia Bd. Of Educ.* v.

Philbrook, 479 U.S. 60, 70 (1986). Further, "compliance with Title VII does not require an employer to give an employee a choice among several accommodations; nor is the employer required to demonstrate that alternative accommodations proposed by the employee constitute undue hardship." *Beadle*, 29 F.3d at 592 (citing *Philbrook*, 479 U.S. at 68). Even if an employer does not offer an accommodation that was suggested by the employee, "the inquiry ends when an employer shows that a reasonable accommodation was afforded the employee." *Ibid.* Additionally, an employee has a concomitant duty of making "a good faith attempt to accommodate his religious needs through means offered by the employer." *Id.* at 593 (citations omitted)

On numerous occasions throughout Patterson's employment. Walgreens permitted Patterson to swift shifts with other employees when he was scheduled to work during the Sabbath hours. Indisputably, Patterson did not find someone to switch shifts with him for the Saturday Session; however, Walgreens did not have the duty to attempt to arrange schedule swaps for Patterson. Rather, Walgreens "'had done all that was reasonably required of it when it was amenable to, and receptive to, efforts that [Patterson] could have conducted for himself to arrange his own schedule swap.'" See *Morrissette-Brown*, 506 F.3d at 1323 (quoting *Thomas* v. *Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1157 (10th Cir. 2000)). In so finding, the Court notes Davidson's deposition testimony that, "Walgreens doesn't accommodate religious accommodations. We don't because it's a 24-hour call center... they don't make any accommodations." (Davidson Dep. at 42:22-25.) The Court also notes Davidson's testimony that she was not aware of any

Walgreens policy prohibiting religious accommodations. (*Id.* at 147:17-19.) Walgreens attests that Davidson's testimony cannot be relied on because it is inadmissible, while Patterson argues that Davidson's testimony "establish[es] clear liability on each of Patterson's claims." (Doc. 69 at 2.) Regardless, clear record testimony, including Patterson's own admissions, demonstrate that Walgreens provided religious accommodations on multiple occasions during Patterson's employment. (See Patterson Dep. at 102:13-18; 107:22-109:9, 125:1-126:9, 145:13-17, 168:1-169:15, 190:13-18; Alsbaugh Dep. at 73:12-74:2.) Although Patterson avers that he was told by Davidson that he was not able to swap shifts for the Saturday Session, the record evidence in this case shows that this type of accommodation was readily available to Patterson and that he had taken advantage of it in the past without issue. Further, after Patterson missed the Saturday Session, he was presented with the possibility of transferring to other positions within Walgreens or a neighboring facility, and he was given the specific option of transferring back to a CCR position within Walgreens. Although Patterson declined the transfer option, he testified that during his training for and employment as a CCR, he was never scheduled to work during the Sabbath hours. (Patterson Dep. at 68:20-69:4, 116:11-19.)

Additionally, in order to ensure that Patterson maintained his position as a Training Instructor with a guarantee that he never work during the Sabbath hours. Walgreens would be forced to tailor its training schedule around Patterson or schedule other employers to work during any and all shifts that occur within the time that Patterson observes Sabbath. In the days

leading up to Patterson's termination, additional CCRs were hired to work at the Orlando CCC and a large volume of calls were being transferred to the Orlando CCC from the Muscle Shoals CCC. Also, training activity was increased for both new and existing CCRs, and Patterson was slated to become the Orlando CCC's only Training Instructor. Considering Walgreens' shifting and urgent business needs, allowing Patterson to maintain his position as a Training Instructor with a guarantee that he would never be obligated to work during the Sabbath hours would present an undue hardship on the conduct of Walgreens' business. Delaying emergency training or locating and scheduling other employees to work weekend shifts that take place during the Sabbath hours, "would require [Walgreens] to bear greater than a 'de minimis cost' in accommodating [Patterson's] religious beliefs.'" *Beadle*, 29 F.3d at 592 (citing *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 75 (1977)); see *Telfair* v. *Fed. Exp. Corp.*, 934 F. Supp. 2d 1368, 1385-86 (S.D. Fla. 2013) (granting summary judgment to employer in a Title VII discrimination case after finding that the accommodations proffered by the employer were reasonable and that "'[a]ny further accommodation ... would have been too costly, impractical, or contrary to the seniority [scheduling] system" in place).

Walgreens, through White, attempted to accommodate Patterson's religious beliefs on an ongoing basis by presenting transfer and other options to Patterson prior to terminating his employment. Walgreens also made efforts to accommodate Patterson's religious beliefs throughout his employment by permitting him to swap schedules and tailoring his training schedule when business needs

permitted. An employer, like Walgreens, is not required to give an employee several accommodation options, nor is the employer required to demonstrate that alternative accommodations proposed by the employee constitute undue hardship." *Beadle*, 29 F.3d at 592. Walgreens' past efforts to accommodate Patterson's scheduling needs and its proffer of various accommodation suggestions to Patterson prior to his termination satisfied Walgreens' duties regarding reasonable accommodation under Title VII. See *Hardison*, 432 U.S. at 81 (Title VII does not require an employer to "'deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others"); *Beadle*, 29 F.3d at 593 (finding that… voluntary swaps instituted by employers within neutral rotating shift systems constitute reasonable accommodations under Title VII."); *Telfair*, 934 F. Supp. 2d at 1384 ("It is sufficient, for example, that the employer offer to help the employee apply for other positions where the likelihood of encountering further conflicts with his or her religious beliefs would be reduced."); *Howard*, 2007 WL 5023585, at *6 (… Permitting employees to swap shifts with each other constitutes a reasonable accommodation under Title VII."); *Sanchez-Rodriguez* v. *AT&T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 12-13 (1st Cir. 2012) (recognizing a combination of attempts to accommodate a religious belief or practice as sufficient for purposes of Title VII). After consideration of the undisputed, material facts of this case, and making reasonable inferences in Patterson's favor, the Court finds that Patterson cannot create a genuine issue of material fact with regard to Walgreens' alleged failure to accommodate his religious

needs. Patterson's employment termination was not discriminatory or otherwise unlawful under Title VII, and Walgreens is thus entitled to summary judgment on Patterson's Title VII claims.

IV. CONCLUSION

For the foregoing reason, it is ORDERED and ADJUDGED as follows:

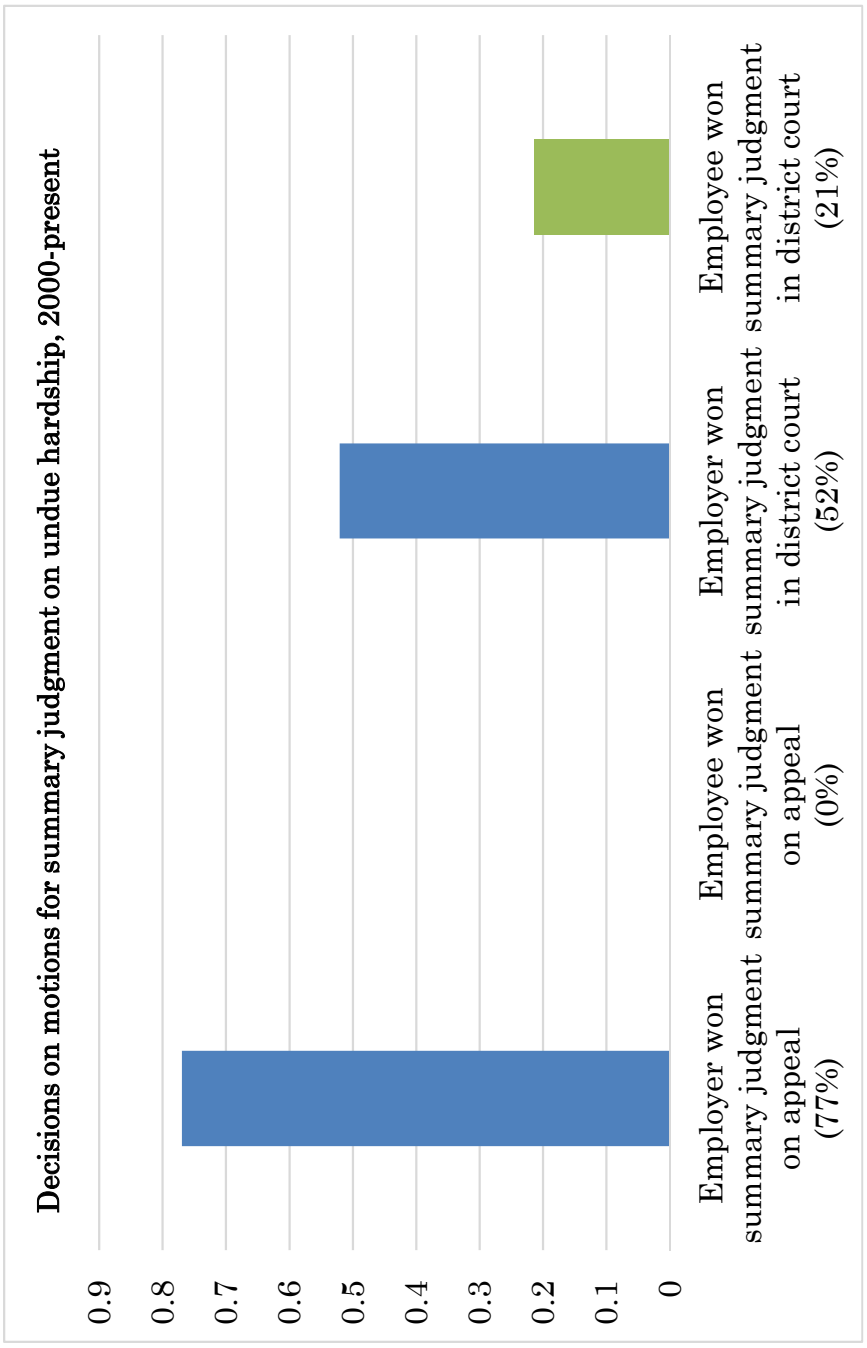
1. Defendant Walgreen, Co.'s Motion for Summary Judgment (Doc. 59) is.
2. Plaintiff Darrell Patterson's Motion for Summary Judgement (Doc, 69) is DENIED.
3. The Clerk of Court is directed to ENTER JUDGEMENT accordingly and to CLOSE the case.

DONE and ORDERED in Orlando, Florida on this 4th day of October 2016.

G. KENDALL SHARP

SENIOR UNITED STATES DISTRICT JUDGE

Copies furnished to: Counsel of Record


Decisions on motions for summary judgment on undue hardship, 2000-present
0.9
0.8
0.7
0.6
0.5
0.4
0.3
0.2
0.1
0
Employer won summary judgment on appeal (77%)
Employee won summary judgment on appeal (0%)
Employer won summary judgment in district court (52%)
Employee won summary judgment in district court (21%)

Summary of decisions on motions for summary judgment on undue hardship since 2000

Circuit	Total decisions*	Employer won SJ on appeal (%)	Employee won SJ on appeal (%)	Employer won SJ in district court (%)	Employee won SJ in district court (%)
First	5	1/1 (100%)	0/0 (0%)	3/4 (75%)	0/0 (0%)
Second	7	0/0 (0%)	0/0 (0%)	4/7 (57%)	0/2 (0%)
Third	9	2/2 (100%)	0/0 (0%)	4/7 (57%)	0/0 (0%)
Fourth	8	0/0 (0%)	0/0 (0%)	1/8 (13%)	0/2 (0%)
Fifth	26	6/8 (71%)	0/0 (0%)	14/18 (75%)	0/0 (0%)
Sixth	17	3/4 (75%)	0/0 (0%)	6/13 (46%)	0/0 (0%)
Seventh	16	3/4 (75%)	0/0 (0%)	8/12 (67%)	0/2 (0%)
Eighth	9	2/2 (100%)	0/0 (0%)	3/7 (43%)	0/0 (0%)
Ninth	9	2/2 (100%)	0/0 (0%)	2/6 (33%)	2/4 (50%)
Tenth	8	0/1 (0%)	0/1 (0%)	3/7 (43%)	1/3 (33%)
Eleventh	10	1/2 (50%)	0/1 (0%)	2/8 (25%)	0/1 (0%)
D.C.	1	0/0 (0%)	0/0 (0%)	1/1 (100%)	0/0 (0%)
Total	125	20/26 (77%)	0/2 (0%)	51/98 (52%)	3/14 (21%)

***** Some decisions addressed motions by employees as well as employers.

Decisions in the First Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Cloutier v. *Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)	Summary judgment to employer only on appeal.	Violation of uniform dress code; was undue hardship.
Brown v. *F.L. Roberts & Co., Inc.*, 419 F.Supp.2d 7 (D. Massachusetts 2006)	Summary judgment to employer.	Blanket exception from uniform appearance policy was undue hardship for employer
O'Brien v. *City of Springfield*, 1 (D. Massachusetts 2003)	Summary judgment denied to employer.	"[P]ure conjecture" of hardship is insufficient.
Robinson v. *Children's Hosp. Bos.,* 2016 WL 1337255 (D. Mass. Apr. 5, 2016*)*	Employer's motion for summary judgment granted: request would have caused undue hardship as a matter of law.	Employer reasonably accommodated employee, and employee's proposed accommodation would have caused undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Rojas v. *GMD Airlines Servs.,* 254 F. Supp. 3d 281 (D.P.R. 2015).	Employer motion for summary judgment granted; Employee failed to establish prima facie case, reasonable accommodation was given, and further accommodation would create undue hardship.	Compromising a scheduling system constitutes undue hardship.

Decisions in the Second Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Litzman v. *New York City Police Dep't*, 2013 WL 6049066 (S.D. New York 2013)	Employer and employee moved for summary judgment; summary judgment to employer on Title VII claim; employee ultimately won on state law grounds.	Immediate hardship of lost efficiency.
Rivera v. *Choice Courier Sys.,* 2004 WL 1444852 (S.D.N.Y. June 28, 2004)	Summary judgment motions by employee and employer denied.	Genuine issues of material fact remained on reasonable accommodation and whether any accommodation was possible without undue hardship.
Quental v. *Conn. Comm'n on the Deaf & Hearing Impaired,* 122 F. Supp. 2d 133 (D. Conn. 2000)	Summary judgment for employer.	Further accommodations would have created disruption of the workplace, an undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Jamil v. *Sessions,* 2017 WL 913601 (E.D.N.Y. Mar. 6, 2017)	Employer's motion for summary judgment denied.	Reasonable jury could find that there was no undue hardship because employer offered no evidence in support of claim that a permanent accommodation would detract from employee morale.
Hussein v. *Hotel Emples. & Rest. Union, Local 6,* 108 F. Supp. 2d 360 (S.D.N.Y. 2000)	Employer's motion for summary judgment granted on both prima facie case and undue hardship grounds.	Allowing employee to not fall roll call rules would cause undue hardship on employer.
Hussein v. *Waldorf Astoria,* 134 F. Supp. 2d 591 (S.D.N.Y. 2001).	Employer's motion for summary judgment granted on prima facie case, reasonable accommodation, and undue hardship grounds.	Employee informed employer of conflict too late to resolve conflict without undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Chavis v. *Wal-Mart Stores E., LP,* 265 F. Supp. 3d 391 (S.D.N.Y. 2017)	Employer's motion for summary judgment denied in part on undue hardship grounds	Employer did not provide sufficient evidence of hardship.

Decisions in the Third Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
E.E.O.C. v. *Geo Group, Inc.*, 616 F.3d 265 (3rd Cir. 2010)	Summary judgment for employer; affirmed.	Immediate and threatened safety-related hardships from headpiece.
Cherry v. *Sunoco, Inc.*, 2009 WL 2518221 (E.D. Pennsylvania 2009)	Summary judgment for employer.	Immediate hardship would have occurred if employee did not carry identification.
E.E.O.C. v. *Aldi, Inc.*, 2008 WL 859249 (W.D. Pennsylvania 2008)	Employer's motion for summary judgment denied.	Hardship allegations regarding exempting employee from all Sunday work were based on speculation; accommodations were insufficient.
Webb v. *City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009)	Summary judgment for employer; affirmed.	Immediate hardship to employer's interest in neutral uniforms.

Case Name	*Undue Hardship Result*	*Reasoning*
Wallace v. *City of Phila.,* 2010 WL 1730850 (E.D. Pa. Apr. 26, 2010)	Summary judgment for employer.	Accommodating more than half-inch beard would create a more than *de minimis* hardship on police department key objectives.
Shepherd v. *Gannondale,* 2014 WL 7338714 (W.D. Pa. Dec. 22, 2014)	Employer's motion for summary judgment denied.	Desire for unity insufficient to constitute undue hardship.
Mathis v. *Christian Heating & Air Conditioning, Inc.,* 158 F. Supp. 3d 317 (E.D. Pa. 2016)	Employer's motion for summary judgment denied.	Allowing atheist to cover religious message on back of ID card not shown to be undue hardship on employer.

Decisions in the Fourth Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
EEOC v. *Triangle Catering, LLC*, 2017 WL 818261 (E.D. North Carolina, Western Division 2017)	Employer's and employee's motions for summary judgment denied.	Employer showed no evidence that allowing change to dress code violated health and safety codes.
E.E.O.C. v. *Thompson Contracting, Grading, Paving, and Utilities, Inc.*, 793 F.Supp.2d 738 (E.D. North Carolina, Western Division 2011)	Summary judgment for employer.	Accommodation does not have to eliminate religious conflict and further accommodation would slow work, which is more than de minimis hardship.
Andrews v. *Va. Union Univ.,* 2008 WL 2096964 (E.D. Va. May 16, 2008)	Summary judgment denied to employer.	No evidence of undue hardship offered; factual questions on *prima facie* case.
Jacobs v. *Scotland Mfg., Inc.,* 2012 WL 2366446 (M.D.N.C. June 21, 2012)	Employer's motion for summary judgment denied.	Factual questions regarding whether employer can accommodate no Sunday work without undue burden.

Case Name	*Undue Hardship Result*	*Reasoning*
Westbrook v. *N.C. A&T State Univ.,* 51 F. Supp. 3d 612 (M.D.N.C. 2014)	Employer's motion for summary judgment denied.	Factual question whether parking attendant not being trained to carry a weapon was undue hardship.
Batson v. *Branch Banking & Tr. Co.,* 2012 WL 4479970 (D. Md. Sep. 25, 2012)	Employer's motion for summary judgment denied.	Material facts remained regarding whether there was undue hardship by giving employees Saturdays off.
EEOC v. *Consol Energy, Inc.*, 2015 WL 106166 (N.D.W. Va. Jan. 7, 2015)	Employer's and employee's motions for summary judgment denied.	Material facts remained regarding whether employee not submitting to biometric scanning was undue hardship.
Daniel v. *Kroger Ltd. P'ship I,* 2011 WL 5119372 (E.D. Va. Oct. 27, 2011)	Employee did not establish prima facie case, but employer would not have prevailed on undue hardship.	Employer did not quantify extent of the burden.

Decisions in the Fifth Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Weber v. *Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000)	Employer's motion for summary judgment granted; affirmed.	Possibility of adverse impact on coworkers is enough to establish undue burden.
Tagore v. *United States*, 735 F.3d 324 (5th Cir. 2013)	Summary judgment to employer, affirmed.	Violating safety / weapons regulations is immediate undue hardship.
Leonce v. *Callahan,* 2008 WL 58892 (N.D. Texas 2008)	Summary judgment to employer.	Possibility of disgruntling / low morale on part of possibly impacted coworkers is more than *de minimis*.
George v. Home Depot, 51 Fed. Appx. 482 (5th Cir. 2002)	Summary judgment to employer, affirmed.	Accommodating employee's Sabbath would be undue hardship.
Davis v. *Fort Bend County,* 765 F.3d 480 (5th Cir. 2014) and 893 F.3d 300 (5th Cir. 2018)	Summary judgment that was on *prima facie* case and hardship grounds, reversed on hardship grounds.	On appeal, issues of fact remained regarding whether allowing employee to get a replacement so she could attend church services was undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Finnie v. *Lee County, Miss.*, 907 F. Supp. 2d 750 (N.D. Miss. 2012)	Summary judgment to employer.	Safety risks are undue hardship.
EEOC v. *Dalfort Aero., L.P.,* 2002 WL 255486 (N.D. Texas 2002)	Summary judgment to employer.	Mere possibility of adverse impact on co-workers is sufficient to constitute undue hardship.
Jones v. UPS, 2008 WL 2627675 (N.D. Texas 2008)	Summary judgment to employer.	Employer showed undue hardship would result from accommodating employee's Sabbath during busy season.
Daniels v. *City of Arlington, Tex.*, 246 F.3d 500 (5th Cir. 2001)	Summary judgment on other grounds, undue hardship judgment for employer on appeal.	Employer could insist on no religious symbols on dress.
Stolley v. *Lockheed Martin Aeronautics Co.*, 228 Fed. Appx. 379 (5th Cir. 2007)	Summary judgment to employer, affirmed.	Conflict with collective bargaining agreement is undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Abdelwahab v. *Jackson State Univ.,* 2010 WL 384416 (S.D. Mississippi, Jackson Division 2010)	Summary judgment to employer.	Mere possibility of adverse impact on co-workers is undue hardship.
Nobach v. *Woodland Village Nursing Home Center, Inc.*, 2012 WL 3811748 (S.D. Miss. 2012)	Employer's motion for summary judgment denied.	Question of fact regarding undue hardship of not requiring nursing home aid to assist patient request for rosary.
Antoine v. *First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013)	Summary judgment to employer, reversed; undue hardship reached on appeal only, remanded.	One undue hardship argument failed but there may be other undue hardships re collective bargaining agreement.
Shatkin v. *University of Texas at Arlington*, 2010 WL 2730585 (N.D. Tex. July 9, 2010)	Employer's motion for summary judgment denied.	Employer focused on nature of prayer at work rather than meet its burden to show undue burden so issues of fact remain.

Case Name	*Undue Hardship Result*	*Reasoning*
Ford v. *City of Dallas, Tex.*, 2007 WL 2051016 (N.D. Tex. July 12, 2007)	Employer's motion for summary judgment denied.	Creation of a new position not necessarily undue hardship.
Rumfola v. *Total Petrochemical USA, Inc.*, 2012 WL 860405 (M.D. La. Mar. 13, 2012)	Employer's motion for summary judgment denied.	Undue hardship not shown; issues of fact regarding undue hardship of employee missing work on Sabbath during plant turnaround.
Moore v. *Metro. Human Serv. Dist.*, 2010 WL 3982312 (E.D. Louisiana 2010)	Employer's motion for summary judgment granted.	Potential Establishment Clause violation was undue hardship.
Gay v. *Lowe's Home Ctrs.,* 2007 WL 1599750 (S.D. Miss. June 1, 2007)	Employer's motion for summary judgment granted on undue hardship and prima facie case	Mere possibility of an adverse impact is sufficient to constitute undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Lorenz v. *Wal-Mart Stores, Inc.,* 225 F. App'x 302 (5th Cir. 2007)	Employer's motion for summary judgment granted on undue hardship and prima facie case; affirmed	Creating a new position solely to accommodate employee would have created more than de minimis cost.
Vaughn v. *Waffle House, Inc.,* 263 F. Supp. 2d 1075, 1084 (N.D. Tex. 2003)	Employer's motion for summary judgment granted on reasonable accommodation and undue hardship	Accommodation was reasonable; employee's requested accommodation was likely to create hardship on other employees

Decisions in the Sixth Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
E.E.O.C. v. *Texas Hydraulics, Inc.*, 583 F. Supp. 2d 904 (E.D. Tenn. 2008)	Employer's motion for summary judgment denied.	Employer seemed to claim than any accommodation of Sabbath would be undue burden without showing any evidence of undue burden.
Crider v. *University of Tennessee, Knoxville*, 492 Fed. Appx. 609 (6th Cir. 2012)	Summary judgment for employer; reversed.	Coworker "grumbling" was inadequate evidence of undue hardship.
Abdi Mohamed v. *1st Class Staffing, LLC*, 286 F. Supp. 3d 884, (S.D. Ohio 2017)	Employers' motion for summary judgment denied.	Must be more than speculative concern; no showing that allowing for prayer would be undue hardship.
Jiglov v. *Hotel Peabody, G.P.*, 719 F. Supp. 2d 918 (W.D. Tenn. 2010)	Employer's motion for summary judgment denied.	Questions of fact remain about undue hardship of allowing employee time off to attend Easter service.

Case Name	*Undue Hardship Result*	*Reasoning*
Virts v. *Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002)	Summary judgment for employer, affirmed.	Undue hardship both because of bargaining agreement and the possibility of future hardship.
Prach v. *Hollywood Supermarket, Inc.*, 2010 WL 4608781 (E.D. Mich. 2010)	Summary judgment for employer.	Employer would have had to hire extra worker, an undue hardship.
King v. *Borgess Lee Mem. Hosp.*, (W.D. Mich. 2014)	Summary judgment for employer.	In the face of undue hardship, plaintiff did not seek offers to transfer jobs.
Burdette v. *Federal Exp. Corp.*, 367 Fed. Appx. 628 (6th Cir. 2010)	Summary judgment for employer; affirmed.	Accommodation would have created safety risk, an undue hardship.
O'Barr v. *United Parcel Service, Inc.*, 2013 WL 2243004 (E.D. Tenn. May 21, 2013)	Employer's motion for summary judgment denied.	Questions of fact regarding undue hardship of allowing for employee's Easter observance.

Case Name	*Undue Hardship Result*	*Reasoning*
Creusere v. *James Hunt Construction*, 83 Fed. Appx. 709 (6th Cir. 2003)	Summary judgment to employer, affirmed.	Accommodating would cause more than *de minimis* financial cost.
Mohamed-Sheik v. *Golden Foods/Golden Brands LLC,* 2006 WL 709573 (W.D. Kentucky 2006)	Employer's motion for summary judgment denied.	Issues of fact regarding whether an employee leaving a shirt untucked was an undue hardship.
E.E.O.C. v. *Healthcare and Retirement Corp. of America*, 2009 WL 2488110 (E.D. Mich. Aug. 11, 2009)	Employer's motion for summary judgment denied.	Issues of fact remain regarding undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Morris v. *Four Star Paving,* LLC, 2013 WL 1681835 (M.D. Tenn. 2015)	Employer's motion for summary judgment denied.	issues of fact regarding undue hardship to accommodate employee's Sabbath worship.

Decisions in the Seventh Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Adeyeye v. *Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013)	Summary judgment to employer, reversed.	Factual questions remain on undue hardship of allowing employee unpaid leave to attend to father's religious burial rites in Nigeria.
Bolden v. *Caravan Facilities Mgmt., LLC,* 112 F. Supp. 3d 785 (N.D. Ind. 2015)	Summary judgment to employer.	All other accommodations besides shift swapping would be undue hardship.
Rose v. *Potter,* 90 F. App'x 951 (7th Cir. 2004)	Summary judgment to employer in based on *prima facie* case and undue hardship; on appeal summary judgment to employer on undue hardship.	Neutral seniority system disruption is undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Nichols v. *Illinois Dep't of Transportation*, 152 F. Supp. 3d 1106 (N.D. Ill. 2016)	Employer's motion for summary judgment denied.	Factual questions remain on undue hardship of providing quiet place to pray.
E.E.O.C. v. *Oak-Rite Mfg. Corp.*, 2001 WL 1168156 (S.D. Ind. Aug. 27, 2001)	Summary judgment to employer.	Employer not required to try novel policy.
EEOC v. *Bridgestone/Firestone, Inc.*, 95 F. Supp. 2d 913 (C.D. Ill. 2000)	Summary judgment to employer; EEOC's motion for partial summary judgment denied.	Bargaining agreement violation is undue hardship.
Lizalek v. *Invivo Corp.*, 314 F. Appx. 881 (7th Cir. 2009)	Summary judgment in favor of employer, affirmed.	Company demonstrated that attempts to accommodate employee's belief that he was three separate beings caused undue hardship.
Noesen v. *Medical Staffing Network, Inc.*, 232 Fed. Appx. 581 (7th Cir. 2007)	Summary judgment in favor of employer, affirmed.	Company demonstrated that employee's refusal to fill birth control orders caused undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Walker v. *Alcoa, Inc.*, 2008 WL 2356997 (N.D. Ind. June 9, 2008)	Employer's summary judgment motion denied.	Factual questions remain regarding undue burden of permanent Sundays off.
Adams v. *Retail Ventures, Inc.*, 325 Fed. Appx. 440 (7th Cir. 2009)	Summary judgment in favor of employer.	Undue hardship to have to deny other workers their preferred shifts.
Filinovich v. Claar, 2005 WL 2709284 (N.D. Ill. Oct. 19, 2005)	Employer's and employee's motion for summary judgment denied, subsequently dismissed on other grounds.	Factual dispute about Sabbath accommodation as undue hardship.
Hill v. *Cook County*, 2007 WL 844556 (N.D. Ill. Mar. 19, 2007)	Employer's summary judgment motion denied.	Factual dispute whether a bargaining agreement precluded summary judgment.

Decisions in the Eighth Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Maroko v. *Werner Enterprises, Inc.,* 778 F. Supp. 2d 993 (D. Minn. 2011)	Employer's motion for summary judgment denied.	Material issues of fact remained regarding whether Sabbath accommodation that employer alleged would cause undue hardship was insisted on by employee.
E.E.O.C. v. *Chemsico, Inc.,* 216 F. Supp. 2d 940 (E.D. Mo. 2002)	Employer's motion for summary judgment denied.	Material issues of fact remained on whether there would be loss of efficiency by accommodating.
E.E.O.C. v. *Sw. Bell Tel.,* L.P., 2007 WL 2891379 (E.D. Ark. Oct. 3, 2007)	Employer's motion for summary judgment denied.	Material issues of fact remained regarding hardship of accommodating two employees' absence to attend religious convention.
Harrell v. *Donahue,* 638 F.3d 975 (8th Cir. 2011)	Summary judgment for employer, affirmed.	Employer not required to violate seniority system.

Case Name	*Undue Hardship Result*	*Reasoning*
Brown v. *Hot Springs Nat'l Park Hosp. Holdings, LLC,* 2013 WL 1968483 *(E.D. Ark. May 13, 2013)*	Summary judgment for employer.	Employer would have had to schedule another employee, an undue hardship.
Seaworth v. *Pearson,* 203 F.3d 1056 (8th Cir. 2000)	Summary judgment for employer, affirmed.	Violation of federal law is undue hardship.
Kenner v. *Domtar Indus., Inc,* 2006 WL 522468 (W.D. Ark. Mar. 3, 2006)	Employer's motion for summary judgment denied	Material issues of fact remain because it was a factual question whether employer would incur additional costs.

Decisions in the Ninth Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Peterson v. *Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)	Summary judgment for employer, affirmed.	Allowing employee to post Biblical messages demeaning to coworkers would be an immediate undue hardship.
Berry v. *Dep't of Soc. Servs.,* 447 F.3d 642 (9th Cir. 2006)	Summary judgment for employer, affirmed.	Employer violation of establishment clause would be an immediate undue hardship.
Slater v. *Douglas Cty.,* 743 F. Supp. 2d 1188 (D. Or. 2010)	Summary judgment denied to employer and employee.	Employer showed no effort to determine whether it could accommodate employee's wish to not process domestic partnerships without undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
U.S. Equal Employment Opportunity Comm'n v. *Abercrombie & Fitch Stores, Inc.,* 966 F. Supp. 2d 949 (N.D. Cal. 2013)	Summary judgment for EEOC; employer's motion for summary judgment denied.	Employer did not present evidence of hijab wear by employee causing undue hardship; employee had worn hijab for months with now shown hardship to employer.
E.E.O.C. v. *Alamo Rent-A-Car LLC,* 432 F. Supp. 2d 1006 (D. Ariz. 2006)	Summary judgment for EEOC.	Employer's conclusion that allowing hijab "would have opened the floodgates" was speculation.
E.E.O.C. v. *Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005)	Employer's motion for summary judgment denied.	Hypotheticals and speculation insufficient to warrant summary judgment about small religious tattoos.
Fazlovic v. *Maricopa Cty.,* 2012 WL 12960870 (D. Ariz. Sept. 28, 2012)	Both parties' motions for summary judgment denied.	Issues of material fact remain regarding safety-related undue hardship if beard prevents proper use of safety mask in emergencies.

Decisions in the Tenth Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Tabura v. *Kellogg USA,* 880 F.3d 544 (10th Cir. 2018)	Summary judgment to employer and denied to employee; on appeal, summary judgment denied to both employer and employee.	Undue hardship not shown regarding use of vacation and sick time and shift swaps to avoid working on Saturday; district court ruling was *sua sponte.*
EEOC v. *JBS USA, LLC,* 115 F. Supp. 3d 1203 (D. Colorado 2015)	Employer's motion for summary judgment denied.	Factual issues regarding adjusting shift precluded determination of whether hardship was undue.
EEOC v. *JetStream Ground Servs.,* 134 F. Supp. 3d 1298 (D. Colorado 2015)	Employee's motion for summary judgment denied; employer's motion denied in part.	Safety concerns regarding religious clothing are speculative.

Case Name	*Undue Hardship Result*	*Reasoning*
EEOC v. *Abercrombie & Fitch Stores, Inc.,* 731 F.3d 1106 (10th Cir. 2013) reversed by: 135 S. Ct. 2028 (2015)	Summary judgment for EEOC and against employer at district court; undue hardship not reached on appeal or certiorari.	District court found only speculative testimony of undue hardship of hijab wearing;
Ross v. *Colorado Dep't of Transp.,* 2012 WL 5975086 (D. Colo. Nov. 14, 2012)	Employer's summary judgment motion granted.	Hardship by burdening the religious beliefs of other employees.
Farah v. *A-1 Careers,* 2013 WL 6095118 (D. Kansas 2013)	Employer's summary judgment motion granted.	Employer offered a reasonable accommodation of praying at noon; alternate accommodations would not have been reasonable.
EEOC v. *704 HTL Operating, LLC,* 979 F. Supp. 2d 1220 (D.N.M. 2013)	Employer's summary judgment motion denied.	Employer did not support undue hardship theory with authority or argument.

Decisions in the Eleventh Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
Patterson v. *Walgreen*, 727 Fed. Appx. 581 (11th Cir. 2018).	Summary judgment to employer; employee's motion for summary judgment denied, affirmed on appeal.	Employer demonstrated undue hardship.
Dixon v. *The Hallmark Companies, Inc.,* 627 F.3d 849 (11th Cir. 2010)	Summary judgment to employer, reversed on appeal.	Undue hardship of religious artwork not shown; no findings of fact in summary judgment order.
E.E.O.C. v. *Papin Enterprises, Inc.,* 2009 WL 961108 (M.D. Fla. Apr. 7, 2009)	Employer's motion for summary judgment denied.	Material issues of fact as to safety issue and therefore undue burden of employee nose ring.

Case Name	*Undue Hardship Result*	*Reasoning*
Rice v. *U.S.F. Holland, Inc.,* 410 F. Supp. 2d 1301 (N.D. Ga. 2005)	Employer's motion for summary judgment denied.	Having conceded that one type of accommodation of Sabbath was not undue hardship, employer could not claim inability to grant any accommodation without undue hardship.
Kilpatrick v. *Hyundai Motor Mfg. Alabama, LLC*, 911 F. Supp. 2d (M.D. Ala. 2012)	Employer's motion for summary judgment denied.	Question of fact whether voluntary shift swapping is undue hardship.
Zamora v. *Gainesville City Sch. Dist.,* 2015 WL 12851549 (N.D. Ga. June 22, 2015)	Employer's motion for summary judgment denied.	Question of fact whether bookkeeper absence last day of fiscal year is undue hardship.
Ashley v. *Chafin,* 2009 WL 3074732 (M.D. Ga. Sept. 23, 2009)	Employer's motion for summary judgment denied.	Assumption that many more would need same Sabbath accommodation is insufficient to show undue hardship.

Case Name	*Undue Hardship Result*	*Reasoning*
Cameau v. *Metro. Atlanta Rapid Transit Auth.*, 2013 WL 11319425 (N.D. Ga. Nov. 18, 2013); 2014 WL 11379548.	Employer's motion for summary judgment denied.	Factual questions remain as to whether mere opportunity to swap shifts is reasonable accommodation; undue hardship not reached but court found employer does not have to swap shifts for employee.

Decisions in the D.C. Circuit

Case Name	*Undue Hardship Result*	*Reasoning*
E.E.O.C. v. *Rent-A-Center, Inc.,* 917 F.Supp.2d 112 (D.D.C. 2013)	Summary judgment for employer.	Supervisor absent Saturdays is an undue hardship.