No. 18-349

IN THE

# Supreme Court of the United States

DARRELL PATTERSON,

*Petitioner,*

v.

WALGREEN CO.,

*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* FOUNDERS' FIRST FREEDOM, INC. IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICUS CURIAE* FOUNDERS' FIRST FREEDOM, INC.[1]

Founders' First Freedom, Inc. ("Founders' First Freedom") is a 501(c)(3) non-profit organization incorporated in 2005 that exists to uphold liberty of conscience and to pursue a cooperative approach to resolving disputes between parties in cases affecting religious freedom.

Founders' First Freedom is the successor organization to the Council on Religious Freedom, a non-partisan, non-profit national advocacy group formed in 1986 that appeared frequently in court on issues involving the Free Exercise and Establishment Clauses and associated legislation.

## SUMMARY OF ARGUMENT

The circuits are split over the extent to which employers are obligated to accommodate employee's religious practices and beliefs under 42 U.S.C. § 2000e(j) incorporated into the Civil Rights of 1964 in 1972.

In the words of the statute, "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

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[1] Pursuant to Supreme Court Rule 37, all parties received notice of amicus curiae Founders' First Freedom's intent to file this brief 10 days before its due date. All parties to this matter have granted consent to this amicus curiae brief. Amicus Founders' First Freedom certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund preparing or submitting this brief. No person or entity, other than its amicus, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of the employer's business." *Id.*

Despite Congress' incorporation of the EEOC Guidelines via the passage of § 2000e(j) with the apparent intent of bolstering the right to accommodation of religious beliefs, the circuit courts are presently divided on what the terms "reasonably accommodate" and "undue hardship" mean for employers and employees.

The uncertainty surrounding the meanings of these terms has resulted in litigation that would be avoided if clarity was provided by the Court. *Patterson* provides this Court with the ideal vehicle to address both of these terms.

This Court has the opportunity in this case to provide clarity that will help reduce the amount of litigation by creating reasonable expectations before issues arise.

While current interpretations of employer and employee obligations vary between the circuits and the EEOC, this case presents the Court with the opportunity to promote consistency and predictability in a manner that is respectful of both religious beliefs and diverse business situations.

## ARGUMENT

*Patterson v. Walgreen* is the latest in a string of cases which have presented inconsistent and incompatible interpretations of an employer's responsibility to reasonably accommodate religious practices under § 2000e(j) of the Civil Rights Act of 1964. We are writing in support of the plaintiff's petition for certiorari so that that the Supreme Court can provide needed clarity on this subject.

## I. Inconsistent Interpretations of the Religious Accommodation Requirement of Title VII Between Congress, the EEOC, and the Circuits

When Congress passed the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, sex, religion, or national origin, Congress did not include specific language requiring *accommodation* of religious beliefs and practices.

After some employers concluded that providing religious accommodation for people of faith amounted to "discrimination" against non-religious employees the EEOC published guidelines in 1966. The guidelines stated that while employers could establish a "normal work week" they should also attempt to accommodate reasonable religious needs "where such accommodation can be made without serious inconvenience to the conduct of the business." The next year, the EEOC changed the term "serious inconvenience" to "undue hardship" which, "may exist where the employee's required work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath keeper." 29 C.F.R. § 1605.1 (1968) codifying the 1967 Guidelines.

The courts disregarded the EEOC 1967 guidelines. For instance in *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970) *aff'd mem. by an equally divided court*, 402 U.S. 689 (1971)(per curiam), the Supreme Court affirmed a Sixth Circuit decision that failure to accommodate an employee's religious observance was not the same as religious discrimination and even questioned whether the EEOC could issue such guidelines. *Id.* at 331 n.1.

In 1972, the Fifth Circuit reasoned that religious accommodation is an impossibility, and applied this rationale against a Seventh-day Adventist who was terminated for insubordination when he refused to work on his Sabbath. See *Riley v. Bendix Corp.* 330 F.Supp. 583 (M.D. Fla. 1971), *rev'd* 464 F.2d 1113 (5th Cir. 1972) after Congress passed § 2000e(j). The *Riley* court wrote, "If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment." *Id.* at 590.

Given the fact that the courts were acting contra to the 1967 EEOC Guidelines, in 1972, Congress amended the Civil Rights Act of 1964 to incorporate an affirmative duty of religious accommodation. Under § 2000e(j), originally designated § 701(j) of the Civil Rights Act of 1964, Congress added language stating "[t]he 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 . . . an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

In 1972, when he introduced the legislation, Senator Jennings Randolf explained its purpose, "Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This amendment is intended, in good purpose, to resolve by legislation – and in a way I think was originally intended by the Civil Rights Act – that which the courts have apparently not resolved." 118 Cong. Rec. 705-06 (1972).

In 1977, the case of *TWA v. Hardison*, 432 U.S. 63 (1977) reached the United States Supreme Court. It involved a member of the Worldwide Church of God who was terminated for insubordination for refusing to violate his religious beliefs and work on the Sabbath. Although the employer had been willing for him to swap shifts, the labor union did not approve the accommodation because it would ostensibly violate a provision of the collective bargaining agreement.

The Supreme Court held against Hardison, stating that without clear Congressional intent, "we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances," *id.* at 79.

Then the *Hardison* Court turned to "undue hardship" under Title VII finding that if the employer were required to bear any inconvenience greater than a *de minimis* cost, it would constitute an undue hardship, *id.* at 84.

After this sweeping decision, many employers believed they were now relieved of any affirmative duty to accommodate religious beliefs under §2000e(j), a situation that the EEOC addressed in a series of meetings held across the United States in 1978. *Hearings before the United States Equal Employment Opportunity Commission (EEOC) on Religious Accommodation: Hearings Held in New York, NY, Los Angeles, CA, and Milwaukee, WI*, *April-May 1978.* Washington, D.C.: United States Equal Employment Opportunity Commission, 1978, p.2 (statement of commissioner Eleanor Holmes Norton, Chair).

The narrowing of accommodation requirements under § 2000e(j) in *Hardison* was reflected in the case of *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60

(1986) in which the Court ruled that a collective bargaining agreement that provided three religious holidays and three personal holidays, but prohibited a high school teacher from using personal holidays for religious purposes and instead required him to use unpaid days off was a "reasonable accommodation." The Court did provide a basis for an interactive process for determining whether an accommodation that resolves the conflict between religious and job requirements is possible.

## II. The Fact That Title VII Litigants in Different Circuits Cannot Know Whether the Facts of Similar Cases Will Take Them to a Jury or a Dismissal via Summary Judgment has Created an Uncertain and Confusing Environment Which Leads to Increased Litigation

*Patterson* presents the ideal vehicle for this Court to provide clarity as to what "reasonable accommodation" and "undue hardship" mean under § 2000e(j).

Here, Darrel Patterson, a Seventh-day Adventist, was a call center trainer whose employer initially accommodated his religious observance of his Sabbath from sundown Friday to sundown Saturday. When the employer scheduled a training meeting on a Saturday, he requested the opportunity to swap with a co-worker. Mr. Patterson was told that this would "not be fair" because it would inconvenience the employee who would replace him, and according to the complaint, he viewed this statement as a refusal to allow him to swap shifts.

When he did not appear for the training meeting, the employer allowed him to provide the training the next Monday, which he did.

When he met with human resources later that day, he requested that the employer provide him religious accommodation and the employer refused, offering instead to "accommodate" him by demoting him to his prior position. Not only did the proposed demotion offer significantly lower pay, but the demoted position would still not guarantee him religious accommodation.

The employer then bypassed all progressive disciplinary steps and summarily terminated him for the act of "gross negligence" of being unavailable to conduct the two hours of training that prior Saturday. Doc.60-1:119 (Termination Letter).

After obtaining the requisite EEOC "right to sue" letter, Patterson filed suit against the employer. The district court granted summary judgment, and the Eleventh Circuit affirmed the dismissal of the claim, concluding that the employer had satisfied its obligation to accommodate Patterson's religious beliefs by allowing him to switch shifts with other trainers.

The Eleventh Circuit never addressed whether accommodating Patterson posed an actual undue hardship, but instead said that Patterson's single absence could produce undue hardship for the employer "in the future."

Had Patterson's case been heard in the Sixth, Ninth, Seventh, or Second Circuits, these courts would have likely held that an accommodation would not have met the reasonable standard unless it *eliminated the conflict* between his employment and religious requirements.

In *Cooper v. Oak Rubber Co.* 15 F.3d 1375 (6th Cir. 1994), the court held that two accommodations offered by the employer did not meet the "reasonable accommodation" standard because it did not eliminate the

conflict, even though the plaintiff's case failed because the accommodation would have still posed an "undue hardship" on the employer.

In *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996), a Seventh-day Adventist employee offered to take alternative shifts, and even move with his family to another town to be accommodated. In that case, the Ninth Circuit ruled that if the employer could not eliminate the conflict via accommodation, it could only prevail if it demonstrated undue hardship.

The Seventh Circuit found that a proposed accommodation that would have provided a Jewish employee with a day off other than Yom Kippur was not a reasonable accommodation because "it does not eliminate the conflict between the employment requirement and the religious practice." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997).

The Second Circuit similarly found that an employer did not reasonably accommodate a religious employee's Sunday rest requirement when it offered him a transfer to a different position, with fewer benefits and possibly lower pay, and when it offered him a Sunday shift that did not interfere with his Sunday worship services. *Baker v. Home Depot*, 445 F.3d 541 (2d Cir. 2006).

Unlike the result in the Eleventh Circuit in which his case was dismissed on summary judgment, Mr. Patterson's case would have likely survived summary judgment and gone to a jury for a determination as to the reasonableness of religious accommodation if heard in the Eighth, Tenth, or Fourth Circuits. See *Sturgill v. UPS*, 512 F.3d 1024 (8th Cir. 2008), *Opuku-Boateng v.* California, 95 F.3d 1461, 1465 (9th Cir. 1996), *Tabura v. Kellogg*, 880 F.3d 544 (10th Cir. 2018),

and *Benton v. Carded Graphics, Inc.*, 28 F.3d 1208 (4th Cir. 1994)(unpublished decision)(per curiam).

In *Sturgill*, a Seventh-day Adventist employee was terminated for failing to complete a single shift, and the Eighth Circuit upheld the jury finding that Sturgill was not reasonably accommodated when his employer terminated him. In *Patterson*, a case with similar facts, Patterson's case was dismissed on summary judgment.

In *Opuku-Boateng*, a Seventh-day Adventist's request for religious accommodation was denied even though he relocated his family, and offered to take undesireable shifts, swap shifts, or work at a different location. 95. F.3d 1461, 1465 (9th Cir. 1996). The Ninth Circuit held that only if proposed accommodations "do not produce a proposal by the employer that would eliminate the religious conflict" the employer can only prevail if it shows undue hardship. *Id.* at 1467.

In *Tabura*, the Tenth Circuit similarly rejected an employer's attempt at summary judgment, ruling that, "whether an accommodation is reasonable in a given circumstance is ordinarily a question of fact to be decided by a fact finder." *Tabura*, *id.* at 555, n.11.

Had Patterson's case been heard in the Fourth, Eighth, Ninth, or Tenth Circuits, and the case passed the "reasonable accommodation" threshold to address "undue hardship," the result would likely have been very different as these circuits have held that speculative hardship is not the same as an actual hardship. In fact, these circuits have specifically held that an employer may not rely on "speculation," or "conceivable" or "hypothetical" hardships. See *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989).

In *Benton v. Carded Graphics, Inc.*, 28 F.3d 1208 (4th Cir. 1994)(unpublished decision)(per curiam), the Fourth Circuit ruled that the law required an employer to respond to a request for reasonable accommodation by making "a thorough exploration of all the alternatives that would meet the employee's religious needs, and [a] fact-based determination of whether any of those programs could be implemented without a predictably certain undue hardship." The *Benton* decision explained the employer's burden and also stood for the proposition that the Fourth Circuit required an accommodation to completely eliminate the conflict by mandating that the employer consider measures which "meet the employee's religious needs."

The fact that litigants in different Federal Circuits cannot know whether the facts of a case will take them to a jury or a dismissal via summary judgment has created an uncertain and confusing environment which leads to increased litigation. It is therefore, appropriate for the Supreme Court to resolve the circuit split and clarify the Federal legal "reasonable accommodation" requirements for both employers and employees.

## CONCLUSION

The split in the circuits on what constitutes "reasonable accommodation" and "undue hardship" needs to be resolved and the Patterson case, which would had different results in different circuits, provides an excellent vehicle for the Court to address this issue, so people of faith and their employers can work together productively to protect and respect both the employee's religious beliefs and practices and to preserve the employer's business interests to the extent possible.

For the preceding reasons we respectfully join in Petitioner's request that this Court agree to hear this matter.

Respectfully submitted,

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