No. 20-1419

IN THE 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, No. 3:18-cv-00804
Hon. Barbara B. Crabb, District Judge

OPENING BRIEF FOR PLAINTIFF-APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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STATEMENT OF JURISDICTION

The Equal Employment Opportunity Commission (EEOC or Commission) brought this enforcement action against Walmart Stores East, L.P., and Walmart, Inc. (collectively, Walmart), pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* *See* R.1 at 1.[1] The district court had jurisdiction under 28 U.S.C. § 1331 and Title VII, 42 U.S.C. § 2000e-5(f)(3). The district court granted summary judgment in Walmart's favor and entered final judgment against the EEOC on January 16, 2020. R.64 (A-21); R.65 (A-22). On March 16, 2020, the EEOC timely filed a notice of appeal. *See* R.72; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the district court's final decision pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err in concluding that Walmart offered a religious accommodation that was reasonable as a matter of law where, in response to Edward Hedican's request to avoid work on his Sabbath, Walmart neither accommodated him in the job it had offered him, nor offered to reassign him to the most comparable position available, but instead merely invited him to apply to lower-paying, lower-ranking jobs?

[1] "R.#" refers to the district court docket entry. The page numbers refer to the CM/ECF numbers appended to each document. Where a cited document is included in the attached short appendix, "A-#" refers to the pertinent page number(s) in the appendix.

2. Did the district court err in holding that a reasonable jury would be compelled to find that Walmart demonstrated that it would have incurred undue hardship if it had accommodated Hedican in a way that would have let him both observe his Sabbath and keep the job Walmart had offered him?

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are reproduced in the short appendix attached to this brief.

STATEMENT OF THE CASE

A. Statutory Background

Title VII generally prohibits employers from "fail[ing] or refus[ing] to hire . . . any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). In 1972, Congress amended Title VII to clarify that the term "religion" "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

Together, these provisions "make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World*

Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986); 29 C.F.R. § 1605.2(b)(1) (EEOC guideline). Pursuant to this statutory accommodation obligation, employers must therefore sometimes make exceptions to generally applicable employment policies and practices so that an individual may keep his job and observe his religion. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 2032 n.2, 2034 (2015); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934-35 (7th Cir. 2003).

B. Factual Background

1. Walmart's job offer and Edward Hedican's request for religious accommodation

The EEOC brought this enforcement action on behalf of Edward Hedican. R.1 at 1. For all times relevant to this case, Hedican was a practicing Seventh-day Adventist. R.42 at 2. It was Hedican's religious practice to abstain from secular work on his Sabbath, which was sundown Friday to sundown Saturday. *Id.*

In April 2016, Hedican applied to work as a salaried assistant manager at a Walmart store in Hayward, Wisconsin. R.52-1 at 2-25. Walmart offered Hedican the position on the conditions that he pass a drug test and a criminal-background check. R.52-5 at 3-4. Hedican responded to Walmart's offer by email, saying that he was "very excited to accept the position." R.52-2 at 2 (emphasis omitted). Hedican then explained that, as a devout Seventh-day Adventist, he keeps the Sabbath and therefore would "not [be] able to work any Saturdays until after sundown." *Id.* Hedican

emphasized, however, that he was "available any other day of the week and can be available after sundown on Saturday nights if needed." *Id.* [2]

Lori Ahern, a Walmart human resources official, responded to Hedican that he would "need to apply for an accommodation," and she attached an "[Americans with Disabilities Act] Accommodation Request Form"—a form designed for individuals requesting disability-related accommodations that had no questions bearing specifically on requests for religious accommodations. *Id.*; R.52-7 at 6-10. Soon after Hedican submitted that form, Walmart's "Accommodation Service Center" notified him that it did "not approve accommodations for Religious beliefs," and that his request would thus go back to Ahern for handling. R.52-6 at 2. A week later, Ahern told Hedican in an email that Walmart had "denied the request" and, "effective immediately," "rescind[ed]" the salaried assistant-manager job offer. R.52-10 at 2. Ahern's stated reason for rescinding the offer was Hedican's "inability to perform the essential functions of the job." *Id.*

In the same email, Ahern told Hedican to "advise [her] of any interest [he] may have in other positions" and said she would "assist [him] in [applying]." *Id.* Ahern and

[2] When he applied, Hedican notified Walmart only that he could not work Saturdays before sundown, not that he was also unavailable Fridays after sundown. *See* R.52-2 at 2-3; R.52-5 at 5; R.52-10 at 2; R.45 at 50. When Walmart was assessing his request, it therefore considered only whether it could give Hedican Saturdays before sundown off. At his deposition, Hedican clarified that he would have been unavailable Fridays after sundown as well. R.45 at 39. In district court, Walmart did not argue that Hedican's unavailability Fridays after sundown would have affected its analysis concerning his accommodation request.

Hedican then spoke on the phone about this suggestion, during which call Ahern confirmed to Hedican that he needed to reapply for any new position. R.45 at 38-39; R.47 at 12. Ahern testified that she told Hedican he could apply for "hourly supervisor positions"—lower-ranking positions that would have paid "a little less" initially. R.47 at 12; R.42 at 17; *see also, e.g.*, R.41 at 11-12; R.52-11 at 2 (job description making clear that assistant managers "supervis[e] and develop[]" hourly employees). For his part, Hedican testified that Ahern told him that any alternative positions would not be "managerial," which he understood to mean "salaried management positions." R.45 at 39. The only specific alternate positions Hedican recalled Ahern mentioning were customer-service-representative roles, and he said that he "had no idea what else was available." R.45 at 39, 43. Hedican did not explore other jobs or reapply to work at Walmart. R.42 at 18. Ahern testified that she "got the impression" that Hedican's lack of interest in other jobs was "due to money." R.47 at 12.

2. The Hayward store's operations and Walmart's practices

The Hayward Walmart store at issue here operated 24 hours a day, 364 days a year. R.38 at 1. When Hedican applied in April 2016, there were eight assistant-manager positions and one store-manager position in the Hayward store, all of which were salaried. *Id.* at 1-2. Assistant managers were generally assigned to one of seven "area[s] of responsibility," such as "apparel," "entertainment," and "overnights." *Id.* at 2. Two assistant managers worked overnights. *Id.* They typically worked from 8 p.m.

to 8 a.m., "on a four days on, three days off basis," R.42 at 8, and they oversaw "anything that happen[ed]" in the store during the overnight hours, R.23 at 24. Other assistant managers ordinarily worked five days a week in one of the six other areas of responsibility, from 7 a.m. to 5 p.m., 8 a.m. to 6 p.m., or 11 a.m. to 9 p.m. R.38 at 3.

According to store manager Dale Buck, "Walmart wants its [a]ssistant [m]anagers to be familiar with all aspects of its operations," so he generally "rotated" them to "new areas of responsibility" once a year. *Id.* After rotating them, he adjusted their schedules to work "shifts that best allow[ed] them to manage their specific area." *Id.* Buck testified that he "would never give an [a]ssistant [m]anager a permanent area[] of responsibility or a permanent schedule." *Id.* Even so, at least one assistant manager at the Hayward store worked the overnight shift for more than two consecutive years, from July 2016 to September 2018. R.52-13 at 2-14; R.44 at 33-34. Further, Walmart's corporate representative testified that rotating assistant managers was not always required, and some worked in the same area for up to six years. R.23 at 25; *see also* R.24 at 36 (Ahern testifying that rotating assistant managers was at the discretion of the store manager).

Assistant managers in the Hayward store most frequently requested Fridays, Saturdays, and Sundays as days off. R.44 at 28. According to Buck, "on any given Saturday," he "usually scheduled half or more of the [a]ssistant [m]anagers" to be working in the store; and, "[o]n average," from July 2016 through June 2018, assistant managers "were generally scheduled for more than 60% of Saturdays." R.38 at 3-4.

3. Walmart's analysis in denying Hedican's accommodation request

Ahern was the principal decisionmaker in denying Hedican's accommodation request. R.44 at 19. At her deposition, Ahern testified that she considered giving Hedican a flexible arrival time so he could work on Saturdays after sundown. R.47 at 13. She rejected this idea, however, concluding that it "would be a lot . . . to keep track of" because the sun sets at different times each day. *Id.* She also asserted that it would be "a hardship" for assistant managers other than Hedican "to constantly adjust their schedules . . . for one person," but she did not explain why other assistant managers covering other areas would need to make any such adjustments based on Hedican's schedule. *Id.* at 13, 15. In addition, Ahern noted that a flexible schedule "would be something [Walmart] would have to do differently just for" Hedican and "didn't necessarily match" Walmart's "need[s] for the start of a shift," although Ahern did not explain why Walmart's needs were inflexible in this regard. R.24 at 38.

Ahern also testified that she considered letting Hedican trade shifts with other assistant managers who volunteered to do so, but she concluded that this "would be difficult to do because [the others] may have plans and may not want to [swap shifts] every single week." R.47 at 13-14. Ahern did not, however, actually ask any assistant managers whether they might be willing to swap shifts with Hedican. *Id.* at 14. She claimed that she talked to store manager Buck about the possibility of shift swaps and that Buck "agreed with [her] that it would put hardship on the" other managers. *Id.*

Buck's testimony on this point is quite different, however. He testified that he had no "role in reviewing [Hedican's] request" for accommodation, or in "the decision to deny [that] request." R.44 at 18, 21-22, 23. Buck was unequivocal that he did not talk to Ahern about giving Hedican flexible arrival times or letting him swap shifts. *Id.* at 23-24; *see also id.* at 18-19 (Buck testifying that the only communication he had with Ahern about Hedican's accommodation request was an "FYI" email from Ahern notifying him of the request, *see* R.52-8 at 2).

When asked whether she considered assigning Hedican to work overnights on a schedule that would not interfere with his Sabbath (for example, Sunday through Wednesday), Ahern said she did not think such an arrangement would work. R.24 at 35. She stated that, "at some point," Hedican would need to rotate into new areas, such as apparel or entertainment, which she apparently assumed would necessarily include work on his Sabbath. R.24 at 35-36. And Ahern rejected letting Hedican use leave as part of any accommodation because she believed that he was not entitled to any paid time off right away. R.47 at 14. According to the offer letter Walmart sent Hedican, however, he would have been able to use 21 days of paid time off during his first full fiscal year with the company, which would have commenced on February 1, 2017. R.52-3 at 2-3. Between his hire date and February 1, 2017, he would have received a pro-rated number of days off. *Id.* at 3; *see also* R.44 at 16-17. Ahern admitted that, before denying Hedican's accommodation request, she did not speak to anyone to clarify when he might have been entitled to begin using paid time off. R.47 at 14.

C. Procedural Background

After Walmart rescinded Hedican's job offer and told him he would need to reapply to obtain any other job, he filed an administrative charge with the EEOC, R.1 at 2, and the Commission subsequently filed suit on his behalf. The district court granted Walmart summary judgment on all claims, including the claim at issue in this appeal—that Walmart violated Title VII's reasonable-accommodation provision because it (1) did not provide Hedican a reasonable accommodation for his Sabbath observance; and (2) failed to establish that any such accommodation would impose an undue hardship. R.64 at 1, 18, 20 (A-1, A-18, A-20).

The district court first held that Walmart offered Hedican a reasonable accommodation as a matter of law when Ahern told him that she would help him apply for "hourly managerial positions." R.64 at 1, 13-18 (A-1, A-13-18). The EEOC had argued that Ahern's offer was not reasonable because Walmart did not offer Hedican an alternative job, but rather "only the opportunity to apply" for one. *Id.* at 14 (A-14). The court rejected this argument, stating that "several courts have concluded that offering an employee the opportunity to apply for alternative positions . . . can be a reasonable accommodation." *Id.*

The court also disagreed with the EEOC's contention that Walmart's offer was unreasonable because the alternative jobs Ahern suggested "would have paid less than the assistant manager position." *Id.* at 14-16 (A-14-16). Although the court recognized that "offering a different position with lower pay and benefits might not be a

reasonable accommodation" in some cases, *id.* at 14 (A-14), it also observed that Title VII "does not require employers to accommodate an employee's religious practices" "in exactly the way the employee would like to be accommodated," or "in a way that spares the employee any cost whatsoever," *id.* at 15 (A-15) (citation omitted). And, the court said, "[n]umerous courts have concluded that an offer to help an employee find another [position] that does not require Sabbath work is a reasonable accommodation, even if the other position pays less or is less [desirable]." *Id.* at 16 (A-16).

The court then pointed out that the record included limited evidence about the pay differences between the assistant-manager and hourly management positions, and it concluded that Hedican bore at least some responsibility for the missing information, stating that "employees have a duty to cooperate with an employer in searching for an accommodation for religious needs." *Id.* at 16-17 (A-16-17). Here, the court added, Hedican did not "explore . . . what other positions were open" or apply for any such positions. *Id.* at 17 (A-17). Therefore, according to the court, "Hedican failed to satisfy his duty to make a good faith effort to cooperate . . . in finding a reasonable accommodation." *Id.* "Because [Walmart] has shown that it offered Hedican a reasonable accommodation, and that [Hedican] failed to make a good-faith effort to engage with [Walmart] regarding the proposed accommodation," the court concluded that the EEOC's accommodation claim failed. *Id.* at 18 (A-18).

The court next addressed the parties' undue-hardship arguments "for the sake of completeness" and held that Walmart proved, as a matter of law, that it would have

incurred undue hardship if it had accommodated Hedican in the assistant-manager position. R.64 at 18, 20 (A-18, A-20). The court observed that the EEOC had proposed several potential accommodations, including (1) permitting Hedican to swap shifts with other assistant managers, use paid time off, or have a flexible arrival time; and (2) scheduling him for a day shift Sunday through Friday or for overnight shifts that did not conflict with his Sabbath. *Id.* at 18-19 (A-18-19). The court held, however, that these proposals did not "fully address" Walmart's "undisputed" evidence that: "(1) no assistant manager is assigned to a permanent shift; (2) assistant managers are expected to be available to work varied shifts, including Saturdays; (3) assistant managers are expected to rotate through every area of the store; (4) Saturday was a busy day for the Hayward store, and all assistant managers were expected to work some Saturday shifts; (5) other assistant managers wanted Saturdays off as well; and (6) Hedican would not have any paid personal time off until he had worked for [Walmart] for a full fiscal year." *Id.* at 19 (A-19). The court determined that it followed from this evidence that accommodating Hedican's request for Saturdays off would have forced Walmart to: (1) require another assistant manager to involuntarily work on additional Saturdays; (2) hire another assistant manager who could help cover Saturday shifts; or (3) operate the store with one fewer assistant manager than needed. *Id.* at 20 (A-20). Thus, the court held that the EEOC's proposals would have resulted in undue hardship. *Id.* at 18-20 (A-18-20).

SUMMARY OF THE ARGUMENT

This case raises the question whether Walmart violated Title VII when it denied Edward Hedican's request for a religious accommodation in the assistant-manager position he had been offered, and instead offered him assistance in reapplying for lower-paying, lower-ranking jobs. The district court erred in concluding that a reasonable jury would be compelled to conclude that Walmart complied with its obligation under the statute to provide Hedican with a reasonable accommodation for his religious practices, absent a showing of undue hardship.

First, the district court was incorrect in holding that Walmart provided a reasonable accommodation as matter of law when it offered Hedican help in reapplying for jobs that were inferior—in terms of pay and rank—to the one it had already offered him. Title VII's text, decisions of this Court and other circuits, and the EEOC's guidance all support the conclusion that, to qualify as reasonable, an accommodation should preserve an individual's compensation, terms, conditions, and privileges of employment to the maximum extent possible without causing an employer undue hardship. In accordance with this principle, a reasonable jury could conclude that Walmart would have acted reasonably had it accommodated Hedican in the assistant-manager role; or, if such an accommodation was not possible without undue hardship, had it offered to reassign him to the most comparable job available. Contrary to the district court's analysis, a jury would not be compelled to find that Walmart's mere offer to help Hedican reapply for lower-paying, lower-ranking jobs

was reasonable, given that there were alternative accommodations readily available that would not have imposed an undue hardship on Walmart and would have better preserved the compensation, terms, conditions, and privileges of the employment offered to Hedican.

The district court further erred when it concluded that Hedican's decision not to seek other jobs at Walmart defeated the EEOC's accommodation claim. Although employers and individuals are under a duty to cooperate with each other in resolving conflicts between an employer's requirements and an individual's religious needs, an individual generally has no duty to try out an employer's proposed accommodation that is not reasonable. Because Walmart offered Hedican a resolution of the conflict between his religion and his job that was unreasonable, Hedican was under no obligation to participate with Walmart in carrying it out.

Finally, the district court was mistaken in concluding that a reasonable jury would be required to find for Walmart on the undue-hardship issue. Undue hardship is an affirmative defense on which Walmart bears the burden of proof. And a reasonable jury would not be compelled to conclude that Walmart demonstrated that all of the accommodations the EEOC proposed to allow Hedican to work in the assistant-manager position would have caused Walmart to incur undue hardship. For example, a jury could reasonably conclude that Walmart could have, without enduring undue hardship, scheduled Hedican for a shift that did not interfere with his Sabbath and, to the extent any minor conflicts arose, made scheduling adjustments to fit his

Sabbath observance. Also, a jury would not have to conclude that Walmart would have faced an undue hardship had it exempted Hedican from its practice of rotating assistant managers to other areas of responsibility and thus different schedules. In any event, a jury would not be required to find that Walmart proved that letting Hedican swap shifts with other assistant managers who agreed to such swaps, or allowing him to use accrued annual leave to avoid conflicts with his Sabbath, would have been an undue hardship.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013). On summary judgment, the nonmoving party (here, the EEOC) "is entitled to the benefit of conflicts in the evidence and all reasonable inferences that could be drawn in [its] favor." *Id.* Reversal of summary judgment is required "if a genuine issue of material fact exists that would allow a reasonable jury to find in favor of the" EEOC. *Id.*

ARGUMENT

This case concerns Title VII's bar on "fail[ing] or refus[ing] to hire . . . any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). The statute defines "religion" to "include[] 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." *Id.* § 2000e(j). This Court has emphasized that "[t]he term 'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning"; "[e]ach case involving such a determination necessarily depends upon its own facts and circumstances"; and "[t]he trier of fact is in the best position to weigh these considerations." *Redmond v. GAF Corp.*, 574 F.2d 897, 902-03 (7th Cir. 1978).

As explained below, the district court did not heed these principles when it granted Walmart summary judgment on the EEOC's religious-accommodation claim. First, the court incorrectly held that Walmart offered Edward Hedican an accommodation that was "reasonable" as a matter of law when it rescinded his offer to work as an assistant manager, and instead invited him to apply for lower-paying, lower-ranking jobs that did not conflict with his religion. Second, the court mistakenly determined that any reasonable jury would be compelled to conclude that Walmart proved it would have suffered "undue hardship" if it had accommodated Hedican in the assistant-manager role.

I. A reasonable jury could conclude that Walmart's offer to help Edward Hedican apply for lower-paying, lower-ranking alternative jobs was not a reasonable accommodation.

After Walmart rescinded Hedican's offer to work as an assistant manager, Lori Ahern—Walmart's human resources official—offered to "assist" Hedican in applying for other positions. R.52-10 at 2. Ahern testified that her efforts at such "assistance"

were limited to looking at a listing of available jobs on a Walmart website, which she acknowledged any member of the public likewise could have done. *See* R.24 at 37. A reasonable jury could find that Walmart's offer to provide Hedican such "assistance" in applying for other jobs—which by all accounts would have entailed lower pay and a lower rank—was not a reasonable accommodation. Title VII's text, the EEOC's guidelines, and the precedents of this Court and others all make clear that a critical consideration in determining whether an accommodation offered by an employer is "reasonable" is whether it preserves an individual's compensation, terms, conditions, and privileges of employment, and employment opportunities, to the greatest extent possible short of undue hardship. A jury could reasonably conclude that what Walmart offered here was not reasonable under that standard. The district court's various rationales for concluding otherwise are without merit.

A. An accommodation is not reasonable if it unnecessarily diminishes an individual's compensation, terms, conditions, or privileges of employment.

As noted above, Title VII defines "religion" to include "religious observance and practice," "unless an employer demonstrates that he is unable to reasonably accommodate" the observance or practice "without undue hardship," 42 U.S.C. § 2000e(j), and the statute generally prohibits discrimination based on religion with respect to an individual's "compensation, terms, conditions, or privileges of employment," *id.* § 2000e-2(a)(1). Title VII also bars employers from "limit[ing],

segregat[ing], or classify[ing] his employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" based on religion. *Id.* § 2000e-2(a)(2). These prohibitions would be meaningless if an employer could accommodate an employee's or prospective employee's religion without regard to the accommodation's impact on his compensation, terms, conditions, and privileges of employment, and his employment opportunities and status as an employee, even though another, readily available accommodation would better preserve those attributes of employment.

Given this statutory command, the EEOC's guidelines explain that if 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." 29 C.F.R. § 1605.2(c)(2)(ii). The EEOC's Compliance Manual similarly states that, to qualify as reasonable, an accommodation must not "unnecessarily disadvantag[e] the employee's terms, conditions, or privileges of employment." EEOC Compliance Manual § 12-IV(A)(3) (July 22, 2008), 2008 WL 3862099. Thus, the Compliance Manual adds, an accommodation is not reasonable if it "requires the employee to accept a reduction in pay rate or some other loss of a

benefit or privilege of employment and there is an alternative accommodation that does not do so." *Id.*[3]

As a corollary to this principle, the Compliance Manual specifies that, in general, an employee "should be accommodated in his or her current position if doing so does not pose an undue hardship." EEOC Compliance Manual § 12-IV(C)(3), 2008 WL 3862099. The EEOC's guidelines add that "[w]hen an employee cannot be accommodated [in his job]," employers should consider whether it is possible to "give the employee a lateral transfer." 29 C.F.R. § 1605.2(d)(1)(iii). "The employer cannot transfer [an employee] to a position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship." EEOC Compliance Manual § 12-IV(C)(3), 2008 WL 3862099.

These principles are well supported by decisions of this and other courts of appeals. This Court, for example, has held in a series of decisions that certain accommodations offered by employers were reasonable only after emphasizing that the accommodations in question did not require the plaintiffs to take a job involving lower skill or "accept a reduction in pay or some other loss of benefits." *Wright v.*

[3] Although these guidelines and the Compliance Manual do not have the force of law, they "reflect a body of experience and informed judgment to which courts and litigants may properly resort" and are thus "entitled to a measure of respect." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (citations omitted). Therefore, this Court may rely on such guidance. *See, e.g.*, *Adeyeye*, 721 F.3d at 456 (relying on religion guidelines); *Rodriguez v. City of Chicago*, 156 F.3d 771, 776 (7th Cir. 1998) (same); *see also, e.g.*, *Holowecki*, 552 U.S. at 399-400 (relying on Compliance Manual).

Runyon, 2 F.3d 214, 217 (7th Cir. 1993); *see also Porter v. City of Chicago*, 700 F.3d 944, 952 (7th Cir. 2012) (deeming an employer's proposed accommodation reasonable because it would have both eliminated the religious conflict *and* would not have "impacted [the plaintiff's] pay or benefits in any way"); *Rodriguez v. City of Chicago*, 156 F.3d 771, 775-76 (7th Cir. 1998) (holding that the employer's offer to change the district to which the plaintiff was assigned constituted a reasonable accommodation because, *inter alia*, it would have resulted in no "reduction in pay or benefits"). Indeed, this Court's decisions have admonished that the reasonableness of a proposed accommodation is subject to considerable doubt if it would force the plaintiff to accept a loss of pay, opportunities, or other employment benefits. *See Wright*, 2 F.3d at 217 (explaining that "[a] much more searching inquiry might [have been] necessary" if the employer's proposed accommodation had required the plaintiff to take a job involving lesser skill, or "a reduction in pay or some other . . . benefits"); *see also Porter*, 700 F.3d at 952 (same).

This approach is also reflected in decisions from other courts of appeals. For instance, in *Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002), the Second Circuit explained that even if an employer's proposed accommodation would eliminate the religious conflict at issue, the accommodation may still be unreasonable "if it cause[s] [the employee] to suffer an inexplicable diminution in his employee status or benefits" "without justification." *Id.* at 160; *see also id.* (going on to hold that the position the employer offered as an accommodation was reasonable because, *inter alia*, it would not

have caused the employee any "discernible loss," such as a reduction in pay or seniority); *Baker v. Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006) (similar). Similarly, the Ninth Circuit has held that employers must offer accommodations that, to the extent possible short of undue hardship, "preserve th[e] employee's . . . compensation, terms, conditions, or privileges of employment." *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir. 1986) (remanding for district court to conduct such an inquiry).

The principle derived from these authorities is consistent with the Supreme Court's decision in *Ansonia*, which rejected a court of appeals conclusion that Title VII requires an employer to provide the plaintiff with his preferred religious accommodation absent proof of undue hardship. 479 U.S. at 66, 68-69. The Supreme Court disagreed with the court of appeals' analysis, holding that under the plain terms of the statute, if an employer has offered any reasonable accommodation, "the statutory inquiry is at an end," and the employer need not show that other accommodations would have resulted in undue hardship. *Id.* at 68-69. In reaching this conclusion, *Ansonia* suggested that the EEOC guideline calling for employers to offer the accommodation that least disadvantages an individual's employment opportunities (without undue hardship) is reconcilable with its holding. *See id.* at 69 n.6 (referring to 29 C.F.R. § 1605.2(c)(2)(ii)). The Court noted that, unlike the standard applied by the court of appeals there, the guideline "contains a significant limitation," calling for comparative analysis of accommodations only when they disadvantage employment

opportunities to varying degrees. *Id.* The Court then went on to conclude that the accommodation the employer had offered in that case—unpaid leave to observe religious holidays—is generally a reasonable one, emphasizing that it has "no direct effect upon either employment opportunities or job status." *Id.* at 70-71 (quoting *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977)) (noting that, although the employee would lose pay, that was only "for a day that he did not in fact work").

Thus, although *Ansonia* held that an employer discharges its duty under Title VII by offering any accommodation that is reasonable, the decision did not undermine the principle just discussed—that the predicate determination of whether a given accommodation is reasonable turns in significant part on whether other available accommodations would have resulted in less of a disadvantage to the employee's employment opportunities or status; or compensation, terms, conditions, and privileges of employment, *see supra* pp. 16-20; *see also, e.g.*, *Cosme*, 287 F.3d at 158-60 (recognizing the holding of *Ansonia* but stating that an accommodation may still be "unreasonable if it cause[s] [the plaintiff] to suffer an inexplicable diminution in his employee status or benefits"); EEOC Compliance Manual § 12-IV(A)(3) & n.133, 2008 WL 3862099 (explaining that the EEOC guidelines addressing this principle are consistent with *Ansonia* and observing that "[a]ppellate courts in the wake of *Ansonia*" have analyzed whether "accommodations had a negative impact on the individual's employment opportunities" when evaluating their reasonableness).

B. A jury could reasonably find that Walmart's offer was unreasonable because two other accommodations would have better preserved Hedican's compensation, terms, conditions, and privileges of employment, and would not have imposed an undue hardship on Walmart.

As the preceding discussion illustrates, although Title VII does not require employers to accommodate an individual in a way that he most prefers or in a manner that necessarily "spares [him] any cost whatsoever," *Tabura v. Kellogg USA*, 880 F.3d 544, 550-51 (10th Cir. 2018) (citation omitted), an accommodation is not reasonable if it diminishes a worker's compensation or employment status, and there are other readily available accommodations that would not do so and would not impose undue hardship. And, here, there were at least two accommodations that a reasonable jury could conclude Walmart failed to offer Hedican that would have better protected his compensation and employment status, and posed no undue hardship on Walmart.

1. Walmart could have accommodated Hedican in the assistant-manager job it offered him.

First, a jury could reasonably conclude that Walmart could have accommodated Hedican in the assistant-manager position it offered him without undue hardship—and that its offer instead to help him apply for lower-paying, lower-ranking jobs was therefore unreasonable. As explained above, *see supra* pp. 17-18, at least where, as here, any alternative job would have involved a reduction in pay and rank, *see* R.44 at 7-8, 24-25, an employer should try, absent undue hardship, to accommodate an individual's religious practices in the job that the individual holds or has been offered.

See also Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 519-20 (6th Cir. 1975) (holding that a transfer that would have resulted in, *inter alia*, a "reduction in pay" and "wasted . . . skills" was not a reasonable accommodation where the employer could accommodate the employee in his current position without undue hardship, explaining that an "employer first must attempt to accommodate the employee within his current job classification" in such circumstances); *cf. Adeyeye*, 721 F.3d at 456 ("At the risk of belaboring the obvious, Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices.").

A jury could reasonably determine that there was a range of assistant-manager shifts to which Walmart could have assigned Hedican without interfering with his Sabbath of sundown Friday to sundown Saturday. For example, Walmart could have assigned Hedican to an overnight schedule working 8 p.m. to 8 a.m. four nights in a row, Saturdays through Tuesdays or Sundays through Wednesdays. *See* R.23 at 22-23. Alternatively, Walmart might have given Hedican a daytime shift of 7 a.m. to 5 p.m. or 8 a.m. to 6 p.m., working five straight days Sunday to Thursday or Monday to Friday. *Id.* at 22. To be sure, if Walmart had assigned Hedican to some of these schedules, there may have been occasions on which his schedule would still cause minor conflicts with his Sabbath observance. For instance, if Hedican worked an 8 p.m. to 8 a.m. overnight schedule Saturday through Tuesday, he would need to arrive up to an hour or so late on Saturdays during certain spring and summer months when

sundown occurred after 8 p.m. *See* R.52-15 at 2-6 (sunrise/sunset calendar for Hayward).

But in those situations, and even if Hedican's shift routinely required him to work on his Sabbath, a jury could reasonably conclude that Walmart could have resolved any conflicts by, as appropriate, slightly adjusting the start and end times of Hedican's shifts, allowing him to swap shifts with other assistant managers who agreed to such swaps, or letting him use accrued annual leave, which are all forms of accommodation commonly recognized as reasonable in these circumstances. *See infra* pp. 38-48 (describing these accommodations); *see also, e.g.*, *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997) (recognizing that offering time off can be a reasonable accommodation); *Tabura*, 880 F.3d at 555 (observing that, in many circumstances, it will be a reasonable accommodation to let plaintiffs combine "vacation and other paid time off" with shift swaps to avoid religious conflicts); *Draper*, 527 F.2d at 520 (concluding that employer should have "experimented with shift exchanges" and "other scheduling arrangement[s]" to accommodate the plaintiff's Sabbath observance); 29 C.F.R. § 1605.2(d)(1)(i)-(ii) (listing accommodations that are often understood as reasonable in this context, including "facilitat[ing] the securing of a voluntary substitute" as well as "flexible arrival and departure times"). Because a reasonable jury would be entitled to conclude that Walmart could have provided Hedican with reasonable accommodations in the assistant-manager position, and because—for the reasons explained in Section II,

infra—those accommodations would not have posed an undue hardship for Walmart, a jury could also determine that Walmart's mere offer to assist Hedican in applying for lower-paying, lower-ranking jobs was not reasonable.

2. Walmart could have offered to reassign Hedican to the most comparable job available.

Even if accommodating Hedican in the assistant-manager position would have imposed an undue hardship on Walmart, a reasonable jury could conclude that Walmart could have offered to accommodate Hedican by reassigning him to an hourly supervisor position—the most comparable job available in the Hayward store and a position that would not have conflicted with his religious observance. *See* R.23 at 32-33; *see also supra* pp. 17-20 (explaining that such reassignment can be a reasonable accommodation, given that no lateral transfers were available). A jury could conclude that Walmart's offer instead to assist Hedican in *applying* to such positions and other lower-ranking jobs was therefore not a reasonable accommodation.

As explained above, *see supra* pp. 16-21, an accommodation offered by an employer may be deemed unreasonable under the statute if it "unnecessarily disadvantag[es] the employee's terms, conditions, or privileges of employment," EEOC Compliance Manual § 12-IV(A)(3), 2008 WL 3862099, or "employment opportunities," 29 C.F.R. § 1605.2(c)(2)(ii). Where, as here, an employer has already offered an individual a job, the employer quite plainly disadvantages that individual's terms, conditions, and privileges of employment if, in response to a request for

religious accommodation, it rescinds that offer and instead provides only the opportunity to *apply* for other jobs that would not present a religious conflict. Such an action amounts to a "diminution in [the individual's] employee status or benefits" that is unreasonable if it is "without justification." *Cosme*, 287 F.3d at 160.

Significantly, Walmart has never provided a "justification" for insisting that Hedican reapply for vacant positions. Walmart has not argued, for example, that Hedican needed to submit a new application so it could reassess his qualifications for other jobs. In fact, by the time Walmart insisted he reapply, the company had interviewed Hedican at least twice, R.42 at 2-3, and other than his inability to work on Saturdays before sundown, it deemed him qualified for the assistant-manager position, which is subordinate only to the store-manager position in the Hayward store, R.52-3 at 2. It is thus reasonable to infer that to offer Hedican one of the available hourly manager jobs, without any need to reapply, would have posed no hardship whatsoever, much less undue hardship. *Cf. EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 138-39, 143 (4th Cir. 2017) (criticizing employer for not offering an accommodation that would have "impose[d] no additional burdens or costs on the company").

Supporting this analysis, this Court has specifically held that merely offering someone the ability to reapply to a position he already holds does not constitute any accommodation whatsoever, let alone a reasonable one. Indeed, in *Adeyeye*, an employee sought a leave of absence for religious reasons, and the employer argued that it provided the plaintiff with a reasonable accommodation when it denied his

request for leave but told him he could quit his job and reapply when he was ready to return. 721 F.3d at 447, 456. This Court emphatically rejected this contention. *Id.* at 456. "We strain to imagine a situation," this Court wrote, in which giving a worker the mere "possibility of being rehired" "could be considered an accommodation" at all. *Id.* The Court went on to hold that providing a worker with such reapplication rights was certainly not a "reasonable accommodation." *Id.* The same principle should hold true here as well.

C. The district court's rationales for concluding that Walmart offered a reasonable accommodation lack merit.

The district court erred in its analysis of whether Walmart's offer to assist Hedican with applying for lower-paying, lower-ranking jobs was a reasonable accommodation as a matter of law.

1. The district court erred in concluding that Walmart's offer was reasonable, even though it required Hedican to reapply to jobs that paid less and ranked lower than the assistant-manager job.

The district court correctly acknowledged that this Court's precedent provides that, "in some circumstances, an employer's offering a different position with lower pay and benefits might not be a reasonable accommodation." R.64 at 14-15 (A-14-15). The court did not, however, analyze whether any "circumstances" present in this case rendered Walmart's offer merely to help Hedican apply for lower-paying, lower-ranking jobs unreasonable. Instead, the court determined that it was of no moment

that Walmart offered Hedican only the opportunity to *apply* to other jobs and that the alternative jobs in question paid less than the assistant-manager job, reasoning that "several courts have concluded that offering an employee the opportunity to apply for alternative positions . . . can be a reasonable accommodation," *id.* at 14 (A-14), "even if the other position pays less or is less [desirable]," *id.* at 16 (A-16).

The decisions on which the district court relied, however, did not hold that offering the opportunity to apply for other positions is always a reasonable accommodation, much less where, as here, the other positions involved less pay and prestige. Nor did those decisions conclude that such a rule should apply to factual circumstances like those present in this case. At bottom, the district court improperly attempted to distill bright-line rules from these decisions when instead it should have recognized that "'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning," and that "[e]ach case involving such a determination necessarily depends upon its own facts and circumstances." *Redmond*, 574 F.2d at 902.

First, the district court misunderstood this Court's decision in *Wright*, which concerned an employer that abolished the plaintiff's original job and then offered him the opportunity to bid on alternative equivalent positions that would not conflict with his religious practices. 2 F.3d at 215-16. Although the district court correctly observed that *Wright* deemed that offer to be a reasonable accommodation, R.64 at 14 (A-14), the "bid[ding] process" in *Wright* was a mere formality because it was undisputed that the plaintiff "would have received at least two of the [alternative] positions . . . had he

bid for them," 2 F.3d at 216. As *Wright* recognized, the employer there thus effectively allowed the plaintiff "to *select*" another comparable position. *Id.* at 217; *see also Rodriguez*, 156 F.3d at 776 (noting the employer in *Wright* let the plaintiff "select [a position] through the bidding system"). This case is different in two significant ways: Walmart required Hedican to compete for any alternative positions, and the positions in question were lower paying and lower ranking.

The district court also mistakenly relied on four decisions from other circuits—*Bruff v. North Mississippi Health Services, Inc.*, 244 F.3d 495 (5th Cir. 2001); *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000); *Telfair v. Federal Express Corp.*, 567 F. App'x 681 (11th Cir. 2014) (per curiam) (unpublished); and *Walker v. Indian River Transport Co.*, 741 F. App'x 740 (11th Cir. 2018) (per curiam) (unpublished). R.64 at 14, 16 (A-14, A-16). Those decisions are not, however, binding on this Court, and they should not be followed to the extent they are construed to conflict with the principles discussed above. In any event, the circumstances in those cases were meaningfully different from those present here.

To be sure, *Bruff*, *Shelton*, and *Telfair* held that the employers in those cases satisfied their duty of accommodation by, *inter alia*, offering to assist the plaintiffs in finding alternative positions that would not have conflicted with the plaintiffs' religious beliefs. *See Bruff*, 244 F.3d at 498, 501; *Shelton*, 223 F.3d at 226-28; *Telfair*, 567 F. App'x at 682, 684. But *Bruff* and *Shelton* only reached that conclusion where, unlike here, the employers had first offered to transfer the plaintiffs to lateral positions. *See*

Bruff, 244 F.3d at 498, 502-03 (emphasizing that the plaintiff "refused to even consider" a lateral transfer); *see also Shelton*, 223 F.3d at 223, 226. And *Telfair* reached that conclusion, much as in *Bruff* and *Shelton* and unlike here, where the employer had first offered to transfer the plaintiffs into other positions. 567 F. App'x at 684. Although the other jobs that the employer in *Telfair* offered would have meant lower pay for the plaintiffs, *id.* at 682, the court in that unpublished decision did not opine on the principle discussed above—that an accommodation is unreasonable if an available alternative accommodation would better preserve an employee's compensation, terms, conditions, or privileges of employment without undue hardship. *Telfair* thus provides no basis for departing from that well-supported foundational principle.

The Eleventh Circuit's unpublished decision in *Walker* similarly fails to support the conclusion that Walmart met its duty of offering a reasonable accommodation. *Walker* concluded that the "only way" the employer in that case could "ensure that [the plaintiff truck driver] would not have mandatory" work on Sundays, which he requested so that he could attend religious services, was to assign him to another type of delivery route that "paid differently." 741 F. App'x at 748. The court held that "[t]he fact that at least some of those [alternate] routes happened to pay less than the" type of route the plaintiff had originally been assigned was "insufficient to render the accommodation unreasonable." *Id.* Here, by contrast, a reasonable jury would be entitled to conclude that Walmart could have accommodated Hedican's religion either

in the assistant-manager job, or by reassigning him to the most comparable job available, *see supra* pp. 22-27, and thus forcing him to reapply for other lower-paying, lower-ranking positions was not the "only way" of accommodating him. *Walker*, 741 F. App'x at 748.[4]

2. The district court erred in faulting Hedican for not applying for other jobs.

The district court mistakenly relied on one final rationale for rejecting the EEOC's challenge to the reasonableness of Walmart's offer—the court concluded that the EEOC's accommodation "claim fails" because Hedican did not, as the court put it, "make a good-faith effort to engage with [Walmart] regarding" its "proposed accommodation." R.64 at 18 (A-18). According to the district court, Hedican's actions were deficient because he did not apply for any positions other than the one Walmart offered him, and "declined to even explore" what jobs were open. *Id.* at 17 (A-17).

The district court was correct, as a general matter, that applicants and employees are sometimes under a duty to engage in "bilateral cooperation" with

[4] *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012), also does not support the district court's decision. Although *Walden* held that it was a reasonable accommodation for an employer to offer the plaintiff assistance in obtaining new employment after it laid her off pursuant to a directive from a federal agency, *id.* at 1294, there was no comparable position to which the plaintiff could be reassigned, *see id.* at 1282, 1294 (noting the plaintiff was a counselor and the employer had no counselor positions open in the same metropolitan area). Here, by contrast, there were several hourly manager positions available to which Hedican could have been reassigned because they were sufficiently similar to the assistant-manager position. *See* R.42 at 5; *see also* R.23 at 33 (Walmart's corporate representative describing hourly "department manager[s]" as "very similar" to assistant managers).

employers "in the search for an acceptable reconciliation of the needs of [their] religion and the exigencies of the employer's business." *Ansonia*, 479 U.S. at 69 (citation omitted). In particular, when an employer "offers a reasonable resolution of the conflict," an employee or applicant has a duty to cooperate in carrying out that resolution. *Id.*; *see also, e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 791 (5th Cir. 2020) ("The employer's offer of a reasonable accommodation triggers an accompanying duty for the employee . . . to cooperate in achieving accommodation of his or her religious beliefs . . . ." (citation omitted)).

Because Walmart's offer was unreasonable, however, Hedican had no legal obligation to help Walmart carry it out. Indeed, no court of appeals has ever held that an employee or applicant must try an accommodation deemed by the court to be unreasonable. To the contrary, this Court has suggested that a worker's "lack of interest" in particular positions discussed as accommodations is understandable where the positions do not qualify as reasonable accommodations because they "would not be available" "in the near future." *EEOC v. United Parcel Serv.*, 94 F.3d 314, 319 & n.5 (7th Cir. 1996); *see also Draper*, 527 F.2d at 518, 519-20 (employer may be deemed to have violated Title VII even though the plaintiff did not attempt to bid on the jobs it offered as accommodations, where such jobs would have meant, *inter alia*, lower pay and "wasted . . . skills"). Moreover, except as discussed *infra* on pages 33-34, the courts of appeals to have concluded that a worker did not satisfy his duty of bilateral cooperation have done so only in cases where the court also made an independent

determination that the accommodation the employer offered was reasonable. *See, e.g.*, *Shelton*, 223 F.3d at 226-28; *Walden*, 669 F.3d at 1293-94; *cf. Wright*, 2 F.3d at 217.

In *Ansonia*, the Supreme Court recognized an employee's duty of bilateral cooperation in the context of concluding that once an employer offers an accommodation that is reasonable, the employer need not prove that other accommodations that the employee preferred would have posed an undue hardship. 479 U.S. at 68-69. *Ansonia* reasoned that if the "employer offers a reasonable resolution of the conflict," but the employee can hold out for an accommodation that he finds more advantageous, the employee would have "every incentive" to resist cooperating with the employer, thus undermining Congress's hope that "accommodation[s] would be made with 'flexibility.'" *Id.* at 69 (citation omitted). *Ansonia*'s concern about discouraging cooperation is certainly valid where the employer has presented the employee with a reasonable accommodation, but such concerns do not extend to situations where, as here, the employer offers an unreasonable accommodation. To the contrary, if a worker must try out a proposed accommodation that is unreasonable, his employer would be incentivized to offer a series of unreasonable accommodations in an effort to wear the employee down, thus undermining Title's VII's important accommodation mandate and its goal of encouraging flexibility. *Id.*

This is not to say, however, that a worker's duty of bilateral cooperation is triggered *only* if the employer first offers an accommodation that qualifies as

reasonable as a matter of law. There may be, for example, limited situations in which an employer offers something that requires a worker's participation in order to determine whether it would eliminate the religious conflict and constitute a reasonable accommodation in practice. In those cases, the employee's failure to cooperate may well redound to his detriment. In *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982), for example, the employer told the plaintiff that he could arrange shift swaps with any co-worker who was willing to do so, but the plaintiff "made only haphazard efforts" at arranging such swaps. *Id.* at 143-44, 145. The Fifth Circuit faulted the employee for not "fully explor[ing] the possibilities" that the employer had offered, stating that, "[i]n such circumstances, he cannot reject [his employer's] efforts as inadequate." *Id.* at 146; *see also id.* at 145 (also affirming determination by district court that the employer "took active steps to accommodate" the plaintiff). Similarly, when an employee makes a religious-accommodation request but quits before his employer has had an adequate chance to address the request, it may be appropriate to fault the employee for "short-circuit[ing] the interactive process required by Title VII." *EEOC v. AutoNation USA Corp.*, 52 F. App'x 327, 329 (9th Cir. 2002).

But this case presents no such scenario. Unlike in *Brener*, there was no need here to test Walmart's proposed accommodation to determine if it would eliminate the religious conflict and constitute a reasonable accommodation; instead the unreasonableness of the accommodation was apparent when it was offered because, although the accommodation would have eliminated the religious conflict, it would

have plainly resulted in an unnecessary diminution in Hedican's employment opportunities. *See supra* pp. 16-27. Nor is this a situation, as in *AutoNation*, where the employee or applicant abandoned the accommodation process before providing the employer with adequate time to reach a decision on the request. Quite the contrary, Hedican declined to explore other job opportunities only after Walmart unequivocally rescinded his offer to work as an assistant manager and made clear that he would have to reapply for any other job. R.52-10 at 2; R.45 at 39; R.47 at 14-15.

As the discussion above illustrates, if an employer offers an accommodation that is reasonable, the employee must help carry it out; but if an employer fails to offer a reasonable accommodation, the employee generally has no obligation to try the accommodation. Here, the district court apparently predicated its ruling that Hedican failed to satisfy his duty to participate in the bilateral process on its earlier conclusion that giving Hedican the opportunity to compete for inferior jobs was a reasonable accommodation. R.64 at 17-18 (A-17-18) (concluding the accommodation Walmart offered was reasonable *and* Hedican failed to engage in the bilateral process). But because that predicate ruling is wrong for the reasons already discussed, *see supra* pp. 14-31, the court's consequent holding regarding bilateral cooperation should also be reversed.

Moreover, even if the district court deemed Hedican's failure to apply for inferior jobs an independent ground for rejecting the EEOC's claim, the court's analysis was flawed because it again failed to grapple with the fact-dependent nature

of the relevant inquiry. The court cited two out-of-circuit decisions for the proposition that "[c]ourts have rejected Title VII religious accommodation claims because the plaintiff employee failed to engage with the employer regarding the employer's accommodation proposal" without acknowledging that, in each case, the court of appeals had also deemed the proposed accommodation to be reasonable. *See* R.64 at 17 (A-17) (citing *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1294 (11th Cir. 2012); and *Shelton*, 223 F.3d at 228). But, as explained above, there is no basis for extending that result to the facts here, where Walmart offered an accommodation that was unreasonable.

II. A reasonable jury would not be required to find that Walmart would incur undue hardship if it accommodated Hedican in the assistant-manager position.

The district court also erred in holding that Walmart proved as a matter of law that accommodating Hedican's request to take his Sabbath off while serving as an assistant manager would have posed an "undue hardship on the conduct of [its] business," 42 U.S.C. § 2000e(j). *See* R.64 at 1, 20 (A-1, A-20). In *Hardison*, the Supreme Court held that under Title VII's undue-hardship provision, employers need not "bear more than a de minimis cost" to accommodate a religious practice. 432 U.S. at 84.[5]

[5] The EEOC takes the position that the Supreme Court should overrule the "de minimis" standard from *Hardison*. *See* Br. for the United States as Amicus Curiae, *Patterson v. Walgreen Co.*, No. 18-349 (S. Ct. Dec. 9, 2019), 2019 WL 6727110; *cf. Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari) (writing that "in an appropriate case," the Court should "consider whether

Continued on next page.

Under *Hardison*, an accommodation poses undue hardship if it forces employers regularly to make premium (overtime) payments to someone substituting for an employee who cannot work for religious reasons. 432 U.S. at 76-77, 84. An employer is also not obliged to replace a worker seeking an accommodation with another employee who would otherwise be performing different functions, resulting in "lost efficiency." *Id.* at 84. And *Hardison* establishes that employers need not mandate shift swaps that contravene contractual seniority systems. *Id.* at 76-77, 79, 81-83.

In applying *Hardison*, this Court has emphasized that "Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that." *Adeyeye*, 721 F.3d at 455-56 (quoting § 2000e(j)). Because undue hardship is an affirmative defense under Title VII on which Walmart bears the burden of proof, Walmart may not obtain summary judgment on this ground unless it shows that the only reasonable conclusion to draw from the record is that "any and all accommodations would have imposed an undue hardship." *Id.* at 455.

Here, the EEOC proposed numerous accommodations that Walmart could have offered to Hedican that would have allowed him to serve as an assistant manager while also observing his Sabbath (from Friday sundown to Saturday sundown). Those

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Hardison's" de minimis standard "should be overruled"). In the EEOC's view, this "de minimis" standard is incompatible with Title VII's text, was adopted without explanation or the benefit of full briefing, and is in tension with subsequent precedent. *See* 2019 WL 6727110, at *19-22. We recognize in this appeal, however, that this Court is bound by *Hardison*.

include: flexible arrival and departure times; voluntary shift swaps; paid time off; an overnight shift Saturday through Tuesday, or Sunday through Wednesday; or a day shift Sunday through Thursday or Monday through Friday. *See* R.64 at 18-19 (A-18-19). And Walmart's evidence falls short of compelling the conclusion that "any and all" of these would have subjected it to undue hardship. *Adeyeye*, 721 F.3d at 455.

A. Walmart has not proven that it would have been an undue hardship to assign Hedican to a permanent shift that either did not conflict with, or that only minimally conflicted with, his Sabbath observance.

First, Walmart could have, without incurring undue hardship, assigned Hedican to an overnight schedule (8 p.m. to 8 a.m.) working Saturday through Tuesday or Sunday through Wednesday. *See* R.23 at 22-23. Or it could have assigned him to a daytime schedule (7 a.m. to 5 p.m. or 8 a.m. to 6 p.m.) working Sunday through Thursday or Monday through Friday. *Id.* It is true, as discussed, *see supra* pp. 23-24, there would be situations in which a Saturday through Tuesday overnight schedule or a Monday through Friday daytime schedule might require Walmart to adjust slightly Hedican's starting and ending times for at least part of the year to accommodate Hedican's Sabbath observance. *See* R.52-15 at 2-6, 12-19. To work the overnight shift on Saturdays, for example, his starting and ending times would need to be delayed by up to an hour or so during certain spring and summer months. *See id.* at 2-6.

Lori Ahern, the human resources official who was the principal decisionmaker on Hedican's accommodation request, rejected making such scheduling adjustments

because she stated that they would not "necessarily match" Walmart's needs, R.24 at 38, and would require other assistant managers to "adjust their schedules," R.47 at 13. She did not explain, however, how such adjustments conflicted with Walmart's needs or why other assistant managers covering different areas of the store would need to adjust their schedules because of a slight modification to Hedican's schedule. In addition, Ahern claimed that adjusting Hedican's schedule "would be a lot for [the store] manager to keep track of because [the time of sundown] varies day by day," R.47 at 13, and Ahern also apparently deemed such an arrangement infeasible because it "would be something [Walmart] would have to do differently just for" Hedican, R.24 at 38. But a jury could reasonably reject Walmart's contention that any such consequences constituted an undue hardship.

For one thing, adjustments to Hedican's schedule would have been unnecessary if he were assigned to an overnight or daytime schedule that started on a Sunday. In addition, contrary to Ahern's apparent understanding, the mere fact that offering flexible arrival and departure times was something Walmart "would have to do differently just for" Hedican does not establish that it would have posed an undue hardship. *Id.* Quite the contrary, accommodations under § 2000e(j) are frequently modifications that employers must make to otherwise-neutral workplace policies specifically for a worker's religious practices. *E.g.*, *Abercrombie*, 135 S. Ct. at 2032 n.2, 2034; *see also Reed*, 330 F.3d at 934-35 (noting "Title VII requires an employer to try

to . . . adjust the requirements of the job so that [an] employee can remain employed without giving up the practice of his religion").

Nor would a jury be required to conclude that it would have been an undue hardship for the store manager to keep track of any flexible arrival and departure times Hedican received as accommodations. If Walmart assigned Hedican to an overnight shift that started on Saturday evenings, for example, it could have simply adjusted his schedule to work from 9:15 p.m. to 9:15 a.m., rather than the standard 8 p.m. to 8 a.m. shift, during certain spring and summer months when the sun sets after 8 p.m. R.52-15 at 2-6; R.23 at 23. Or, if Walmart preferred, it could have provided Hedican with a modified 9:15 p.m. to 9:15 a.m. schedule for the entire duration of his assignment to the overnight area. If Hedican were assigned to a daytime shift, Walmart could have made similar one- or two-hour adjustments to his schedule to account for the fact that, in certain fall and winter months, the sun went down in Hayward before 5 or 6 p.m., the usual ending time for two of Walmart's daytime shifts. *See* R.52-15 at 12-19; R.23 at 22-23.

And because the approximate time of sunset during various periods of the year is common knowledge, Walmart would have had ample advance notice regarding when these issues would arise, and it could plan accordingly. *See Ilona of Hungary, Inc.*, 108 F.3d at 1576-77 (employer failed to establish that it would have been an undue hardship to modify plaintiffs' work schedules because the employer had "ample time" to make the adjustments after learning of plaintiffs' religious conflict). Under this

Court's case law, implementing such minor schedule modifications would not amount to undue hardship. *See id.*; *cf. Adeyeye*, 721 F.3d at 455-56 (recognizing that "costs . . . incurred in rearranging schedules [do] not amount to an undue hardship" and relying on 29 C.F.R. § 1605.2(e)(1), which sets forth similar proposition).

Walmart argued in district court that even if it could have initially scheduled Hedican to work a shift that did not conflict with his Sabbath (with minor schedule adjustments, if needed), "no [a]ssistant [m]anager is ever granted a permanent schedule." R.41 at 7. According to Walmart, Hedican "would have eventually had to rotate to" a new area of responsibility (such as apparel, entertainment, or overnights)—and a new schedule—"that would require working Saturday before sundown." *Id.* at 18; *see also* R.60 at 16. And it is true that store manager Dale Buck's general practice was to rotate assistant managers in the Hayward store to new areas about once a year, although he typically waited longer, up to two years, if an assistant manager joined Walmart mid-way through the year, as would have been the case for Hedican. *See* R.44 at 27; R.52-4 at 2; *see also* R.44 at 15-16.

Adopting Walmart's argument on this point, the district court relied on the fact that the company had an "expectation and practice" that assistant managers "would rotate through all areas of responsibility." R.64 at 7, 19 (A-7, A-19). Contrary to the district court's apparent assumption, however, the pertinent question is not whether Walmart maintained such a practice but rather whether diverging from it to accommodate Hedican's religious observance would have caused Walmart undue

hardship. *See Abercrombie*, 135 S. Ct. at 2034 (making clear that employers must make exceptions to generally applicable employment practices to accommodate an applicant's religious observance, short of undue hardship). And a jury would have good reason to doubt that Walmart would have endured undue hardship if it had exempted Hedican from its general practice of rotating assistant managers.

Walmart claimed that it periodically rotated assistant managers so they could gain "experience in each area of store operations" and thus fill in for each other as needed. R.41 at 5, 9. Walmart also stated that "being over the same area of responsibility for too long would hinder the [a]ssistant [m]anagers' [professional] development and cause them to fall behind on innovations in other areas." R.41 at 5; *see also id.* at 7 n.4 (stating that allowing one assistant manager to work in one area permanently would "hinder the growth and development of" that assistant manager, as well as others "who would be blocked from learning the area" occupied by the first assistant manager). But a reasonable jury would not have to agree that it would have been an undue hardship for Walmart to exempt Hedican from this general practice.

A jury could reasonably conclude, for instance, that Walmart could have assigned Hedican to a permanent, or at least indefinite, overnight shift, which had two assistant managers assigned to it at any given time. R.38 at 2. Walmart's operational needs would have been met in that situation, a reasonable jury could find, because every assistant manager other than Hedican would have an opportunity to rotate through all the areas of responsibility, including overnights, so they could easily fill in

for each other and advance their own professional development. Moreover, a jury could reasonably conclude that Hedican also could have readily filled in for other assistant managers under such an arrangement, given that he would have been assigned to overnights, and thus would have experience overseeing "literally anything that happen[ed]" in the store during the overnight hours, including in other areas of responsibility such as apparel or entertainment. R.23 at 24. Indeed, under this arrangement, it stands to reason that Hedican's experience in all areas of the store would at least rival that of the other seven assistant managers, who—a jury could reasonably conclude—would not have experience being assigned to each of the seven areas of the store until they had worked for at least seven years, *see* R.38 at 2-3 (Buck stating there were seven areas of responsibility in the store, and he typically rotated assistant managers every February).

Further undercutting Walmart's undue-hardship argument, it is undisputed that Walmart assigned one assistant manager in the Hayward store to an overnight schedule for more than two years, from July 2016 to September 2018, *see* R.52-13 at 2-14; R.44 at 34, the very period that Hedican likely would have been working in that store, R.52-3 at 2; R.52-4 at 2. And Walmart admits that it allowed some assistant managers in other stores to work "in the same area for up to six years." R.23 at 25. A jury could reasonably conclude that Walmart should have offered a similar arrangement to Hedican. *See, e.g.*, *Consol Energy, Inc.*, 860 F.3d at 143 (suggesting in dictum that an accommodation likely will not pose undue hardship where the

employer has offered the same arrangement to similarly situated employees); *United States v. City of Albuquerque*, 545 F.2d 110, 114-15 (10th Cir. 1976) (similar).

It is also significant on this point that Walmart readily acknowledged that the company's practice of rotating managers was recommended but not always required, R.23 at 25; R.24 at 36. And it is undisputed that the assistant-manager job description says nothing about rotations. *See* R.52-11 at 2-5. For all these reasons, a jury could reasonably determine that Walmart would not have incurred undue hardship if it had exempted Hedican from its practice of rotating assistant managers and, instead, given him a permanent or indefinite assignment working a shift that interfered minimally, if at all, with his Sabbath observance. This consideration alone supports reversal of the district court's ruling on the undue-hardship defense. *See Adeyeye*, 721 F.3d at 455 (employer must prove "any and all accommodations would have imposed an undue hardship").

B. Even if Hedican were assigned regular Sabbath shifts, Walmart has not proven that it would have been an undue hardship to let him use time off and voluntary shift swaps to accommodate his religious needs.

Even assuming, as Ahern asserted, that Walmart would have "at some point" needed to rotate Hedican to a shift that entailed regular Saturday work, R.24 at 35-36, a jury could still reasonably conclude that Hedican could have avoided work on his Sabbath by combining voluntary shift swaps with accrued leave, and Walmart has not

established that a jury would be required to find that these accommodations would have imposed an undue hardship.

The district court stated that it was "logical" for Ahern "to conclude that it would be difficult or impractical for Hedican to attempt to swap shifts with other assistant managers." R.64 at 20 (A-20). But the relevant question is whether Walmart put forth evidence that would require a reasonable jury to find that voluntary shift swaps would have been infeasible, and a reasonable jury could conclude that such a finding was not compelled here. Store manager Buck stated that he "usually scheduled half or more of the [a]ssistant [m]anagers on any given Saturday," and that "[o]n average," assistant managers at the Hayward store worked "more than 60% of Saturdays." R.38 at 4, 5. Therefore, because there were eight assistant managers total, *id.* at 2, if Hedican were scheduled to work before sundown on a particular Saturday, a jury could reasonably conclude that there typically would have been three or four assistant managers with whom he could potentially trade shifts. Moreover, it is undisputed that assistant managers most often requested Fridays, Saturdays, and Sundays as days off. R.44 at 28. Hedican was available to work 48 of the 72 hours most requested off (anytime on Sundays, before sundown on Fridays, and after sundown on Saturdays). A reasonable jury could therefore conclude that, if Walmart scheduled Hedican to a daytime shift on Saturdays, he could have swapped that shift with one of his co-workers who might have preferred to take another day off, like a Friday or a Sunday. *See Opuku-Boateng v. California*, 95 F.3d 1461, 1471 (9th Cir. 1996)

(reasoning, on similar facts, that "other employees [may] have been willing to trade for many, if not all, of [the plaintiff's] Sabbath shifts in exchange for" shifts they found less desirable).

Importantly, Ahern did not bother to ask the other assistant managers whether they would be willing to swap shifts with Hedican. R.47 at 14. In addition, a jury could conclude that Ahern did not even discuss this possibility with store manager Buck, as he denied ever talking to Ahern about shift swaps. R.44 at 24. Instead, Ahern merely speculated that other managers "may have plans" and thus "may not want to" trade shifts with Hedican. R.47 at 13-14. But such speculative assumptions cannot support Walmart's undue-hardship defense. Title VII requires employers to "demonstrate[]," not speculate, that an accommodation poses an undue hardship. 42 U.S.C. § 2000e(j). Accordingly, courts have expressed "skeptic[ism]" "of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice." *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (citation omitted). Courts have instead demanded that employers base their undue-hardship assessments on objective evidence. *See, e.g.*, *Tabura*, 880 F.3d at 558 (reversing summary judgment for employer where it "did not . . . cite to any evidence to support its assertion[]" that accommodating plaintiffs' need to observe their Sabbath would impose an undue hardship); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979). *See generally* EEOC Compliance Manual § 12-IV(B)(1) & nn.146 & 147, 2008 WL 3862099 (citing cases).

In *Opuku-Boateng*, for example, the Ninth Circuit concluded that the employer failed to prove that voluntary shift swaps would have been infeasible because, although the employer took an "informal poll" of the plaintiff's prospective co-workers to determine whether they would swap shifts with him, the court held that it "failed to conduct the type of inquiry into the feasibility of trading shifts that would have been necessary to answer that question one way or the other, and thus to enable it to carry its burden." 95 F.3d at 1471-72. Here, Walmart did not even conduct an "informal poll" like the employer in *Opuku-Boateng*. *Id.* at 1471. Walmart therefore has not shown that voluntary shift swaps would have posed an undue hardship, as it predicated its conclusion that they were infeasible not on objective facts but on Ahern's speculative hypothesis. Thus, reversal on the district court's undue-hardship ruling is warranted based on consideration of this accommodation, standing alone.

Next, the district court's decision overlooks the possibility that Hedican could have used accrued annual leave, in combination with shift swaps, to avoid working on his Sabbath. The court discounted paid leave as a feasible accommodation because it thought that Hedican would not "begin to acquire paid time off" until "after he had worked for [Walmart] for one full fiscal year." R.64 at 3, 19 (A-3, A-19). But a jury could reasonably construe the document on which the district court relied—Hedican's offer letter—to have entitled Hedican to 21 days of paid time off each fiscal year, *and* a prorated amount available between his start date and the beginning of the upcoming fiscal year. *See* R.52-3 at 3 (providing that salaried employees "receive a grant of [paid

time off] each February 1" for the following twelve months, noting such employees "receive 21 days of [paid time off] on the first full plan year after [their] hire date," and explaining that, "[f]or [such employees'] first year," paid time off "will be pro-rated relative to [their] month of transfer"); *see also* R.44 at 16-17 (Buck deposition indicating that Hedican likely would have been entitled to some amount of paid time off upon being hired).

In any event, Buck's testimony indicates that if an assistant manager were hired in the summer—which would have been true in Hedican's case, R.52-4 at 2; R.41 at 9—he likely would not have rotated that assistant manager to a new schedule "for almost two years," R.44 at 27. Therefore, even under the district court's reading of the offer letter, Hedican would have been entitled to at least 21 days of annual paid time off by the time Walmart would have rotated him to another area of responsibility. R.52-3 at 3. Therefore, a jury could reasonably determine that Walmart could have initially assigned Hedican to a schedule that did not conflict with his Sabbath, and it then could have rotated Hedican to any schedule, including one that involved regular shifts working Saturdays before sundown. By that point, a jury could reasonably find, Hedican would have been able to combine his accrued time off with periodic voluntary shift swaps to avoid working on his Sabbath. *Cf. Opuku-Boateng*, 95 F.3d at 1474-75 (holding that where an applicant seeks an accommodation and a viable arrangement is immediately available, the employer must offer this arrangement in the short term until it can "determine what actual hardships, if any, would result").

* * *

Walmart argued in district court that even if Hedican could have avoided being scheduled to work on his Sabbath through the accommodations just described, there might have been situations in which he would have needed to come into work unexpectedly, which could have interfered with his Sabbath. It said, for example, that "if customers complain[ed] that produce quality [wa]s poor on Saturday mornings, the [a]ssistant [m]anager over the [f]resh area would be expected to spend more time in produce on Saturday mornings to find out what[] [was] happening and fix it." R.41 at 6-7. It is true that Walmart's corporate representative testified that such a hypothetical situation could arise, R.23 at 24-25, but—despite having the burden of proving undue hardship—Walmart has not offered any evidence to suggest (1) that such an occurrence requiring an assistant manager's immediate action would come up with any regularity; or (2) that a voluntary swap with another assistant manager would be impossible in that situation. As noted above, *see supra* pp. 46-47, employers cannot rely on such hypotheticals to satisfy their burden of proving undue hardship under Title VII, but rather must rely on objective information. Walmart has cited none here.

As the discussion above shows, the district court erred in adopting Walmart's argument that if it had accommodated Hedican's request to avoid Sabbath work, it inevitably would have been forced to: (1) require another manager "to work on additional Saturdays" involuntarily; (2) hire another manager to fill in for Hedican; or (3) "operat[e] the store with one less manager than needed." R.64 at 20 (A-20).

Walmart plainly would not have been required to take any of these three actions if it had assigned Hedican to a permanent shift that did not conflict with his Sabbath (which Walmart could have accomplished by slightly adjusting Hedican's arrival and departure times if required). And even if Walmart eventually would have needed to rotate Hedican to a shift involving regular work on his Sabbath, the district court's analysis presupposed that Hedican could not have used accrued leave to avoid Sabbath shifts and that he could not have exchanged his Sabbath shifts with other assistant managers who volunteered to do so. If Hedican could have done these things, Walmart would not have needed to take any of the three actions the court identified. The district court therefore erred in concluding that a reasonable jury would be compelled to find that Walmart proved that it would have suffered undue hardship if it had accommodated Hedican in the assistant-manager position.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

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August 21, 2020

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 13,074 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 Garamond 14-point font, a proportionally spaced typeface.

/s/ Philip M. Kovnat
PHILIP M. KOVNAT

STATEMENT CONCERNING APPENDIX

Pursuant to Circuit Rule 30(d), I certify that all the materials required by Circuit Rules 30(a) and (b) are included. The materials required by Rule 30(a) are bound with this brief in the section labeled "APPENDIX."

/s/ Philip M. Kovnat
PHILIP M. KOVNAT

APPENDIX

APPENDIX: TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

- -

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

OPINION AND ORDER

Plaintiff,

18-cv-804-bbc

v.

WALMART STORES EAST LP AND WALMART, INC.,

Defendant.

- -

Plaintiff Equal Employment Opportunity Commission brought this lawsuit on behalf of Edward C. Hedican, contending that defendant Walmart Stores East LP and Walmart, Inc. engaged in religious discrimination and retaliation under Title VII of the Civil Rights Act of 1964. In particular, plaintiff contends that defendant refused to accommodate Hedican's request to not work on Saturdays, which he observed as the Sabbath, and that defendant rescinded its offer of employment in retaliation for Hedican's request for a religious accommodation. Defendant has filed a motion for summary judgment, contending that it offered Hedican a reasonable accommodation, that allowing Hedican to have every Saturday off would have been an undue hardship and that it did not retaliate against Hedican. Dkt. #19. Because I conclude that defendant offered Hedican a reasonable accommodation and has shown that it could not accommodate plaintiff's request to have every Saturday off without incurring undue hardship, I will grant defendant's motion.

From the parties' proposed findings of facts and responses, I find the following facts

to be material and undisputed unless otherwise noted.

UNDISPUTED FACTS

A. The Parties and Background

In 2016, plaintiff Edward Hedican was a practicing Seventh Day Adventist. Hedican observed the Sabbath by refraining from work each week from sundown on Friday night to sundown on Saturday night.

In April 2016, Hedican applied to become an assistant manager at defendant's store in Hayward, Wisconsin. Hayward is a vacation destination and resort town with many rental properties and vacation homes on its many lakes, and it is especially popular in the summer months. Hedican had two interviews and a store tour. Lori Ahern, defendant's market human resources manager, conducted a phone interview with Hedican. Ahern asked Hedican about his education and past employment, but did not discuss Hedican's availability or scheduling during the phone interview. About a week later, Hedican had a telephone interview with the Hayward store manager, Dale Buck. Buck talked to Hedican about the "Walmart philosophy" and asked Hedican about his education and experience, but Buck did not talk about scheduling with Hedican. During the store tour, Buck told Hedican that assistant managers were expected to work 45 hours a week, with varying schedules and different shifts, but Buck did not talk about specific schedules that assistant managers worked.

On April 28, 2016, defendant made a conditional offer of employment to Hedican

as an assistant manager. Defendant scheduled Hedican to start a training class in June 2016. If he had completed the training program successfully and passed his preemployment screening, Hedican would have begun working in the Hayward store as an assistant manager with the starting salary of $45,000. According to the offer letter, Hedican would begin to acquire paid time off after he had worked for defendant for one full fiscal year.

On May 1, 2016, Hedican accepted defendant's conditional offer of employment by email, and informed defendant that he was a Seventh Day Adventist, he observed the Sabbath and he would not be able to work any Saturdays until after sundown. He stated that he was available any other day of the week and could be available after sundown on Saturday nights if needed. This was the first time that Hedican told defendant that he had restrictions with respect to scheduling. Hedican told defendant that he would wait to complete the new hire paperwork until defendant confirmed that he would not be required to work Saturdays.

When market human resources manager Ahern received Hedican's request for accommodation of his Sabbath, she sent Hedican's email to Hayward store manager Buck for his information. Ahern did not talk to Buck about the email at that time, and Buck did not talk to Hedican about his religious accommodation request. Ahern consulted defendant's religious accommodations guidelines. Defendant's policy at that time was to provide religious accommodations for applicants or associates to comply with their sincerely held religious beliefs unless the requested accommodation would pose an undue hardship on the business. Defendant's "religious accommodation guidelines" list the following as

accommodations which may be necessary to accommodate a request for time off or a schedule change: flexible arrival and departure times; staggered work hours; and voluntary swaps with other associates. The guidelines state that if a salaried manager on a rotating schedule requests a schedule that would allow him or her to never work a particular day, the human resources representative or manager should determine the frequency with which the requestor is scheduled to work on the particular day in question. The guidelines recommend that the human resources representative or manager should advise the individual that he or she may be able to arrange a shift swap with another manager and that defendant can help facilitate that by providing an email or other means of communication. The guidelines also advise that all managers should work collaboratively and swap shifts as needed for personal or religious reasons. Finally, the guidelines state that whether an accommodation imposes an undue hardship must be determined on a case-by-case basis, and that the objections or resentment of other associates is not an undue hardship.

On May 2, 2016, Ahern sent Hedican an accommodation request form to fill out. The form referred to disability accommodation and medical needs, and did not refer to religious accommodations specifically. Several of the questions on the form are irrelevant to religious accommodation requests. However, defendant did not have a specific form for religious accommodations and used some of the same forms in the religious accommodation process as it did for disability accommodations. Ahern told Hedican that defendant's Americans with Disabilities Act department would handle his accommodation request.

Hedican returned the accommodation form to Ahern by email that same day,

requesting "No Saturday workshifts for religious circumstances/beliefs . . . [f]or the entire term of employment." (At his deposition, Hedican stated that he would not have been able to work on Fridays after sundown either, but agreed that his request to defendant was for Saturdays off.) Ahern forwarded Hedican's request to defendant's Accommodation Service Center. On May 11, 2016, the center returned Hedican's request for a religious accommodation to Ahern, stating that the center did not approve accommodations for religious beliefs and that Ahern should handle the request. Ahern felt comfortable handling the request, as she had previously addressed other requests for religious accommodations, including transferring an hourly manager into a position where he would not have to work Saturdays before sundown.

Ahern considered several factors in determining whether defendant could accommodate Hedican's request for Saturdays off as an assistant manager at the Hayward store. She considered defendant's expectations for assistant managers, the assistant manager's role at the Hayward store in particular and the staffing and other needs of the Hayward store. (Ahern testified at her deposition that she discussed Hedican's request and how it would affect the store's operation with Buck the store manager, including how the request would affect stocking and recovery, coverage for management calls, coverage overall and rotations. However, Buck testified at his deposition that although he may have had a conversation with Ahern about Hedican's request, scheduling or other hourly supervisor positions that were available in the store, he could not recall the conversation.)

Assistant managers, along with the store manager, play a key role in managing

defendant's stores. The assistant manager's duties include hiring, training, mentoring, assigning and evaluating hourly associates, overseeing the stocking and rotation of merchandise, creating effective merchandise presentation, insuring accurate pricing, monitoring expenses, asset protection and safety controls, overseeing safety and operational reviews, analyzing reports and modeling proper customer service. All assistant managers are assigned to an area of responsibility within the store, where they are responsible for driving sales, supervising and developing hourly associates, meeting profit goals, assessing community needs and economic trends, participating in community outreach programs and insuring compliance with company policies. Areas of responsibility include: apparel; fresh; consumables; hard lines; entertainment; backroom; and overnights. Within each area of responsibility are multiple departments. For example, "apparel" includes clothing and shoes; "fresh" includes bakery, deli, meat and produce; and "overnights" includes cleaning, maintenance and stocking. Most departments have a department manager who reports to the assistant manager and who supervises associates, tracks inventory and verifies price accuracy. Store managers and assistant managers are salaried and exempt from overtime. All other store associates, including department managers, are paid on an hourly basis and eligible for overtime.

Defendant requires its assistant managers to be familiar with all aspects of its operation. To achieve this, assistant managers are not assigned to any area on a permanent basis. Instead, they are rotated through different functional areas, typically on an annual basis, so that they may learn or refresh skills in all aspects of the business. Annual rotation

gives assistant managers experience in each area of store operations, which allows them to cover for one another and to develop skills necessary to advance with defendant. Timing of the rotation of the areas of assistant managers is at the discretion of the store manager. It is possible to have an assistant manager in an area for more than a year, and defendant has allowed an employee to work in the same area for up to six years. However, defendant discourages store managers from keeping assistant managers in a position for too long. At the Hayward store, store manager Buck typically rotates assistant manager assignments each February, though he has kept an assistant manager in an area for longer than one year due to business needs. For example, if an assistant manager is hired during the summer months, Buck may decide not to rotate that manager to a new area in February. (Plaintiff disputes whether defendant required assistant managers to rotate to different areas of responsibility, and points out that defendant does not have a written policy requiring store managers to rotate assistant manager to different areas of responsibility every year. However, the dispute is not genuine, as plaintiff has cited no evidence to dispute defendant's assertion that it was an expectation and practice that store managers would rotate through all areas of responsibility and that no assistant managers are permanently assigned to an area. Plaintiff also has not cited evidence to dispute Buck's assertion that he rotated assistant managers annually unless there were specific business needs that dictated otherwise.)

Defendant determines the number of salaried managers at a given location by the store's sales volume. In 2016, the Hayward store was allowed one store manager and eight assistant managers. When the Hayward store was fully staffed with assistant managers, two

assistant managers were assigned to overnights and the other six were each assigned to different daytime functional areas (fresh, consumables, apparel, hard lines, entertainment and backroom). The assistant managers assigned to overnight rotation were scheduled to work four days on, three days off, from 8 p.m. to 8 a.m. Assistant managers in the other areas of responsibility worked five days a week. The days and times varied, but fell into one of three shifts: 7 a.m. to 5 p.m.; 8 a.m. to 6 p.m.; or 11 a.m. to 9 p.m. The Hayward store was open 24 hours a day, seven days a week, and an assistant manager's schedule usually varied from day to day and week to week. Generally, Buck made the schedules about three weeks in advance, sometimes more. When assistant managers rotated to a new area of responsibility, they also rotated to a new schedule designed to maximize their efficiency and impact in that new area.

Different areas of responsibility had different variables that affected staffing needs, including traffic patterns, services provided, inventory review schedules, shipment delivery days and the number and type of employees. Defendant does not have a policy requiring assistant managers to work on Saturdays, but defendant expects assistant managers to be available to work at any hour of any day, in case something happens in their area of responsibility that the assistant manager needs to take care of on a given day or time. At the Hayward store, Buck required assistant managers to work on Saturdays, although every assistant manager was not required to work every Saturday.

In 2016, the Hayward store lacked a full staff of associates, which required the assistant managers to work more to cover the store's needs. Fridays and Saturdays were

usually the busiest days for the Hayward store. Friday was usually the highest sales day of the week, and Saturday was the busiest in terms of the number of people coming into the store, services to customers, restocking shelves, bakery and deli production and the number of arriving shipments to be unpacked. Frequently, there were less experienced associates working on Saturdays, especially during the summer season, because some associates were new, temporary, seasonal or worked only on weekends. This meant that managers had to oversee associates more closely on the weekends than they might on other days of the week.

During the summer, the Hayward store had customers visiting from out of town who would have additional questions and need help finding products in the store, which could require management assistance. The Hayward store also offered specialty services, including hunting licenses, fishing licenses, gun sales and a separate liquor store which required staffing management coverage during breaks and busy times. (Plaintiff attempts to dispute some of these facts by stating that Ahern could not remember details at her deposition regarding, for example, how many temporary associates worked at the Hayward store in 2016, how many out-of-town visitors required management assistance or how many associates were scheduled in each department. However, plaintiff has failed to submit any evidence to refute Ahern's or Buck's sworn statements about the general operation and needs of the Hayward store.)

Usually about half of the Hayward store's assistant managers were scheduled to work on any given Saturday. The other half were not scheduled. Between July 1, 2016 and June 30, 2018, each assistant manager at the Hayward store was scheduled to work on more than 60% of Saturdays on average. The assistant manager with the fewest scheduled Saturdays

during those two years was scheduled for 48% of all Saturdays, while the assistant manager with the most scheduled Saturdays was scheduled for 82% of all Saturdays. Some areas of responsibility may lead to long stretches without frequent Saturday work, but all assistant managers worked Saturdays eventually as they rotated through different areas of the store. Weekends are the days that assistant managers most frequently request off, and store manager Buck tried to give all assistant managers Saturdays and Sundays off on occasion.

If the Hayward store was short an assistant manager, Buck tried to cover the hours by asking other assistant managers to come in early or stay later, by asking an assistant manager to come in on his or her day off or by working the shift himself. Buck would sometimes have to deny an assistant manager's request for time off if there were not enough assistant managers with experience in the requesting manager's area of responsibility.

After considering the above information, Ahern concluded that assistant managers at the Hayward store must be available to work on Saturdays. The latest time for sunset in the Hayward area is around 9 p.m., during the summer months, and the earliest sunset is around 4:30 p.m. This meant that during the winter months, Hedican would have been unavailable from 4:30 p.m. or 5:00 p.m. on Fridays to 4:30 or 5:00 p.m. on Saturdays in some weeks. During the summer months, he would have been unavailable from 8:30 or 9:00 p.m. on Fridays to 8:30 or 9:00 p.m. on Saturdays in some weeks. Ahern concluded that accommodating Hedican would impose a hardship on defendant because the store would lack management coverage on Saturdays, which could lead to a loss in customer service and sales.

Ahern did not think that Hedican would be able to swap shifts with other assistant managers because the number of people available to swap shifts was so small that there might not always be someone available to take Hedican's Saturday shifts. At least half of the eight assistant managers would likely be scheduled on any given Saturday, and the other three, not including Hedican, may have plans. She also did not think allowing Hedican to use personal time on Saturdays was an option because Hedican would not have personal time available during his first year of employment, and his taking the time off would still leave defendant having to staff the store with other assistant managers. Ahern concluded that having Hedican work the overnight shift and giving him a more flexible starting time to account for the time of sunset would not be a viable accommodation because having to deal with an ever-changing start time for the overnight manager would be a logistical hardship. She also concluded that even if Hedican's schedule could be accommodated in the overnight shift, he would have problems when he rotated to another area of responsibility.

On May 18, 2016, Ahern sent Hedican an email denying his religious accommodation request to have every Saturday off indefinitely and rescinding the job offer. Ahern stated, "Please advise me of any interest that you may have in other positions in the store and I can assist you in the application process for them." Ahern and Hedican later spoke on the phone. Ahern told Hedican that there were non-salaried supervisory positions for which he could apply and that Ahen could help him apply for those. Those positions would have been full-time, non-salaried positions and would have paid less than the assistant manager role, but they would have provided the opportunity for overtime compensation and would not

have required Saturday work. (Neither side put in evidence about how much the other positions would have paid.) She stated that there were no assistant manager positions for which Hedican could have every Saturday off, and that it would not be fair to other assistant managers to give one assistant manager every Saturday off. Hedican told Ahern that he could work after sundown on Saturdays, that he was flexible every other day of the week and that he could cover days that other assistant managers needed off that were not Saturday. Ahern did not offer to accommodate Hedican by proposing a modified schedule, a flexible arrival time or potential shift swaps with other assistant managers. Hedican did not investigate other open positions and never contacted Ahern to discuss the open positions.

OPINION

Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. 42 U.S.C. § 2000e-2; 2000e(j); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015). Title VII also prohibits employers from retaliating against employees or applicants for opposing any unlawful employment practice. 42 U.S.C. § 2000e-3. In this case, plaintiff's brings both a failure to accommodate and a retaliation claim against defendant. However, the retaliation claim is simply a repackaging of the failure to accommodate claim and is based on the same allegations and arguments, so there is no need to analyze the claims separately.

To survive summary judgment, plaintiff must submit evidence of a prima facie case

of religious discrimination, meaning evidence that (1) his bona fide religious practice conflicted with an employment requirement, (2) he notified the defendant of the practice and (3) defendant rescinded his job offer because of plaintiff's religious practice. Porter v. City of Chicago, 700 F.3d 944, 951 (7th Cir. 2012). If plaintiff establishes a prima facie case, the burden shifts to defendant to show either that it offered plaintiff a reasonable accommodation or that it could not do so without undue hardship. Id. In this instance, defendant assumes that plaintiff can establish a prima facie case. However, defendant asserts that (1) it offered plaintiff a reasonable accommodation; (2) plaintiff did not make a good faith effort to engage with defendant about the accommodation defendant offered; and (3) plaintiff's preferred accommodations would have imposed an undue hardship on defendant.

A. Reasonable Accommodation

Defendant contends that it offered plaintiff a reasonable accommodation by notifying him that there were open hourly management positions that would not require Saturday work and by inviting him to apply for those positions. "A reasonable accommodation is one that 'eliminates the conflict between employment requirements and religious practices.'" Ansonia Board of Education v. Philbrook, 479 U.S. 60, 70 (1986). See also Abercrombie & Fitch, 575 U.S. 768, n.2 (accommodating an employee's religious practice means "allowing the plaintiff to engage in [his or] her religious practice despite the employer's normal rules to the contrary").

Plaintiff contends that defendant's communication regarding alternative positions was

not a reasonable accommodation for two reasons. First, plaintiff says it was not reasonable for defendant to offer plaintiff only the opportunity to apply for a position and not offer him a job. However, several courts have concluded that offering an employee the opportunity to apply for alternative positions that would accommodate their religious practice can be a reasonable accommodation. See, e.g., Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993) (giving employee opportunity to bid on jobs that would have accommodated his religious practice was reasonable accommodation); Bruff v. North Mississippi Health Servs., Inc., 244 F.3d 495, 502 (5th Cir. 2001) (offering to give employee 30 days to find another position that would not conflict with religious beliefs was reasonable accommodation); Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220, 227 (3d Cir. 2000) (offering to meet with employee to discuss other available positions that would resolve religious conflict was reasonable accommodation); Telfair v. Federal Express Corp., 567 F. App'x 681, 684 (11th Cir. 2014) (giving employees opportunity to apply for open positions was reasonable accommodation). Therefore, the fact that defendant offered plaintiff only the opportunity to apply for open positions, as well as help in doing so, does not render defendant's proposed accommodation unreasonable.

Plaintiff also argues that defendant's proposed accommodation was unreasonable because the hourly management positions would have paid less than the assistant manager position that plaintiff was offered. Plaintiff is correct that, in some circumstances, an employer's offering a different position with lower pay and benefits might not be a reasonable accommodation. See, e.g., Porter, 700 F.3d at 952 ("Had changing watch groups

affected Porter's pay or other benefits, a much more rigorous inquiry would be required."); Rodriguez v. City of Chicago, 156 F.3d 771, 776 (7th Cir. 1998) (noting that shift change or job transfer may be reasonable accommodation "particularly when such changes do not reduce pay or cause loss of benefits"); Wright, 2 F.3d at 217 ("A much more searching inquiry might also be necessary if Wright, in order to accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits.").

On the other hand, Title VII does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Philbrook, 479 U.S. at 68. Title VII also does not require employers to accommodate an employee's religious practices in a way that "spares the employee any cost whatsoever." Tabura v. Kellogg USA, 880 F.3d 544, 550–51 (10th Cir. 2018) (citation omitted). See also Getz v. Pennsylvania Dep't of Public Welfare, 802 F.2d 72, 74 (3d Cir. 1986); Brener v. Diagnostic Center Hospital, 671 F.2d 141, 145-46 & 146 n.3 (5th Cir. 1982) ("A reasonable accommodation need not be on the employee's terms, only."). "[A]ny reasonable accommodation by the employer is sufficient to meet its accommodation obligation." Philbrook, 479 U.S. at 70. "So long as the accommodation offered by the employer reasonably balances the employee's observance of [his or] her religion with the employer's legitimate interest, it must be deemed acceptable." Miller v. Port Authority of New York & New Jersey, 351 F. Supp. 3d 762, 779 (D.N.J. 2018), aff'd, No. 18-3710, 2019 WL 5095749 (3d Cir. Oct. 11, 2019) (quoting Cloutier v. Costco Wholesale, 311 F.Supp.2d 190, 200 (D. Mass. Mar. 30, 2004)).

Numerous courts have concluded that an offer to help an employee find another posittion that does not require Sabbath work is a reasonable accommodation, even if the other position pays less or is less desireable. See, e.g., Walker v. Indian River Transp. Co., 741 F. App'x 740, 747 (11th Cir. 2018) (because assigning employee to different driving route was the "only way to ensure that he would not have mandatory Sunday work," the "fact that at least some of those routes happened to pay less" was insufficient to render accommodation unreasonable); Telfair, 567 F. App'x at 684 (FedEx's offer to move employees to different positions, albeit lower paying ones, that would have satisfied their scheduling criteria was reasonable accommodation); Bruff, 244 F.3d at 502, n.23 (noting that "a significant reduction in salary" was insufficient on its own to make accommodation unreasonable). See also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73 (1977) (requiring employee to take unpaid leave to observe religious practices was reasonable).

In this instance, neither side submitted any specific evidence about the salary ranges of hourly management positions compared to the assistant manager position. The only evidence in the record is that hourly manager positions paid "a little less" than the assistant manager position, required fewer hours and provided the opportunity for overtime. It is difficult to evaluate the reasonableness of the accommodation without more information about the jobs for which Hedican could have applied.

However, defendant is not solely to blame for this missing evidence. It is well-established that employees have a duty to cooperate with an employer in searching for an accommodation for religious needs. Philbrook, 479 U.S. at 68. See also Porter, 700 F.3d

at 953 (employer and employee must engage in "bilateral cooperation" in attempting to find reasonable accommodation for religious needs); Brener, 671 F.2d at 146 ("Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer."). Courts have rejected Title VII religious accommodation claims because the plaintiff employee failed to engage with the employer regarding the employer's accommodation proposal. See, e.g., Walden v. Centers for Disease Control & Prevention, 669 F.3d 1277, 1294 (11th Cir. 2012) (affirming summary judgment to employer where employee failed to "make a good faith attempt to accommodate her needs through the offered accommodation"); Shelton, 223 F.3d at 228 (affirming summary judgment to employer where employee's "refusal to cooperate in attempting to find acceptable religious accommodation was unjustified"). In this case, Hedican declined to apply for any open positions with defendant and declined to even explore with human resources manager Ahern what other positions were open. Ahern offered to help Hedican apply for positions, but he never contacted Ahern. Under the circumstances, I conclude that Hedican failed to satisfy his duty to make a good faith effort to cooperate with defendant in finding a reasonable accommodation. He cannot now complain that the proposed alternative hourly management positions identified by defendant would not have been reasonable accommodations.

In sum, plaintiff's need for Saturdays off meant that he lacked the flexibility required for the assistant manager position, so defendant attempted to accommodate him by inviting

him to apply for hourly managerial positions that would not require mandatory Saturday work. This accommodation was reasonable because it eliminated the conflict between plaintiff's employment requirements and his religious practices. Philbrook, 479 U.S. at 70. Because defendant has shown that it offered Hedican a reasonable accommodation, and that plaintiff failed to make a good-faith effort to engage with defendant regarding the proposed accommodation, plaintiff's Title VII claim fails.

B. Undue Hardship

If an employer reasonably accommodates an employee's religious needs, the employer is not required to show that the employee's alternative accommodation proposals would result in undue hardship. Philbrook, 479 U.S. at 68 (noting that undue hardship on employee's business is at issue only when employer fails to offer any accommodation). However, I will briefly discuss the parties' arguments regarding undue hardship for the sake of completeness.

Undue hardship exists when a religious accommodation would cause more than minimal hardship to the employer or other employees. Hardison, 432 U.S. at 81 ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."). For example, the cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship. Tabura, 880 F.3d at 557–58.

Plaintiff proposes several potential accommodations that it says defendant could have

offered Hedican that would have accommodated his request to abstain from work on his Sabbath. In particular, plaintiff says that defendant could have permitted Hedican to swap shifts with other assistant managers, use personal time off, have a flexible arrival time, schedule him for a day shift Sunday through Friday, schedule him for overnight shifts or schedule him to work shorter shifts. However, plaintiff's suggestions do not fully address defendant's undisputed evidence that: (1) no assistant manager is assigned to a permanent shift; (2) assistant managers are expected to be available to work varied shifts, including Saturdays; (3) assistant managers are expected to rotate through every area of the store; (4) Saturday was a busy day for the Hayward store, and all assistant managers were expected to work some Saturday shifts; (5) other assistant managers wanted Saturdays off as well; and (6) Hedican would not have any paid personal time off until he had worked for defendant for a full fiscal year.

Plaintiff contends that all of defendant's arguments about hardship are conclusory or are based on pure speculation, but I disagree. Defendant submitted sworn statements from its employees who are familiar with the Hayward store's operational needs. Both Buck and Ahern have sufficient personal knowledge regarding the store's customer base, services and staffing needs to support their statements regarding the assistant manager's role at the Hayward store. As the store manager, Buck's testimony about scheduling, time-off requests and Saturday operational needs is not hypothetical or speculative.

Morever, many of Ahern's conclusions are supported by common sense. It was logical for Ahern to conclude that if Hedican could not work during his Sabbath hours, then some

other assistant manager would have to do so, or the store would be short-handed. It was also logical for her to conclude that it would be difficult or impractical for Hedican to attempt to swap shifts with other assistant manager, in light of the small pool of assistant managers who were not scheduled to work on any given Saturday and the fact that weekends were the most requested time off by other assistant managers.

Title VII does not require employers to deny the shift preferences of some employees in order to favor the religious needs of others. Hardison, 432 U.S. at 81, 84. Title VII does not contemplate "unequal treatment" between those employees with religious reasons for avoiding working on certain days and those who have "strong, but perhaps nonreligious reasons for not working on weekends." Id. In addition, an accommodation that requires other employees to assume a disproportionate workload is an undue hardship as a matter of law. Noesen v. Medical Staffing Network, Inc., 232 F. App'x 581, 584 (7th Cir. 2007). As defendant points out, hiring an assistant manager who could never work Saturdays would require defendant to choose between requiring another manager to work on additional Saturdays (which would give improper preference Hedican's religious request for time off over other requests), hiring another manager who could help cover those shifts (which would be an extra cost) or operating the store with one less manager than needed (which would create operational inefficiencies and lost sales). Under these circumstances, I conclude that defendant has shown that it would be an undue hardship to provide the accommodations that plaintiff requests.

ORDER

IT IS ORDERED that defendant Walmart Stores East, LP and Walmart, Inc.'s motion for summary judgment, dkt. #37, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 16th day of January, 2020.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

Case No. 18-cv-804-bbc

v.

WALMART STORES EAST LP and
WALMART, INC.,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants Walmart Stores East, L.P. and Walmart, Inc. against plaintiff Equal Employment Opportunity Commission dismissing this case.

s/ J. Smith, Deputy Clerk
Peter Oppeneer, Clerk of Court

1/16/2020
Date

STATUTES

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2 Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

….
42 U.S.C. § 2000e Definitions

For the purposes of this subchapter--

(j) 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.

REGULATORY GUIDELINES

29 C.F.R. § 1605.2
Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

(a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) Duty to accommodate.

(1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

(2) Section 701(j) in conjunction with section 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by title VII that will most often be required to make an accommodation. However, the principles of § 1605.2 also apply when an accommodation can be required of other entities covered by title VII, such as employment agencies (section 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (section 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) Alternatives for accommodating religious practices.

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in

appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue hardship.

(1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a de minimis cost." The Commission will determine what constitutes "more than a de minimis cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. Hardison, supra, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.