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No. 88062-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES KUMAR, RANVEER SINGH, ASEGEDEW GEFE, and
ABBAS KOSYMOV,

Petitioners,

v.

GATE GOURMET, INC.,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE LEGAL VOICE

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INTRODUCTION

Under the Washington Law Against Discrimination (WLAD), employers have a duty to reasonably accommodate the religious practices of their employees. Interpreting the WLAD to include that duty is a reasonable interpretation of the statutory language—and is the only interpretation that fully effectuates the statute’s purpose.

This Court should also use this case to delineate the limits of that duty. In keeping with the limits established by Title VII case law, this Court should hold that the duty of reasonable accommodation is just that—reasonable. The duty is not a license for employees to degrade or offend customers or other employees, to discriminate based on race, gender, or sexual orientation, or to prevent equal access to important basic services such as health care.

IDENTITY AND INTEREST OF AMICUS

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of women and girls through litigation, legislation, and the provision of legal information. Since its founding in 1978 as the Northwest Women’s Law Center, Legal Voice has been dedicated to protecting and advancing women’s legal rights, including the right to equality in the workplace and the right to be free from discrimination in health care and in other public accommodations.

Toward that end, Legal Voice has advocated for legislation and has participated as counsel and as amicus curiae in cases in the Northwest and around the country to ensure strong enforcement and interpretation of antidiscrimination laws so that women, and indeed all people, are free from discrimination.

As part of this mission, Legal Voice has an interest in ensuring that women are free from religious discrimination. In addition, Legal Voice has an interest in making sure that religious freedom does not become a license to discriminate against women based on their gender, sexual orientation, or gender identity, or other protected status.

ISSUES ADDRESSED BY AMICUS

1. Under the WLAD, does a covered employer have a duty to reasonably accommodate an employee's sincere religious beliefs?
2. Under the WLAD, what is a covered employer required—and *not* required—to do in order to reasonably accommodate an employee's sincere religious beliefs?

STATEMENT OF THE CASE

The Petitioners are or were employees of Gate Gourmet, Inc., the Respondent.¹ Pet. Br. 8; Resp. Br. 7. Petitioners hold spiritual and philosophical beliefs that restrict their diets. Pet. Br. 9. Because the motion to dismiss only raised the cognizability of a reasonable accommodation

¹ The parties appear to disagree about whether all of the Petitioners are current employees of Gate Gourmet. *Compare* Pet. Br. 8, *with* Resp. Br. 7.

claim, Gate Gourmet does not challenge the fact that Petitioners are within the groups protected by the WLAD. Resp. Br. 7 n.1; Pet. Br. 8.

Petitioners are not allowed to bring their own food to the job or to leave for meals. Pet. Br. 8. Instead, Gate Gourmet supplies meals. Pet. Br. 8; Resp. Br. 7. Many of the meals are not prepared consistently with Petitioners' beliefs. Pet Br. 10–11; Resp. Br. 7–8. It appears that the preparation of the meals forced Petitioners not simply to forego certain food options, but to forego meals altogether during their shifts. Pet. Br. 12.

Several of the Petitioners asked Gate Gourmet to change their food preparation policies and “suggest[ed] inexpensive” alternatives. Resp. Br. 8. While Gate Gourmet changed one aspect of its practices (provided turkey meatballs), the change was short lived, and subsequent requests for accommodation were ignored. Pet. Br. 11–12.

ARGUMENT

I. The WLAD's prohibition against discrimination includes a duty to reasonably accommodate religion.

The WLAD makes it an “unfair practice” to “discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status,” or

disability.² RCW 49.60.180(3). This case asks a question of statutory interpretation: does the phrase “discriminate against” include a failure to make reasonable accommodation for an employee’s sincere religious beliefs? The answer to that question, Amicus believes, is “yes.”

In interpreting a statute, the first step is to determine whether it is ambiguous. *See, e.g., Davis v. State ex rel. Dep’t of Licensing*, 137 Wn.2d 957, 963–64, 977 P.2d 554 (1999). A statute is ambiguous if it “is subject to more than one reasonable interpretation.” *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). If it finds ambiguity in a statute, this Court will adopt the interpretation “that best fulfills the legislative purpose and intent.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996).

This Court has already held that “discriminate against” is an ambiguous term. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 686, 72 P.3d 151 (2003). Thus, the question becomes whether the phrase “discriminate against” may reasonably be interpreted to include the failure to make a reasonable accommodation. *Marriage of Kovacs*, 121 Wn.2d at 804.

² Note that the WLAD protects employees from discrimination because of “creed”; it does not use the word “religion.” RCW 49.60.130(3). Because the parties use the term “religion” throughout their briefs, this Brief will do the same. Amicus takes no position on the precise meaning of “creed,” but the term at least *includes* religion.

The U.S. Supreme Court has already considered precisely this question—and has answered it in the affirmative. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court held that interpreting a prohibition on discrimination based on religion to include a duty to accommodate is reasonable. While *Hardison* was decided after Title VII was amended to explicitly include a duty to reasonably accommodate, the version of Title VII that *Hardison* applied was the pre-amendment version of the statute—the version that included no explicit duty to accommodate. *See id.* at 76 n.11 (“We thus need not consider whether § 701(j)—the amendment that included a duty to reasonably accommodate—“must be applied retroactively to the facts of this litigation.”). That pre-amendment version of Title VII, in words that are nearly identical to the WLAD’s, prohibited employers from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion.” *Id.* at 72 (quoting 42 U.S.C. § 2000e-2(a)(1)). *Hardison* held that the EEOC’s interpretation of these words—an interpretation that “impos[ed] on TWA the duty of ‘reasonable accommodation’ in the absence of ‘undue hardship’”—was “a defensible construction of the pre-1972 statute.” *Id.* If that interpretation was a defensible construction of pre-amendment Title VII, then it is also a defensible construction of the WLAD. *Accord Wondzell v. Alaska Wood*

Prods., 583 P.2d 860, 864 (Alaska 1978) (“We are persuaded that a duty of reasonable accommodation should be read into the Alaska statute. As the Supreme Court noted in *Trans World Airlines, Inc. v. Hardison*, . . . such a duty can be found as a defensible construction of the analogous federal statute.”).

The next question is then whether this reasonable interpretation of the WLAD “best fulfills the legislative purpose and intent.” *Marquis*, 130 Wn.2d at 108. The WLAD itself requires that it be “construed liberally for the accomplishment of [its] purposes.” RCW 49.60.020. The statute’s core purpose “is to deter and to eradicate discrimination in Washington,” a “policy of the highest priority.” *Marquis*, 130 Wn.2d at 109.

This Court can fully effectuate that policy against discrimination only by interpreting the WLAD to place on employers a duty to reasonably accommodate. Indeed, this Court has recognized that in certain circumstances an employer must take affirmative steps to prevent discrimination. *See Holland v. Boeing Co.*, 90 Wn.2d 384, 388–89, 583 P.2d 621 (1978) (duty to accommodate disability required positive steps because “an interpretation to the contrary would not work to eliminate discrimination”); WAC 162-30-020(4)(a) (effectuating the WLAD’s antidiscrimination purpose by requiring employers to “provide a woman a leave of absence for the period of time that she is sick or temporarily

disabled because of pregnancy or childbirth”); *see also* *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 363, 172 P.3d 688 (2007) (Madsen, J., concurring) (acknowledging pregnancy regulations requiring employers to accommodate pregnancy-related disabilities and childbirth). This case presents one of those circumstances. The fact that—as here—an employer’s policy does not explicitly single out a religious group for different treatment does not prevent that policy from acting as a barrier to real equality of opportunity among all employees. *Cf. Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 733, 709 P.2d 799 (1985) (noting that the WLAD prohibits employment practices that are “fair in form but discriminatory in operation”). To ensure that all employees in Washington share the same opportunities regardless of their religious beliefs, the Court should interpret the WLAD to require employers to reasonably accommodate those beliefs.

II. Reasonable accommodations do not degrade or offend customers or other employees, lead to other kinds of discrimination, or impede access to important basic services such as health care.

In determining the scope of the duty to accommodate religion, this Court should be guided by the WLAD’s purpose: the deterrence and eradication of discrimination. *Marquis*, 130 Wn.2d at 109. That purpose cannot be served if the duty to accommodate itself promotes

discrimination. Thus, the duty to accommodate must be carefully circumscribed to prevent religion from becoming a license for other forms of discrimination.

In defining the limits of a reasonable accommodation, this Court may look to federal case law for guidance. *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406 n.2, 693 P.2d 708 (1985) (noting that federal case law under Title VII, though “not binding,” was “instructive”). Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a “more than *de minimis*” cost or burden. By comparison, this is a significantly easier standard for an employer to meet than the reasonable accommodation standard of the Americans with Disabilities Act. Equal Emp. Opportunity Comm’n, *Compliance Manual* § 12-IV (2008) (citing 42 U.S.C. § 2000e(j)).

Title VII does not give an employee the right to insist on a specific accommodation; rather, it requires only a “reasonable” accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) (stating that an employer need not “choose any particular reasonable accommodation,” and that the only requirement is for the accommodation to be reasonable). Nor does Title VII preempt a law or regulation that precludes a particular

accommodation, even if there is no other accommodation or it results in an employee losing his or her job. *See Hardison*, 432 U.S. at 84.

Guided by these standards, the Court should, at a minimum, make clear what the duty to reasonably accommodate does *not* require employers to do: (1) to allow their employees' religious beliefs to offend or degrade others; (2) to discriminate; or (3) to impede access to important health care services.

A. Reasonable accommodations do not require that employers enable their employees to offend or degrade others.

The federal courts have uniformly held that the duty to reasonably accommodate religion does not license employees to offend or degrade fellow employees or customers. Moreover, it does not prevent employers from pursuing important goals such as encouraging diversity and discouraging discrimination.

In *Peterson v. Hewlett-Packard Co.*, for example, an evangelical Christian employee posted anti-gay biblical verses in response to Hewlett-Packard's diversity campaign, which featured gay-positive posters. 358 F.3d 599, 601–02 (9th Cir. 2004). The employee “hoped that his gay and lesbian co-workers would read the passages, repent, and be saved.” *Id.* at 602. In discussions with managers, the employee said he would remove the biblical verses only if Hewlett-Packard removed the posters. *Id.* If the

posters remained up, the employee said, the anti-gay verses would have to remain. *Id.* The court held that both allowing the anti-gay verses to remain and removing the posters would unduly burden Hewlett-Packard. Hewlett-Packard was not required to allow the anti-gay verses to remain because an employer “need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce.” *Id.* at 607–08. Taking down the posters was not required because “it would have infringed upon the company’s right to promote diversity and encourage tolerance and good will among its workforce.” *Id.* at 608. Hewlett-Packard was not required to do anything that compromised its desire to attract and retain gay and lesbian employees, and to make those employees feel welcome.

Similarly, in *Hall v. Tift County Hospital Authority*, No. 7:12-CV-12(HL), 2013 WL 2484089 (M.D. Ga. June 10, 2013), a federal court dismissed a complaint filed by a nurse at a government-run hospital who was disciplined for harassing a lesbian coworker. The plaintiff, a nursing supervisor, put religious pamphlets in her coworker’s locker and sent her an email warning, “[s]odomy is a sin, gay people live in sin. . . . We will all die. We will stand before the Lord and he will hold us accountable for lack of witnessing and other sins.” *Id.* at *3. The plaintiff was disciplined for violating the hospital’s antidiscrimination policy by being placed on

probation for six months, removed from supervisory duties, and told to refrain from discussing personal beliefs that coworkers consider discriminatory. The district court granted summary judgment to the hospital on the plaintiff's claims under Title VII, the Equal Protection Clause, and the First Amendment, concluding that the plaintiff was not targeted or treated differently because of her religious beliefs, but was disciplined for violating the hospital's policy prohibiting harassment and discrimination.

In *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995), the Eighth Circuit also approved of limits to the duty to reasonably accommodate an employee whose behavior deeply offended co-workers. There, a Catholic employee had taken a religious vow to wear a graphic anti-abortion button "until there was an end to abortion." *Id.* at 1339. The button upset and offended many of her fellow employees, so U.S. West offered her three options: she could wear the button only while in her own cubicle, cover the button while at work, or wear an anti-abortion button with the same message but without a photograph. *Id.* The employee rejected these proposals, believing that they would prevent her from being the "living witness" she had vowed to be. *Id.* The Eighth Circuit, however, held that the three proposals were reasonable accommodations that "respected the desire of co-workers not to look at the button." *Id.* at

1342. The employer was not required “to allow an employee to impose his religious views on other[.]” employees. *Id.*

Nor, for that matter, is an employer required to allow an employee to impose his religious views on customers. In *Johnson v. Halls Merchandising, Inc.*, a retail employee had “religious beliefs which required her to preface nearly every sentence she spoke with the phrase ‘In the name of Jesus Christ of Nazareth.’” No. 87-1042-CV-W-9, 1989 WL 23201, at *2 (W.D. Mo. Jan. 17, 1989). The court ruled that accommodating these beliefs would have been an undue hardship on the employer’s need “to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers.” *Id.*)

This Court should adopt the teaching of these cases: an employer need not accommodate an employee’s religious beliefs if the accommodation would allow the employee to offend or degrade co-workers or customers, particularly if such behavior contravenes the employer’s antidiscrimination policy.

B. Reasonable accommodations do not require employers to discriminate or segregate based on race, sex, or sexual orientation.

The federal courts have also held that the duty to reasonably accommodate does not require employers to discriminate or segregate.

Such holdings are in keeping with the underlying purpose of

antidiscrimination laws: deterring and eradicating discrimination. This Court should likewise ensure that the duty to accommodate under the WLAD is sufficiently narrow to effectuate this purpose.

That means, for example, that an employer need not accommodate an employee's racial harassment. Thus, an employer can forbid an employee from displaying a "recently obtained tattoo on his forearm of a hooded figure standing in front of a burning cross," even when the employee claims the tattoo is in service of his religious beliefs.

Swartzentruber v. Gunito Corp., 99 F. Supp. 2d 976, 978 (N.D. Ind. 2000); *cf. also Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) ("This court refuses to lend credence or support to [the Defendant's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."), *rev'd on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 389 U.S. 815 (1967).

Another court recognized analogous limitations on the duty to reasonably accommodate when a male emergency medical technician scheduled for overnight shifts refused on religious grounds to sleep in the same room as a woman. *Miller v. Drennon*, No. 3:89-1466-0, 1991 WL 325291 (D.S.C. June 13, 1991). There, the employer put up folding walls and allowed the employee to sleep in an alternative place, but refused to

reschedule his shifts, noting that “federal and state laws require the County to make no distinction based on gender in making EMS work assignments.” *Id.* at *2. The court found that the County had gone beyond “its minimum statutory duty by installing folding walls” and by authorizing him to sleep in another place, and that it had no duty to reschedule the employee’s shifts. *Id.* at *8.

Finally, in *Knight v. Connecticut Department of Public Health*, the Second Circuit rejected the reasonable accommodation of a nurse who, during a nursing visit to “the home of a same-sex couple, one of whom was in the end stages of AIDS,” told the couple that salvation was only through faith in Christ and that God “doesn’t like the homosexual lifestyle.” 275 F.3d 156, 161 (2d Cir. 2001). In response to the couple’s complaint, the nurse’s employer required her to create a management-approved “Plan of Correction” before resuming home visits to patients. *Id.* The nurse filed suit, arguing that she should be allowed to evangelize to patients. The Second Circuit held that the employer was not required to permit the nurse to evangelize while providing services. The court reasoned that permitting the nurse to evangelize “would jeopardize the state’s ability to provide services in a religion-neutral manner”—i.e., in a nondiscriminatory manner. *Id.* at 168.

As did the courts in these cases, this Court should hold that an employer is not required to accede to an accommodation that would itself result in discrimination. Setting such a limit would assist in furthering the paramount goal of the WLAD: “to deter and to eradicate discrimination in Washington.” *Marquis*, 130 Wn.2d at 109.

C. Reasonable accommodations cannot bar equal access to health care services.

The duty to reasonably accommodate does not license employees to infringe the patients’ rights to nondiscriminatory health care and mental health services. A purportedly religious refusal to provide health care because of race, gender, sexual orientation, gender identity, or other protected characteristics is itself discrimination,³ and hence contravenes the WLAD’s purpose of prohibiting discrimination.

Such discrimination is not merely hypothetical; rather, incidents of refusals to provide necessary health care based on religious objections are well-documented. Health care providers have cited religious beliefs in denying critical medical treatment in numerous contexts, including end-of-life counseling and reproductive and other basic health care, and basic

³ For example, regardless of the employee’s basis in religious belief, courts have found that refusing service based on sexual orientation is an act of discrimination that violates antidiscrimination law. *See, e.g., Elane Photography, LLC v. Willock*, --- P.3d ----, 2013 WL 4478229 (N.M. Aug. 22, 2013) (concluding that a photography company that refused to photograph a same-sex couple’s commitment ceremony because of the company owners’ religious beliefs violated a state law prohibiting discrimination in public accommodations).

health care for lesbians and gays. For example, some religious hospitals have denied necessary reproductive health care on the basis of religious restrictions, endangering patients' health as well as engaging in discriminatory practices.⁴ Discriminatory health care treatment for LGBT and transgender patients is particularly widespread. According to a recent study, 21% of all LGBT respondents—and 53% of transgender respondents—reported being refused services by healthcare professionals or their staff.⁵ For example, in 1995, Tyra Hunter, a transgender woman, bled to death after paramedics halted emergency treatment when they discovered she was transgender. *See* Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 *Law & Sexuality* 123, 137 (2007). And in 2001, Robert Eads, a transgender man, was refused treatment by twenty doctors after being diagnosed with cervical and ovarian cancer. *Id.*

Given this background of unequal access to health care, it is all the more important that the duty to accommodate under the WLAD not impede health care providers who *do* wish to offer nondiscriminatory

⁴ *See, e.g.*, Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* (2010), available at http://healthlaw.org/images/stories/Health_Care_Refusals_Undermining_Quality_Care_for_Women.pdf.

⁵ One Colorado Education Fund, *Invisible: The State of LGBT Health in Colorado* 19 (2011), available at http://www.one-colorado.org/wp-content/uploads/2012/01/OneColorado_HealthSurveyResults.pdf.

health care. The analogous reasonable accommodation mandate of Title VII certainly provides no such impediment.

A case from the Third Circuit shows how Title VII's reasonable accommodation duty has been interpreted in the health care context. There, a nurse for a public hospital refused on religious grounds to participate in any medical procedure that terminated a pregnancy, saying that she was forbidden from "ending a life." *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 222 (3d Cir. 2000). After the plaintiff refused to participate in two emergency procedures—in one of which she caused the treatment of a patient, "standing in a pool of blood," to be delayed half an hour—the hospital offered her a lateral transfer from the hospital's Labor and Delivery section to its newborn ICU. *Id.* at 223. Shelton refused to accept the transfer based on her belief that, in that new position, she would have to participate in ending an infant's life. *Id.* As a result, she was fired. *Id.* at 224.

In ruling on Shelton's reasonable accommodation claim, the Third Circuit held that the lateral transfer would have been a reasonable accommodation, reasoning:

It would seem unremarkable that public protectors such as police and firefighters must be neutral in providing their services. We would include public health care providers among such public protectors. Although we do not interpret Title VII to require a presumption of undue burden, we

believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and injured—will provide treatment in time of emergency.

Id. at 228. The Third Circuit thus held that public employers who provide health care services have no duty to compromise the public safety to accommodate the religious beliefs of their employees. Private providers of health care do not have such a duty either, because they are governed and regulated by the same professional and ethical standards as public health care providers.

Nor does an employer have to arrange staffing to accommodate a pharmacist's religious objections to dispensing birth control. The Seventh Circuit has already reached this conclusion. *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 585 (7th Cir. 2007). And this conclusion can be seen as merely an application of a broader principle: that the duty to accommodate is not itself a license for discrimination. Under Title VII, an employer that provides a comprehensive prescription drug plan cannot exclude coverage for prescription contraceptives. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1273 (W.D. Wash. 2001). Therefore, it follows that the duty to accommodate also cannot bar equal access to

contraceptives—access that the United Nations has identified as a basic human right.⁶

To ensure that the WLAD will indeed serve its purpose of preventing discrimination, this Court should hold that the duty to reasonably accommodate does not allow race, gender, sexual orientation, or other discrimination in the provision of health care,

CONCLUSION

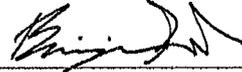
This Court should hold that the WLAD includes a duty to reasonably accommodate employees' sincere religious beliefs. This Court should also hold, however, that this duty does not require employers (1) to permit their employees to offend or degrade others; (2) to discriminate or segregate based on race, gender, sexual orientation, or other protected characteristics; or (3) to impede equal access to important health care services. This Court should then resolve this appeal in accordance with those holdings.

⁶ United Nations Population Fund, *The State of World Population 2012 – By Choice, Not By Chance: Family Planning, Human Rights and Development* at ii (“Family planning is a *human right*. It must therefore be available to all who want it.”), available at http://www.unfpa.org/webdav/site/global/shared/swp/2012/EN_SWOP2012_Report.pdf.

Respectfully submitted this September 20, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on September 20, 2013, I caused a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE LEGAL VOICE**

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A handwritten signature in cursive script, appearing to read "Erica Knerr".

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APPENDIX A

Slip Copy, 2013 WL 2484089 (M.D.Ga.), 118 Fair Empl.Prac.Cas. (BNA) 1625
(Cite as: 2013 WL 2484089 (M.D.Ga.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Georgia,
Valdosta Division.
Pamela HALL, Plaintiff,

v.

TIFT COUNTY HOSPITAL AUTHORITY d/b/a
Tift Regional Medical Center, Ellen Eaton, in her
official capacity as Director of Human Resources and
in her individual capacity, and April Dukes, in her
official capacity as Director of ER/ICU Nursing Ser-
vices and in her individual capacity, Defendants.

Civil Action No. 7:12–CV–12 (HL).
June 10, 2013.

George M. Weaver, Jeffrey Alexander Shaw, Atlanta,
GA, for Plaintiff.

Alyssa K. Peters, Jeffrey Lyn Thompson, Constangy
Brooks & Smith LLP, William M. Clifton, III,
Macon, GA, for Defendants.

ORDER

HUGH LAWSON, Senior District Judge.

*1 This case is before the Court on Defendants' Motion for Summary Judgment (Doc. 21). Plaintiff has filed a response, and Defendants have filed a reply. Upon review of the briefs, depositions, affidavits, and other evidence submitted, Defendants' Motion for Summary Judgment is granted.

I. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 requires that summary judgment be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "The moving party bears

'the initial responsibility of informing the ... court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.' " Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1259 (11th Cir.2004) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotations omitted)). Where the moving party makes such a showing, the burden shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The applicable substantive law identifies which facts are material. *Id.* at 248. A fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law. *Id.* An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 249–50.

In resolving a motion for summary judgment, the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party. Patton v. Trial Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir.2002). But, the court is bound only to draw those inferences which are reasonable. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir.1997) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477

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U.S. at 249–50 (internal citations omitted).

II. FACTS

Viewed in the light most favorable to Plaintiff, the Court finds the material facts for purposes of summary judgment to be as follows.^{FN1}

FN1. Unless otherwise noted, the facts are undisputed and are taken from Defendants' Statement of Material Facts (Doc. 23).

Defendant Tift County Hospital Authority is a governmental entity created under state statute. It operates the Tift Regional Medical Center ("TRMC"). TRMC provides hospital services for twelve counties in south central Georgia. Plaintiff, a Registered Nurse, became employed at TRMC on February 6, 2006.

*2 During her employment with TRMC, Plaintiff performed the duties of both a charge nurse and a relief nursing supervisor. A charge nurse oversees the unit, takes care of patient flow issues, and assigns staff to certain patients. The charge nurse also has the authority to impose minor discipline, such as speaking with subordinate employees privately. (Deposition of Pamela Hall, pp. 49–50). A relief nursing supervisor handles all of the call-ins, oversees all of the floors, handles staffing, handles patient problems that the charge nurse is unable to address, calls back doctors and operating room teams, and helps with anything that the charge nurse cannot solve. Serving shifts as a charge nurse or relief nursing supervisor resulted in increased pay for Plaintiff.

As an employee, Plaintiff was governed by the TRMC Employee Handbook. The handbook contains a diversity policy of which Plaintiff was aware that states in part as follows:

TRMC will provide for all employees an environment that is conducive to open discussion free of

intimidation, harassment, and discrimination. Slurs, jokes, verbal or written, and graphic conduct relating to individuals [sic] differences will not be tolerated. Such conduct will be considered as interfering with an individual's work performance and/or creating an intimidating, hostile or offensive work environment.

(Hall Dep., Ex. 25).

Plaintiff also had access to the TRMC locker room. The locker room is accessible only to TRMC employees. The lockers are used by employees to store private possessions and personal items during their shifts. Each employee locker has either the employee's name or a picture on the front, and is used by a specific employee for the duration of his employment with TRMC. The employees are aware of which locker belongs to which employee.

Plaintiff met Amanda Dix, a staff nurse at TRMC, in 2006. (Declaration of Pamela Hall, ¶ 2). They have worked together since then as nurses at TRMC. (*Id.*) Plaintiff and Dix were social friends and their families even vacationed together. (Hall Decl., ¶ 4). But in 2009, Plaintiff and Dix's friendship was damaged after Plaintiff accused Dix of having an affair with Plaintiff's husband. (Deposition of Amanda Dix, p. 20). Dix then told Plaintiff that she (Dix) was a lesbian. (Dix Dep., pp. 20–21; Hall Decl., ¶¶ 5–6). Plaintiff told Dix that she could not be a part of Dix's lifestyle. (Dix Dep., p. 26). The affair allegation and Dix's revelation that she was a lesbian harmed their friendship, though they did talk about trying to rekindle their friendship. (Dix Dep., pp. 22–23, 29–30). At all times relevant to this case, Dix identified herself as a lesbian. (Dix Dep., p. 26).

Plaintiff, who is a Baptist, obtained a pamphlet entitled "How Should Christians Respond to 'Gay' Marriage?" In July 2011, Plaintiff placed the pamphlet in Dix's locker at a shift change. (Hall Decl., ¶

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11). Plaintiff attached a small piece of paper to the front of the pamphlet with a paper clip. On the piece of paper Plaintiff wrote that she felt led to give the pamphlet to Dix. Plaintiff placed the pamphlet and note in the very back of Dix's locker. Because Dix had said she was a Christian, Plaintiff felt a duty to tell her that, based on Christian teachings, the practice of homosexuality was a mistake and would harm Dix. (Hall Decl., ¶ 7).

*3 Dix found the pamphlet in her locker, read the attached note and title of the pamphlet, and then threw the pamphlet in the trash. Dix was made angry, disgusted, humiliated, and offended by the cover of the pamphlet. Plaintiff, along with other employees, was in the locker room when Dix found the pamphlet. Plaintiff told Dix that she wanted Dix to read the pamphlet in private. Dix did not open or read the pamphlet or otherwise respond to Plaintiff.

Rose Powell, a nurse manager, was told about the pamphlet incident and that Dix had been offended. Powell contacted Dix via telephone to discuss whether Dix wanted TRMC to speak with Plaintiff about the pamphlet. Dix told Powell that she was okay and would handle it. (Dix Dep., p. 42). Dix thought Plaintiff probably would not say anything else because Plaintiff saw how upset the pamphlet made Dix and how Dix was offended by the pamphlet. (*Id.*) Dix then said that if anything else happened, she would let Powell know. (*Id.*)

Plaintiff was concerned that Dix would not read the pamphlet, so she sent Dix an email dated July 28, 2011 through the TRMC email system. The July 28 email reads as follows:

Mandy, Caleb told me you talked with him about the little booklet I left you. I had not told anyone about that I was leaving that up to you. I saw that book in Kentucky when we went to the creation museum. I don't want to hurt your feelings but I

felt led to leave that for you and I would not be a true friend if I ignore the responsibility that God has left for his children to share the message and hold each other accountable. Even me. I would hope that someone would hold me accountable for when I'm not in the right walk with God. I actually wish that someone would have sat me down long ago and really opened me [sic] eyes to the way I was living. It was not pleasing to God. What feels good and what makes up [sic] happy is not always the right thing to do. Sodomy is a sin, gay people live in sin. It is not about self gratification. I have true joy that can only come from being in God's grace. We will all die. We will stand before the Lord and he will hold us accountable for lack of witnessing and other sins. I won't harp on this issue but I will pray for you still and myself because I love you and I want you to be there with me in heaven. When we are in God's will we will WANT to live right and live for him and do what the Bible says and that is to go and tell! Everything else is not important. I hope I have not made you mad but I will leave you alone. Just know that I'll be on my knees for all my friends. I'm still working on some others. It burdens me to think that many will not be with us for eternity. Brandy has often said that there is a special place in heaven for nurses. There is not. I hope she comes to know the Lord one day. There is only one way to heaven. I love ya girl.

(Hall Dep., Ex. 22).^{FN2}

^{FN2}. It is undisputed that TRMC employees often used the TRMC email system to send and receive messages about matters unrelated to work, including religion, politics, and sports.

Dix did not read the email until several days after Plaintiff sent it because Dix had been off work and did not necessarily check her email every day. (Dix Dep., p. 39). She finally read it on August 12, 2011. Dix initially did not want her supervisors to do any-

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thing about the email, but changed her mind after thinking more about the email. (Dix Dep., p. 47). Dix was tired of being harassed at work, so on August 12, she forwarded the email to her supervisors, Rose Powell and Defendant April Dukes, Director of the Intensive Care Unit. (Dix Dep., pp. 39–40). Dix considered the email to be harassing “because [Plaintiff] tells me that I’m going to hell in [the email] and that I’m living in sin and that gay people are going to hell.” (*Id.*) At times, Plaintiff worked as a supervisor over Dix. After the pamphlet and email, Dix did not feel comfortable with Plaintiff supervising her during an assigned shift. Dix wanted Defendant Dukes to handle the situation with Plaintiff. (Dix Dep., p. 45).

*4 After reading Plaintiff’s email, Defendant Dukes believed that the email could be read as offensive to Dix. Pursuant to TRMC protocol, Defendant Dukes forwarded the email to Defendant Ellen Eaton, Human Resources Administrator, and Diane Patrick, Vice President of Patient Care Services and Chief Nursing Officer, for further direction.

The email was forwarded by Defendant Dukes to Defendant Eaton and Patrick on the afternoon of August 12, a Friday. (Deposition of April Dukes, p. 111). Plaintiff was scheduled to work that night. (Dukes Dep., p. 111). Defendant Dukes called Powell and told her to call Plaintiff and tell her that she would be placed on leave until a complaint was investigated. (Dukes Dep., p. 111). While standard practice at TRMC was for such a suspension to be with pay, Plaintiff was in fact suspended without pay for four shifts and had to use vacation hours to make up the time. (Hall Decl., ¶ 20).

Defendants Eaton and Dukes decided to hold a meeting with Plaintiff to talk with her and learn her version of the events. Both Defendants also knew at this time about the pamphlet Plaintiff left in Dix’s locker. The day before the meeting with Plaintiff, Defendants Dukes and Eaton and Diane Patrick had a discussion about what to do. (Dukes Dep., p. 120).

The group agreed that Plaintiff was a skilled nurse and they wanted to retain her as an employee. (Dukes Dep., p. 120). However, the group did decide that Plaintiff should not function in a supervisory capacity for at least some period of time. (Dukes Dep., pp. 122–123). That decision could be reconsidered after the probationary period. (Dukes Dep., p. 123). A counseling record reflecting certain discipline was then prepared. (Dukes Dep., p. 139).^{FN3}

FN3. The Court recognizes that Defendant Eaton testified that alternative counseling forms were prepared and that Defendants argue that no decision about discipline was made prior to the August 16 meeting. However, the Court has closely read Defendant Dukes’ deposition testimony, and construing it in the light most favorable to Plaintiff, the Court reads the testimony as Plaintiff does—that the group decided prior to the August 16 meeting that Plaintiff would be put on probation and removed from any supervisory position for a period of time.

On August 16, 2011, Plaintiff met with Defendants Eaton and Dukes to discuss Dix’s complaint. It was Defendant Eaton’s intent during the meeting for Plaintiff to understand that she could not continue to harass co-workers on the topic of homosexuality. (Declaration of Ellen Eaton, ¶ 14). While Plaintiff understood that Defendants Eaton and Dukes were trying to tell her that she could not harass her co-workers, she believed she did not engage in any harassment. (Hall Dep., p. 106). Defendant Eaton then told Plaintiff that “we” could not talk about Jesus or share “our” faith at work. (*Id.*)^{FN4} Defendant Eaton testified that Plaintiff would not agree during the meeting that she could not discuss her religious beliefs with another employee once the employee said to stop, (Deposition of Ellen Eaton, p. 35), and she was concerned that Plaintiff would continue to harass Dix. (Eaton Decl., ¶ 13). Plaintiff states she did not refuse to stop communicating with Dix about same-

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sex marriage or homosexual practices and since July 28, 2011 has not attempted to communicate with Dix about those issues. (Hall Decl., ¶ 19).

FN4. Defendants Eaton and Dukes both say Eaton never made that comment.

Plaintiff then received the counseling record which was prepared after the August 15 meeting between Patrick and Defendants Eaton and Dukes. The counseling record classified the meeting as a written counseling session. (Hall Dep., Ex. 23). The specific problems listed on the form were: “Sending an electronic message to a co-worker that could be perceived as discriminatory in nature. Leaving printed material for a co-worker that could be considered discriminatory with subjects related to religion and sexual preferences while at work.” FN5 (*Id.*) Plaintiff was put on probation for six months, removed from supervisory duties, and told to refrain from discussing or using electronic media to further personal beliefs that co-workers consider discriminatory. (*Id.*)

FN5. While the counseling record uses the word “discriminatory,” it is clear to the Court that Defendants Dukes and Eaton actually meant that the message and material could have been perceived as harassing in nature. This distinction does not change the Court’s ultimate conclusion but was worth noting.

*5 Plaintiff was subsequently moved from the Emergency Department to the Intensive Care Unit, where she continues to work today as a staff nurse. She has not been put back into a supervisory position. However, in order to be considered for a supervisory position an employee must complete a position interest form and Plaintiff has not done so. (Dukes Dep., p. 124).

Other TRMC employees have been disciplined

for sending offensive or harassing emails. (Eaton Decl., ¶ 8). Two employees were terminated in April of 2009 for distribution of racial, ethnic, and religious materials in the form of an email that was offensive to other TRMC employees. (Eaton Decl., Attachs. B–C). The email makes specific reference to Islam, blacks, black Muslims, and Hispanics. (Eaton Decl., Attachs. B–C). Plaintiff is not aware of any other TRMC employee who has been disciplined for sending a Christian-themed email absent a complaint of harassment or discrimination, and is not aware of any other employees who have been disciplined for expressing their religious views.

On October 14, 2011, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”). The EEOC issued a Dismissal and Notice of Rights on October 21, 2011. Plaintiff filed this lawsuit on January 13, 2012. Defendants now seek summary judgment in their favor on all four counts. The Court will address each count below, but not in the order presented in the complaint.

III. DISCUSSION

A. Title VII

In Count IV of her complaint, Plaintiff contends she was subjected to religious discrimination in violation of Title VII.

Title VII provides that “[i]t shall be an unlawful employment practice for an employer ... 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...” 42 U.S.C. § 2000e–2(a)(1). Plaintiff contends that she was disciplined because of her religion. She specifically contends that her brand of religious beliefs did not conform to the religious or-

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thodoxy that Defendants followed and sought to impose.

Plaintiff's Title VII claim is a disparate treatment claim. Disparate treatment with respect to religion may be established either through direct evidence of discrimination or through circumstantial evidence that creates an inference of discrimination. Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir.1999); Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir.1998). Plaintiff here attempts to prove her discrimination claim with both direct and circumstantial evidence.

1. Direct evidence

Plaintiff first contends she has presented a direct evidence case of discrimination. Direct evidence of discrimination “reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.” Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir.2004). Direct evidence of discrimination is evidence that, “if believed, proves [the] existence of [a] fact in issue without inference or presumption.” Burrell v. Board of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir.1997). The proffered statements must both “reflect a discriminatory attitude and tie the discriminatory attitude to the relevant employment decision.” Bernstein v. Sephora, Div. of DFS Group L.P., 182 F.Supp.2d 1214, 1216 (S.D.Fla.2002) (citing Wright, 187 F.3d at 1294). Evidence that only suggests discrimination, see Earley v. Champion Intern. Corp., 907 F.2d 1077, 1081–82 (11th Cir.1990), or that is subject to more than one interpretation, see Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1083 n. 2 (11th Cir.1996), does not constitute direct evidence of discrimination.

*6 Plaintiff points to the following statement by Defendant Eaton as direct evidence of religious discrimination: “[Defendant Eaton said] we could not share our faith at work. We could not talk about Jesus

at work. She said if someone actually came up to me and asked me about the Lord, that my response should be, you have to wait until I clock out.” (Hall Dep., p. 93). But “[t]o be direct evidence, the remark must indicate that the employment decision in question was motivated by [religion].” Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 1227–28 (11th Cir.2002) (racial discrimination case). Defendant Eaton's statement does not on its face tie the employment decision (probation and removal of supervisory duties) to any alleged discriminatory attitude.

The statement from Defendant Eaton can be differentiated from the one contained in the case mentioned by Plaintiff, Dixon v. The Hallmark Companies, Inc., 627 F.3d 849 (11th Cir.2010), where the plaintiffs alleged their supervisor said upon terminating them from employment, “You're fired, too. You're too religious.” Id. at 853. Certainly that statement, if believed, proves a discriminatory motive without inference. See also Earley, 907 F.2d at 1081 (holding that a management memorandum saying, “Fire Early—he is too old” constituted direct evidence of discrimination); Haynes v. W.C. Caye & Co. Inc., 52 F.3d 928, 930 (11th Cir.1995) (finding direct evidence of discrimination where the decisionmaker stated that women were simply not tough enough to do the job from which the plaintiff had been removed and that it would require a man to do the job); contra Murdick v. Catalina Marketing Corp., 496 F.Supp.2d 1337, 1349–1350 (M.D.Fla.2007) (statement that plaintiff was evil because he was a Buddhist did not constitute direct evidence of discrimination because the statement does not prove the supervisor would take adverse action based on his negative feelings).

Defendant Eaton's statement is not the sort of blatant remark “whose intent could be nothing other than to discriminate on the basis of [religion]” in connection with the employment action taken. Dixon, 627 F.3d at 854. Instead, a reasonable juror would have to draw an inference that because Defendant Eaton holds a discriminatory animus towards Chris-

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tians, she disciplined Plaintiff. If the evidence truly was direct evidence of discrimination the jury would not have to make such an inference. Thus, the Court finds that Plaintiff has not established a direct evidence case of disparate treatment.

2. Circumstantial evidence

As Plaintiff has not demonstrated direct discrimination, the Court must consider whether she has identified sufficient circumstantial evidence of discrimination. This means the Court must conduct an analysis under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Under the McDonnell Douglas test, the plaintiff bears the initial burden of establishing a prima facie case. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir.2001). If the plaintiff “fails to satisfy any one of the elements of a prima facie case,” summary judgment against the plaintiff is appropriate. Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1433 (11th Cir.1998).

*7 However, if a plaintiff establishes a prima facie case, the employer must then articulate a legitimate, nondiscriminatory reason for the challenged employment action. Pennington, 261 F.3d at 1266. This burden is “exceedingly light;” the defendant must merely proffer a non-discriminatory reason, not prove it. Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 (11th Cir.1983). “The defendant need not persuade the court that it was actually motivated by the proffered reasons.... It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.” *Id.*

If the employer can give an appropriate explanation, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer’s explanation is merely a pretext. *Id.* A plaintiff cannot establish pretext by simply demonstrating facts that suggest discrimination, but must specifi-

cally respond to the employer’s explanation and rebut it. Crawford v. City of Fairburn, Ga., 482 F.3d 1305, 1309 (11th Cir.2007). Pretext evidence is that which demonstrates “such weaknesses, implausibilities, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its actions that a reasonable fact finder could find them unworthy of credence.” Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir.1997) (citation omitted).

The Court must first consider whether Plaintiff has established a prima facie case of discrimination. To establish a prima facie case of disparate treatment in a religious discrimination case, a plaintiff must show: (1) she is a member of or practices a particular religion; (2) she is qualified to perform the job at issue; (3) she has suffered an adverse employment action; and (4) someone outside the protected class of which she is a member was treated differently. Wilshin v. Allstate Ins. Co., 212 F.Supp.2d 1360, 1371 (M.D.Ga.2002); Gunning v. Runyon, 3 F.Supp.2d 1423, 1428 (S.D.Fla.1998).

Defendants focus only on the fourth prong of the prima facie test. Thus, the Court finds the first three prongs to be established. Defendants argue that Plaintiff cannot make a prima facie case of disparate treatment because she has not presented any evidence that members outside her protected class were treated differently by TRMC following receipt of complaints of harassment. In other words, Plaintiff has not shown that any non-Christians were treated differently by TRMC.

Plaintiff does not address Defendants’ fourth prong argument in her response. Instead she just makes a conclusory statement that the methods of proving a prima facie case are not fixed and moves on into pretext. But the Court cannot just skip over the prima facie case in its analysis. Defendants are correct that Plaintiff has not produced evidence of someone outside the Christian religion who was treated differently from her. The question is whether

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Plaintiff was discriminated against *because of* her religion—was she discriminated against because she is a Christian? Without producing evidence of a non-Christian employee in the same job being treated differently after engaging in the same activity, Plaintiff cannot establish a prima facie case.^{FN6} See also *Patterson v. Indiana Newspapers, Inc.*, 589 F.3d 357, 365–66 (7th Cir.2009) (plaintiff did not establish a prima facie case of religious discrimination because she did not present evidence of similarly situated employees outside of the protected class who were treated more favorably); *Mohamed v. Public Health Trust of Miami-Dade County*, No. 09-21235-CIV, 2010 WL 2844616, at *9–10 (S.D.Fla.2010) (Muslim plaintiff failed to establish a prima facie case of religious discrimination because he failed to identify any similarly situated non-Muslim who was treated more favorably for the same actions); *Postell v. Greene County Hospital Auth.*, No. 3:05-CV-73 (CDL), 2007 WL 1876014, at * 6 (M.D.Ga.2007) (defendant was entitled to summary judgment on religious discrimination claim when Christian plaintiff failed to present evidence that plaintiff was treated differently than similarly situated employees outside her protected class).^{FN7}

FN6. Plaintiff also has failed to present a “convincing mosaic of circumstantial evidence” of discrimination sufficient to get her past summary judgment on the Title VII claim. *Smith v. Lockheed-Martin*, 644 F.3d 1321, 1328 (11th Cir.2011).

FN7. The case from the Eastern District of Pennsylvania cited by Plaintiff in support of her Title VII claim, *Gadling-Cole v. West Chester University*, 868 F.Supp.2d 390 (E.D.Pa.2012), is not persuasive because that case was decided on a motion to dismiss, not a motion for summary judgment.

*8 Also, Plaintiff attempts to raise a “mixed motive” theory for the first time in her response brief to

Defendants' motion for summary judgment. Plaintiff did not raise the mixed motive issue in her complaint, and the section in her response brief, which is one sentence long, is not sufficient to provide Defendants with adequate notice of the new claim or to amend the original complaint. See *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314–15 (11th Cir.2004); *Keaton v. Cobb County, Ga.*, No. 08-11220, 2009 WL 212097, at * 10 (11th Cir.2009). Thus, the Court will not address a mixed motive theory at this stage of the proceedings.

Because Plaintiff has not established a prima facie case of religious discrimination, her Title VII claim fails. The Court grants summary judgment in Defendants' favor on Count IV of Plaintiff's complaint.

B. Equal Protection

In Count III of her complaint, Plaintiff alleges an equal protection violation. “The Equal Protection Clause of the Fourteenth Amendment generally requires government entities to treat similarly situated individuals alike.” *Aford v. Consolidated Gov't of Columbus, Ga.*, 438 F.App'x 837, 839 (11th Cir.2011) (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir.2006)). Two kinds of equal protection claims exist: “(1) [the plaintiff] is a member of a protected class similarly situated to members of an unprotected class and was treated differently from the unprotected class; or (2) he belongs to a ‘class of one’ and was intentionally treated differently from others similarly situated without any rational basis.” *Mayer v. Gottheiner*, 382 F.Supp.2d 635, 651 (D.N.J.2005) (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir.1990) and *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)).

Defendants contend that Plaintiff is asserting a “class of one” equal protection claim, as, in their opinion, she claims she was intentionally treated differently from others similarly situated and there was

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no rational basis for the treatment. But as Defendants point out in their motion, the Supreme Court has held that a class of one equal protection claim is not cognizable in the context of public employment. Engquist v. Oregon Dept of Agric., 553 U.S. 591, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008).

In response, Plaintiff contends that she is not alleging a class of one claim, and therefore, *Engquist* is not applicable. Instead, she asserts she was discriminated against because of her membership in a protected class. But to succeed on an equal protection claim, Plaintiff has to show more than just being a member of an identifiable group. She must also show that she was subjected to differential treatment from others similarly situated and that the difference in treatment was based on her membership in that group. Glenn v. Brumby, 724 F.Supp.2d 1284, 1296 (N.D.Ga.2010) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)). The problem here, as with her Title VII claim, is that Plaintiff has presented no evidence that she was subjected to different treatment from similarly situated persons in an unprotected class.

*9 Thus, even assuming Plaintiff is truly not making a class of one claim, which would fail because of *Engquist*, her equal protection claim still fails. Without evidence of a comparator or someone similarly situated who was treated differently, Plaintiff cannot establish an equal protection violation.

Defendants are entitled to summary judgment on Count III of Plaintiff's complaint.

C. First Amendment—Free Speech

In Count I of her complaint, Plaintiff alleges that Defendants' actions violated her free speech rights under the First Amendment. Though not specifically stated in the complaint, in reviewing the summary judgment briefs it appears that Plaintiff is asserting a

First Amendment retaliation claim, in that she was disciplined for speaking out about her religious beliefs. Accordingly, the Court will analyze Count I as a retaliation claim.

A state may not demote or discharge a public employee in retaliation for protected speech. The Eleventh Circuit has developed a four-part test to determine whether an employee suffered such retaliation. First, the Court must determine whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern. If so, the Court must weigh the employee's First Amendment interests against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. If the employee prevails on the balancing test, she must prove to the factfinder that her speech played a substantial part in the government's decision to demote or discharge her. Finally, if the employee shows that the speech was a substantial motivating factor in the employment decision, the state must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Morgan v. Ford, 6 F.3d 750, 753–54 (11th Cir.1993) (quotation marks, citations, brackets, and ellipsis omitted); Gonzalez v. Lee County Hous. Auth., 161 F.3d 1290, 1295 (11th Cir.1998). This four-part test is known as the *Pickering* analysis. Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

“The threshold question of whether an employee's speech may be fairly characterized as constituting speech on a matter of public concern is a question of law.” Deremo v. Watkins, 939 F.2d 908, 910 (11th Cir.1991). In their motion, Defendants argue that they are entitled to summary judgment on Plaintiff's free speech claim because she was not speaking on a matter of public concern, and therefore, the speech was not protected by the First Amendment.

For an employee's speech to rise to the level of

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public concern, it must relate to a matter of political, social, or other concern to the community. The Court must decide whether the purpose of Plaintiff's speech was to raise issues of public concern or to further her own private interest. Morgan, 6 F.3d at 754. In determining whether an employee's speech touched on a matter of public concern, the Court looks to the content, form, and context of the statement, the employee's attempts to make the concerns public, and the employee's motivation in speaking. See Connick v. Myers, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); Morgan, 6 F.3d at 754; Deremo, 939 F.2d at 910-11.

*10 Defendants argue that after applying the foregoing factors, it is clear that Plaintiff did not speak out on a matter of public concern. The pamphlet was placed in the very back of Dix's locker located in a private locker room accessible only to TRMC employees. Plaintiff knew it was Dix's locker as it had either her name or picture on it. Plaintiff attached a private note to the pamphlet directed only to Dix, and later told Dix that the pamphlet was for Dix to read in private. As for the email, it also was not published to others. It was sent to Dix alone. The email specifically said Plaintiff had not mentioned the pamphlet to anyone else. In Defendants' opinion, the pamphlet and email were both private speech made for personal reasons, and thus not protected by the First Amendment.

Plaintiff argues in response that her speech on the issue of homosexuality and gay marriage is a matter of public concern. She further states that speech can still be protected if delivered in private. It need not be stated to a public or widespread audience. Further, Plaintiff states, the speech did not relate to any issue involving the business of TRMC, but instead she was expressing her opinion on a public topic. In Plaintiff's view, the fact that she communicated with Dix in a private manner does not preclude a finding that the speech related to a matter of public concern.

Plaintiff relies heavily on a case from the Northern District of Georgia in support of her argument that her speech should be deemed to have been on a matter of public concern. But the case referenced, Dombrowski v. Federal Aviation Administration, Civil Action No. 1:06-CV-1444-BBM (N.D.Ga.2008), is not binding on this Court and is distinguishable on its facts from the case currently pending. Dombrowski involved a situation where the plaintiff made comments in response to certain statements from a co-worker which "constituted an invitation to discuss the propriety of ordaining homosexual clergy." *Id.* at 24. Notably, the district court found that the plaintiff's statements with regard to homosexuality "were hardly unsolicited attempts to affect anyone's religious beliefs." *Id.* Here, on the other hand, there was no conversation between Plaintiff and Dix. Certainly Dix did nothing that could be construed as an invitation for Plaintiff to discuss homosexuality or gay marriage with her. Instead, Plaintiff was the instigator and was clearly motivated by a desire to evangelize. The Court does not find Dombrowski to be persuasive on this issue.

While it is true that speech on a matter of public concern does not lose its public character solely because it is privately expressed, a failure to make the public aware of the issue can undermine its public nature. See Kurtz v. Vickers, 855 F.2d 723, 729 (11th Cir.1988) (stating that "Kurtz's profession of public concern loses force when it is considered that he took no affirmative steps ... to inform the public at large about the problems with which he was so gravely concerned.") As noted above, the employee's motivation and his efforts to communicate the concerns to the public are relevant considerations. *Id.*

*11 Further, the mere fact that the subject matter of the expression is one in which the public might have a substantial interest, such as homosexuality or gay marriage, is not dispositive. Morgan, 6 F.3d at 754. The Court is most certainly aware that homosexuality and gay marriage have public concern im-

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plications. But in this case, Plaintiff's motivation was not to bring these issues to the public's attention. Instead, Plaintiff was proselytizing to a former friend in a private manner. Plaintiff's statement that she wanted Dix to read the pamphlet in private shows that her expression was not intended to be publicly aired and was not meant to be a matter of public concern. Plaintiff's July 28 email confirms this. There was no effort whatsoever by Plaintiff to communicate her concerns to the public. Plaintiff was doing nothing more than speaking for herself by giving her personal opinion. Her motivations were completely personal in nature.

"If the relevant speech was motivated by personal concerns instead of public concerns then it is not protected by the First Amendment in this context." Johnson v. Clifton, 74 F.3d 1087, 1092 (11th Cir.1996). Under the First Amendment standards promulgated by the appellate courts, the Court finds that Plaintiff's speech does not satisfy the first prong of the *Pickering* test, and therefore, her First Amendment free speech claim fails.

Defendants are entitled to summary judgment on Count I of Plaintiff's complaint.

D. First Amendment—Free Exercise of Religion

Plaintiff's final claim is that by disciplining her for expressing her sincerely held religious beliefs, Defendants' actions deprived her of the free exercise of religion under the First Amendment.

The First Amendment's prohibition on the making of a law prohibiting the free exercise of religion applies to the states through the Fourteenth Amendment. See Cantwell v. Connecticut 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Cornerstone Christian Schs. v. Univ. Interscholastic League, 563 F.3d 127, 135 (5th Cir.2009)

(quoting Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). But "[w]hile the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause does not prohibit governments from validly regulating religious conduct." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir.2006). Neutral laws of general applicability are constitutional, even if they incidentally burden religious beliefs or practices. Employment Div., 494 U.S. at 878--79.

"A law is neutral so long as its object is something other than the infringement or restriction of religious practices." Grace United Methodist Church, 451 F.3d at 649--50 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (a "law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context")). Here, the TRMC diversity policy which contains the anti-harassment provision under which Plaintiff was disciplined is neutral. Certainly the object of the policy is something other than the restriction of religious practices. It is also generally applicable and applies equally to all TRMC employees, regardless of religion. "Neutral rules of general applicability ordinarily do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief." Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir.2004). Since the diversity policy is neutral and generally applicable, it must simply be rationally related to a legitimate government end to pass muster. TRMC's interest in the effective operation of the hospital provides a rational basis for the rule.

*12 The question before the Court is whether Plaintiff has adduced evidence from which a reasonable jury could conclude that her ability to practice her religion was substantially burdened. The Court finds that she has not. Any burden on Plaintiff's right

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to freely exercise her religion was imposed by the implementation of a neutral policy of general applicability and therefore does not infringe upon the First Amendment. The Court disagrees with Plaintiff's contention that Defendants punished her for following a brand of Christianity they found unacceptable. The evidence simply does not support that proposition.

Defendants are entitled to summary judgment on Count II of Plaintiff's complaint.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants' Motion for Summary Judgment (Doc. 21) in its entirety.

SO ORDERED.

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(Cite as: 1989 WL 23201 (W.D.Mo.))

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United States District Court, W.D. Missouri, Western
Division.

Lena M. JOHNSON, Plaintiff,

v.

HALLS MERCHANDISING, INC. d/b/a Swanson's,
Defendant.

No. 87-1042-CV-W-9.

Jan. 17, 1989.

Joseph B. Polette, Polette & Lynn, Kansas City, Mo.,
for plaintiff.

Carol F. Fowler, M. Theresa Hupp, David C.
Trowbridge, Kansas City, Mo., for defendant.

*ORDER DENYING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT, GRANTING DEFEN-
DANT'S MOTION FOR SUMMARY JUDGMENT
AND REQUIRING PLAINTIFF TO SHOW CAUSE
WHY SANCTIONS SHOULD NOT BE IMPOSED*

BARTLETT, District Judge.

*1 The parties have filed cross-motions for
summary judgment.

Standard for Summary Judgment

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the Court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from

the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970); Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28 (8th Cir.), cert. denied, 444 U.S. 991, 100 S.Ct. 522 (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. Roberts v. Browning, 610 F.2d 528, 531 (8th Cir.1979); United States v. Porter, 581 F.2d 698, 703 (8th Cir.1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986). See also City of Mt. Pleasant v. Associated Electric Cooperative, Inc., 838 F.2d 268, 273 (8th Cir.1988). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 106 S.Ct. at 2553.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* (emphasis added).

The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to

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get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* The evidence favoring the nonmoving party must be more than “merely colorable.” *Id.* at 2511. The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Id.* Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

Discussion

Plaintiff's Motion For Summary Judgment

*2 Plaintiff has brought this action under Title VII of the Civil Rights Act of 1964, as amended in 1972, for alleged religious discrimination by defendant in violation of Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1). In her motion for summary judgment plaintiff contends that the issue of defendant's alleged liability in this Title VII religious discrimination case was fully and finally litigated in plaintiff's unemployment compensation hearing in which the Missouri Labor and Industrial Relations Committee reached a result adverse to defendant's. Plaintiff contends that the Missouri Labor and Industrial Relations Committee's decision now precludes defendant from litigating the issue of liability in the present case.

Defendant argues that plaintiff's summary judgment motion should be denied because: 1) the United States Supreme Court has held that unreviewed state administrative agency decisions are not entitled to preclusive effect under Title VII; and 2) Missouri courts would not accord collateral estoppel effect to

the decision rendered in plaintiff's unemployment compensation proceeding.

For the reasons set forth in “Defendant's Opposition to Plaintiff's Motion for Summary Judgment” at pages 4–16 and in defendant's letter to the court dated December 21, 1988, plaintiff's motion for summary judgment will be denied because unreviewed administrative decisions have no preclusive effect under Title VII. *University of Tennessee v. Elliott*, 478 U.S. 788 (1988).

Defendant also requests sanctions against plaintiff pursuant to Rule 11, Federal Rules of Civil Procedure, for what it characterizes as “plaintiff's frivolous summary judgment argument.” Plaintiff shall show cause in writing within 20 days from the date of this order why sanctions should not be imposed pursuant to Rule 11.

Defendant's Motion For Summary Judgment

Defendant argues that it is entitled to summary judgment because: 1) application of the religious accommodation provision of Title VII in this case would violate the Establishment Clause of the First Amendment to the United States Constitution; 2) plaintiff refused to cooperate when defendant attempted to accommodate her religious beliefs; and 3) defendant could not reasonably accommodate, without undue hardship, plaintiff's religious beliefs which required her to preface nearly every sentence she spoke with the phrase “In the name of Jesus Christ of Nazareth.”

Plaintiff does not dispute the facts set forth by defendant in defendant's suggestions at 2–11 and 23–30 and in its reply to plaintiff's suggestions at 5–8 and 15–22. Therefore, under *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986), there is no genuine issue of material fact.

For the reasons stated in Defendant's Suggestions

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in Support of its Motion for Summary Judgment and in Defendant's Reply to Plaintiff's Suggestions in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's prefacing statements on the job with "In the name of Jesus Christ of Nazareth" is not "religion" as defined in § 701(j) of Title VII, 42 U.S.C. § 2000e(j) because defendant has demonstrated that it was unable to reasonably accommodate plaintiff's religious practices without undue hardship on the conduct of defendant's business. Defendant attempted to reasonably accommodate plaintiff's practices but plaintiff did not make any effort to cooperate with her employer or to accommodate her beliefs to the legitimate and reasonable interests of her employer, i.e., to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers.

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*3 Having reached these conclusions, it is unnecessary to decide whether § 701(j) violates the Establishment Clause of the First Amendment to the United States Constitution. Accordingly, judgment will be granted in favor of defendant and against plaintiff on plaintiff's claim under § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1).

Conclusion

Therefore, it is hereby ORDERED that:

1) plaintiff's motion for summary judgment is denied;

2) defendant's motion for summary judgment is granted; and

3) within 20 days from the date of this order, plaintiff shall show cause why sanctions should not be imposed under Rule 11.

W.D.Mo., 1989.

Johnson v. Halls Merchandising, Inc.

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(Cite as: 1991 WL 325291 (D.S.C.))

H

United States District Court, D. South Carolina, Columbia Division.

Glen Eyrie James MILLER, Plaintiff

v.

Michael DRENNON, EMS Coordinator et al., Defendants.

No. 3:89-1466-0.

June 13, 1991.

PERRY, District Judge:

*1 The plaintiff, Glenn Eyrie James Miller, commenced this action against his former employers, Lexington County officials under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e *et seq.* and 42 U.S.C. § 1983, alleging that the defendants failed and refused to reasonably accommodate his religiously based objection to being assigned to certain Emergency Medical Services (EMS) substations with a female partner. He states that it is his sincerely held religious belief that "it is morally and spiritually wrong to sleep unsupervised in a room with another woman other than his wife." Plaintiff also alleges that the defendants have violated his rights under the Free Exercise Clause of the First Amendment by subjecting him to a rotating schedule which included his assignment to unmanned EMS substations with a female partner. The defendants asserts that in recognition of the plaintiff's stated beliefs, the County has adopted several initiatives, all designed to reasonably accommodate the plaintiff's objections and that the County has satisfied its statutory obligation to the plaintiff. The defendants deny that they have violated the plaintiff's rights under the First and Fourteenth Amendments to the Constitution of the United States.

The case was tried to the Court without a jury.

Upon consideration of the evidence and applicable law the Court now enters the following finding of fact and conclusions of law.

Findings of Fact

1. The plaintiff was employed by Lexington County as a Senior Paramedic in the Emergency Medical Service (EMS) Division of the Lexington County Department of Public Safety from June 2, 1975 to July 24, 1989.

2. In July of 1988, in response to budgetary constraints and the need to reduce overtime compensation being paid to EMS personnel, the County adopted a mandatory rotation system under which EMS paramedics and technicians were rotated through the seven EMS substations scattered throughout Lexington County. Prior to the change, EMS personnel had been assigned primarily to one of the seven substations. For example, plaintiff had been assigned, for the better part of his 13 years, to the Chapin substation. The change to a rotation system reduced the amount of overtime and more fairly apportioned the workload among all EMS personnel since substations in some areas of the County receive and respond to more calls than those in other areas.

3. When the new system was announced, plaintiff and his wife met with the County Administrator, Mr. Hartwig. Plaintiff stated that he objected, on religious grounds, to being assigned to work a shift with a co-worker who is female in a substation where no other employees were present and where separate sleeping facilities were not provided. He indicated that three of the seven substations were objectionable to him: Swansea, Batesburg, and Metro. Plaintiff's wife objected that permitting a male and female to be assigned to a substation where other personnel were not present would promote sexual misconduct and

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encourage rumors and gossip about sexual misconduct. Mr. Hartwig explained that civil rights laws prohibited assignment being made on the basis of sex and that available funding prohibited assignment of unnecessary personnel to, in essence, serve as chaperons. He invited the Millers to propose any solution that was in keeping with these limitations.

*2 In response to Mr. Hartwig's invitation, plaintiff and his wife proposed that separate bedrooms be provided at the three substations that plaintiff found objectionable. As a temporary solution, the Millers proposed that the County continue to allow EMS personnel to swap assignments.

5. Mr. Hartwig promptly responded to the Miller's proposal. On September 1, 1988, Mr. Hartwig wrote to plaintiff:

Thank you for your letter dated August 24, 1988, in which you objected to "placing one female and one male (EMS employee) in secluded places of opportunity." As I have previously informed your wife, federal and state laws require the County to make no distinction based on gender in making EMS work assignments. The County will continue to comply with these laws notwithstanding your general objection.

The County recognizes the possibility that your own assignments to a particular substation with a female paramedic may conceivably cause a conflict with some aspect of your religious observance, practice, or belief, and, therefore, the County will attempt to make a reasonable accommodation to resolve any such conflict.

You have identified the objectionable substations as Batesburg, Swansea, and Metro (adjacent to Lexington Medical Center). You have suggested that all three substations be located to share quarters with a fire station, presumably so that firefighting personnel

can act as chaperons for EMS personnel. This proposal will not be accepted because these three substations were specifically built as they are and where they are to fill the needs of the community.

Your alternative to moving the substation is to build separate bedrooms. I must first observe that I do not see how separate bedrooms will solve the problem of opportunity for sexual misconduct or rumors of sexual misconduct which seem to be the basis for your objection. Next, I must tell you that there is no room for separate bedrooms at any of these substations and that building such rooms is too expensive to be a "reasonable" accommodation to your needs. What the County will do, however, is install an opaque barrier between the bunks at these substations. If the ceilings will support a "folding wall" and the costs of such a modification is not prohibitive, such will be installed. Otherwise, the opaque barrier may be little more than a thick sliding drape.

If you wish, you may sleep in the ambulance instead of the bunk provided to you.

You have also suggested as a "temporary" solution that you be permitted to exchange assignments with other paramedics to avoid working with a female at one of these substations. Subject to the limitations expressed below, the County will permit this on a permanent basis. The limitations are:

1. Such exchanges may not cause you or another paramedic to be assigned so frequently to the busiest substations (Metro, Cayce, and Batesburg) that the County would have to pay more overtime premiums than it would have to pay if paramedics are scheduled part of the time to the less busy substations, such as Chapin. I am sure that you realize that overtime premiums are paid after 86 hours of actual work in two weeks and that a normal schedule is 14 hours a day, or 70 hours in most two-week periods. I am sure that you also know that working one or two shifts at a

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busy substation will cause an employee's actual work hours to exceed 70, but not usually to exceed 86. The limitations, which I have described is to avoid one employee being assigned so often to a busy substation that he or she exceeds 86 work hours in a pay period.

*3 2. In accordance with section 7(p)(3) of the Fair Labor Standards Act and with section 553.31 of the Department of Labor's regulations pertaining to the same subject (copy enclosed), public employees may—with employer approval—substitute for one another. EMS employees have the County's approval to make such substitutions. The substitution must be voluntary for both employees and is strictly between the two employees. The employee who is scheduled to work will be paid for his scheduled hours as if he had worked those hours. The substituting employee who actually works the scheduled hours will not be paid for the scheduled hours by the County.

I enclose a list of the employees whom the County feels are qualified to substitute for you. Their home telephone numbers are provided unless they maintain unlisted numbers.

The County will be happy to consider any other alternative accommodations which you wish to propose. Unless and until some other alternative is agreed to by the County, however, you will be assigned initially to substations in the same manner as other EMS personnel. If or when you receive an assignment to which you have religious objections you will be responsible for either performing the assignment or seeing to it that a qualified substitute performs the assignment subject to the limitations on overtime premiums described above. If neither you nor a qualified substitute accepts the assignment, you will be treated as having had an unexcused absence. For instance, if you are assigned to Batesburg with a female crew member for a particular shift, and you believe that you have arranged for a substitute to

cover for you, and the substitute does not show up for any reason whatsoever, the County will still be looking to you to perform the job or to arrange for another substitute.

Mr. Miller, I sincerely, hope that these accommodations will solve your problems and enable you to continue as an employee of the County. If, however, you have excessive unexcused absences, you will be disciplined in the same manner as any other EMS employee who has excessive unexcused absences. As you know, at some point this would mean termination. I certainly hope that the matter will never reach this point, but fairness to you requires that I make this point very clear.

6. On September 20, 1988, the EMS Operations Office, Mr. Drennon, distributed a memorandum to all Paramedics and Emergency Medical Technicians confirming that voluntary shift-swapping and station-swapping was permissible under the terms described in Mr. Hartwig's letter of September 1, 1988 to plaintiff. In addition, plaintiff was informed that he could ask for annual leave when he was scheduled to work with a female partner and could not arrange a swap.

7. Defendants thereafter installed walls between the bunks at the substations. However, the plaintiff has testified that the walls are insufficient because each substation has only one entrance. Plaintiff also complains that some co-workers have ridiculed the walls and have referred to them as "Miller Walls."

*4 8. On November 8, 1988, plaintiff filed a grievance with Mr. Whitehead, the Lexington County Public Safety Director, over "the continuing threat of violation of my religious rights in the EMS assignment at certain duty stations which would require me to sleep in the same room with a female employee." Specifically, plaintiff wrote:

I am requesting by means of an official em-

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ployee grievance that you inform me (so I can relieve my wife of the constant pressure of this threat) in writing as to how the county intends to accommodate my sincerely held religious beliefs so as to avoid any duty rotation assignment which would require me to "spend time in the equivalence of a motel room" with a female employee. While there has been some suggestion that the county is working towards a solution to this problem county-wide, I have still not received any written assurance that I will not be placed in a compromising position on the next modification of the schedule.

9. On November 21, 1988, Mr. Whitehead responded in writing to this grievance, in pertinent part, as follows:

No one has violated your religious rights. No one threatens to violate your religious rights. The County has already informed you in writing of how it intends to accommodate your religious beliefs. I refer you to the County Administrator's letter to you dated September 1, 1988, and to the memo to all paramedics and EMT's dated September 20, 1988, copies of which are attached to this memo. I need to update one portion of the Administrator's September 1, letter. In it he told you that if the cost of installing "folding walls" was not prohibitive, such would be installed. The walls have, in fact, been ordered. All other parties of the September 1, letter are accurate and operative.

10. On December 26, 1988, plaintiff was assigned to work at the Batesburg substation with a male partner. The male partner failed to report on time and, when he reported several hours late, was suspended as discipline. Both stand-by EMTs that day were female. When, at about 11:00 A.M., a female stand-by was called in to work the shift with plaintiff, plaintiff went to the shift supervisor to object to having to work with a female partner for the duration of the shift. The shift supervisor directed

plaintiff to return to the Batesburg substation and work the remainder of his shift, as assigned. Plaintiff refused to do so and was suspended for two days.

11. During the latter part of 1988, the plaintiff was unable to obtain agreements with other employees to exchange work assignments with him and he complains that the defendants did not assist him obtain such agreements.

12. On February 10, 1989, plaintiff was suspended for two days following an investigation into a female co-worker's written complaint that he had made disparaging statements about her to newspaper reporters who were covering his story for the Columbia Newspapers. The County Grievance Committee viewed the female co-worker's testimony as more credible and upheld the suspension.

*5 13. On March 24, 1989, with plaintiff's concurrence, he was placed on sick leave. On May 5, 1989 plaintiff's counselor, Scott White, Psy.D., wrote the County's personnel director:

It is my assessment that the acute anxiety, depression and somatic symptoms which Mr. Miller presented when we first met have improved slightly. The continued distress that he is experiencing appears to be related to the fact that no compromises or resolutions have been worked out related to his job situation.

It is my opinion that Mr. Miller is capable of holding employment at this time. However, I *do not* believe he is capable of returning to the same position under the same conditions at this time. I believe that this would simply lead to the rapid reoccurrence of the same intense distress. Therefore, unless he can be offered a different position or the same position under different conditions, I recommend that he remain on sick leave at this time.

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Based on Dr. White's assessment that Plaintiff could work in some capacity for the County and because the County had a temporary need for someone to work in the dispatch area, plaintiff returned to work in the dispatch area of the Public Safety Department on May 15, 1989. He remained in that position until July 17, 1989, when he was again placed on paid leave.

14. Because Dr. White continued to be of the view that plaintiff was unable to return to his duties as a Senior Paramedic so long as the rotation system remained intact, plaintiff was placed on unpaid leave of absence on July 24, 1989 when his paid leave was exhausted.

15. County policy authorizes unpaid leaves of absence for a maximum of one year. In accordance with that policy, plaintiff's employment with the County terminated at midnight on July 24, 1990 because he had not returned to his job as a Senior Paramedic.

Conclusions of Law

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiff asserts four claims. The first is for religious discrimination under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e et seq.) ("Title VII"). The second is for religious discrimination under the Free Exercise Clause of the First Amendment. The third claim alleges a violation of the Free Speech and Free Association Clause of the First Amendment. The fourth alleges a violation of plaintiff's constitutional rights to Equal Protection and Due Process. All four claims derive from plaintiff's religiously-based objection to being assigned to work a shift with only a female co-worker. The County contends that it has satisfied its duty of reasonable accommodation under Title VII and that the Free Exercise, Free Speech and Association, and

Equal Protection and Due Process claims are without merit. The Court agrees.

Title VII and the Duty of Reasonable Accommodation

3. Under Title VII, an employer cannot discriminate against an employee with respect to the terms, conditions or privileges of employment because of the employee's religion. 42 U.S.C. § 2000e-2 "Religion", as used in Title VII, is defined to

*6 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.

42 U.S.C. § 2000e(j).

In *Trans World Airlines, Inc. v. Hardison*, [14 EPD ¶ 7620] 432 U.S. 63 (1977), the Supreme Court addressed the extent of the "reasonable accommodation" requirement imposed on employers by Title VII. In *Hardison*, a sabbatarian declined to work on Saturdays in accordance with the rotating shift schedule of an airline maintenance facility which maintained a 24-hour, 7 day a week operation. The Court of Appeals had held that TWA could reasonably accommodate Hardison by assigning another employee to work in Hardison's place when Hardison was scheduled to work on his sabbath. That such re-assignment would result in reduced efficiency, require payment of overtime and/or violate seniority rights of other employees was, according to the Court of Appeals, insufficient to constitute "undue hardship." The Supreme Court reversed. The Court held that an employer which follows a neutral, rotating shift schedule is not required to rearrange its schedule in order to accommodate the religious practices of an employee. Nor is it required to incur anything more than *de minimis* cost in an effort to accommodate the religious practices or observances of employees. To

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require anything more, said the Court, “is an undue hardship.” 432 U.S. at 84.

Following *Hardison*, several courts have been confronted with the issue of whether an employer has an affirmative duty, under Title VII, to alter a neutral, rotating shift schedule or to direct employees to “swap” shifts with an employee whose religious observance conflicts with the shift to which he has been assigned. These courts have held that there is no such obligation. For example, in *Brener v. Diagnostic Center Hospital*, [28 EPD ¶ 32,550] 671 F.2d 141 (5th Cir.1982), the Fifth Circuit held that a hospital had no duty to arrange shift swaps between pharmacists to accommodate the religious observance of one of its pharmacists which prohibited work from sundown Friday until sundown Saturday. The employer's obligation of reasonable accommodation under Title VII was satisfied, the court said, by its *permitting* pharmacists to make voluntary shift swaps between themselves. To require anything more of an employer such as requiring the employer to arrange or direct shift swaps would result in preferential treatment of some employees because of their religion, a result not intended by Congress, and would constitute undue hardship.

Similarly, in *Murphy v. Edge Memorial Hospital*, 550 F.Supp. 1185 (M.D.Ala.1982), the court rejected a nurse's claim that, because of her religious beliefs, she should be exempted from working from sunset Friday until sunset Saturday. Under the hospital's rotating shift schedule, all nurses were required to work three out of four weekends. They were permitted to arrange swaps among themselves, but understandably, there were not many nurses interested in taking on more weekend work. After making her religious objection to working from sundown Friday until sundown Saturday known and being refused an exemption from the schedule, Murphy was fired when she failed to report to work for weekend duty. The court emphasized that, under *Hardison*, an em-

ployer “is not required to alter a neutral scheduling system, but may satisfy the reasonable accommodation requirement by demonstrating efforts to accommodate an employee *within* the neutral system.” 550 F.Supp. at 1189 (emphasis added).

*7 Finally, in *United States v. city of Albuquerque*, [12 EPD ¶ 11,244] 545 F.2d 110 (10th Cir.1976), *cert. denied* [14 EPD ¶ 7635] 433 U.S. 909 (1977), the Tenth Circuit rejected the EEOC's claim that the City of Albuquerque violated a Seventh Day Adventist firefighter's rights under Title VII because, pursuant to the City's rotating shift assignments, he was sometimes required to work on Friday evening and Saturday in violation of his religious beliefs. Subject to minimum staffing requirements, the City permitted firefighters to avoid a particular shift assignment by trading shifts or by using annual leave or leave without pay. Relief from a particular assignment was not always possible under the City's system, though, because of illness of other shift members, inability to find a substitute, or emergency conditions. Nonetheless, the court concluded that because in most circumstances a firefighter had considerable latitude in getting excused from reporting for a particular shift assignment, the City had satisfied its reasonable accommodation obligation.

The EEOC had contended that the City of Albuquerque had an affirmative obligation to seek out firefighters to substitute for a firefighter whose religious beliefs prohibited his working at designated times. The court rejected this argument, noting:

For understandable reasons, the policy within the department was for the firemen to arrange their own tradeoffs, as the supervisors did not want to be in the position of coercing trade-offs.

545 F.2d at 113. Moreover, the court observed: “In our view, when the ‘business’ of an employer is protecting the lives and property of a dependent citi-

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zenry, courts should go slow in restructuring his employment practices.” *Id.* at 114 (citations omitted). Any accommodation beyond that provided by Albuquerque (voluntary shift swapping and permitting the use of paid or unpaid leave),

would impose an undue hardship on the Albuquerque Fire Department in any of several ways: by inflicting an unjustified financial burden upon it; by compelling other firemen to accept less favorable working conditions; by forcing a reduction in the defendant Department's firefighting efficiency; by imposing onerous and complex scheduling problems upon it.

Id. at 114.

In this case, Lexington County authorized EMS technicians and Senior Paramedics to swap shifts with each other. Indeed the County provided plaintiff with a list of names and telephone numbers to facilitate his arranging to swap shifts with someone whenever he was scheduled to work with a female at one of the three substations to which he objected. The County also authorized plaintiff to use leave to avoid assignments when they presented a conflict with his religious beliefs. Of course, plaintiff's latitude to avoid shifts was limited by his ability to find a substitute and by certain minimum staffing requirements. But these same limitations were present in *Brener*, *City of Albuquerque* and *Murphy*, in all of which the courts found the duty of reasonable accommodation satisfied. See also *Eversley v. M Bank Dallas*, [46 EPD ¶ 37,940] 843 F.2d 172, (5th Cir.1988) (Title VII's duty of reasonable accommodation does not require employer to force other employees to trade shifts with religious objector).

*8 Thus, by permitting plaintiff to swap shifts on a voluntary basis with other EMS personnel and by permitting him to use leave to avoid objectionable assignments, the County fulfilled its duty of reason-

able accommodation. Indeed, the County went beyond its minimum statutory duty by installing folding walls—at a cost of several thousand dollars—at the three substations that plaintiff found objectionable; by authorizing him to sleep in the ambulance; and by offering the use of a heated, pop-top camper. That these accommodations did not satisfy plaintiff is of no consequence. As the Supreme Court explained in *Ansonia v. Board of Education v. Philbrook*, [41 EPD ¶ 36,565] 479 U.S. 60 (1986):

By its very terms the statute directs that *any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation. The employer violates the statute unless it ‘demonstrates that [it] is unable to reasonably accommodate ... an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business.’ *Thus, where the employer has already reasonably accommodation the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.* As *Hardison* illustrates, the extent of undue hardship on the employer's business is at issue only where the employer claims that its is unable to offer *any* reasonable accommodation without such hardship. Once the Court of Appeals assumed that the school board had offered to Philbrook a reasonable alternative, it erred by requiring the board to nonetheless demonstrate the hardship of Philbrook's alternatives.

479 U.S. at 68–69 (emphasis added).

The Free Exercise Claim

4. As a governmental employer, Lexington County is subject to the First Amendment's Free Exercise Clause as well as to Title VII. However, the Supreme Court's recent decision in *Employment Division Department of Human Resources of Oregon v. Smith*, — U.S. —, 110 S.Ct. 1590, makes it clear that the actions of which plaintiff complains do not

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violate the Free Exercise Clause.

As the *Smith* Court observed, the Free Exercise Clause prohibits governmental regulation of the religious *beliefs* of its citizens. It also prohibits government regulation of the performance of, or abstention from physical acts when the regulation is aimed only at religiously motivated acts or abstentions. The Free Exercise Clause does not, however prohibit the government from requiring an individual to adhere to a law or policy of general applicability simply because adherence would involve the performance of an act that his religious belief forbids or abstention from an act that his religious belief requires. 110 S.Ct. at 1599. If prohibiting the exercise of religion is not the *purpose* but merely the *incidental effect* of a law or policy of general applicability, the Free Exercise Clause is simply not implicated. *Id.* at 1600.

*9 Here, it is undisputed that the rotating schedule was implemented by the County in furtherance of its legitimate needs. The County had a legitimate interest in reducing its overtime costs and more evenly distributing the workload among its EMS personnel. The incidental effect of the rotating schedule policy may have been to interfere with plaintiff's religious beliefs and practices, but that is not sufficient to implicate the Free Exercise Clause, much less to constitute a violation thereof. *Smith*.

Plaintiff relies on *Sherbert v. Verner*, 374 U.S. 398 (1963), and contends that under *Sherbert* and its progeny, the County must satisfy the “compelling governmental interest—least restrictive alternative” test to justify the rotating schedule's burdening of plaintiff's religious beliefs. But, as *Smith* makes clear, neither *Sherbert* nor its analysis apply to the facts of this case. According to *Smith*, *Sherbert* and its progeny are limited to the denial of unemployment compensation benefits to a person whose unemployment was brought about by his religious beliefs or practices. 110 S.Ct. at 1602–3. These unemployment

cases, the *Smith* court stressed, are unique. *Id.*

Because there is no evidence to suggest that the implementation of a rotating shift schedule for EMS personnel was motivated by a desire to prohibit the free exercise of plaintiff's religion, his Free Exercise claim is without merit.

Moreover, plaintiff cannot prevail under the “compelling state interest—least restrictive alternative” analysis he advocates. To permit plaintiff to be exempt from assignment at certain locations or to exempt him from assignment with a female partner solely because of his religious beliefs would single out his religious beliefs for preferable treatment. Such action would, when undertaken by Lexington County, constitute a violation of the Establishment Clause. See *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (law requiring employers to permit employees not to work on their sabbath violates Establishment Clause). Avoiding a violation of the Establishment Clause, is by definition, a compelling state interest. *Bollenbach v. Board of Education*, [43 EPD ¶ 37,051] 659 F.Supp. 1450 (S.D.N.Y.1987) (school board's refusal to assign female bus drivers to buses transporting Hasidic Jews because of religious objection violates Establishment Clause). The alternatives proposed by the County for accommodating plaintiff's religious objections—permitting him to swap shifts on a voluntary basis; installing folding walls in the objectionable subsections; offering the use of a portable, heated pop-top camper; offering the use of the ambulances for sleeping; and authorizing the use of leave to avoid assignments that are religiously objectionable—not only more than satisfied Title VII's reasonable accommodation requirement, they also constituted the least restrictive alternatives to accomplishing the County's compelling interest in avoiding an Establishment Clause violation.

*10 Finally, to the extent that plaintiff's Free Exercise claim is based on his fear of rumors about sex-

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ual misconduct, it is without merit. See *Garcia v. Williams*, 704 F.Supp. 984 (N.D.Cal.1988). In *Garcia*, a federal judge's secretary alleged that her First Amendment right to the free exercise of her religion was violated by coerced workplace exposure to immoral, unethical and unchaste behavior. The district court summarily dismissed this aspect of Garcia's claim for failure to state a claim. If an employee could pick and choose which of his fellow employees he is willing to work with based on those employees' willingness to comply with *his* notice of moral or Christian behavior, the workplace would be chaotic. The Free Exercise Clause does not extend this far.

The Free Speech and Free Association Claims

5. Plaintiff's third cause of actions alleges a violation of his First Amendment rights of free speech and free association. It is clear, however, that this claim is simply another way of asserting a violation of his rights under Title VII and the Free Exercise Clause. Since the County has satisfied its obligation of reasonable accommodation under Title VII and has not violated plaintiff's First Amendment right to freely exercise his religion, his Free Speech and Free Association claims also fail.

To the extent that plaintiff's claim may be viewed as something other than a different way of stating his religious discrimination claim, it fails under pertinent case law. To state a free speech claim, a public employee must allege and prove that he has spoken out on a matter of public concern; that his interest in speaking out on this matter outweighs his employer's interest in the effective and efficient fulfillment of its duties to the public; that he has lost some benefit of employment as a result of his speech; and that his speech on the matter of public concern was the cause of his losing the employment benefit. *Connick v. Myers*, 461 U.S. 138 (1983); *Huang v. Board of Governors*, 902 F.2d 1134 (4th Cir.1990); See *Muller v. Fairfax County School Board*, 878 F.2d 1578 (4th Cir.1989).

Assuming that plaintiff's complaint that the County was discriminating against him on the basis of his religious beliefs addresses a matter of public, not private, concern, the fact remains that he was not deprived of any benefit of employment for speaking out. It is this absence of any loss of benefit that defeats plaintiff's free speech claim.

While plaintiff did ultimately lose his employment with the County, his termination did *not* result from his speaking out of any matter of public concern. It resulted from the application of the County's facility neutral leave of absence policy under which any employee who is unable to return to work within a year after going on leave of absence is terminated. It is true that plaintiff's leave of absence was prompted by his belief and the opinion of a counselor that he could not, without jeopardizing his mental health, work so long as there was a possibility that he might have to be assigned to one of the three objectionable substations with a female co-worker. But that fact merely demonstrates that plaintiff's Free Speech claim is nothing more than a restatement of his religious discrimination claims or as a distinct claim, the Free Speech claim is without merit.

*11 There is no evidence of any attempt by the County to regulate plaintiff's associational rights. It has merely insisted that, subject to the accommodations it has made, plaintiff comply with the rotating schedule that it has promulgated for EMS personnel. Plaintiff has refused, citing his religious objection to being subject to the possibility that he may be assigned to one of the three objectionable stations with a female coworker. Thus, his claim is *not* for violation of his right of association but for religious discrimination, and that claim has been previously addressed and rejected.

The Equal Protection and Due Process Claim

6. The fourth cause of action purports to state a

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claim for violation of plaintiff's constitutional rights to Due Process and Equal Protection. If this claim is merely another way of alleging the religious discrimination that plaintiff asserts in his first two causes of action, the claim fails for the reasons that the religious discrimination claims under Title VII and the Free Exercise Clause fail. *See Daniels v. Quinn*, 801 F.2d 687, 691 (4th Cir.1986).

The Equal Protection Clause requires that similarly situated persons be treated similarly by the government. That is precisely what Lexington County has done, subject to its duty to attempt to reasonably accommodate plaintiff's religious objection to being treated like all other EMS employees. Plaintiff cannot invoke a constitutional guarantee that is aimed at assuring that similarly situated persons will be treated alike in support of his claim to be treated differently. His Equal Protection claim is patently without merit.

Plaintiff's Due Process claim is also deficient. To state a Due Process—either substantive or procedural—claim, plaintiff must show that he has been deprived of a property or liability interest in his employment. *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 172 (4th Cir.1988). He cannot do so. He was an employee-at-will and therefore, by definition, had no property interest in continued employment. *Bishop v. Wood*, 426 U.S. 341 (1976); *Pittman v. Wilson County*, 839 F.2d 225, 229 (4th Cir.1988). Moreover, nowhere has plaintiff alleged facts tending to show that the County or its officials publicized outside the channels of county government false charges that stigmatized him to such an extent that his freedom to take advantage of other employment opportunities has been foreclosed. *Stone, supra*, 855 F.2d at 172 n. 5. Accordingly, plaintiff has not made out a Due Process Clause violation.

7. In sum, this Court concludes that the County has satisfied its duty of reasonable accommodation

under Title VII and that the County has not violated plaintiff's rights under the First or Fourteenth Amendments to the United States Constitution.

Conclusion

For the foregoing reasons, the Court finds for defendants. Judgment will be entered accordingly.

It Is So Ordered.

D.S.C.,1991.

Miller v. Drennon

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232 Fed.Appx. 581

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Seventh Circuit Rule 32.1. (Find CTA7 Rule 32.1) United States Court of Appeals, Seventh Circuit.

Neil T. NOESEN, Plaintiff-Appellant,

v.

MEDICAL STAFFING NETWORK, INC., et al., Defendants-Appellees.

No. 06-2831. | Submitted April 25, 2007* . | Decided May 2, 2007. | Rehearing Denied June 13, 2007.

Synopsis

Background: Roman Catholic pharmacist who was terminated after he refused to fill prescriptions for birth control or to have any contact with customers who asked to have such prescriptions filled brought Title VII action against pharmacy, health care staffing provider, and state, alleging that they discriminated against him on the basis of his religion. The United States District Court for the Western District of Wisconsin, 2006 WL 1529664, John C. Shabaz, J., entered judgment for defendants. Pharmacist appealed.

Holdings: The Court of Appeals held that:

[1] pharmacist waived his claim against health care staffing provider by failing to develop a factual basis;

[2] relieving pharmacist of all telephone and counter duties so that he could avoid birth control customers was not a reasonable accommodation required by Title VII; and

[3] state was immune from Title VII claim.

Affirmed.

West Headnotes (3)

[1] Federal Courts

⚡ Waiver of Error in Appellate Court

Roman Catholic pharmacist, who was terminated after he refused to fill prescriptions for birth control or to have any contact with customers who asked to have such prescriptions filled, waived on appeal his Title VII claim against health care staffing provider by failing to develop a factual basis for it in his appellate brief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[2] Civil Rights

⚡ Particular Cases

Relieving Roman Catholic pharmacist of all telephone and counter duties so that he would not have any contact with customers who asked to have birth control prescriptions filled was not a reasonable accommodation required by Title VII, since this would impose an undue hardship on the employer by shifting pharmacist's share of initial customer contact to other pharmacy staff, requiring other employees to assume a disproportionate workload. Civil Rights Act of 1964, §§ 701(j), 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2.

1 Cases that cite this headnote

[3] Civil Rights

⚡ Public Employers and Employees

Since state did not employ Roman Catholic pharmacist who was terminated after he refused to fill prescriptions for birth control or to have any contact with customers who asked to have such prescriptions filled, it was immune from his Title VII claims. U.S.C.A. Const.Amend. 11; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2 Cases that cite this headnote

*582 Appeal from the United States District Court for the Western District of Wisconsin. No. 06-C-071-S. John C. Shabaz, Judge.

Attorneys and Law Firms

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Stephanie L. Adler, Jackson Lewis, Orlando, FL, Michael Aldana, Quarles & Brady, Milwaukee, WI, Thomas J. Balistreri, Office of the Attorney General Wisconsin, Department of Justice, Madison, WI, for Defendants-Appellees.

Before Hon. DANIEL A. MANION, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

Opinion

ORDER

Neil Noesen, a pharmacist, refuses on religious grounds to fill prescriptions for birth control. He brought this *pro se* lawsuit against Medical Staffing Network, Inc. ("MSN"), Wal-Mart Stores, Inc., and the State of Wisconsin, alleging that they discriminated against him on the basis of his religion by refusing to exempt him from having any contact with customers who ask to have such prescriptions filled. The district court resolved all claims against Noesen. The only issues on appeal concern Noesen's contention that the defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when Wal-Mart refused to accede to his demand that it insulate him from any interaction, no matter how brief, with any person seeking birth control. We affirm the district court's judgment.

The material facts are undisputed. Wal-Mart's pharmacy in Onalaska, Wisconsin assists hundreds of customers with pharmacy-related requests and fills an average of 250 prescriptions daily. To meet the high volume of customer requests, pharmacists and pharmacy technicians share customer-service duties. For example, both pharmacists and technicians must assist walk-in customers and answer telephone inquiries from customers, physicians, hospitals, clinics, insurance companies, *583 and other pharmacies. Technicians typically input prescription information into the computer system and verify insurance, while pharmacists have sole responsibility for checking all prescriptions and handing the medications to retail customers. Approximately

10% of the pharmacy's customer volume is related to requests for birth control.

In July 2005 Wal-Mart asked MSN, a health care staffing provider, for temporary assistance in its Onalaska pharmacy. MSN recommended Noesen. Noesen, a Roman Catholic, is licensed by the State of Wisconsin to practice pharmacy, but the state licensing authority restricted his license in 2004 because of his refusal to fill, or refer to another pharmacy, a woman's prescription for contraception. Under the restriction, Noesen must notify potential employers in writing of the pharmacy services he will not perform and the steps he will take to ensure that a patient's access to medication remains unimpeded.

Before starting work at the Onalaska pharmacy, Noesen wrote to Wal-Mart and explained that, due to his religious convictions, he would "decline to perform the provision of, or any activity related to the provision of contraceptive articles," including "complete or partial cooperation with patient care situations which involve the provision of or counsel on contraceptive articles." Robert Overton, a pharmacist and acting supervisor of the Onalaska pharmacy, understood Noesen's limitations to mean that he would not fill prescriptions for birth control, and agreed to accommodate that limitation. Overton relieved Noesen from: filling prescriptions for birth control, taking orders for birth control from customers or physicians, handing customers birth control medication, and performing checks on birth control orders. Overton also arranged for birth control prescriptions to be sorted into a separate basket so that Noesen would not have to touch the items and ensured that someone would be available to fill orders and respond to customer inquiries concerning birth control.

Within days Overton realized that, even with these accommodations, Noesen refused to perform general customer-service duties if they involved even briefly talking to customers seeking contraception. For example, when Noesen answered telephone calls from customers or physicians attempting to place orders for birth control, Noesen put them on hold and refused to alert other pharmacy staff that someone was holding. Similarly, when customers came to the counter with birth control prescriptions, Noesen walked away and refused to tell anyone that a customer needed assistance. Noesen explained that if required to speak to customers seeking birth control, he would always counsel them against it and refuse to fill their prescriptions. Noesen rejected Overton's offer that Noesen assist only customers

that were not of childbearing age or only male customers. He insisted that the only acceptable accommodation was to relieve him of all counter and telephone duties unless customers were first pre-screened by some other employee to ensure that they were not seeking birth control. Overton agreed that he and the pharmacy intern could assist all walk-in customers but due to high caller volume Noesen, like all other staff, needed to answer the telephones, although he could refer callers with birth control issues to others. Noesen rejected this accommodation.

On his fifth day at the Onalaska pharmacy, after Noesen refused his work assignment with the modified accommodations, Overton fired Noesen. But Noesen refused to leave the store. He began lecturing customers about Wal-Mart's discriminatory practices and had to be carried out *584 by police. Based upon his conduct at Wal-Mart, MSN also fired Noesen.

The district court resolved all claims in favor of the defendants. The court concluded that Noesen had not alleged a failure to accommodate claim against MSN and that "Wal-Mart gave [Noesen] the exact accommodation that he sought." The court also explained that, after receiving Wal-Mart's initial accommodation, Noesen wanted an additional accommodation-avoiding any situation where he might interact with a customer seeking birth control-to which he was not entitled. As to Noesen's separate claims against the State of Wisconsin for failing to enact a rule that would allow him to refuse to distribute birth control, the district court dismissed them, stating generally that it lacked jurisdiction.

[1] On appeal Noesen first contends that a genuine issue of material fact exists concerning whether Wal-Mart and MSN reasonably accommodated his religious beliefs because a jury could find that his proposed accommodation was reasonable. We review the district court's grant of summary judgment de novo, viewing all facts and inferences in Noesen's favor.¹ See *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 538 (7th Cir.2007).

[2] Title VII of the 1964 Civil Rights Act requires employers to make reasonable accommodations for their employees' religious beliefs and practices unless doing so would result in undue hardship to the employer. 42 U.S.C. § 2000e-2; *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934-35 (7th Cir.2003). A reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70, 107 S.Ct.

367, 93 L.Ed.2d 305 (1986); see *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir.2001). Noesen's religious beliefs (and his interpretation of the Wisconsin Administrative Code) require him to avoid participating in the distribution of birth control "in any way." Although Wal-Mart attempted to accommodate him, Noesen says that the conflict between his employment obligations and religious beliefs was not eliminated. And, he insists, the conflict could have been eliminated in only one way: by Wal-Mart relieving him of all counter and telephone duties. Noesen, however, was not entitled to that accommodation if it would work an undue hardship on Wal-Mart. See 42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); *Endres v. Ind. State Police*, 349 F.3d 922, 925 (7th Cir.2003). Undue hardship exists when a religious accommodation would cause more than minimal hardship to the employer or other employees. *Trans World Airlines, Inc.*, 432 U.S. at 84, 97 S.Ct. 2264; *Endres*, 349 F.3d at 925.

Wal-Mart contends, and we agree, that Noesen's proposed accommodation would impose an undue hardship. It is undisputed that Wal-Mart's relieving Noesen of all telephone and counter duties would have shifted his share of initial customer contact to other pharmacy staff. Yet an accommodation that requires other employees to assume a disproportionate workload (or *585 divert them from their regular work) is an undue hardship as a matter of law. See *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir.2001); see also *Endres*, 349 F.3d at 925 (excusing some employees from undesirable tasks would create substantial costs for other employees as well as for the entity itself). Noesen nevertheless insists that reassigning initial customer contact away from him to lower-paid technicians would result in a more efficient use of pharmacy resources. But even assuming that the technicians could promptly answer all incoming calls from customers and health professionals, the diversion of technicians from their assigned duties of data input and insurance verification would impose the undue cost of uncompleted data work on Wal-Mart. Wal-Mart was under no obligation to rearrange staffing and incur such costs to accommodate an inflexible employee. See *Endres*, 349 F.3d at 926; *Bruff*, 244 F.3d at 500. Accordingly, the district court's grant of summary judgment in Wal-Mart's favor was proper.

[3] Noesen next contends that the district court erroneously dismissed his claims against the State of Wisconsin because, he says, Title VII requires that Wisconsin enact a "conscience clause" exception to its codified standards of professional

conduct allowing him to refuse to dispense birth control without facing disciplinary proceedings. Thus, he says, the state was a party to Wal-Mart's Title VII violation.

Even though Noesen insists that § 2000e-7 establishes federal court jurisdiction over his claim against the State of Wisconsin, it does not. The Eleventh Amendment bars federal jurisdiction over suits brought against states unless the state has consented to suit in federal court or Congress validly abrogated the state's immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Although Congress has abrogated states' immunity under Title VII, *Nanda v. Bd. of Tr. of Univ. of Ill.*, 303 F.3d 817, 828-31 (7th Cir.2002), *cert. denied*, 539 U.S. 902, 123 S.Ct. 2246, 156 L.Ed.2d 110 (2003), Title VII applies

to states only in their capacity as employers, *see id.*; *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 885 n. 4 (7th Cir.1998). Here it is undisputed that the State of Wisconsin neither agreed to this suit in federal court nor employed Noesen during the events at issue in this suit. The district court therefore was correct that it lacked jurisdiction over Noesen's Title VII claims against the State of Wisconsin and properly dismissed them.

AFFIRMED.

Parallel Citations

2007 WL 1302118 (C.A.7 (Wis.)), 100 Fair Empl.Prac.Cas. (BNA) 926

Footnotes

- * After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus the appeal is submitted on the briefs and the record. *See* Fed. R.App. P. 34(a)(2).
- 1 We note that the district court never considered whether MSN afforded Noesen a reasonable accommodation because the court concluded that he had not alleged a failure to accommodate claim against MSN. Indeed, our review of the record reveals that he never developed a factual basis for his claim against MSN. Likewise, in his brief to this court he did not explain how MSN failed to accommodate him. Thus Noesen has waived his claim against MSN. *See Spath v. Hayes Wheels Int'l-Incl., Inc.*, 211 F.3d 392, 397 (7th Cir.2000) (explaining that failure to develop factual basis for argument results in waiver).