No. 09-709

IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Title VII requires unions to reasonably accommodate employees' religious beliefs. Must an employee suffer discharge or discipline as a prerequisite to challenging the reasonableness of a labor union's religious accommodation?

2. The lower courts have uniformly agreed that employees who have religious objections to supporting labor unions may, as a reasonable accommodation under Title VII, redirect their compulsory union fees to charity. Where a labor union requires that the religious objector must pay more than any other member of the bargaining unit to retain employment, is that a reasonable accommodation?

PARTIES TO THE PROCEEDINGS

The parties before this Court are employee Petitioner Jeffrey J. Reed and Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW").

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Reed respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Sixth Circuit is reported at 569 F.3d 576 (6th Cir. 2009) and is reproduced at Appendix ("App.") 1a. The opinion of the United States District Court for the Eastern District of Michigan is reported at 523 F. Supp. 2d 592 (E.D. Mich. 2007) and is reproduced at App. 55a. The cause determination letter of the Equal Employment Opportunity Commission is reproduced at App. 73a.

JURISDICTION

The Court of Appeals issued its original reported opinion (564 F.3d 781) on May 7, 2009. App. 28a. Petitioner filed a timely petition for rehearing *en banc* on May 15, 2009. The panel withdrew its original opinion and entered an amended opinion on June 23, 2009. Petitioner filed a timely petition for rehearing *en banc* on June 24, 2009, which the Court of Appeals denied on September 21, 2009. App. 75a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the Civil Rights Act of 1964 provides:

> (c) Labor organization practices
> It shall be an unlawful employment practice for a labor organization—
>
> > (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . .

42 U.S.C. § 2000e-2(c)(1).

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

42 U.S.C. § 2000e-2(a)(1).

Section 701(j) of Title VII of the Civil Rights Act of 1964 provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

Jeffery Reed challenges the Sixth Circuit's split decision that he must be fired, or experience some sort of employment discipline, before he is eligible to contest the union's requirement that he pay substantially more in compulsory union fees than any other objecting employee. On this point, the Circuits are in disagreement.

When an employee's religious beliefs conflict with an employment requirement, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) requires that a reasonable accommodation be attempted. Mr. Reed has religious objections to supporting the union. The union's accommodation is to require him to make, as a condition of employment, a charity payment in an amount approximately 22% greater than any other objecting employee must pay.

The dissenting judge on the Sixth Circuit panel found that Mr. Reed need not suffer discharge or discipline as a prerequisite to challenging this scheme, and that the majority opinion was in conflict on this point with decisions of the First, Second, Fourth, Seventh and Ninth Circuits. App. 17a. In

fact, the various Circuits are in turmoil over the necessary elements of a prima facie case of religious accommodation.

This Court granted a writ of certiorari to define the elements of a prima facie case for religious accommodation in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986), but failed to reach that issue. It remains unresolved by the Court to this day.

I. FACTS

Mr. Reed assembles vehicles for AM General. The UAW is Mr. Reed's exclusive bargaining representative. The UAW and AM General entered into a contract requiring Mr. Reed to join the union or pay union fees as a condition of employment.

Mr. Reed sincerely believes that the UAW supports activities that are in conflict with the will of God and the historic teachings of his church. He informed the UAW of the conflict, and then followed the UAW's procedure for applying for a religious accommodation that would allow him to redirect his compulsory union fees to a charity. In accord with the UAW policy, and to show that he did not seek any financial advantage, Mr. Reed offered to make an alternative payment to the Disabled American Veterans.

The UAW constitution grants to voluntary union members the right to object to the political portion of its dues and to receive a rebate of that amount. This allows UAW members to pay less than 100% of full dues and to avoid supporting union politics. Similarly, non-union employees have the right to refrain from paying that portion of dues devoted to politics. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (compulsory union fees can reflect union bargaining costs, but not union political costs). This

allows non-union employees who object to pay less than 100% of full dues and to avoid support for union politics.

As a result, no employee in Mr. Reed's bargaining unit is required to pay full dues to retain employment. They can all, UAW member and non-member alike, choose to pay less than 100% of the full dues amount and still remain employed.

The UAW calculates that approximately 22% of its dues dollar is devoted to politics. Therefore, the UAW claims its *Beck* fee (the amount it does not spend on politics) is about 78 cents of every dues dollar. Mr. Reed does not challenge the UAW's calculation. The result is that every employee in the bargaining unit must pay only $78 of every $100 claimed by the UAW in dues to fulfill all legal obligations and retain employment under the union contract. Paying less than full dues is an option available to both voluntary UAW members and non-UAW employees.

Mr. Reed, who is not a union member, offered to make his charity-substitution payment in the *Beck* amount, so that the amount of his charitable payment would not reflect what the UAW officials spend for politics.

After initial resistance, the UAW agreed to accommodate Mr. Reed's religious beliefs through a charity-substitution payment, but rejected his suggested charity. Instead, it informed him of three other charities to which he could make payment to retain his employment at AM General.

While waiting for the UAW to decide on his religious accommodation request, Mr. Reed had been paying the 78% "*Beck*" fee. When the UAW agreed to

accommodate Mr. Reed, it required him to provide proof of a retroactive payment to the charity in the amount of 100% of union dues, after which it would refund to Reed the *Beck* amount he had paid. That resulted in Mr. Reed having to immediately pay an additional $100, and then continue to pay approximately 22% more than he previously paid. Paying this additional tariff will go on for as long as he remains an AM General employee.

Mr. Reed objected because he was the only employee, union member or non-member, required to pay the full dues amount—including that portion the UAW calculated that it used for politics. Because he is a religious objector, Mr. Reed alone is required to pay an amount equal to 100% of the UAW's dues, and not the 78% of dues that is available to every other employee. App. 4a (Reed is required to make "a monthly charity payment approximately 22% greater than what he would pay the UAW as an objecting member or nonmember.").

II. PROCEEDINGS BELOW

When the UAW refused to grant him an accommodation that limited the amount of the charity payment to that paid by other objecting nonmembers, Mr. Reed filed a charge with the EEOC. Upon investigation, the Commission issued a letter finding cause to believe that the UAW refused to give Mr. Reed a non-discriminatory reasonable accommodation of his sincerely held religious beliefs.

To enforce the EEOC's decision, Mr. Reed sued in federal court. Mr. Reed challenged only the *amount* of his required charity payment. He sought a return of the excessive fees he had paid, and a judgment that he must only pay the *Beck* amount in the future.

On cross-motions for summary judgment, Mr. Reed and the UAW argued only whether a charitable payment fee equal to dues was a reasonable accommodation. The federal district court, *sua sponte*, determined that, before Mr. Reed could challenge the amount of his accommodation payment, he must prove all elements of a religious accommodation case, including proof of "discharge or discipline." App. 63a-64a. Noting that Reed was "still employed," App. 64a, the trial court found that it need not consider the reasonableness of the accommodation offered to him. App. 66a.

Nevertheless, the district court also opined that, because almost all employees *voluntarily* paid the full dues amount, it was not discrimination to force Mr. Reed to pay, over his objection, 100% of dues to a charity. App. 69a.

A three-judge panel of the Sixth Circuit Court of Appeals issued three separate opinions. Judge Batchelder's opinion affirmed on the basis that Mr. Reed failed to establish that he had been discharged or disciplined. She found that in the absence of such harm, the union had no duty to make any sort of accommodation for Mr. Reed. App. 34a. She refused to consider whether discharge or discipline "should be understood to include any adverse employment action," because she did not believe that Mr. Reed had shown any adverse action. App. 36a.

Judge Guy's concurring opinion did not pass on the issue of whether Mr. Reed had shown a prima facie case, but found that requiring Reed to pay more than any other employee was a "reasonable and nondiscriminatory accommodation" because many union members voluntarily paid 100% of dues. App. 39a.

Judge McKeague, dissenting, found that the Sixth Circuit "incorrectly" required a different level of harm in religious accommodation cases than it required in disparate treatment cases. App. 43a. He determined that five other circuits used a different standard. App. 45a.

Even if the Sixth Circuit should continue to require "discharge or discipline" in religious accommodation cases against employers, Judge McKeague concluded that there is no reason to apply that standard to labor unions: "As a union can neither discharge nor discipline an employee," application of that "element in claims against unions would foreclose all such claims." App. 46a.

As to whether Mr. Reed suffered an "adverse action," Judge McKeague thought it was "clear that Reed did suffer an adverse employment action."App. 46a.

He believed the circuit had an obligation to explain what would constitute a prima facie case against a union, because the language of Title VII suggests a different standard applies in cases against employers as opposed to unions. App. 46a-47a.

Because Mr. Reed was required to "make larger payments than secular objectors," Judge McKeague determined that he had suffered a materially adverse action, for it resulted in Mr. Reed "receiving less net income." App. 48a.

Judge McKeague noted that under the opinions of the other two judges, employees of faith "can do nothing but lose." App. 50a. Either the employee accepts the unreasonable accommodation, or the employee "puts his or her employment in jeopardy."App. 50a.

Having concluded that Mr. Reed proved a prima facie case, Judge McKeague addressed the reasonableness of the union's accommodation. He found it unreasonable because a union lacks the authority to charge objecting non-members more than the 78% *Beck* amount. App. 51a-52a. Finally, Judge McKeague determined that the union had a discriminatory motive for imposing higher fees on religious objectors: to deter others from asserting religious objections. App. 53a.

When Mr. Reed petitioned for rehearing *en banc*, the panel withdrew its opinions, and then filed three virtually identical opinions. App. 1a ff. The only substantive difference was that Judge Guy changed a portion of one line of his opinion to agree that Mr. Reed had not made out the elements of a prima facie case. *Compare* App. 12a with App. 39a.

Mr. Reed filed a second petition for rehearing *en banc* that was subsequently denied by the Circuit.

REASONS FOR GRANTING THE WRIT

Nearly twenty-five years ago this Court resolved to settle the question of what an employee must prove to claim a reasonable religious accommodation in the workplace. However, it failed to follow through on the very element at issue here. The result is that the circuits are now evenly divided on the question.

The majority of the split panel below believed that Mr. Reed must be fired or disciplined in order to challenge the reasonableness of the union's requirement that he pay more in compulsory fees than all other employees, non-member and union member alike, are required to pay to retain employment. Requiring discharge or discipline is inconsistent with this Court's recent instructions to the Sixth Circuit in

a parallel case, inconsistent with the decisions of other circuits, inconsistent with the language of Title VII, inconsistent with common sense (unions do not wield the power of the employer), and inconsistent with the common practice of allowing unions an involuntary deduction of their fees from employee paychecks.

Permitting a union to impose a religious accommodation that compels employees of faith to pay more than all other employees is inconsistent with this Court's precedents. This Court requires a non-discriminatory accommodation and places a cap on the amount of union fees that can be charged to objecting employees.

I. THIS COURT PREVIOUSLY GRANTED CERTIORARI TO RESOLVE THE ELEMENTS OF A PRIMA FACIE CASE FOR RELIGIOUS ACCOMMODATION, BUT FAILED TO DO SO.

In the landmark case *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court defined the elements of a prima facie case for disparate treatment claims (including religious discrimination) under Title VII. In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 66-67 (1986), this Court granted a writ of certiorari to define the elements of a prima facie case for religious accommodation, but did not reach that issue. It remains unresolved.

Title VII not only bars religious discrimination, it affirmatively requires reasonable religious accommodation in employment. In modern labor relations, employer targeting of a specific religion for disparate treatment is uncommon. Far more common is the clash between an employee's unique religious beliefs

and a neutral workplace rule. Thus, the elements of the more common of the two classes of Title VII religion claims remain undefined by this Court.

The majority below required "discharge or discipline" as an element of a prima facie case for religious accommodation. Nowhere in the statute does Congress require any sort of "adverse action" as a prerequisite to the right of religious accommodation, much less state that an employee must be fired or disciplined. The clear statutory mandate to attempt an accommodation is antithetical to the idea that an employee must first suffer discharge or discipline before being eligible to obtain an accommodation.

As discussed next, the Sixth Circuit's "discharge or discipline" requirement conflicts with decisions of other circuits—and those circuits are themselves divided over what type of adverse action can be required.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER DISCHARGE OR DISCIPLINE IS A REQUIRED ELEMENT OF A PRIMA FACIE CASE FOR RELIGIOUS ACCOMMODATION.

A. The circuits are equally divided.

In his opinion, Judge McKeague determined that five other circuits use a different standard than what the Sixth Circuit applies. App. 17a. In the Sixth Circuit, an employee must show the following elements for a prima facie case for religious accommodation: 1) a sincere religious belief in conflict with a work requirement; 2) notice to the employer or union about the conflict; and, 3) employee discharge or discipline over the conflict. App. 6a-7a.

The first two elements are consistent with the statute and common sense. They are also consistent with other circuits' decisions. The unsettled point is the third element, often referred to as the "adverse action" element. The validity of this third element was the question upon which this Court granted review in *Ansonia*, but did not resolve. 479 U.S. at 66-67.

The Sixth Circuit's requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim is consistent with language used in religious accommodation opinions of the Third, Fourth, Fifth, Tenth and Eleventh Circuits. Indeed, the Tenth and Eleventh Circuits use only the terms "discharged," "fired," or "not hired," and do not refer to "discipline." The problem with asserting that all of these circuits are in complete accord with the Sixth is that in those cases the employees were, in fact, discharged or disciplined.

However, the First, Second, Seventh, Eighth and Ninth Circuits do allow the "adverse action" element in religious accommodation cases to be satisfied by adverse action that is less than discharge or discipline. What follows is a brief survey of what the circuits require for adverse action in a religious accommodation case.

B. Five circuits use "discharge or discipline" to define adverse action.

The Third Circuit, in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 224 (3d Cir. 2000), uses the term "disciplined" to describe the adverse action element in the context where the employee was terminated.

The Fourth Circuit, in both *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008), and *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996), uses the term "disciplined" to describe the adverse action element. In both cases, the employee was terminated. *Firestone Fibers*, 515 F.3d at 311; *Chalmers*, 101 F.3d at 1017.

The Fifth Circuit uses either "discharged" or "disciplined" to describe the adverse action element. In *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273, 276 (5th Cir. 2000), where the employee was discharged, the court uses "discharged." In *Turpen v. Missouri-Kansas-Texas Railroad*, 736 F.2d 1022, 1024, 1026 (5th Cir. 1984), the employee was discharged and the court uses the term "disciplined."

The Tenth Circuit uses the term "fired" or "not hired" to describe the required "adverse action." In *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir. 2000), where the employee was terminated, the court uses the term "fired" to describe the adverse action element. In *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1484, 1486 (10th Cir. 1989), the employer refused to hire the employee and the court uses the term "not hired" to describe the adverse action element.

The Eleventh Circuit states the adverse action standard as requiring discharge. *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007); *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 592 n.5 (11th Cir. 1994). Although on the face of it the Eleventh Circuit's language is the most extreme, in both cases the employee was discharged and whether something less would suffice was not discussed.

C. Five circuits allow a showing of adverse action by something less than discharge or discipline.

The other circuits satisfy the third element of a prima facie case by something less (sometimes much less) than discharge or discipline.

For example, the Ninth Circuit allows a prima facie religious accommodation claim to be established by showing even a threat of an adverse employment action. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (employee "discharged, threatened, or otherwise subjected . . . to an adverse employment action"). The threat can be implicit. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) ("the employer, at least implicitly, threatened some adverse action"). Far from requiring discharge or discipline, an employee need only face an implicit threat to meet the "adverse action" element in that circuit.

The Seventh Circuit, in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997), states the standard as "discharge or other discriminatory treatment." Later, in *EEOC v. United Parcel Service*, 94 F.3d 314, 318 n.3 (7th Cir. 1996), the Seventh Circuit remarked that religious accommodation claims do not "fit comfortably into the ordinary Title VII dichotomy between 'disparate treatment' and 'disparate impact'" cases. Religious accommodation cases "ordinarily stem, as do 'disparate impact' cases, from the application of some neutral employment policy." *Id.*

Pointing out that this Court in *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977), allows a prima facie case of disparate impact to be

proven through statistical evidence without any individual proof of discrimination, the Seventh Circuit noted in *United Parcel Service* that "the employee, in the prima facie case, must show that the employer *consciously* failed to make an accommodation." 94 F.3d at 318, n.3. There the employee had neither been discharged nor disciplined. The employer refused to allow the employee to take a "public contact" position because (in accord with his religious beliefs) the employee refused to shave his beard. *Id.* at 315.

The First Circuit also broadly states the third element of a prima facie case. In *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002), it refers only to an "adverse employment decision." Although the First Circuit did not discuss its reasoning, a recent lower court decision on religious accommodation in the First Circuit interpreted the "adverse employment decision" requirement as much broader than discharge or discipline. It includes "tak[ing] something of consequence from the employee." *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 13 (D. Mass. 2006).

The Second Circuit has explicitly rejected a "discharge" requirement. In *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *aff'd & remanded on other grounds*, 479 U.S. 60, 67 (1986), the court noted that "[t]he district court placed much reliance on the fact that appellant was not forced into a choice between his job and his religious beliefs . . . ." *Id.* at 482. It also noted that other circuits "have stated that discharge was required to make a prima facie showing of discrimination." *Id.* at 483. However, the court determined that a "choice

here between giving up a portion of [the employee's] salary and his religious beliefs" was sufficient to meet the third element. *Id.* at 482-83.

In a later case, *Knight v. Connecticut Department of Public Health*, 275 F.3d 156, 163 (2d Cir. 2001), one employee seeking a religious accommodation (Quental) had simply been issued a letter of reprimand and told to stop promoting her religious beliefs on company time. The only defect in the employee's prima facie case identified by the court was failure to give notice of her religious beliefs, not a lack of discharge or discipline. *Id.* at 167-68.

In a very recent unpublished religious accommodation case, *Bowles v. New York City Transit Authority*, 285 Fed. Appx. 812, 814 (2d Cir. 2008), the Second Circuit quoted with approval the adverse action standard from its published decision in *Zelnik v. Fashion Institute of Technology*, 464 F.3d 217, 225 (2d Cir. 2006), which included "a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation."[1]

The Eighth Circuit's reading of the third element of a prima facie case requires only any "adverse employment action." *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983 (8th Cir. 2002). This can include "a 'tangible change in duties or working conditions

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[1] *Zelnik,* a First-Amendment case, quotes *Galabya v. New York City Board of Education,* 202 F.3d 636 (2d Cir. 2000), an ADEA case. *Galabya* notes that the Second Circuit analyzes Title VII and ADEA cases under the same legal framework. *Id.* at 640 n.2.

that constitute [sic] a material employment disadvantage.'" *Id.* at 984 (citations omitted).

The district court and the majority of the panel below required discharge or discipline. That requirement conflicts with five circuits, but is consistent with language used by five others.

D. This case squarely presents the conflict among the circuits on adverse action.

Both the district court and Judge Batchelder's opinion highlight the fact that Reed did not bring a disparate treatment claim, thus suggesting a failure to properly raise the discriminatory aspect of the union's excessive fee. App. 71a (trial court); App. 11a (Batchelder). To the contrary, Mr. Reed consistently argued below that a "reasonable" accommodation could not be a "discriminatory" accommodation—which is precisely what this Court ruled in *Ansonia*, 479 U.S. at 71. Indeed, Reed's argument on this point is even quoted in the lower courts. App. 68a (trial court); App. 13a (appeals court).

An employee who objects on religious grounds to paying the union fee is requesting a religious accommodation. Such a request can never be considered a disparate treatment claim. However, having granted Mr. Reed an accommodation, the statute (§ 701(j)) requires that the accommodation be "reasonable," as did this Court in *Ansonia*, 479 U.S. at 71.

That the lower courts should even suggest that Reed might have won if he pled his case differently is remarkable. The Sixth Circuit reads *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as requiring the showing of "adverse action" as an element of a prima facie case for disparate treatment.

Talley v. Bravo Pitino Rest., 61 F.3d 1241, 1246 (6th Cir. 1995). Thus, even if Mr. Reed had pled his case as a disparate treatment claim, the majority of the panel below would have rejected his claim.

Reed has properly argued his case as a "reasonable accommodation" case, and that charging him more than any other employee is not "reasonable." This brings the elements of a reasonable accommodation case unequivocally into focus here.

III. THE SIXTH CIRCUIT'S DECISION TO REQUIRE DISCHARGE OR DISCIPLINE IN A CASE AGAINST A LABOR UNION CONFLICTS WITH THIS COURT'S DIRECTIONS TO THE SIXTH CIRCUIT IN *WHITE V. BURLINGTON NORTHERN & SANTA FE RAILWAY.*

The Sixth Circuit recently found itself corrected by this Court in a parallel matter. In *White v. Burlington Northern & Santa Fe Railway*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006), the Sixth Circuit concluded that under Title VII the standard for "adverse action" should be applied uniformly across all Title VII claims, including those raising retaliation issues.

When this Court reviewed *White*, it rejected a "uniform" adverse action standard for all Title VII claims. It determined that in retaliation cases adverse action need not be "limited to discriminatory actions that affect the terms and conditions of employment." *Compare* 364 F.3d at 799 *with* 548 U.S. at 62-64. The result of this Court's correction is that, in a retaliation case, adverse action constitutes anything that "well might have 'dissuaded a reasonable worker from making or supporting a charge of

discrimination.'" *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. at 68 (citations omitted). That standard does not require discharge or discipline.

This Court based that distinction upon the fact that Section 704 of Title VII (42 U.S.C. §2000e-3(a)) (the part dealing with retaliation), merely prohibits an employer to "discriminate against," while Section 703 (42 U.S.C. § 2000e-2(a)(1)) (the part dealing with employer discrimination) prohibits discrimination "with respect to his compensation, terms, conditions, or privileges of employment." *See White*, 548 U.S. at 62, 67.

That same distinction applies to cases against labor unions. The majority on the Sixth Circuit panel below repeated the same error the circuit made in *White*. Like Section 704, Title VII's prohibition applicable to labor unions (Section 703(c)) (42 U.S.C. § 2000e-2(c)(1)) bars discrimination without adding the employment context, *i.e.,* without adding "with respect to . . . compensation, terms, and conditions of employment."

Claims against employers are rooted in the language of 42 U.S.C. § 2000e-2(a)(1) & (2), which includes terms such as "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee." *See TWA v. Hardison*, 432 U.S. 63, 73 (1977). These terms "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *White*, 548 U.S. at 62.

In contrast, claims against a union are based on statutory language that makes it an unlawful practice for a union to "exclude or to expel from its

membership, or otherwise to discriminate against, any individual because of his . . . religion," 42 U.S.C. § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c)(3).

It is obvious why Congress made such a distinction. As Judge McKeague astutely pointed out below, unions have no power to discharge or discipline an employee. App. 19a. They have no authority to punish an employee with respect to compensation, terms, and conditions of employment.

Using the plain language of the statute as a guide, the "adverse action" standard for religious accommodation cases against a union should be no higher than the standard applied by this Court in retaliation cases: adverse action constitutes anything that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'." *White*, 548 U.S. at 68 (citations omitted). In the religious accommodation context, the standard should be, at least, anything that would likely dissuade a worker from following the dictates of religious conscience.

Even the majority below was uncomfortable with applying the employer standard to a labor union case, for it noted that "prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." App. 8a. The dissent was blunt: "Add th[e] difference in statutory language to the practical reality that a 'discharge or discipline' requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the 'discharge or discipline' requirement in this context." App. 20a.

To require discharge or discipline (matters having to do with compensation, terms and conditions of employment) in a religious accommodation case against a labor union is at odds with this Court's logic in *White*.

IV. THE SIXTH CIRCUIT'S DECISION ON THE FEE AMOUNT CONFLICTS WITH DECISIONS OF THIS COURT.

A. The decision below conflicts with *Ansonia Board of Education v. Philbrook*.

Although *Ansonia* did not resolve the "adverse action" issue, this Court did determine that a reasonable religious accommodation cannot be a discriminatory accommodation. 479 U.S. at 71. The court below found that Mr. Reed was required to pay 22% more in compulsory fees as a religious objector than he would have to pay as an objecting member or non-member. App. 4a. Thus, Mr. Reed was required to pay more than anyone else in the bargaining unit to retain his employment. That higher payment arose for only one reason: Mr. Reed's religious beliefs. The dissent below found that this "accommodation should also be deemed unreasonable under *Ansonia*." App. 25a. Approving a union practice that charges religious objectors more than any other objector conflicts with *Ansonia*.

B. The decision below conflicts with *Communications Workers of America v. Beck*.

This Court has a "black letter" rule that no objecting employee in the United States can ever be compelled to pay for union politics. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (private sector employees); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984) (railroad and airline employees);

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public sector employees).

In *Beck*, this Court construed the "periodic dues and initiation fees" requirement of the National Labor Relations Acts ("NLRA"), 29 U.S.C. § 158, to mean that the *maximum* an objector is required to pay is "financial core" dues—the amount the union spends for bargaining, but not the amount spent on politics. 487 U.S. at 744-45, 751-53, 760-63.

Beck sets the benchmark for the maximum amount of union fees that can be extracted from an unwilling employee. It was not Congress' intent to compel employees to support union politics through their compulsory dues dollars. *Id.* at 755-59. Although Mr. Reed is not paying any money to the union, the statutory cap on the amount that can be compelled under the NLRA from unwilling employees should apply to the charity-substitute payment for religious objectors. The dissent below endorsed this argument: "If a union cannot charge an objecting nonmember more than the *Beck* amount . . . there is no basis for offering an accommodation in excess of that amount." App. 23a.

V. BOTH QUESTIONS PRESENTED ARE OF SIGNIFICANT IMPORTANCE TO THE ADMINISTRATION OF TITLE VII CLAIMS AND CONCERN FUNDAMENTAL RIGHTS.

A. The amount of the charity-substitution payment is an important question of first impression.

The concurring opinion below noted that "no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues." App.

12a. Conditioning a citizen's means of employment on payments to a labor union, or any third party, is a subject that has repeatedly attracted the Court's attention in recent years. In the last thirty years, this Court has reviewed various aspects of compulsory union payments at least eight times.[2] For the state to compel an employee to pay money to a labor union, or even to a charity, raises First-Amendment issues. *Abood*, 431 U.S. at 231 (philosophical and social matters entitled to protection).

The two members of the Sixth Circuit panel who reached that issue split. *Compare* App. 12a *with* App. 24a. Below, the district court and the EEOC were also split, with the trial court disagreeing with the EEOC, which issued a favorable cause determination letter to Mr. Reed. *Compare* App. 69a *with* App. 73a.

In many respects, Title VII imports First-Amendment concepts into the workplace. Were this a First-Amendment claim, there would be little debate that freedom of religion and free speech are seriously compromised by a requirement that employees with certain religious views about supporting labor unions must pay more than any other objecting employee in the bargaining unit.

Compulsory union fees present a special circumstance in which this Court would not find a trivial violation. "The amount at stake for each individual

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[2] *Locke v. Karass*, _ U.S. _ , 129 S. Ct. 798 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

dissenter does not diminish this concern. . . . Thomas Jefferson and James Madison [agreed] about the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986).

Mr. Reed is required, year after year, to pay 22% more than his co-workers must pay to retain their jobs. Because the union gets none of this charitable money, there is no countervailing argument in favor of charging employees of faith more—other than to punish religious objections or deter religious employees from asserting their rights under Title VII. Deterrence is self-evidently not a trivial matter.

No logic supports compelling Mr. Reed to pay 22% more to charity simply because the UAW spends 22% of its dues money to inform its members to vote for politicians favored by union leadership.

B. Requiring discharge or discipline could forever bar religious accommodation claims against unions because of statute of limitations problems.

This Court has long held that, in other Title VII contexts, the statute of limitations begins to run when a violation of Title VII is announced, and not when the effects of the violation are implemented. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). This Court recently reaffirmed the validity of *Ricks*. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 626 (2007).

If the Sixth Circuit is correct that Mr. Reed has no cause of action unless he is actually discharged (or disciplined), and, if the Sixth Circuit is right that threats of discrimination, announcements of the

discrimination or even the actual application of the discriminatory accommodation do not constitute adverse action, then Reed has absolutely no control over a timely filing of an EEOC charge. The statute of limitations would begin running as soon as the union announced that Mr. Reed must pay full dues to charity, but he could not then satisfy the Sixth Circuit's "discharge or discipline" requirement.

Even if Mr. Reed did not acquiesce in the discriminatory accommodation, and refused to make payment and therefore suffered discharge, he would have no control over the timing of the union's request for his discharge or the employer's decision when he should be discharged. A union could thwart all litigation over this issue by simply ensuring that he was discharged at least 300 days after it informed him that he would have to pay to charity more than anyone else was required to pay to remain employed. 42 U.S.C. § 2000e-5(e)(1).

Congress's decision to require a reasonable religious accommodation would be completely frustrated. Employees of faith would not only have to determine that they must suffer discharge to vindicate their statutory rights, they could not be sure that such dire action would assure the timely filing of an EEOC charge. There is absolutely no justification for such a result in either the statute or common sense. As the dissent here complained, if the Sixth Circuit's split opinion is allowed to stand, "The majority opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII." App. 22a.

C. The decision below could forever bar religious accommodation claims against unions because of the way compulsory union payments are extracted from employees.

The Ohio legislature, among legislatures of other populous states, allows the nonconsensual, automatic extraction of union fees from public employees' paychecks. Ohio Rev. Code Ann. § 4117.09(C). Consider the application of the Sixth Circuit standard if Mr. Reed were an Ohio public employee, where his union fees would be involuntarily extracted from his pay. If the union refused to accommodate him in any way, would he be able to show discharge or discipline?

If the Sixth Circuit correctly held that an employee must suffer discharge or discipline, what discharge or discipline has an employee suffered who has no control over the confiscation of union dues? An employee has no ability to satisfy the discharge or discipline element if the employee cannot refuse to pay—yet the violation of the employee's religious beliefs is complete upon the extraction of union fees contrary to the employee's sincere religious beliefs.

As recently as summer 2009, two cases were pending before the U.S. District Court in Columbus, Ohio, in which Ohio public school teachers who had union fees involuntarily taken from their pay claimed the right to a religious accommodation. The union defended that they were not entitled to an accommodation because they had not suffered discharge or discipline. *Bostelman v. Ohio Educ. Ass'n*, No. 2:08 cv930 (S.D. Ohio dismissed Sept. 29, 2009); *Hart v. Ohio Educ. Ass'n*, No. 2:08cv1141 (S.D. Ohio dismissed Sept. 29, 2009).

Ms. Bostelman is a public school teacher who is close to retirement. Should she have had to quit her teaching job to keep her conscience clear? And, if the Sixth Circuit majority is correct about what constitutes adverse action, would even quitting be sufficient to establish a prima facie case for religious accommodation?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to eliminate the conflict among the Circuits over what an employee of faith must prove to claim a religious accommodation, to bring the turmoil in the lower courts in line with the will of Congress, and to protect employees from having to choose between their God and their job. At the same time, the Court should settle the amount of the charity-substitution payment.

Respectfully submitted,

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