No. 20-1419

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

WALMART STORES EAST, L.P., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin
The Honorable Barbara B. Crabb
No. 3:18-cv-00804-bbc

RESPONSE BRIEF FOR APPELLEES

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September 22, 2020

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1419

Short Caption: Equal Employment Opportunity Comm'n v. Walmart Stores E., L.P., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Walmart Stores East, L.P., Wal-Mart Stores, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jackson Lewis P.C.: Susan Zoeller (District Court and Court of Appeals), Sharon K. Mollman Elliott (District Court)

King & Spalding LLP: Jeremy M. Bylund, Kelly Perigoe, Gabriel Krimm

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

WSE Management, LLC; WSE Investment, LLC; Wal-Mart Stores East, LLC; Walmart Inc.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Walmart Inc.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: s/Jeremy M. Bylund Date: 9/22/2020

Attorney's Printed Name: Jeremy M. Bylund

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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n/a

Attorney's Signature: s/Kelly Perigoe Date: 9/23/2020

Attorney's Printed Name: Kelly Perigoe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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n/a

Attorney's Signature: s/Gabriel Krimm Date: 9/23/2020

Attorney's Printed Name: Gabriel Krimm

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

The Commission's jurisdictional statement is complete and correct.

REQUEST FOR ORAL ARGUMENT

Walmart respectfully submits that oral argument is unnecessary as the issues are straightforward, resolved by existing precedent, and well addressed in the district court's opinion.

PRELIMINARY STATEMENT

This Court should affirm the district court's grant of summary judgment to Wal-Mart Stores East and Walmart, Inc. Suing on behalf of Edward Hedican, the Equal Employment Opportunity Commission wrongly accused Walmart of religious discrimination. When Mr. Hedican applied for an assistant manager position, the duties of which he could not perform due to his weekly Sabbath day of rest, Walmart tried to find him a reasonable alternative job. The district court was thus correct to conclude that Walmart satisfied its obligation under Title VII of the Civil Rights Act to accommodate Mr. Hedican's religious practice. And the court was also correct to hold that the Commission's proposed alternative work arrangements were impracticable and went far beyond what the law requires.

After learning that Mr. Hedican's faith prohibited him from meeting the scheduling obligations of an assistant manager, Walmart on multiple occasions invited Mr. Hedican to consider other similar management roles with more flexible hours. The Commission concedes that these other management roles were sufficiently similar to the assistant manager position. Mr. Hedican declined to pursue these other positions, however, refusing to cooperate with Walmart. Because Walmart offered to assist Mr. Hedican in obtaining a similar management position, and because Mr. Hedican failed to engage with Walmart in a good-faith effort to accommodate his religious practice, Walmart is not liable for religious discrimination.

Even if Walmart had not offered Mr. Hedican a reasonable accommodation, Walmart was still entitled to summary judgment. The law does not mandate accommodations that would impose an undue hardship on an employer, and the Commission's preferred accommodations would have done just that. By requiring Walmart to schedule Mr. Hedican and seven other assistant managers around Mr. Hedican's Sabbath, and by redefining the assistant manager position writ large, the Commission's proposal would have harmed Walmart and

its employees. Contrary to the Commission's position, Mr. Hedican could not have alleviated those burdens through voluntary shift swaps and paid leave because that solution was not workable. Recognizing the undisputed, material evidence pointed only in Walmart's direction, the district court properly awarded summary judgment to Walmart on this alternate ground.

The Commission has shown no error in the district court's decision. This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court correctly grant summary judgment to Walmart because the undisputed facts show that Walmart offered a reasonable accommodation and Mr. Hedican refused to cooperate in Walmart's attempt to accommodate his religious practice? *See* Appellant's Appendix (A) A-012–18.

2. Did the district court correctly grant summary judgment to Walmart on the alternate ground that the undisputed facts show the Commission's preferred accommodations would have imposed an undue hardship on Walmart's business operations and other employees? *See* A-018–20.

STATEMENT OF THE CASE

The Walmart store in Hayward, Wisconsin gets busy on the weekends. Supplemental Appendix (SA)-017–18, 038–39; Dist. Ct. Record (R.)55 at 18. Hayward is a vacation town, conveniently situated among the lakes and forests between Ashland, Wisconsin, and Minneapolis, Minnesota. SA-039. In addition to its permanent residents, Hayward has many rental properties that continually host out-of-town visitors, especially during the long summer days between late May and the end of August. R.55 at 4; SA-039. Those visitors often end up at the Hayward Walmart store on Friday night and Saturday morning, looking to stock up on groceries and other goods. SA-018, 038–39. And because they are unfamiliar with the store's layout and services, they often ask for help finding what they need. SA-044.

In the Spring of 2016, Edward Hedican was a resident of northern Wisconsin and a practicing Seventh-Day Adventist. R.55 at 4; SA-032. As a part of his religious practice at the time, Mr. Hedican observed a Sabbath day of rest from sundown Friday to sundown Saturday. R.55 at 3; SA-034. Within those hours, Mr. Hedican devoted time to prayer and family, and he abstained from all nonessential labor. R.55 at 3; SA-033–

34. On April 19, 2016, in the ramp up to the busy summer season, Mr. Hedican applied for an assistant manager job at the Hayward Walmart. R.55 at 4.

At that time, Dale Buck ran the store with help from eight assistant managers, keeping its doors open and its various departments running 24 hours a day, 7 days a week. R.55 at 13–14; SA-014. The Hayward store also had a high number of new and transitory associates because of its resort town location, which made the presence of management more important. SA-009. To ensure full night-and-day oversight of the store, the assistant managers worked as a team. R.55 at 13–14; SA-015, 002–03. Each was assigned a different "area of responsibility," which they would cover on a fluctuating shift schedule. R.55 at 14; SA-015; *see also* R.55 at 9–10 (explaining the "areas of responsibility"); SA-002–03 (explaining why assistant managers cannot have fixed schedules). Under this arrangement, six assistant managers would report for five ten-hour daytime shifts per week, with the days, start times, and end times staggered to meet business needs. SA-015–17; R.55 at 14. The other two would each report for four twelve-hour nighttime shifts per week, each on consecutive nights. R.55 at 13–14. To foster competence and promote

efficient store operations, Mr. Buck would also periodically rotate the assistant managers to new posts so that each assistant manager learned and could manage all of the store's operations. R.55 at 11, 26–27; SA-015–17. Through this system, the assistant managers developed the skills and experience necessary to assist each other and cover the full breadth of operations at the Hayward store. R.55 at 11, 26–27; SA-015–17. And although they often requested time off on the weekends, SA-020, each assistant manager worked on average six out of every ten Saturdays, SA-018.

Mr. Hedican learned during the interview process that being an assistant manager would require him to work varying hours, including evenings, nights, and weekends. R.55 at 5. But when Mr. Hedican received a conditional offer to join the assistant manager team, he made clear that he would not move forward until assured that he would not be asked to work on his Sabbath. R.55 at 5–6; SA-022–23.

Mr. Hedican's attempt to renegotiate his job duties to avoid Sabbath work was the first time anyone at Walmart learned of Mr. Hedican's religious practice. A-003. But Walmart employees acted promptly and appropriately in response. In an email the next day,

Market Human Resources Manager Lori Ahern asked Mr. Hedican to formally request a religious scheduling accommodation using Walmart's standard procedures. R.55 at 7; SA-022. She then set to work researching the available options.

Based on her research, Ms. Ahern concluded that Walmart could not accommodate Mr. Hedican in the assistant manager position at the Hayward store without undue hardship. SA-008–12, 044. She based her decision on her own experience, discussions with Mr. Buck[1] and other Walmart management, and consultation with Walmart's Legal Department. SA-008–12, 044. She also reviewed several internal reports on the Hayward store, which showed average sales, average sales for a Saturday, average customer traffic, schedules, call-outs, attendance logs, and staffing. SA-009, 045. In addition, Ms. Ahern considered the services offered at the Hayward store, including liquor sales, fishing licenses,

[1] The Commission attempts to manufacture a factual dispute about whether Ms. Ahern discussed the accommodation with Mr. Buck. EEOC Br. at 46. Although that detail is in no way material to the Commission's claims, the evidentiary record shows that Mr. Buck did not deny talking with Ms. Ahern about the accommodation. To the contrary, Mr. Buck stated that *there may have been a conversation* with Ms. Ahern about weekend work, he just did not remember. SA-041. Ms. Ahern does remember having the conversation. SA-009, 044. All evidence thus points to the fact that the conversation occurred.

hunting licenses, and gun sales, all of which contributed to the store's management needs. SA-044.

From this information, Ms. Ahern recognized that accommodating Mr. Hedican in the assistant manager role would have required operating the store short-handed, hiring another assistant manager, or forcing the other assistant managers to pick up additional, undesirable shifts and limiting their opportunities to have Saturday off. SA-018; SA-077–127; R.55 at 26–27. Mr. Hedican's schedule would also render him unavailable to work or respond to emergencies during some of the store's busiest hours, and it would prevent him from developing the same skills and experience as other members of the team. SA-015–18; R.55 at 23–24; SA-002–03. In sum, there was no way to make Mr. Hedican an assistant manager without disadvantaging him, discriminating against other employees, and unduly burdening the store.

As a reasonable accommodation, Ms. Ahern tried to find Mr. Hedican another role at the Hayward Walmart that would suit both his professional goals and his religious needs. She told him about several alternate positions, including hourly management posts that would not have required him to work on the Sabbath. R.55 at 42–43; SA-035–36,

042. She even offered to help him apply for any positions he might have interest in. SA-048. This would have given Mr. Hedican a substantial leg up because Ms. Ahern was heavily involved in interviewing, SA-005, and she had shepherded him through a hiring process once before.

Unfortunately, Mr. Hedican did not cooperate. R.55 at 47. He did not even attempt to discuss the potential job duties, compensation, or benefits of alternative positions at the Hayward store. SA-035–37. Instead, Mr. Hedican insisted on being accommodated in the assistant manager role with a set schedule and limited hours, SA-036–37 — *exactly* what Ms. Ahern had offered to help him secure through other positions.

After abruptly disengaging from the discussion, Mr. Hedican complained to the Equal Employment Opportunity Commission. R.1 ¶ 8. The Commission then filed this lawsuit, alleging that Walmart had discriminated against Mr. Hedican in violation of Title VII of the Civil Rights Act. R.1.

Following discovery, the district court granted summary judgment to Walmart on two independently dispositive grounds. *See* A-001. *First*, the court determined that Walmart had offered Mr. Hedican a reasonable accommodation and that Mr. Hedican "failed to satisfy his duty to make

a good faith effort to cooperate with [Walmart] in finding a reasonable accommodation" for his Sabbath observation. A-017. It thus held that Walmart had met its statutory duty to accommodate, and that any responsibility for that accommodation's failure rested with Mr. Hedican, not Walmart. *See* A-017–18. *Second*, the court held that Walmart could not be held liable because the Commission's accommodation demands went beyond what the law requires. The court recognized the substantial burden that Mr. Hedican's scheduling restrictions would impose on the store's operations and the other assistant managers. A-018–20. And because the law does not expect employers to incur such "undue hardship," the district court held summary judgment appropriate on this alternative ground. *See id.*

The Commission now appeals, challenging the district court's reasoning on both holdings.[2] Contrary to the Commission's position, the district court faithfully applied the law. This Court should affirm.

[2] The Commission has abandoned its separate "retaliation" claim by not briefing it. *See Help at Home Inc. v. Med. Capital, L.L.C.*, 260 F.3d 748, 753 n.2 (7th Cir. 2001).

STANDARD OF REVIEW

This Court applies *de novo* review to grants of summary judgment. *See Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 702 (7th Cir. 2009). "If, after reviewing the record as a whole and drawing all reasonable inferences in favor of the nonmoving party, a court determines that there remains no genuine issue as to any material fact, then the moving party is entitled to judgment as a matter of law." *Id.*

SUMMARY OF ARGUMENT

The Commission has failed to present a viable case for trial. The material facts are not in dispute, and no reasonable jury could hold that Walmart breached its obligation to accommodate Mr. Hedican reasonably or short of undue hardship.

First, Walmart met its obligation to offer a reasonable accommodation for Mr. Hedican's religious needs. Under Title VII, *any* reasonable accommodation will suffice, and it need not be the employee's preferred accommodation. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986). Moreover, a reasonable accommodation requires "bilateral cooperation" between the employer and the employee. *Porter v. City of Chicago*, 700 F.3d 944, 953 (7th Cir. 2012) (quoting *Rodriguez v. City of Chicago*, 156 F.3d 771, 777–78 (7th Cir. 1998)). Walmart had a duty to

"open a dialogue" on how to try to find Mr. Hedican a management role that did not require Sabbath work. *Rodriguez*, 156 F.3d at 777. Walmart fulfilled that duty, and the only reason Walmart's effort did not succeed was because Mr. Hedican refused his corresponding obligation to cooperate. He insisted on being accommodated only in the position for which he had first applied, regardless of the duties, compensation, or benefits of other positions. That unbending stance excused Walmart of any additional obligation to try to accommodate Mr. Hedican.

Second, even if Walmart had not reasonably accommodated Mr. Hedican, it would still be entitled to summary judgment. Employers have no obligation to incur "undue hardship" for the sake of a religious accommodation. The Commission offered several theories of how Walmart could have restructured its management team to accommodate Mr. Hedican. But those theories did not account for Walmart's undisputed business needs. The Commission's proposals all would have imposed undue hardship on the Hayward store's operations and the employees who work there. And Mr. Hedican could not have alleviated these issues with voluntary shift changes and leave, which would not have allowed a full accommodation anyway. Because the Commission's

demand that Walmart reorganize its management team at the Hayward store went beyond what the law requires, Walmart was entitled to summary judgment on this alternate ground as well.

ARGUMENT

I. Walmart Offered a Reasonable Accommodation for Mr. Hedican's Religious Practice, but Mr. Hedican Refused to Cooperate.

In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), the Supreme Court held that an employer satisfies Title VII's reasonable accommodation duty by offering *any reasonable accommodation* for an employee's religious practice. Employers are not required to grant the specific accommodation requested by the employee. *See id.* at 69 n.6 ("To the extent that the [EEOC] guideline ... requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline *simply inconsistent with the plain meaning of the statute*." (emphasis added)). Nor are employers required to grant any accommodation that does not cause an undue hardship; the undue hardship analysis is separate from the reasonableness inquiry. *See Cosme v. Henderson*, 287 F.3d 152, 161 (2d Cir. 2002) ("[T]he issue of undue hardship is irrelevant to a claim of religious discrimination when considering whether a proposed accommodation is reasonable.").

Walmart offered a reasonable accommodation and no more is required. By claiming otherwise, the Commission is seeking to re-write the law.

Mr. Hedican's own conduct also prevented the Commission from prevailing in this case. When an employer offers a reasonable accommodation, the employee has an obligation to cooperate. *Ansonia*, 479 U.S. at 70. But when Walmart offered to help Mr. Hedican find a management position that would fit his scheduling needs, Mr. Hedican declined to cooperate.

A. When Mr. Hedican Made Known that He Could Not Work on His Sabbath, Walmart Proposed Alternative Positions with Flexible, Accommodating Schedules.

Walmart fulfilled its statutory duty to offer a reasonable accommodation for Mr. Hedican's Sabbath hours as soon as Mr. Hedican raised the issue.

Title VII of the Civil Rights Act "strives to achieve equality of opportunity by rooting out '*artificial*, *arbitrary*, and *unnecessary*' employer-created barriers to professional development." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (emphasis added) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). The statute thus prohibits employers from "fail[ing] or refus[ing] to hire … any individual …

because of [his] … religion." 42 U.S.C. § 2000e-2(a)(1). When a prospective employee's religious practices would otherwise interfere with his workplace responsibilities, the employer generally must "make reasonable efforts to accommodate" those practices. *Porter*, 700 F.3d at 951; *see* 42 U.S.C. § 2000e(j); *see also Ansonia*, 479 U.S. at 63 n.1 (explaining the "reasonable accommodation" duty).

But Congress has *not* required employers to accommodate religious practices "at all costs." *Porter*, 700 F.3d at 951 (quoting *Ansonia*, 479 U.S. at 70). An employer need only find some "reasonable" means of accommodation. *Ansonia*, 479 U.S. at 70. And what is "reasonable" depends on the circumstances of each case, *Rodriguez*, 156 F.3d at 776 n.7, including the religious practice at issue and the employer's business needs, *see Ansonia*, 479 U.S. at 70–71; *see also EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 313 (4th Cir. 2008) (noting that the meaning of "reasonable" is "dependent on the extent of the employee's religious obligations and the nature of the employer's work requirements").

Whatever the circumstances, however, the employee may not use his or her individual religious practices as a fulcrum to dictate preferred job duties, work conditions, and schedules. *See Porter*, 700 F.3d at 951.

There is "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation." *Ansonia*, 479 U.S. at 68. Rather, "*any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Id.* (emphasis added). And "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end." *Id.*

Ignoring this clear precedent, the Commission repeatedly conflates the reasonableness inquiry with the undue hardship analysis. It argues that reasonableness can be determined only by evaluating whether the employee's preferred accommodations can be granted without causing the employer undue hardship. EEOC Br. at 15–36. In support, the Commission relies on guidance it issued in 1980, but the Supreme Court rejected the Commission's reading and declined to apply that guidance more than thirty years ago. *See Ansonia*, 470 U.S. at 69 n.6. Since 1986, courts have been clear that the undue hardship inquiry is irrelevant to the reasonableness question. *See Cosme*, 287 F.3d at 161. The Commission's arguments about what a jury could find are *more* reasonable accommodations should thus be disregarded. The only

question is whether Walmart offered a reasonable accommodation. *Ansonia*, 470 U.S. at 70.

Here, the undisputed facts show that Walmart satisfied its statutory duties by "mak[ing] reasonable efforts to accommodate" Mr. Hedican. *Porter*, 700 F.3d at 951. When Walmart offered Mr. Hedican the assistant manager position, he revealed for the first time that he would not report to work unless Walmart "confirm[ed] that [he would] not be required to work on" his Sabbath. SA-023. The next day, Walmart personnel began searching for a reasonable accommodation by asking Mr. Hedican to fill out a simple form spelling out his religious needs. SA-022. Although Ms. Ahern determined that Mr. Hedican's lack of availability during crucial business hours would conflict with the obligations of the specific assistant manager role, she tried to help Mr. Hedican find another job that would suit both his professional goals and his religious needs. R.55 at 42–43.

The Commission itself concedes that the alternatives Ms. Ahern proposed were "sufficiently similar" to the assistant manager job. EEOC Br. at 31 n.4. Walmart routinely employs hourly department managers with a more predictable schedule that does not require work

on Friday night or Saturday. SA-026. The Hayward store had several such positions available in the Spring of 2016 when Mr. Hedican was looking for a job. SA-042. Although the base compensation for these positions may have been "a little less[] … initially" than that of the assistant managers, SA-013, the job also required fewer hours and (unlike the assistant manager role) came with eligibility for premium overtime pay. SA-015. Additionally, credit for other supervisory experience before Walmart employment could be added to the base compensation for these jobs. SA-013. And Ms. Ahern told Mr. Hedican she would help him pursue those options — an offer that was particularly meaningful as she was intimately involved in the hiring process. SA-005, 026, 030, 048. The district court was right to conclude that the potential for a small pay differential did not make the position an unreasonable accommodation. A-015.

This Court and its sister circuits have recognized that a shift in job duties can be a reasonable accommodation of a religious practice if it eliminates scheduling conflicts between the practice and the employee's workplace responsibilities. *See Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (shift from a box sorting position to operation of a "flat sorter"

machine was a reasonable accommodation); *see also Sánchez-Rodríguez v. AT & T Mobility P.R., Inc.*, 673 F.3d 1, 12–13 (1st Cir. 2012) (potential shift from a "Retail Sales Consultant" position to a "Business Sales Specialist" position was part of a reasonable accommodation); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1324 & n.6 (11th Cir. 2007) (allowing "transfer to another position" as part of a reasonable accommodation effort); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) ("Allowing … changes of job assignments constitutes a reasonable accommodation."); *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988) (locating another job that the employee refused was part of a reasonable accommodation effort). In the same vein, an hourly manager position at Walmart was a reasonable accommodation.

Courts have also recognized that changes to — or even modest reductions in — compensation are reasonable when an employee cannot keep the same schedule as his coworkers. In fact, the Supreme Court in *Ansonia*, 479 U.S. at 70, permitted unpaid leave to be part of a reasonable accommodation, notwithstanding the necessary pay reduction. Numerous other cases have also recognized that at least some reduction

of pay can be part of a reasonable accommodation. *See Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390–91 (10th Cir. 1984); *see also Morrissette-Brown*, 506 F.3d at 1324 n.6 ("[A]n employer's proposed 'reasonable accommodation' may involve some cost to the employee.") (citing *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 502 n. 23 (5th Cir. 2001); *Eversley*, 843 F.2d at 176; and *Ansonia*, 479 U.S. at 68); *cf. Horvath v. City of Leander*, 946 F.3d 787, 792 (5th Cir. 2020) (reaffirming and applying *Bruff*).

Because the practical realities of the workplace often demand compromises, a potential difference in pay for a different job is not an "'artificial, arbitrary, and unnecessary' employer-created barrier[] to professional development" that Title VII aims to "root[] out." *Teal*, 457 U.S. at 451 (quoting *Griggs*, 401 U.S. at 431). And given the circumstances of this case, including the distinct challenges of meeting Mr. Hedican's religious needs in a busy, resort-town, retail management setting, the district court correctly concluded that it was reasonable for Walmart to accommodate Mr. Hedican with a managerial position, even if the starting pay may have been "a little less" at first. A-016–18.

Walmart's chosen accommodation was reasonable and that is where the inquiry ends.

B. Mr. Hedican Did Not Cooperate with Walmart to Explore the Reasonable Accommodation Offered for His Religious Needs.

Unfortunately for both Mr. Hedican and Walmart, Mr. Hedican refused to explore the reasonable accommodation offered and instead instigated this costly litigation. But the Commission cannot hold Walmart liable for Mr. Hedican's unbending insistence on the accommodation of his choice.

Courts have long recognized that "a successful accommodation will rarely be possible unless employer and employee make mutual efforts." *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977); *see also Porter*, 700 F.3d at 953 (discussing the need for "bilateral cooperation" (quoting *Rodriguez*, 156 F.3d at 777–78); *Bruff*, 244 F.3d at 503 ("An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end."). So, "[w]here an employee refuses … to cooperate with his employer's attempt to reach a reasonable accommodation, … the *employee himself* is responsible for any failure of accommodation." *Chrysler*, 561 F.2d at 1285

(emphasis added); *see also Porter*, 700 F.3d at 953 ("We have not demanded … hand-holding … for an offer of an accommodation to be sufficient under Title VII."). In that circumstance, the employer has satisfied its duty to accommodate by "open[ing] a dialogue" on potential accommodations, *Rodriguez*, 156 F.3d at 777, and it cannot be held liable for the employee's failure to engage, *Chrysler*, 561 F.2d at 1285; *see Shelton v. Univ. of Medicine & Dentistry*, 223 F.3d 220, 227 (3d Cir. 2000).

This Court has applied that logic in circumstances similar to this case. In *Porter*, 700 F.3d 944, this Court considered an employee's request to structure a rotating, shift-based schedule around her church attendance. The *Porter* Court affirmed summary judgment for the employer on the reasonable accommodation claim, reasoning that by broaching the subject of a shift change the employer had satisfied its obligation to seek a reasonable accommodation. *See id.* at 953. The Court reached that conclusion even though the employee would still have to *apply* for the shift change, and there was no guarantee the application would be granted and an actual accommodation reached. *See id.* In that case, the employee refused to apply for the change because it required night-shift duties that she did not prefer. *See id.* at 952. This Court held

that by "express[ing] no interest" in the possibility of a shift change and "not pursu[ing] it further," the employee relinquished any right to have the employer "take further steps" towards a reasonable accommodation. *Id.* at 953. The district court was correct to rely on this precedent in granting summary judgment. A-014–15.

Other panels and courts have reached similar conclusions about employees that took an uncompromising approach to the accommodation process. For example, in *Wright*, 2 F.3d 214, this Court affirmed summary judgment for an employer who had tried to accommodate an employee's Sabbath observance by allowing him to bid for alternate positions with nonconflicting schedule demands. The Court recognized that the employee's failure to consider those alternatives could not negate the employer's efforts to accommodate because "[i]t is difficult for any organization to accommodate employees who are choosy about assignments." *Id.* at 217 (quoting *Ryan v. DOJ*, 950 F.2d 458, 462 (7th Cir. 1991)).

The Fifth Circuit's decision in *Bruff*, 244 F.3d 495, is also instructive. In that case, the court of appeals reversed the district court and overturned a jury verdict because the employee failed to fulfill her

"duty to cooperate in achieving accommodation" by applying for alternative positions. *Id.* at 502–03 & n.24.

Cases like *Bruff*, *Wright*, and *Porter* "confirm what the statute's use of the term 'reasonable' suggests: bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145–46 (5th Cir. 1982). An employer has no obligation to help an employee who is unwilling to cooperate in reaching a reasonable accommodation.

Mr. Hedican's unwillingness to cooperate in the face of Walmart's overtures thus dooms the Commission's case. Although Mr. Hedican does not recall what alternative positions he discussed with Ms. Ahern,[3] SA-036, the record makes clear that he never explored the possibility of a reasonable accommodation through any of those positions. SA-037. Nor did he ask to bypass the normal application process on account of his already having interviewed for the assistant manager post. SA-037.

[3] Ms. Ahern remembers discussing management positions with Mr. Hedican and telling him how to apply for those positions. SA-026. Mr. Hedican's lack of memory about which management jobs were discussed does not create a genuine dispute of material fact.

Instead, when Ms. Ahern "open[ed] a dialogue" on potential accommodation through an hourly management role, *Rodriguez*, 156 F.3d at 777, Mr. Hedican refused to consider a workable solution outside the assistant manager job. SA-037. In so doing, Mr. Hedican relinquished any right to have Walmart "take further steps" towards a reasonable accommodation. *Porter*, 700 F.3d at 953; *see Bruff*, 244 F.3d at 502–03 & n.24; *Chrysler*, 561 F.2d at 1286.

C. The Commission's Arguments for Reversal Disregard the Law.

In the face of clear precedent and the undisputed facts, the Commission attempts to undermine the district court's reasoning with a host of meritless theories.

First, the Commission contends that Walmart had a duty to offer Mr. Hedican his *preferred* accommodation *within* the assistant manager role if it could be done without undue hardship. *See* EEOC Br. at 12, 16–21. According to the Commission, any other management position would have "unnecessarily diminishe[d]" Mr. Hedican's "compensation, terms, conditions, or privileges of employment." *See* EEOC Br. at 16 (quoting 42 U.S.C. § 2000e-2(a)(1)).

That just isn't the law. In fact, the Commission relies on the *same logic* citing its *same guidance* that the Supreme Court expressly rejected thirty years ago in *Ansonia*. In that case, the Second Circuit held (as the Commission contends here) that the law "requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." 479 U.S. at 66 (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985), *aff'd and remanded sub nom.*, *Ansonia*, 479 U.S. 60; *cf.* EEOC Br. at 17 ("[I]f there are two potential accommodations that 'would not cause undue hardship,' the employer must offer the one that 'least disadvantages the individual with respect to his or her employment opportunities.'" (quoting 29 C.F.R. § 1605.2(c)(2)(ii))). But the Supreme Court rejected that argument, explaining that it had "little support in the statute." *Ansonia*, 479 U.S. at 66. The Court explained that "[b]y its very terms the statute directs that *any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Id.* at 68 (emphasis added). The employer therefore meets its statutory obligations by "open[ing] a dialogue" about potential accommodations, *Rodriguez*,

156 F.3d at 777, even if they are not what the employee might prefer, *see, e.g.*, *Porter*, 700 F.3d at 952–53.

The logic and wisdom of the Supreme Court's interpretation is borne out by the fact that the Commission's own proposed alternative accommodations would also have "disadvantaged" Mr. Hedican in the "terms" and "conditions" of his employment — at least as the Commission interprets those words. For example, the Commission suggests that Walmart "could have assigned [Mr.] Hedican to an overnight schedule working 8 p.m. to 8 a.m. four nights in a row" as part of a reasonable accommodation. EEOC Br. at 23. But employees often find night shifts less desirable than day shifts. *See Porter*, 700 F.3d at 952. And even if Mr. Hedican would not have felt slighted by perpetual night-shift duties, the schedule would still have stunted his professional growth by preventing him from developing the skills and experience of other assistant managers with experience in all aspects of store operations, not just those occurring during the night shift. SA-046 (Ms. Ahern explaining how the overnight area did not include all functions of the store); R.55 at 9–11, 26–27 (explaining how the assistant managers rotated through different "areas of responsibility" to develop the skills and experience

needed to cover each other and manage the entire store); SA-002–03 (Mr. Lee Spude explaining that Walmart requires assistant managers to be familiar with all aspects of its operations and that it is therefore not possible to leave an assistant manager in one area of responsibility indefinitely).

In a similar way, the Commission suggests that Walmart could have scheduled Mr. Hedican to work in violation of his Sabbath and put the onus on him to find voluntary replacements or request vacation time. *See* EEOC Br. at 24. But this too would have placed a burden on Mr. Hedican not borne by his fellow assistant managers. And had these options *at any point* failed, Mr. Hedican would have been forced to take *unpaid* leave, which would have reduced his compensation and left the store understaffed. It is thus unsurprising that Mr. Hedican did not propose this alternative to Walmart during the accommodation process.

Accordingly, even assuming the Commission's proposals would not pose an undue hardship to Walmart, it is only Mr. Hedican's, and the Commission's, subjective preferences that separate those proposals from the accommodation Walmart offered. Because the law requires only a *reasonable* accommodation of the employee's religious needs, and not a

"capitulation" to the employee's subjective preferences, *Ryan*, 950 F.2d at 461, the Commission's out-of-date argument cannot support reversal.

Second, the Commission contends that the mere existence of potential accommodations Mr. Hedican might have preferred defeats summary judgment because a reasonable jury could find Walmart's actions unreasonable given those possible alternatives. *See* EEOC Br. at 22–27. This transparent retooling of the Commission's first argument is likewise foreclosed. This Court has stated in no uncertain terms that "the employee's proposals are not the measure of the employer's obligation." *Ryan*, 950 F.2d at 461. Just because there may have been "other steps" that the employer "could have … taken" to accommodate the employee does not mean that the law *requires* the employer to do so. *Wright*, 2 F.3d at 218. And so long as Walmart did what the law requires, "it is entitled to summary judgment." *Id.* A jury would be precluded by law from faulting Walmart for failing to provide the preferred accommodations the Commission demands.

Third, the Commission challenges the district court's determination that Walmart could reasonably accommodate Mr. Hedican by offering him an alternative job for which he would have to apply.

See EEOC Br. at 27–36. As already explained, however, any failure to find a workable solution stems from Mr. Hedican's refusal to even consider these alternative jobs. The law required Walmart to "open a dialogue" on how to reasonably accommodate Mr. Hedican's Sabbath hours given Walmart's business needs. *Rodriguez*, 156 F.3d at 777. Walmart fulfilled that requirement by trying to discuss possible accommodations with Mr. Hedican, including alternative management positions that would allow him Friday nights and Saturdays off. *See* SA-026, 037. There is no evidence that Mr. Hedican thought the application process onerous or unnecessary. *See* SA-036. The undisputed evidence establishes that Mr. Hedican disengaged from discussions after learning he could not be accommodated in his preferred assistant manager role. *See* SA-024, 036. That failure to cooperate is what prevented a successful accommodation here, and it requires summary judgment. *See Porter*, 700 F.3d at 953; *see Bruff*, 244 F.3d at 502–03 & n.24; *Chrysler*, 561 F.2d at 1286.

The Commission downplays the assistance offered by Walmart, claiming Mr. Hedican was not better situated than any other member of the public in seeking an hourly managerial job. But that goes against the

evidence. Ms. Ahern was heavily involved in Mr. Hedican's initial application process. *See* SA-005. She was well placed to help him apply for and obtain a substitute position. In fact, she in the past facilitated placing a Sabbath observer in an hourly manager position. SA-006–07. Mr. Hedican's failure to engage with Ms. Ahern is what stymied the accommodation process.

The Commission's attempt to distinguish these facts from *Ansonia* and its progeny likewise fails. The Commission criticizes Walmart for asking Mr. Hedican to *apply* for an alternative position rather than simply offering him one outright. *See* EEOC Br. at 27–28. But the need to apply for alternate job duties is often a component of a reasonable accommodation. *See Rodriguez*, 156 F.3d at 775 (identifying "applying for 'special function assignments'" as a reasonable accommodation); *Porter*, 700 F.3d at 953 (noting "we have not demanded the hand-holding Porter argues was lacking here"); *see also Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1294 (11th Cir. 2012) ("CSC reasonably accommodated Ms. Walden when it encouraged her to obtain new employment with the company and offered her assistance in obtaining a new position."). And the employee's *refusal* to engage in such a process

defeats a discrimination claim. *Wright*, 2 F.2d at 217; *see also Walden*, 669 F.3d at 1294 ("Ms. Walden … failed to comply with [her] duty [to cooperate] when she elected not to apply for any positions within the one-year period).

The Commission attempts to evade this result by claiming the alternative positions Walmart suggested would have unreasonably diminished Mr. Hedican's pay and job duties. *See* EEOC Br. at 29–36. But that contradicts the Commission's own admission that the other supervisor positions are "sufficiently similar" to the assistant manager position. EEOC Br. at 31 n.4.

Moreover, the Commission's position relies on an untenable view of the law. Contrary to the Commission's view, it is reasonable to alter an employee's job duties to accommodate his religious needs. *See Wright*, 2 F.3d at 217; *Sánchez-Rodríguez*, 673 F.3d at 12–13; *Morrissette-Brown*, 506 F.3d at 1324 & n.6; *Eversley*, 843 F.2d at 176. This is true even when the new duties carry a possible reduction in pay. *See Ansonia*, 479 U.S. at 70; *Morrissette-Brown*, 506 F.3d at 1324 n.6; *Bruff*, 244 F.3d at 502 n.23. And the potential differences between the job Mr. Hedican *preferred* and the jobs Walmart *proposed* do not matter here anyway because Mr.

Hedican made no effort to explore the possibilities. If specific aspects of the available jobs were of special importance to Mr. Hedican, he never told Walmart so. SA-021–24, 036–37. Instead, he shut down any potential accommodation by walking away. SA-021–24, 036–37.

The undisputed evidence thus leads to only one permissible finding: Walmart honored its obligation to offer a reasonable accommodation for Mr. Hedican's Sabbath rest, and Mr. Hedican refused to go along. The Commission cannot hold Walmart liable on these facts. This Court should affirm.

II. The Accommodations that the Commission Demanded Would Have Imposed an Undue Hardship on Walmart.

Even if Walmart had not fulfilled its obligation to offer a reasonable accommodation, it would still be entitled to summary judgment. As the district court correctly held, the accommodations the Commission proposed all would have imposed undue hardship on Walmart. In arguing otherwise, the Commission misapprehends the very nature of the relevant assistant manager position. The accommodations proposed by the Commission would essentially convert that position into precisely the other types of management positions Walmart *already offered* to help Mr. Hedican apply for. The Commission refuses to engage with the

undisputed facts and instead substitutes its own judgment and argument for the evidence in the record.

The Civil Rights Act does not require employers to incur "undue hardship" to accommodate their employees' religious practices. 42 U.S.C. § 2000e(j). And much like the "reasonableness" of an accommodation, the substantiality of a hardship depends on "the specific circumstances of the job" at issue and "the leave schedule the employee believes is needed." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013). Whatever the circumstances, though, the Supreme Court has made clear that a business need not sacrifice operational efficiency to accommodate an employee's religious needs. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

Just as critically, "[a]n employer need not disturb the job preferences of other employees to accommodate an employee's religious observance." *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986). "The central focus" in every religious discrimination case is "whether the employer is treating 'some people less favorably than others because of their … religion.'" *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (quoting *Int'l B'hood of Teamsters v. United States*, 431 U.S. 324,

335 n.15 (1977)). "[S]uch discrimination is proscribed when it is directed against majorities as well as minorities." *Hardison*, 432 U.S. at 81. Accordingly, when "a religious accommodation would cause more than minimal hardship to … other employees," such hardship is necessarily "undue." *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 584 (7th Cir. 2007); *see also Hardison*, 432 U.S. at 81 ("Title VII does not require an employer to go that far.").

The scheduling accommodations the Commission demanded for Mr. Hedican went above and beyond what the law requires in multiple crucial respects. At base, the Commission attempted to force Walmart to redefine the assistant manager position, but those business decisions reside with Walmart, not the Commission. The undisputed facts establish that constructing a fixed assistant manager schedule around Mr. Hedican's Sabbath observation would have substantially burdened Walmart's business operations and disadvantaged its other employees. Moreover, allowing Mr. Hedican to avoid Sabbath work through voluntary shift swaps and leave was not a feasible, or less-burdensome, alternative. Because Walmart could not adopt either measure without

undue hardship, the district court rightly granted summary judgment on this alternative ground.

A. Constructing an Assistant Manager Schedule Around Mr. Hedican's Sabbath Rest Would Have Burdened Walmart and Disadvantaged Other Employees.

The Commission argues that Walmart could have made an assistant manager schedule for Mr. Hedican that would have accommodated his Sabbath without undue hardship. *See* EEOC Br. at 37–38. That ignores the undisputed evidence that assistant managers do not have set schedules and must be willing to work at unpredictable times. SA-002–03. It also ignores the reality of how the Hayward store operated and was staffed. With eight assistant managers and their respective workloads, a special schedule for Mr. Hedican would have necessarily forced Walmart to choose between (1) burdening the other seven assistant managers, (2) hiring yet another assistant manager (defeating the purpose of hiring Mr. Hedican), or (3) operating short-staffed. All of these options would have imposed an undue hardship on Walmart.

By the Commission's own admission, its proposal would have required Walmart to excuse Mr. Hedican from ordinary job duties

(changing the very core of the job) in several important ways. *First*, Walmart could not have scheduled Mr. Hedican for any Friday night shifts or Saturday day shifts. *See* EEOC Br. at 38. *Second*, Walmart would have had to adjust Mr. Hedican's Friday day shifts and Saturday night shifts to fit shifting sundown times. *See id*. *Third*, each time Walmart rotated the assistant managers to new areas of responsibility, it would have had to maintain Mr. Hedican in the same post or else reconfigure his schedule in a new post around his Sabbath restrictions. *See id.* at 41–42. *Fourth*, whenever business demands required assistant managers to cover each other's shifts, come in at unpredictable times to address problems, or work extra hours, Walmart would have had to excuse Mr. Hedican from any duties that conflicted with his religious practice. *See id.* at 44. Under well-established precedent, these measures would have posed an undue burden to the Hayward store's operations, as well as to Mr. Hedican's fellow employees.

1. The Commission's Preferred Accommodations Would Have Burdened Store Operations.

Title VII does not require employers to make religious accommodations that disrupt business operations and reduce efficiency. *See Hardison*, 432 U.S. at 84; *Noesen*, 232 F. App'x at 584–85. Because

the Commission's proposal to have Walmart schedule around Mr. Hedican's Sabbath would have been costly and disruptive to the Hayward store, it constituted "undue hardship."

Mr. Hedican's Sabbath hours would have required continual scheduling adjustments. Each time Mr. Buck made a new schedule for his assistant managers, he would have had to substitute others to keep Mr. Hedican off Saturday day shifts. *See* EEOC Br. at 38; R.55 at 13–15; SA-016. He would also have had to research sundown times for the rest of the new schedule and alter Mr. Hedican's Friday day shifts and Saturday night shifts accordingly. *See* EEOC Br. at 40; SA-058–75. Mr. Buck would then have had to anticipate whether Mr. Hedican's early Friday departures or late Saturday arrivals would require another assistant manager to stay late or leave early to keep the store appropriately staffed. R.55 at 13–15; SA-016. If so, Mr. Buck would have had to adjust *those* employees' schedules as well. R.55 at 13–15; SA-016. He would then have had to repeat this onerous process each time he rotated the assistant managers into new posts. *See* EEOC Br. at 41–42; R.55 at 14; SA-016 (explaining the practice and benefit of rotating assistant managers through different areas of responsibility). And if he

ever determined that he needed an extra hand between Friday night and Saturday night, he would have had to make do without Mr. Hedican's help. *See* R.55 at 13–15; SA-016. Moreover, when there was an emergency in Mr. Hedican's area of responsibility that needed to be addressed during his Sabbath, a different assistant manager would have had to cover for him.

Contrary to the Commission's insistence, these burdens are nothing like the one-off adjustments this court considered in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1996), *modified on reh'g* (Mar. 6, 1997), and *Adeyeye*, 721 F.3d 444. Both cases concerned an employee request for a single period of religious leave, which the employer flat-out refused. *See Ilona*, 108 F.3d at 1572; *Adeyeye*, 721 F.3d at 447. Yet here, the Commission demanded an *ongoing* accommodation process that allowed for a day and a night's worth of leave *every week*, despite the operating demands of a 24-hour, resort, retail setting. *Cf. Baz*, 782 F.2d at 707. *Compare* EEOC Br. at 38–42 *with* R.55 at 13–15 *and* SA-014–18. It also ignores the *evidence* that by the nature of the position, assistant manager schedules are variable and unpredictable. *Ilona* and *Adeyeye* thus do not support the Commission's position.

In addition to the staffing challenges, Mr. Hedican's exemption from work on one of the store's busiest days would also have hindered the skills development, flexibility, and capability of the entire management team. At a minimum, Mr. Hedican's schedule would have walled him off from experience that other assistant managers were gaining, which would have slowed his own professional development, made him unable to run all aspects of the store, and made him a less valuable assistant manager. *See* SA-016 (Mr. Buck explaining that "[r]otating assistant managers through different areas of responsibility provides them with recent experience in each area of store operations" and "allows assistant managers to cover for one another and to develop the skills they would need to advance their careers"); SA-003 (Mr. Spude explaining that Walmart requires assistant managers to be familiar with all aspects of its operations and that it is therefore not possible to leave an assistant manager in one area of responsibility indefinitely). At the same time, Mr. Hedican's schedule would have inhibited the other assistant managers by forcing them to rotate job duties around Mr. Hedican, making the entire team less able to cover each other when that need arose. *See id.* Because Mr. Buck varied the assistant managers' schedules specifically

to develop their skills and ability to work as a team, *see* SA-016, the Commission's proposed deviations from that schedule would have burdened the store's operations beyond what the law requires. *See Hardison*, 432 U.S. at 84; *Noesen*, 232 F. App'x at 584–85.

The Commission attempts to manufacture a factual dispute on these points, but there is none. Mr. Buck's testimony describes the business needs and essential assistant manager duties of the Hayward Walmart based on *Mr. Buck's experience running the Hayward Walmart*. *See* SA-014. His assessment of the store's needs and operational challenges is not "speculative" or "hypothetical," *see* EEOC Br. at 46, but learned from personal experience, *see* SA-014. And contrary to the Commission's belief, *see* EEOC Br. at 44, evidence of what Walmart corporate policy minimally "required" of assistant managers, or how Walmart generally described the job in the application posting, does not fully capture — much less contradict — the real-world responsibilities of the assistant managers in Hayward. *Compare* SA-050 *with* SA-014–18. Mr. Buck explained those responsibilities and the local business demands driving them, and the Commission offers no probative evidence to rebut that testimony.

The Commission attempts to use other assistant manager schedules to undermine Mr. Buck's assessment of his own store's operations. *See* EEOC Br. at 42–43. But that effort fails as well. Indeed, the very schedule that the Commission relies on clearly required Friday night shifts that Mr. Hedican would have had to refuse. *See, e.g.*, SA-056 (scheduling Tammy Casler for night shifts on four consecutive Fridays in September 2016).[4] And even if it had not, there is still "an important distinction" between an employee who receives a certain schedule *because* of business demands and one whose scheduling restrictions completely exempt him from ordinary job duties *despite* business demands. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 137 (1st Cir. 2004); *see also* SA-016 (explaining why an assistant manager might be kept in a particular post for longer than expected because of the business needs of Walmart). In the first scenario, the employer can adjust the schedule as necessary to suit its fluctuating needs. *See Cloutier*, 390 F.3d at 137; SA-016. In the second scenario, the employer "forfeits" that ability

[4] The Commission's claim that Walmart did not raise the Friday night issue before the district court is belied by even a cursory review of Walmart's summary judgment papers. R.41 at 2–3 & n.3, 18, 21; R.60 at 11, 16.

and thus "loses control" over its operations. *Cloutier*, 390 F.3d at 137. The law does not demand such a sacrifice. *See, e.g.*, *Hardison*, 432 U.S. at 84. The Commission is wrong to say otherwise.

In sum, the Commission has failed to raise a genuine dispute of material fact on the undue hardship of scheduling around Mr. Hedican's Sabbath.

2. The Commission's Preferred Accommodations Would Discriminate Against Other Employees.

Even if Walmart could have redefined the assistant manager role to create a schedule that suited its business interests *and* accommodated Mr. Hedican, that schedule would still have imposed an "undue hardship" on Walmart under the law. Such a schedule would have disadvantaged Mr. Hedican's coworkers in more than a minimal way because of their *not* observing a Saturday Sabbath. "Title VII does not require an employer to go that far." *Hardison*, 432 U.S. at 81.

Unlike some aspects of running a business, scheduling employee worktime is a zero-sum game. *Id.* at 80. For every assistant manager given Saturday off, another assistant manager must report to work. *Id.* And the Hayward store had a high number of new and transitory associates because it is in a resort town, which made the presence of

management even more important. SA-009. If one assistant manager could not work particular hours at the Hayward Walmart because of a religious practice, other assistant managers would have had to fill in the gap specifically because they *do not* subscribe to the same practice as Mr. Hedican. *Hardison*, 432 U.S. at 81. That is why, according to the Supreme Court's authoritative interpretation, Title VII does not require a religious scheduling accommodation that would be unduly borne by other employees. *Id.* This Court has confirmed, in no uncertain terms, that "[a]n employer need not disturb the job preferences of other employees to accommodate an employee's religious observance." *Baz*, 782 F.2d at 707.

The Court's interpretation accords with Title VII, especially when the burden on co-workers is more than minimal. *See Opuku-Boateng v. California*, 95 F.3d 1461, 1469–70 & n.14 (9th Cir. 1996), *as amended* (Nov. 19, 1996). Often, an employee's religious practice *will not* create extra, undesirable work for his or her coworkers. *See Ilona*, 108 F.3d at 1576 (concerning a salon that could have allowed leave on a religious holiday reasoning that salon employees could reschedule their own customers to avoid work on a religious holiday without burdening the employer's business); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*,

135 S. Ct. 2028, 2031 (2015) (concerning a restriction on employee apparel); *Cloutier*, 390 F.3d at 128–29 (concerning a restriction on employees wearing "facial jewelry"). And in those circumstances, "discrimination ... against majorities" will not be an issue. *Hardison*, 432 U.S. at 81. But when it comes to scheduling, especially for a position that specifically required a 24/7 commitment and on days with the most day off requests in a busy resort town store, there was only so much an employer could do to accommodate one employee without directly burdening others. *See id.*

Had Walmart done what the Commission demanded, it would have required an extra commitment from another assistant manager *every time* Mr. Hedican left early, arrived late, was unable to respond to an emergency, or was given Saturday off. *See* SA-017. And those employees would have had to shoulder those substantial burdens precisely because they did not hold the same beliefs and observe the same religious practices as Mr. Hedican. *See Hardison*, 432 U.S. at 81. In the Hayward store, where assistant managers worked on average six out of every ten Saturdays, there were simply not enough assistant managers to shoulder this burden without undue hardship. Far from demanding that result,

Congress has expressly forbidden it. *See id.* That is why so many courts — including the Supreme Court and this Court — have explicitly held that making forced schedule adjustments to accommodate Sabbath observation that necessarily burden fellow employees in more than a minimal way imposes an undue hardship on a business. *See id.* at 85; *Baz*, 782 F.2d at 707; *Eversley*, 843 F.2d at 175–76. The Commission cannot escape those holdings, and they dictate affirmance.

B. Allowing Mr. Hedican to Avoid Sabbath Work Through His Own Scheduling Adjustments Was Not a Feasible Alternative.

Implicitly recognizing the difficulties of a top-down approach, the Commission also suggests that Walmart could have allowed Mr. Hedican to sort out his own schedule through a combination of voluntary shift swaps and paid leave. *See* EEOC Br. at 44–50. But such accommodations would equally have presented undue hardship in the management of the Hayward Walmart.

To begin with, even if voluntary shift changes had allowed Mr. Hedican to avoid Friday night shifts, Saturday day shifts, and any other Sabbath work hours, they still would not have alleviated the issues just discussed. Mr. Hedican and his co-workers would still have been stunted

in their professional growth, reducing their capacity to meet the store's fluctuating business needs. *See supra* at 40–41. At the same time, Mr. Hedican's inability to work on the Sabbath would still have adversely impacted his coworkers, each of whom would be left with fewer opportunities to avoid Saturday work and fewer viable options for trading their own Saturday shifts. *See* SA-018 (discussing the store's staffing needs on Saturdays); SA-077–127 (showing how often employees requested Saturdays off). Again, these are not "hypothetical hardships," EEOC Br. at 46 (quoting *Cloutier*, 390 F.3d at 135), but the predictable consequence of having one out of only eight assistant managers unavailable during some of the business's most important operating hours, including the Saturdays that each assistant manager must work roughly half the time. *Cf. Cloutier*, 390 F.3d at 135 (holding that an anticipated hardship was not speculative where the employer "calculat[ed]" business demands based on experience and common sense).

In any event, the undisputed facts would not permit a reasonable jury to find that voluntary swaps and paid time off were a viable option in this case. The Hayward Walmart often got busy and required substantial staffing between sundown Friday and sundown Saturday.

SA-018. And both common sense and the evidence show that assistant managers often requested that time off. SA-018, 020, 077–127. Even so, because of the store's needs, the assistant manager who worked the fewest Saturdays in 2016 still worked nearly *half* of all Saturdays — shift swaps and vacation time notwithstanding. SA-018. No reasonable juror could think that Mr. Hedican could have used voluntary shift swaps to avoid roughly twenty-five more Saturday shifts per year than even his next-most-fortunate colleague. *Cf. Cloutier*, 390 F.3d at 135 (holding that no reasonable juror could find a deviation from employee ban on "facial jewelry" did not constitute undue hardship). Perhaps an accommodation through voluntary shift changes and paid leave might be plausible in a different context, but on the facts here — with Mr. Hedican unavailable on one of the store's busiest days, with only seven other assistant managers for potential shift swaps, and with the other assistant managers also frequently requesting Saturdays off — it plainly would not have worked, and certainly not without undue hardship to Walmart and the other assistant managers.[5] Such an accommodation would not

[5] The Commission faults Walmart for not polling assistant managers to see if they would swap with Mr. Hedican. But Ms. Ahern thoroughly reviewed the scheduling conditions and staffing needs at the Hayward

have "eliminat[ed] the conflict" between Mr. Hedican's job duties and religious practice, and it would have substantially burdened Mr. Hedican's employer and coworkers regardless.

When Mr. Hedican could not find an assistant manager to cover his shift on days when he could not work because of his Sabbath, his only options would have been to not come to work (whether on paid or unpaid leave), leaving the store without a scheduled assistant manager, or to come to work and violate his Sabbath observance. These options either would have not accommodated Mr. Hedican or would have led to the Hayward store being understaffed. *Cf. Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 547 (7th Cir. 2008) (noting that despite other accommodations requested by an employee, the employer correctly provided the employee "with the only accommodation proven to 'effectively accommodate[ ][her] limitations"). Indeed, the Hayward store already was understaffed due to

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store. SA-008–12, 044–45. And Walmart did not have to conduct such a poll. Indeed, an employer may "prove undue hardship without actually having undertaken any of the possible accommodations." *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975). An employer "can do so by 'examining the specific hardships imposed by specific accommodation proposals,'" which is exactly what Ms. Ahern did. *Cloutier*, 390 F.3d at 135 (quoting *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989)).

lack of associates in 2016, and assistant managers had to work more to cover the store's needs. SA-028–29. The store's characteristics also meant that on Friday nights and Saturdays there were likely manager-heavy customer requests including fishing licenses, hunting licenses, and gun sales. SA-044. Being short-handed in management would lead to lost sales. SA-044–45. Such a loss of efficiency is recognized as an undue hardship as a matter of law. *Hardison*, 432 U.S. at 84 (noting that more than a *de minimis* loss of efficiency constitutes an undue hardship).

* * * *

"Title VII … requires only reasonable accommodation, not satisfaction of an employee's every desire." *Porter*, 700 F.3d at 952 (quoting *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001)). Here, Mr. Hedican applied for a specific assistant manager position that he was told required a commitment that conflicted with his religious practices. When he eventually told Walmart about this conflict, Walmart thoroughly researched whether the assistant manager position could be modified to accommodate him and, when it determined that modifying the position would be impracticable and unduly burdensome, it offered to help him apply for other, "sufficiently similar" management

positions that did not require him to be available 24 hours a day, 7 days a week. Instead of cooperating with Walmart, Mr. Hedican complained to the Commission, which demanded a substantial rearrangement of Walmart's assistant manager team. Those demands went far beyond Walmart's Title VII obligations.

CONCLUSION

For the reasons set forth above, this Court should affirm the grant of summary judgment to Walmart.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because it contains 9,952 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Office 365 ProPlus in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: September 22, 2020

/s/ Jeremy M. Bylund
Jeremy M. Bylund

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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I hereby certify that on September 23, 2020, I electronically filed the foregoing brief with additional disclosure statements with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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