No. 20-1419

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

WALMART STORES EAST, L.P., and WAL-MART STORES, INC., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 18-cv-804-bbc — **Barbara B. Crabb**, *Judge*.

ARGUED DECEMBER 2, 2020 —
DECIDED MARCH 31, 2021

Before EASTERBROOK, RIPPLE, and ROVNER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. The Walmart store in Hayward, Wisconsin, is open 24 hours a day, 7 days a week. It is especially busy on Fridays and Saturdays from late May to late August, the peak tourism season. Assistant managers help the manager run the store, which tries to have assistant managers on hand all the time. The store also hires additional

managers and supervisors who work by the hour. In April 2016 Walmart offered Edward Hedican a job as one of eight full-time assistant managers. After receiving the offer, Hedican revealed that, as a Seventh-day Adventist, he cannot work between sundown Friday and sundown Saturday. That disclosure led to a reevaluation of the offer and to this suit under Title VII of the Civil Rights Act of 1964.

Lori Ahern, the store's human resources manager, assessed whether Walmart could accommodate Hedican's religious practices. She concluded that doing so would require assigning the other seven assistant managers to additional Friday night and Saturday shifts, even though they prefer to have weekends off. With eight assistant managers available, any given assistant manager works (on average) six weekend shifts out of every ten weeks. (The historical range has been 48% to 82% of Saturdays, in particular.) If one of the assistant managers could not work from Friday sundown to Saturday sundown, six would rise to seven. And it would disrupt the work schedule. Six of the eight assistant managers work five days in a row, ten hours a day (for 50-hour weeks); the other two work four days in a row, 12 hours a day (for 48-hour weeks). That system could be preserved if, for example, Hedican were assigned permanently to one of the 4-day-12-hour slots, and his days never included weekends. But then other assistant managers would need to work even more weekend days, and the store's practice of rotating all eight assistant managers through all eight of the schedules would end. The store's manager believes that each assistant manager should have experience with all available schedules,

which (because of how these were arranged) also requires each to work in all of the store's departments—for although the store is open all the time, many of its departments (including liquor and firearms) are closed some of the time. The manager thinks that each assistant manager should be able to handle every department, something that could be especially important if because of illness, vacation, resignation, or retirement the store has fewer than eight assistant managers available.

Ahern concluded that accommodating Hedican would leave the store short-handed at some times, or would require it to hire a ninth assistant manager, or would compel the other seven assistant managers to cover extra weekend shifts despite their preference to have weekends off. She therefore raised with Hedican the possibility that he apply for an hourly management position, which would not be subject to the rotation schedule for the eight assistant managers. Hedican did not do so. Instead he filed a charge with the Equal Employment Opportunity Commission, which decided to prosecute a failure-to-accommodate suit on its own behalf. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Title VII forbids employment discrimination on account of religion. 42 U.S.C. §2000e–2(a)(1). Section 2000e(j) adds:

> 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.

Walmart contends that its invitation to Hedican to apply for an hourly management position satisfies its duty to accommodate his religious practice and that any greater obligation would yield an "undue hardship" as that term was understood in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977): "To require [an employer] to bear more than a *de minimis* cost in order to give [an employee] Saturdays off is an undue hardship." (From now on, we'll use the phrase "slight burden" to avoid the Latin.) On motion for summary judgment, the district judge sided with Walmart. 2020 U.S. Dist. LEXIS 8596 (W.D. Wis. Jan. 16, 2020). The judge thought that an hourly management job would have been a reasonable accommodation, even though the entry-level pay of that position is lower than the entry-level pay of an assistant manager. And the judge believed that interference with the store's rotation system would exceed a slight burden.

The EEOC's appeal observes that an opportunity to apply to be an hourly manager is not necessarily an accommodation; after all, an applicant may be turned down, and the need to apply seems a gratuitous insult to someone who has already been offered a managerial job. Walmart responds that Ahern's invitation to Hedican to apply for an hourly position meant no more than a request that he fill out some papers different from the documents required to assume the position of assistant manager. Cf. *Wright v. Runyon*, 2 F.3d 214 (7th Cir. 1993). We shall never know what would have happened if Hedican had used this opportunity,

because he was not interested in it. Ahern testified by deposition that "I did communicate to [Hedican] what [hourly] positions were open at the Hayward store and directed him on how to apply if those were of interest to him. He said those were not." Given an opportunity in his own deposition to contradict Ahern, Hedican did not say that an hourly position would have been accepted. The difference between an offer of an hourly management job, and an opportunity to apply for an hourly management job, therefore does not matter to the outcome of this suit. Walmart made an offer that could have put Hedican in a management job without working on the Sabbath, but he wanted to be an assistant manager and nothing less. Unless Title VII entitles Hedican to that position, Walmart must prevail.

According to the EEOC, Walmart could have offered Hedican several accommodations that would have enabled him to be an assistant manager. One would have been to give him that job and let him trade shifts with other assistant managers. But that would not be an accommodation *by the employer*, as Title VII contemplates. This proposal would thrust on *other workers* the need to accommodate Hedican's religious beliefs. That's not what the statute requires. *Hardison* addressed and rejected the sort of shift-trading system that the EEOC now proposes. 432 U.S. at 78–79. The Supreme Court held that Title VII does not require an employer to offer an "accommodation" that comes at the expense of other workers.

There's a further problem: What would Walmart do if other workers balked, as they did in *Hardison*? (The union in *Hardison* refused to modify the rules to

require workers with more seniority to take less-desirable shifts.) If, say, four of the seven other assistant managers declined to take extra weekend shifts, that would consign the remaining three to work, not six Saturdays out of ten, but nine or ten Saturdays out of ten. In *Hardison*, which dealt with workers at a large repair and maintenance facility, there were many potential trading partners; at the Walmart store in Hayward, there are only seven (fewer if vacations, vacancies, or sick leave reduce the staff).

Another possibility, according to the EEOC, would have been to assign Hedican permanently to the 4-day-12-hour shift and ensure that it never included Fridays or Saturdays. Once again this is a proposal to require more weekend work by the other assistant managers—and without their approval, as a shift-trading system entails. We repeat that the burden of accommodation is supposed to fall on the employer, not on other workers. See also *Porter v. Chicago*, 700 F.3d 944, 951–53 (7th Cir. 2012) (holding that Title VII does not require an accommodation that would require other workers to work extra weekend shifts); *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986) ("An employer need not disturb the job preferences of other employees to accommodate an employee's religious observance."). The EEOC's approach also would make it difficult for Walmart to maintain its rotation system, designed to ensure that all of the assistant managers can handle all of the departments. If Hedican became a specialist in some departments, Walmart would encounter more than a slight burden when he went on vacation or sick leave.

And all of the EEOC's other proposals also would require Walmart to bear more than a slight burden when vacations, illnesses, and vacancies reduced the number of other assistant managers available. These proposals need not be discussed in detail, though it is appropriate to note that the EEOC's suggestion that Walmart simply accept the presence of fewer assistant managers on weekends is a parallel to the argument, which *Hardison* rejected, that Title VII requires employers to hire workers for four-day rather than five-day weeks and accept that some days will be short-staffed. 432 U.S. at 80, 84–85.

Three Justices believe that *Hardison*'s definition of undue hardship as a slight burden should be changed. See *PaJerson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.). See also *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 826–29 (6th Cir. 2020) (Thapar, J., concurring). Our task, however, is to apply *Hardison* unless the Justices themselves discard it. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). Because accommodating Hedican's religious practices would require Walmart to bear more than a slight burden (if he became one of the eight assistant managers), and because Title VII does not place the burden of accommodation on fellow workers, the district court's judgment is

AFFIRMED.

ROVNER, *Circuit Judge*, dissenting. I respectfully part ways with my colleagues because I think there is a question of fact as to whether Walmart did enough to explore ways of accommodating Hedican's religion. I would therefore reverse and remand for a trial.

Although Ahern considered whether it might be feasible to adjust other assistant managers' schedules in some manner (including voluntary shift-trades) so that Hedican would never have to work on a Friday night or Saturday, one thing she did not do is consult with the other managers in making her assessment. I agree with my colleagues that accommodating Hedican in this way posed a challenge, given the store's 24-hour schedule, busy weekends, and the demand among staff for time off on Fridays, Saturdays, and Sundays. Yet Hedican was available to work on Fridays, Saturday nights and Sundays, and if he were willing to disproportionately accept shift assignments during the 48 of 72 weekend hours outside of his observed Sabbath, then other managers might have been willing to pick up the slack on Friday nights and Saturdays. Ahern could not know for certain unless she asked, and yet she did not. *See* Walmart Br. at 48-49 n.5. I appreciate the store's need for predictability in scheduling, but had Ahern convened the managerial staff to discuss the possibilities, she might have discovered that it was in fact feasible to accommodate both Hedican and the other managers. *Cf. Opuku-Boateng v. California*, 95 F.3d 1461, 1471-72 (9th Cir. 1996) (flawed, informal poll of other workers insufficient to demonstrate that shift-trades were not a feasible means of

accommodating plaintiff's inability to work on Sabbath).

Discussion of the difficulty of accommodating Hedican brings to mind the sorts of excuses employers long trotted out for why it was impractical to hire women of child-bearing age: that employers could not afford to waste resources training employees who would quit as soon as they were pregnant; that projects and deadlines could not accommodate the gaps of maternity leave and the vagaries of daycare and school schedules; that client needs could not be met on a nine to five, Monday through Friday schedule. Indeed, child-bearing and parenting did pose challenges for working women and their employers, but accommodations that were a long time in coming—flexible hours, remote work, job-sharing, family leave time—have shown why work and motherhood were never as incompatible as employers once thought.

That a business historically has been run in a certain way does not mean that is the only or best way in which it can be run. I grant that Walmart's scheduling needs are genuine. But the duty to reasonably accommodate entails an obligation to look at matters with fresh eyes and to separate what is necessary from what, to date, has been customary. I think there is a jury question as to whether Walmart went far enough in considering whether Hedican's religious scheduling needs could be accommodated.

Ahern did suggest that Hedican might instead apply for an hourly supervisory position. Setting aside any differences between the two positions (including starting pay), I am not convinced that inviting Hedican

to *apply* for a different position for which he was obviously qualified constitutes a meaningful accommodation. After all, the company had already offered Hedican an ostensibly superior job. Now it was treating him as a near-stranger who needed to start over. The company's counsel suggested at argument that application for an hourly position was simply a matter of paperwork, but its brief suggests otherwise,[1] and in any case it does not appear that this was ever communicated to Hedican. It was not Hedican's responsibility to ferret this out.

The record shows that Walmart gave serious thought to whether it could accommodate Hedican and I commend the company for the efforts it did make. But a jury could nonetheless conclude that more was required to discharge its duty of reasonable accommodation.

I respectfully dissent.

---

[1] *See, e.g.*, Walmart Br. at 9 (noting that with Ahern's help, Hedican would have a "leg up" in applying for other positions, as Ahern was involved with the interviewing), and 24 (faulting Hedican for not asking Walmart to bypass the usual application process for other positions).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

March 31, 2021
Before:
FRANK H. EASTERBROOK, *Circuit Judge*
KENNETH F. RIPPLE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 20-1419	EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff - Appellant v. WALMART STORES EAST, L.P., et al., Defendants - Appellees
Originating Case Information:	

District Court No: 3:18-cv-00804-bbc
Western District of Wisconsin
District Judge Barbara B. Crabb

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. WALMART STORES EAST LP AND WALMART, INC., Defendant.	**OPINION AND ORDER** 18-cv-804-bbc

Plaintiff Equal Employment Opportunity Commission brought this lawsuit on behalf of Edward C. Hedican, contending that defendant Walmart Stores East LP and Walmart, Inc. engaged in religious discrimination and retaliation under Title VII of the Civil Rights Act of 1964. In particular, plaintiff contends that defendant refused to accommodate Hedican's request to not work on Saturdays, which he observed as the Sabbath, and that defendant rescinded its offer of employment in retaliation for Hedican's request for a religious accommodation. Defendant has filed a motion for summary judgment, contending that it offered Hedican a reasonable accommodation, that allowing Hedican to have every Saturday off would have been an undue hardship and that it did not retaliate against Hedican. Dkt. #19. Because I

conclude that defendant offered Hedican a reasonable accommodation and has shown that it could not accommodate plaintiff's request to have every Saturday off without incurring undue hardship, I will grant defendant's motion.

From the parties' proposed findings of facts and responses, I find the following facts to be material and undisputed unless otherwise noted.

UNDISPUTED FACTS

A. The Parties and Background

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

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

work 45 hours a week, with varying schedules and different shifts, but Buck did not talk about specific schedules that assistant managers worked.

On April 28, 2016, defendant made a conditional offer of employment to Hedican as an assistant manager. Defendant scheduled Hedican to start a training class in June 2016. If he had completed the training program successfully and passed his preemployment screening, Hedican would have begun working in the Hayward store as an assistant manager with the starting salary of $45,000. According to the offer letter, Hedican would begin to acquire paid time off after he had worked for defendant for one full fiscal year.

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

When market human resources manager Ahern received Hedican's request for accommodation of his Sabbath, she sent Hedican's email to Hayward store manager Buck for his information. Ahern did not talk to Buck about the email at that time, and Buck did not talk to Hedican about his religious accommodation request. Ahern consulted defendant's religious

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

On May 2, 2016, Ahern sent Hedican an accommodation request form to fill out. The form referred to disability accommodation and medical needs, and did not refer to religious accommodations specifically. Several of the questions on the form are irrelevant to religious accommodation requests.

However, defendant did not have a specific form for religious accommodations and used some of the same forms in the religious accommodation process as it did for disability accommodations. Ahern told Hedican that defendant's Americans with Disabilities Act department would handle his accommodation request.

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

Ahern considered several factors in determining whether defendant could accommodate Hedican's request for Saturdays off as an assistant manager at the Hayward store. She considered defendant's expectations for assistant managers, the assistant manager's role at the Hayward store in particular and the staffing and other needs of the Hayward store. (Ahern testified at her deposition that she discussed Hedican's request and how it would affect the store's

operation with Buck the store manager, including how the request would affect stocking and recovery, coverage for management calls, coverage overall and rotations. However, Buck testified at his deposition that although he may have had a conversation with Ahern about Hedican's request, scheduling or other hourly supervisor positions that were available in the store, he could not recall the conversation.)

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

and assistant managers are salaried and exempt from overtime. All other store associates, including department managers, are paid on an hourly basis and eligible for overtime.

Defendant requires its assistant managers to be familiar with all aspects of its operation. To achieve this, assistant managers are not assigned to any area on a permanent basis. Instead, they are rotated through different functional areas, typically on an annual basis, so that they may learn or refresh skills in all aspects of the business. Annual rotation gives assistant managers experience in each area of store operations, which allows them to cover for one another and to develop skills necessary to advance with defendant. Timing of the rotation of the areas of assistant managers is at the discretion of the store manager. It is possible to have an assistant manager in an area for more than a year, and defendant has allowed an employee to work in the same area for up to six years. However, defendant discourages store managers from keeping assistant managers in a position for too long. At the Hayward store, store manager Buck typically rotates assistant manager assignments each February, though he has kept an assistant manager in an area for longer than one year due to business needs. For example, if an assistant manager is hired during the summer months, Buck may decide not to rotate that manager to a new area in February. (Plaintiff disputes whether defendant required assistant managers to rotate to different areas of responsibility, and points out that defendant does not have a written policy requiring store managers to rotate assistant manager to different areas of responsibility every year. However, the dispute is not genuine, as plaintiff has cited no

evidence to dispute defendant's assertion that it was an expectation and practice that store managers would rotate through all areas of responsibility and that no assistant managers are permanently assigned to an area. Plaintiff also has not cited evidence to dispute Buck's assertion that he rotated assistant managers annually unless there were specific business needs that dictated otherwise.)

Defendant determines the number of salaried managers at a given location by the store's sales volume. In 2016, the Hayward store was allowed one store manager and eight assistant managers. When the Hayward store was fully staffed with assistant managers, two assistant managers were assigned to overnights and the other six were each assigned to different daytime functional areas (fresh, consumables, apparel, hard lines, entertainment and backroom). The assistant managers assigned to overnight rotation were scheduled to work four days on, three days off, from 8 p.m. to 8 a.m. Assistant managers in the other areas of responsibility worked five days a week. The days and times varied, but fell into one of three shifts: 7 a.m. to 5 p.m.; 8 a.m. to 6 p.m.; or 11 a.m. to 9 p.m. The Hayward store was open 24 hours a day, seven days a week, and an assistant manager's schedule usually varied from day to day and week to week. Generally, Buck made the schedules about three weeks in advance, sometimes more. When assistant managers rotated to a new area of responsibility, they also rotated to a new schedule designed to maximize their efficiency and impact in that new area.

Different areas of responsibility had different variables that affected staffing needs, including traffic

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

In 2016, the Hayward store lacked a full staff of associates, which required the assistant managers to work more to cover the store's needs. Fridays and Saturdays were usually the busiest days for the Hayward store. Friday was usually the highest sales day of the week, and Saturday was the busiest in terms of the number of people coming into the store, services to customers, restocking shelves, bakery and deli production and the number of arriving shipments to be unpacked. Frequently, there were less experienced associates working on Saturdays, especially during the summer season, because some associates were new, temporary, seasonal or worked only on weekends. This meant that managers had to oversee associates more closely on the weekends than they might on other days of the week.

During the summer, the Hayward store had customers visiting from out of town who would have additional questions and need help finding products in the store, which could require management assistance. The Hayward store also offered specialty services, including hunting licenses, fishing licenses,

gun sales and a separate liquor store which required staffing management coverage during breaks and busy times. (Plaintiff attempts to dispute some of these facts by stating that Ahern could not remember details at her deposition regarding, for example, how many temporary associates worked at the Hayward store in 2016, how many out-of-town visitors required management assistance or how many associates were scheduled in each department. However, plaintiff has failed to submit any evidence to refute Ahern's or Buck's sworn statements about the general operation and needs of the Hayward store.)

Usually about half of the Hayward store's assistant managers were scheduled to work on any given Saturday. The other half were not scheduled. Between July 1, 2016 and June 30, 2018, each assistant manager at the Hayward store was scheduled to work on more than 60% of Saturdays on average. The assistant manager with the fewest scheduled Saturdays during those two years was scheduled for 48% of all Saturdays, while the assistant manager with the most scheduled Saturdays was scheduled for 82% of all Saturdays. Some areas of responsibility may lead to long stretches without frequent Saturday work, but all assistant managers worked Saturdays eventually as they rotated through different areas of the store. Weekends are the days that assistant managers most frequently request off, and store manager Buck tried to give all assistant managers Saturdays and Sundays off on occasion.

If the Hayward store was short an assistant manager, Buck tried to cover the hours by asking other assistant managers to come in early or stay later, by asking an assistant manager to come in on his or her

day off or by working the shift himself. Buck would sometimes have to deny an assistant manager's request for time off if there were not enough assistant managers with experience in the requesting manager's area of responsibility.

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

Ahern did not think that Hedican would be able to swap shifts with other assistant managers because the number of people available to swap shifts was so small that there might not always be someone available to take Hedican's Saturday shifts. At least half of the eight assistant managers would likely be scheduled on any given Saturday, and the other three, not including Hedican, may have plans. She also did not think allowing Hedican to use personal time on Saturdays was an option because Hedican would not have personal time available during his first year of employment, and his taking the time off would still leave defendant having to staff the store with other

assistant managers. Ahern concluded that having Hedican work the overnight shift and giving him a more flexible starting time to account for the time of sunset would not be a viable accommodation because having to deal with an ever-changing start time for the overnight manager would be a logistical hardship. She also concluded that even if Hedican's schedule could be accommodated in the overnight shift, he would have problems when he rotated to another area of responsibility.

On May 18, 2016, Ahern sent Hedican an email denying his religious accommodation request to have every Saturday off indefinitely and rescinding the job offer. Ahern stated, "Please advise me of any interest that you may have in other positions in the store and I can assist you in the application process for them." Ahern and Hedican later spoke on the phone. Ahern told Hedican that there were non-salaried supervisory positions for which he could apply and that Ahen could help him apply for those. Those positions would have been full-time, non-salaried positions and would have paid less than the assistant manager role, but they would have provided the opportunity for overtime compensation and would not have required Saturday work. (Neither side put in evidence about how much the other positions would have paid.) She stated that there were no assistant manager positions for which Hedican could have every Saturday off, and that it would not be fair to other assistant managers to give one assistant manager every Saturday off. Hedican told Ahern that he could work after sundown on Saturdays, that he was flexible every other day of the week and that he could cover days that other assistant managers needed off that were not Saturday. Ahern did not offer to accommodate Hedican by proposing a

modified schedule, a flexible arrival time or potential shift swaps with other assistant managers. Hedican did not investigate other open positions and never contacted Ahern to discuss the open positions.

OPINION

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

To survive summary judgment, plaintiff must submit evidence of a prima facie case of religious discrimination, meaning evidence that (1) his bona fide religious practice conflicted with an employment requirement, (2) he notified the defendant of the practice and (3) defendant rescinded his job offer because of plaintiff's religious practice. Porter v. City of Chicago, 700 F.3d 944, 951 (7th Cir. 2012). If plaintiff establishes a prima facie case, the burden shifts to defendant to show either that it offered plaintiff a reasonable accommodation or that it could not do so without undue hardship. Id. In this instance, defendant assumes that plaintiff can establish a prima facie case. However, defendant

asserts that (1) it offered plaintiff a reasonable accommodation; (2) plaintiff did not make a good faith effort to engage with defendant about the accommodation defendant offered; and (3) plaintiff's preferred accommodations would have imposed an undue hardship on defendant.

A. Reasonable Accommodation

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

Plaintiff contends that defendant's communication regarding alternative positions was not a reasonable accommodation for two reasons. First, plaintiff says it was not reasonable for defendant to offer plaintiff only the opportunity to apply for a position and not offer him a job. However, several courts have concluded that offering an employee the opportunity to apply for alternative positions that would accommodate their religious practice can be a reasonable accommodation. See, e.g., Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993) (giving employee opportunity to bid on jobs that would have accommodated his religious practice was reasonable accommodation); Bruff v. North Mississippi Health Servs., Inc., 244 F.3d 495, 502 (5th

Cir. 2001) (offering to give employee 30 days to find another position that would not conflict with religious beliefs was reasonable accommodation); Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220, 227 (3d Cir. 2000) (offering to meet with employee to discuss other available positions that would resolve religious conflict was reasonable accommodation); Telfair v. Federal Express Corp., 567 F. App'x 681, 684 (11th Cir. 2014) (giving employees opportunity to apply for open positions was reasonable accommodation). Therefore, the fact that defendant offered plaintiff only the opportunity to apply for open positions, as well as help in doing so, does not render defendant's proposed accommodation unreasonable.

Plaintiff also argues that defendant's proposed accommodation was unreasonable because the hourly management positions would have paid less than the assistant manager position that plaintiff was offered. Plaintiff is correct that, in some circumstances, an employer's offering a different position with lower pay and benefits might not be a reasonable accommodation. See, e.g., Porter, 700 F.3d at 952 ("Had changing watch groups affected Porter's pay or other benefits, a much more rigorous inquiry would be required."); Rodriguez v. City of Chicago, 156 F.3d 771, 776 (7th Cir. 1998) (noting that shift change or job transfer may be reasonable accommodation "particularly when such changes do not reduce pay or cause loss of benefits"); Wright, 2 F.3d at 217 ("A much more searching inquiry might also be necessary if Wright, in order to accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits.").

On the other hand, Title VII does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Philbrook, 479 U.S. at 68. Title VII also does not require employers to accommodate an employee's religious practices in a way that "spares the employee any cost whatsoever." Tabura v. Kellogg USA, 880 F.3d 544, 550–51 (10th Cir. 2018) (citation omitted). See also Getz v. Pennsylvania Dep't of Public Welfare, 802 F.2d 72, 74 (3d Cir.

1986); Brener v. Diagnostic Center Hospital, 671 F.2d 141, 145-46 & 146 n.3 (5th Cir. 1982) ("A reasonable accommodation need not be on the employee's terms, only."). "[A]ny reasonable accommodation by the employer is sufficient to meet its accommodation obligation." Philbrook, 479 U.S. at 70. "So long as the accommodation offered by the employer reasonably balances the employee's observance of [his or] her religion with the employer's legitimate interest, it must be deemed acceptable." Miller v. Port Authority of New York & New Jersey, 351 F. Supp. 3d 762, 779 (D.N.J. 2018), aff'd, No. 18-3710, 2019 WL 5095749 (3d Cir. Oct. 11, 2019) (quoting Cloutier v. Costco Wholesale, 311 F.Supp.2d 190, 200 (D. Mass. Mar. 30, 2004)).

Numerous courts have concluded that an offer to help an employee find another position that does not require Sabbath work is a reasonable accommodation, even if the other position pays less or is less desirable. See, e.g., Walker v. Indian River Transp. Co., 741 F. App'x 740, 747 (11th Cir. 2018) (because assigning employee to different driving route was the "only way to ensure that he would not have mandatory Sunday work," the "fact that at least some of those routes

happened to pay less" was insufficient to render accommodation unreasonable); Telfair, 567 F. App'x at 684 (FedEx's offer to move employees to different positions, albeit lower paying ones, that would have satisfied their scheduling criteria was reasonable accommodation); Bruff, 244 F.3d at 502, n.23 (noting that "a significant reduction in salary" was insufficient on its own to make accommodation unreasonable). See also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73 (1977) (requiring employee to take unpaid leave to observe religious practices was reasonable).

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

However, defendant is not solely to blame for this missing evidence. It is well established that employees have a duty to cooperate with an employer in searching for an accommodation for religious needs. Philbrook, 479 U.S. at 68. See also Porter, 700 F.3d at 953 (employer and employee must engage in "bilateral cooperation" in attempting to find reasonable accommodation for religious needs); Brener, 671 F.2d at 146 ("Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer."). Courts have rejected Title VII religious

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

In sum, plaintiff's need for Saturdays off meant that he lacked the flexibility required for the assistant manager position, so defendant attempted to accommodate him by inviting him to apply for hourly managerial positions that would not require mandatory Saturday work. This accommodation was reasonable because it eliminated the conflict between plaintiff's employment requirements and his religious practices. Philbrook, 479 U.S. at 70. Because defendant has shown that it offered Hedican a reasonable accommodation, and that plaintiff failed to make a good-faith effort to engage with defendant

regarding the proposed accommodation, plaintiff's Title VII claim fails.

B. Undue Hardship

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

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

Plaintiff proposes several potential accommodations that it says defendant could have offered Hedican that would have accommodated his request to abstain from work on his Sabbath. In particular, plaintiff says that defendant could have permitted Hedican to swap shifts with other assistant managers, use personal time off, have a flexible arrival time, schedule him for a day shift Sunday through Friday, schedule him for overnight shifts or schedule him to work shorter shifts. However,

plaintiff's suggestions do not fully address defendant's undisputed evidence that: (1) no assistant manager is assigned to a permanent shift; (2) assistant managers are expected to be available to work varied shifts, including Saturdays; (3) assistant managers are expected to rotate through every area of the store; (4) Saturday was a busy day for the Hayward store, and all assistant managers were expected to work some Saturday shifts; (5) other assistant managers wanted Saturdays off as well; and (6) Hedican would not have any paid personal time off until he had worked for defendant for a full fiscal year.

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

Moreover, many of Ahern's conclusions are supported by common sense. It was logical for Ahern to conclude that if Hedican could not work during his Sabbath hours, then some other assistant manager would have to do so, or the store would be short-handed. It was also logical for her to conclude that it would be difficult or impractical for Hedican to attempt to swap shifts with other assistant manager, in light of the small pool of assistant managers who were not scheduled to work on any given Saturday and

the fact that weekends were the most requested time off by other assistant managers.

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

ORDER

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

Entered this 16th day of January, 2020.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

June 4, 2021

Before
FRANK H. EASTERBROOK, *Circuit Judge*

No. 20-1419	EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff - Appellant v. WALMART STORES EAST, L.P., et al., Defendants - Appellees
Originating Case Information:	
District Court No: 3:18-cv-00804-bbc Western District of Wisconsin District Judge Barbara B. Crabb	

Upon consideration of the **MOTION TO INTERVENE OF CHARGING PARTY EDWARD HEDICAN**, filed on June 3, 2021, by counsel for Edward Hedican,

IT IS ORDERED that the motion to intervene is **DENIED** as untimely. Edward Hedican had opportunity to intervene before the case was argued to the panel many months ago. The request to defer issuance of the mandate also is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

June 8, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

No. 20-1419	EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff - Appellant v. WALMART STORES EAST, L.P., et al., Defendants - Appellees
Originating Case Information:	
District Court No: 3:18-cv-00804-bbc Western District of Wisconsin District Judge Barbara B. Crabb	

Upon consideration of the **MOTION FOR PANELOR EN BANC RECONSIDERATION OF DENIAL OF INTERVENTION FOR PURPOSES OF APPEAL BY CHARGING PARTY EDWARD HEDICAN**, filed June 7, 2021, by counsel for the Proposed Intervenor Edward Hedican,

IT IS ORDERED that the motion is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
June 1, 2021
Before
Frank H. Easterbrook, *Circuit Judge*
Kenneth F. Ripple, *Circuit Judge*
Ilana Diamond Rovner, *Circuit Judge*

No. 20-1419

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff – Appellant,

v.

WALMART STORES EAST, L.P., and WAL-MART STORES, INC.,
Defendants – Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 18-cv-804-bbc
Barbara B. Crabb,
Judge.

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on May 17, 2021. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Judge Wood and Judge Scudder did not participate in the consideration of this petition.

No. 20-1419

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

WALMART STORES EAST, L.P., and WAL-MART STORES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 18-cv-804-bbc — **Barbara B. Crabb**, *Judge*.

PETITION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR REHEARING OR REHEARING EN BANC

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

SYDNEY A.R. FOSTER
Assistant General Counsel

PHILIP M. KOVNAT
Attorney, Appellate Litigation Services
Office of General Counsel
Equal Employment Opportunity Commission
131 M St. NE, Fifth Floor
Washington, DC 20507
(202) 921-2702
philip.kovnat@eeoc.gov

RULE 35(b) STATEMENT AND INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) petitions for rehearing or rehearing en banc on two related questions of exceptional importance decided by the panel majority. This case concerns an employer's obligations under Title VII of the Civil Rights Act of 1964 to "reasonably accommodate" an employee's religious practices absent "undue hardship," 42 U.S.C. § 2000e(j). The employer here—Walmart Stores East, L.P., and Walmart, Inc. (collectively, Walmart)— offered Edward Hedican a position as an assistant manager but then rescinded the offer when he sought an accommodation to avoid working on his Sabbath. As relevant here, the panel majority ruled that, based on the summary-judgment record, a reasonable jury would be compelled to find that Walmart showed that it would have incurred "undue hardship" if it had accommodated Hedican by allowing him to swap any shifts falling on his Sabbath

with other assistant managers who agreed to such a trade.

The panel majority offered two reasons for ruling for Walmart on this issue, each of which warrants rehearing and rehearing en banc. First, the majority held that Title VII never requires an employer to allow voluntary shift swaps as a means of accommodating an employee's religious practices. That ruling is incorrect and squarely conflicts with decisions of the Fifth, Sixth, and Ninth Circuits, all of which have held that, at least in some circumstances, voluntary shift swaps pose no undue hardship and must be offered as accommodations. *See Davis v. Fort Bend Cnty.,* 765 F.3d 480, 488-89 (5th Cir. 2014); *Opuku-Boateng* v. California, 95 F.3d 1461, 1471-73 (9th Cir. 1996); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1089 (6th Cir. 1987). The panel's conclusion is also contrary to *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116, 119 & n.4 (4th Cir. 1988) (en banc), which concluded that an employer violated Title VII because it made no efforts to accommodate an employee through, inter alia, voluntary shift swaps. And the majority's opinion is in tension with other appellate decisions recognizing that voluntary shift swaps constitute reasonable accommodations in some circumstances, including *Tabura v. Kellogg USA*, 880 F.3d 544, 556-57 (10th Cir. 2018).

Second, the majority concluded that voluntary shift swaps here would have posed an undue hardship as a matter of law because it speculated that there might not have been enough willing volunteers. That holding conflicts with decisions of at least four other courts of appeals forbidding reliance on such speculation. *See Opuku-Boateng*, 95 F.3d at 1471-73

(9th Cir.); *Brown v. Polk Cnty.*, 61 F.3d 650, 657 (8th Cir. 1995) (en banc); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Smith*, 827 F.2d at 1085-86 (6th Cir.). The majority's reliance on speculation is also incompatible with this Court's longstanding precedent that employers bear the burden of proving undue hardship. E.g., *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997).

STATEMENT OF THE CASE

1. Walmart offered Edward Hedican a salaried assistant-manager position at one of its stores. R.52-3 at 2.[1] When Hedican, a Seventh-day Adventist, sought an accommodation to avoid work on his Sabbath (Friday sundown to Saturday sundown), Walmart rescinded this offer. R.52-2 at 2-3; R.52-10 at 2. The EEOC sued, alleging that Walmart violated Title VII because it failed to reasonably accommodate Hedican's Sabbath observance, and it did not prove that accommodating Hedican in the assistant-manager role posed an undue hardship.

One accommodation Walmart considered was letting Hedican swap any shifts conflicting with his Sabbath with volunteers from the pool of seven other assistant managers. See R.47 at 13-14. Walmart's human resources manager, Lori Ahern, unilaterally rejected this option, however. *Id.* She did not ask any of the other assistant managers whether they would willingly swap shifts with Hedican. *Id.* at 14; see also R.44 at 24 (store manager's testimony that Ahern also

---

[1] R.#" refers to the district court docket entry. The page numbers refer to the CM/ECF numbers appended to each document.

did not speak to him about shift swaps). Instead, Ahern assumed the other assistant managers "may have plans and may not want to do" so. R.47 at 13. Ultimately, Walmart did not try to accommodate Hedican in the assistant-manager job, but Ahern said she would "assist [him] in [applying]" for certain lower-paying and lower-ranking jobs. R.52-10 at 2; R.47 at 12. Hedican did not apply for those other jobs.

2. The district court granted Walmart summary judgment. The court held that Walmart provided Hedican a reasonable accommodation by offering him limited assistance in applying for lower-paying and lower-ranking jobs. R.64 at 1318. The court also concluded that, in any event, a reasonable jury would be compelled to find that Walmart demonstrated that accommodating Hedican in the assistant-manager position posed an undue hardship. *Id.* at 18-20.

A divided panel of this Court affirmed solely on undue-hardship grounds. Op. at 4-7. As relevant here, the majority categorically rejected voluntary shift swaps as an accommodation. The majority reasoned that "[t]his proposal would thrust" the "need to accommodate" "on other workers" rather than on the employer, which it stated is "not what the statute requires." Op. at 5. According to the majority, the Supreme Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), "addressed and rejected the sort of shift-trading system that the EEOC now proposes." Op. at 5.

The majority stated there was a "further problem: What would Walmart do if other workers balked . . . ?" *Id.* The majority posited that "[i]f, say, four of the seven other assistant managers declined to take extra weekend shifts," then those who agreed to swap shifts

with Hedican would need to work "nine or ten Saturdays out of ten." *Id.* The majority did not explain the basis for its calculations or why the posited result would be problematic. It also did not identify any evidence in the record compelling the conclusion that an insufficient number of assistant managers would have volunteered to trade shifts.

Judge Rovner dissented. She observed that "Hedican was available to work on Fridays, Saturday nights and Sundays," and she explained that "if he were willing to disproportionately accept shift assignments during the 48 of 72 weekend hours outside of his observed Sabbath, then other managers might have been willing to pick up the slack on Friday nights and Saturdays." Op. at 8 (Rovner, J., dissenting). She noted that Walmart "could not know for certain unless [it] asked" the other assistant managers, "and yet [it] did not." *Id.* Had Walmart done so, it "might have discovered that it was in fact feasible to accommodate both Hedican and the other managers." *Id.* Because Judge Rovner believed there was a genuine question "as to whether Walmart did enough to explore ways of accommodating Hedican[]," she would have reversed and remanded for a trial. *Id.*

ARGUMENT

The majority's affirmance of summary judgment for Walmart on the question whether voluntary shift swaps constituted an undue hardship is incorrect and conflicts with decisions of other courts of appeals.

In analyzing whether a reasonable jury would be compelled to find that Walmart demonstrated that

voluntary shift swaps would have imposed an undue hardship, the majority reached two erroneous conclusions, each of which conflicts with decisions of multiple other courts of appeals. First, in holding that voluntary shift swaps are never required under Title VII, the majority created a categorical rule in this Circuit that is at odds with precedent in at least four other circuits. Also, although the majority said that Hardison "rejected the sort of shift-trading system that the EEOC now proposes," Op. at 5, *Hardison* supports the opposite conclusion—that voluntary shift swaps are a critical way of effectuating Congress's goal of accommodating employees' religious beliefs.

Second, in adopting Walmart's unsupported assumption that there would have been an insufficient number of volunteers to swap shifts with Hedican, the majority let Walmart predicate its undue-hardship defense on speculation. That conclusion is inconsistent with the rule in at least four other circuits that such a defense must be based on objective facts, not speculation. More broadly, the majority's holding is irreconcilable with the fundamental principle recognized by this Court that employers bear the burden of proving undue hardship. E.g., *Ilona of Hungary*, 108 F.3d at 1576. In effect, the majority required the EEOC to disprove undue hardship by showing that enough of Hedican's colleagues would have willingly swapped shifts with him, instead of requiring Walmart to prove its defense by demonstrating that they would not have done so. This is not the law.

A. The majority's holding that Title VII never requires voluntary shift swaps as an

accommodation is incorrect and conflicts with decisions of other courts of appeals.

The panel majority categorically rejected voluntary shift swaps as an accommodation that employers must sometimes offer. Op. at 5. Letting Hedican "trade shifts with other assistant managers," the majority reasoned, would be an accommodation by "*other workers*," not "*by the employer*, as Title VII contemplates." Op. at 5. The majority's conclusion that Title VII never requires employers to offer voluntary shift swaps as an accommodation is incorrect, conflicts with decisions from at least four other circuits, and would seriously undermine congressional intent.[2]

1. The majority's categorical rejection of voluntary shift swaps as an accommodation that Title VII sometimes requires conflicts with precedent in at least four other courts of appeals.

Three other courts of appeals have squarely held that, at least in some circumstances, voluntary shift swaps do not impose an undue hardship on employers and thus must be offered as a reasonable

---

[2] Although the relevant paragraph in the majority's opinion does not expressly acknowledge that the shift swaps the EEOC proposed would be voluntary, it is evident that the majority correctly understood this to be so for three reasons. First, in the following paragraph, the majority stated concerns that other assistant managers might have "balked," thus recognizing that other managers could choose whether to swap shifts with Hedican. Op. at 5. Second, on the next page, the majority referred again to the EEOC's proposed "shift-trading system" and explained that it would have "entail[ed]" the "approval" of "other assistant managers." Op. at 6. Third, Judge Rovner's dissent highlighted that "voluntary shift-trades" were at issue. Op. at 8 (Rovner, J., dissenting).

accommodation under Title VII. In *Davis*, the Fifth Circuit considered the very concern expressed by the majority here regarding the potential of shift swaps to burden other employees. 765 F.3d at 488. *Davis* concluded, however, that although "requiring an employee to substitute" for a plaintiff may impose an undue hardship as a matter of law, "[s]ubstituting a volunteer does not necessarily impose the same hardship on the employer, if any." *Id.* at 488-89. Because in *Davis* the plaintiff arranged for a voluntary replacement on a day she wished to miss work for religious reasons, the Fifth Circuit reversed a grant of summary judgment for the employer on the undue-hardship issue. *Id.* at 489.

Similarly, in *Opuku-Boateng*, the Ninth Circuit reversed judgment in the employer's favor—and directed entry of judgment in the plaintiff's favor—because the employer did not prove that voluntary shift swaps, among other accommodations, posed an undue hardship. See 95 F.3d at 1469, 1471-73, 1475. And, in *Smith*, the Sixth Circuit affirmed a judgment in the plaintiff's favor on the ground that facilitating voluntary shift swaps did not impose an undue hardship and thus was required. 827 F.2d at 1089; see also *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991) (employer did not explore a voluntary shift-swap arrangement and thus was "in no position to argue" that doing so posed an undue hardship).

In addition, the majority's conclusion that voluntary shift swaps categorically constitute undue hardship conflicts with the en banc Fourth Circuit's decision in *Ithaca Industries*. There, the court noted evidence that several employees would have been

willing to substitute for the Sabbath-observant employee. 849 F.2d at 118. Because the employer neither explored this option nor attempted to accommodate the worker by other means, *Ithaca Industries* held that it violated Title VII. *Id.* at 119 & nn.4-5.

The majority's conclusion that voluntary shift swaps are not "an accommodation *by the employer*, as Title VII contemplates," Op. at 5, is also in tension with decisions by other circuits holding that voluntary shift swaps can constitute a reasonable accommodation and, in some circumstances, must be offered as such. In *Tabura*, for instance, the Tenth Circuit reversed summary judgment for an employer because, on the facts presented, a reasonable jury could determine that the employer "had to take a more active role in helping arrange [voluntary shift] swaps in order for that to be a reasonable accommodation of Plaintiffs' Sabbath observance." 880 F.3d at 556-57. Similarly, in stark contrast to the majority's conclusion here, the First and Eleventh Circuits have made clear that voluntary shift swaps can qualify as a reasonable accommodation for Sabbatarians. See *Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 12-13 (1st Cir. 2012); *Beadle v. Hillsborough Cnty. Sheriff's Dep't*, 29 F.3d 589, 593 (11th Cir. 1994).

2. The majority opined that Hardison "rejected the sort of shift-trading system that the EEOC now proposes." Op. at 5. That is incorrect. In *Hardison*, unlike here, the employer went to considerable lengths to pursue shift swaps as an accommodation. 432 U.S. at 68, 77, 78. The employer determined, however, that "[t]here were no volunteers to relieve [the plaintiff]"; instead, accommodating the plaintiff

through a shift swap would mean "depriv[ing] another employee of his shift preference[s]." *Id.* at 81. Moreover, the relevant union "was unwilling to entertain a variance [from the governing seniority system] over the objections of" other workers. *Id.* at 78-79.

Thus, what *Hardison* "rejected" (Op. at 5) was not a voluntary shift-trading system of the sort the EEOC here proposes, but rather the argument that Title VII requires employers to "compel[]" other employees "to work involuntarily[]" in a Sabbath-observant employee's place in violation of a seniority system. 432 U.S. at 84-85; *see also id.* at 78-79, 81; *accord, e.g.*, *Davis*, 765 F.3d at 489 (adopting similar reading of Hardison); *Beadle*, 29 F.3d at 593 (similar). Significantly, *Hardison* reasoned that such an involuntary shift-trading system would pose undue hardship because it would result in "unequal treatment" of employees—employers would be required to "deny the shift and job preference of some employees" to "prefer the religious needs of others." 432 U.S. at 81. That reasoning is inapplicable where, as proposed here, other employees agree to swap shifts with someone who must miss work for religious reasons.

3. The majority offered no other basis for holding that voluntary shift swaps always impose an undue hardship, and there is none. As this Court has explained, "Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455-56 (7th Cir. 2013) (quoting 42 U.S.C. § 2000e(j) and recognizing that, under *Hardison*, "anything more than a 'de minimis cost' creates undue

hardship" (citation omitted)). In a typical case, voluntary shift swaps burden employers only insofar as they may incur costs in "rearranging schedules and recording substitutions for payroll purposes," which this Court and the EEOC's guidelines recognize do not amount to undue hardship. *Id.* at 456 (relying on 29 C.F.R. § 1605.2(e)(1)). It follows that "[r]easonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available." 29 C.F.R. § 1605.2(d)(i) (explaining that "[o]ne means of substitution is the voluntary swap").[3]

4. The majority's decision seriously undermines congressional intent. When Congress amended Title VII in 1972 to require that employers reasonably accommodate religious practices absent undue hardship, its "stated purpose" was "to protect Sabbath observers whose employers fail to adjust work schedules to fit their needs." *Ithaca Indus.*, 849 F.2d at 119; *see also* 118 Cong. Rec. 705, 705-06 (1972) (Senator sponsoring the amendment stating that he aimed to protect those who believe in "a steadfast observance of the Sabbath").

Courts and employers have recognized that a critical way to effectuate Congress's goal of accommodating Sabbath-observant workers is through voluntary shift-trading arrangements. *See supra* pp. 7-9 (discussing cases); *Smith,* 827 F.2d at 1088 ("Undoubtedly, one means of accommodating an

---

[3] Although the EEOC's guidelines do not have the force of law, they "reflect a body of experience and informed judgment to which courts and litigants may properly resort" and are thus "entitled to a measure of respect." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (citations omitted).

employee who is unable to work on a particular day due to religious convictions is to allow the employee to trade work shifts with another qualified employee."). Indeed, it is highly unusual for employers to take the position that voluntary shift swaps are never required. *Cf. Hardison*, 432 U.S. at 77 (employer's "normal procedure" was to authorize voluntary shift swaps as a religious accommodation (citation omitted)). In this litigation, for instance, Walmart did not take that view. Nor could it, given that the company maintains a nationwide policy recognizing that "[v]oluntary swaps" are an accommodation that "may be necessary," and that "[e]ncourage[s]" employees to "swap shifts" for "religious reasons." R.52-9 at 2, 4.

In the span of a single paragraph, however, the majority here did away with this vital and well-recognized form of accommodation, declaring that voluntary shift swaps are never required because they are not an accommodation "*by the employer*." Op. at 5. Rehearing or rehearing en banc is required to bring this Court's case law into conformity with precedent in other courts of appeals—and to ensure that one of the most critical tools for effectuating Congress's goal of accommodating Sabbath-observing employees remains available in this Circuit.

B. The majority's reliance on speculation to conclude that voluntary shift swaps were infeasible defies this Court's precedent holding that employers bear the burden of proving undue hardship, and conflicts with decisions of other courts of appeals.

The majority stated that there was a "further problem" with the shift-swap accommodation: "What

would Walmart do if other workers balked . . . ?" Op. at 5. The majority hypothesized that "[i]f, say, four of the seven other assistant managers declined to take extra weekend shifts" at Hedican's behest, the ones who agreed to shift swaps would need to work "nine or ten Saturdays out of ten." *Id.* Even assuming the mathematical accuracy of that hypothetical, [4] however, it merely underscores the EEOC's point: it describes a scenario in which Hedican could have avoided working on his Sabbath, and other willing assistant managers could have covered all shifts falling on that day.

It appears that the majority ruled for Walmart based on its broader concern about what Walmart would do "if other workers balked," Op. at 5, but that ruling also warrants rehearing and rehearing en banc. As the majority's use of the word "if" makes clear, such a concern is based on the speculative argument—unsupported by record evidence—that there would have been an insufficient number of volunteers to swap shifts with Hedican. There are two closely related problems with the majority's reliance on this speculation.

First, it is well established in this Court that undue hardship is an affirmative defense on which Walmart bears the burden of proof. *E.g., Adeyeye*, 721 F.3d at 448, 455. That rule is rooted in 42 U.S.C. § 2000e(j)'s text, which specifies that "employer[s]

---

[4] The majority's calculations appeared to be based on evidence that assistant managers worked, on average, six out of ten Saturdays. See Op. at 2. If, however, three assistant managers agreed to assume responsibility for Hedican's average of six Saturday shifts, it stands to reason each would then be working an average of eight Saturdays out of ten.

[must] demonstrate[]" an inability to reasonably accommodate "without undue hardship." The majority's reliance on speculation is incompatible with this precedent.

Second, contrary to the majority's opinion, at least four other courts of appeals have held that an employer does not satisfy its burden of proving undue hardship unless it produces objective evidence, as distinct from speculative hypotheses, to support its defense. For instance, in *Opuku-Boateng*, the Ninth Circuit applied this principle to the very defense advanced by Walmart here: the claim that not enough volunteers would agree to shift swaps. 95 F.3d at 1471-73. In that case, unlike here, the employer had polled the plaintiff's co-workers regarding their willingness to trade shifts. *Id.* at 1471. But because the poll was "vague and ambiguous" and thus incapable "of producing reliable results," the Ninth Circuit held that the employer "failed to offer any probative evidence that would demonstrate that a system of voluntary shift trades was infeasible," and thus did not "carry its burden" of proving undue hardship. *Id.* at 1471-72.

Several other circuits have reached the same conclusion in similar circumstances. *See Smith*, 827 F.2d at 1085-86, 1089 (6th Cir.) (affirming determination that employer did not prove that asking co-workers to swap shifts posed an undue hardship and explaining that, although an employer may "establish undue hardship without actually putting an accommodation into effect," it "cannot rely merely on speculation"); *see also Brown*, 61 F.3d at 655, 656-57 (8th Cir.) (employer's contention that accommodating plaintiff would cause workplace

"polarization" lacked foundation because "[a]ny hardship . . . must be 'real' rather than 'speculative'" (citation omitted)); *Toledo*, 892 F.2d at 1492 (10th Cir.) (rejecting employer's argument that accommodation would expose it to increased tort liability because it relied on speculation).

Here, Walmart argued that a reasonable jury would be compelled to find that it demonstrated that a shift-swap system would have lacked a sufficient number of willing volunteers. Walmart Br. at 48. But Walmart's human resources manager did not ask other assistant managers whether they would willingly swap shifts with Hedican; instead, she theorized that they "may have plans" and "may not want to" do so. R.47 at 13-14. That is too speculative a basis to support an undue-hardship defense. Moreover, evidence in the record shows that: (1) the days assistant managers most often requested off were Fridays, Saturdays, and Sundays, and Hedican was available to work 48 of those 72 hours, R.44 at 28; and (2) on any given Saturday, there typically would have been three or four assistant managers available to swap shifts with Hedican. R.38 at 1, 4 (explaining that approximately half of the eight assistant managers worked each Saturday). As Judge Rovner explained in her dissent, it follows that Hedican's co-workers may have been open to trading shifts with him. Op. at 8 (Rovner, J., dissenting); cf. *Opuku-Boateng*, 95 F.3d at 1471 (reasoning, on similar facts, that "[i]t is not unreasonable to assume that other employees would have been willing to trade [shifts]").

Ultimately, here, the record does not answer the question whether there would have been enough willing volunteers to swap shifts with Hedican, and

this is for one reason: Walmart's human resources manager never asked the others if they would participate in such an arrangement. Because Walmart bore the burden of proving undue hardship, see, e.g., *Adeyeye*, 721 F.3d at 455, and that burden cannot be met with speculation, this gap in the record must inure to Walmart's detriment, not the EEOC's. *Accord* Op. at 9 (Rovner, J., dissenting) ("[T]here is a jury question as to whether Walmart went far enough in considering whether Hedican's religious scheduling needs could be accommodated.").

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc.

Respectfully submitted,

GWENDOLYN YOUNG REAMS
Acting General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
SYDNEY A.R. FOSTER
Assistant General Counsel

/s/ Philip M. Kovnat
PHILIP M. KOVNAT
Attorney, Appellate Litigation Services
Office of General Counsel
Equal Employment Opportunity Commission
131 M St. NE, Fifth Floor
Washington, DC 20507
(202) 921-2702
philip.kovnat@eeoc.gov

May 17, 2021

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limit of Federal Rules of Appellate Procedure 35(b)(2)(A), (b)(3), and 40(b)(1) because it contains 3,898 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). This petition also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and (c)(2) and Seventh Circuit Rule 32(b) because it was prepared using Microsoft Word for Office 365 ProPlus in Century 12point font, a proportionally spaced typeface.

/s/ Philip M. Kovnat
PHILIP M. KOVNAT

No. 20-1419

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

WALMART STORES EAST, L.P., and WAL-MART STORES, INC., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 18-cv-804-bbc — **Barbara B. Crabb**, *Judge*.

MOTION TO INTERVENE OF CHARGING PARTY EDWARD HEDICAN

Eric C. Rassbach
Counsel of Record
Mark L. Rienzi
Nicholas R. Reaves
Christopher Pagliarella
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW, Suite 400
Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Counsel for Proposed Intervenor Edward Hedican

APPEARANCE & CIRCUIT RULE 26.1
DISCLOSURE STATEMENT

Appellate Court No: 20-1419
Short Caption: Equal Employment Opportunity Commission v. Walmart Stores East, L.P.

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

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

☐ PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

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

Edward C. Hedican

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

The Becket Fund for Religious Liberty

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Eric C. Rassbach
Date: 6/3/2021
Attorney's Printed Name: Eric C. Rassbach
Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d):

Yes ☒ No ☐
Address: 1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
Phone Number: 202-955-0095
Fax Number: 202-955-0090
E-Mail Address: erassbach@becketlaw.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1419
Short Caption: Equal Employment Opportunity Commission v. Walmart Stores East, L.P.

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for**

any information that is not applicable if this form is used.

☐ PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

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

Edward C. Hedican

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

The Becket Fund for Religious Liberty

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Mark L. Rienzi
Date: 6/3/2021
Attorney's Printed Name: Mark L. Rienzi
Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d):
Yes ☐ No ☒
Address: 1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
Phone Number: 202-955-0095
Fax Number: 202-955-0090
E-Mail Address: mrienzi@becketlaw.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1419
Short Caption: Equal Employment Opportunity Commission v. Walmart Stores East, L.P.

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of

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

☐ PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

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

Edward C. Hedican

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

The Becket Fund for Religious Liberty

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Nicholas R. Reaves
Date: 6/3/2021
Attorney's Printed Name: Nicholas R. Reaves
Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d):
Yes ☐ No ☒
Address: 1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
Phone Number: 202-955-0095
Fax Number: 202-955-0090
E-Mail Address: nreaves@becketlaw.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1419
Short Caption: Equal Employment Opportunity Commission v. Walmart Stores East, L.P.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a

private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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

☐ PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

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

Edward C. Hedican

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

The Becket Fund for Religious Liberty

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Christopher C. Pagliarella
Date: 6/3/2021
Attorney's Printed Name: Christopher C. Pagliarella
Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d):
Yes ☐ No ☒
Address: 1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
Phone Number: 202-955-0095
Fax Number: 202-955-0090
E-Mail Address: cpagliarella@becketlaw.org

MOTION

Edward Hedican, the employee whose rights are at stake in this appeal, respectfully moves the Court to allow him to intervene as a party plaintiff alongside the EEOC. The EEOC takes no position on this motion; Walmart opposes it. Indeed, the EEOC has confirmed that no decision has been made as to whether the federal government will seek certiorari, raising—for the first time in the litigation—the prospect that the federal government will cease pursuing the litigation. Hedican respectfully requests that the Court rule on his motion before issuing the mandate, either by expediting briefing or by delaying issuance of the mandate.

Hedican seeks to intervene for the purpose of petitioning the Supreme Court for review of the panel's decision that a "slight burden" on Walmart sufficed to trigger Title VII's "undue hardship" provision. In addition, Hedican intends to ask the Supreme Court to "discard" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and replace it with a standard more reflective of Title VII's text and history. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 660 (7th Cir. 2021).

Hedican is entitled to intervention at this juncture because he has a Title VII statutory right to intervene under Fed. R. Civ. P. 24(a)(1) and because he meets the mandatory intervention standard under Fed. R. Civ. P. 24(a)(2). Alternatively, permissive intervention should be granted under Fed. R. Civ. P. 24(b).

First, Title VII creates an unconditional right for an "aggrieved" person to intervene in a lawsuit the EEOC brings regarding his claims. The only

requirement is that the intervention be timely. Here, Hedican's intervention is timely because he seeks to intervene only two days after the ruling that transfers responsibility for prosecuting the lawsuit from the EEOC—which focuses on employee protections—to the Solicitor General—who must take into account the interests of the many federal agencies that are employers and thus potentially adverse to religious accommodations.

Second, Hedican is separately entitled to mandatory intervention under Fed. R. Civ. P. 24(a)(2) because his interests are implicated—as this Court put it, this is his "one and only opportunity" to obtain relief—and the federal government does not adequately represent his interests here.

Indeed, the federal government, represented by the Solicitor General, *cannot* represent Hedican's interest in the outcome of this lawsuit. That is because Title VII itself prescribes a different role for the government ("vindicat[ing] the public interest"), and because when deciding whether to seek certiorari, the Solicitor General must take into account the "equities" of numerous federal agencies, not the EEOC's interests alone, including those parts of the federal government that employ workers who might seek religious accommodations.

This Court has already recognized that this case implicates an ongoing debate at the Supreme Court as to the meaning of Title VII's "undue hardship" standard. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d at 660 (citing *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020)). Hedican should be allowed to intervene—either as of right or by permission—in order to resolve this issue of nationwide importance.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2016, Walmart offered Hedican a position as assistant manager but then rescinded the offer when he sought an accommodation so as not to work on his Sabbath in violation of his religious beliefs. After investigating Hedican's complaint, the EEOC brought this action against Walmart on September 27, 2018.

On January 16, 2020, the district court dismissed the case and held that under the *Hardison* standard, Walmart "could not accommodate [Hedican's] request to have every Saturday off without incurring undue hardship." *EEOC v. Walmart Stores E., L.P.*, No. 18-cv-804, 2020 WL 247462, at *1 (W.D. Wis. Jan. 16, 2020).

On March 31, 2021, a divided panel of this court affirmed the decision below. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d at 660. The panel majority acknowledged an ongoing debate at the Supreme Court over the validity of the *Hardison* standard, noting "[t]hree Justices believe that *Hardison*'s definition of undue hardship as a slight burden should be changed[,]" but stated that "[o]ur task, however, is to apply *Hardison* unless the Justices themselves discard it." *Id.*

On May 17, 2021, the EEOC filed a petition for panel rehearing and rehearing *en banc*, raising a division of authority among the Courts of Appeals on two questions regarding what constitutes an "undue hardship" under Title VII. On June 1, 2021, this Court denied the petition.

STANDARD OF REVIEW

In evaluating a motion to intervene, courts "must accept as true the non-conclusory allegations" made by the proposed intervenor, *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (quoting *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)), and "should avoid rigid construction of Rule 24." *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000).

ARGUMENT

Courts frequently grant intervention after a final decision is rendered for the purpose of seeking further review. *See, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 (1977) (granting "post-judgment intervention for the purpose of appeal"); *Marino v. Ortiz*, 484 U.S. 301, 303-04 (1988) (per curiam) (recognizing that a non-party may intervene for the limited purpose of taking an appeal); *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573-74 (7th Cir. 2009) (permitting intervention for purposes of appeal); *Clarke v. Baptist Mem'l Healthcare Corp.*, 641 F. App'x 520, 527 (6th Cir. 2016) (same); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) ("[C]ourts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment[.]").

As this Court explained in *Sierra Club, Inc. v. EPA*, when a federal agency loses a case at the appellate stage, "the Solicitor General may decide that the matter lacks sufficient general importance to justify proceedings before the court en banc or the Supreme Court." In such cases, intervention by the party of

interest "places the private adversaries on equal terms and permits both to make their own decisions about the wisdom of carrying the battle forward." 358 F.3d 516, 517-18 (7th Cir. 2004).

I. Hedican is entitled to intervene under Fed. R. Civ. P. 24(a)(1).

Under Fed. R. Civ. P. 24(a)(1),[1] any party possessing "an unconditional right to intervene by a federal statute" may, "on a timely motion," intervene as of right. *Id.* Adequacy of representation is not part of the Fed. R. Civ. P. 24(a)(1) analysis. *See Shea v. Angulo*, 19 F.3d 343, 346 (7th Cir. 1994) (contrasting "conjuctive criteria" of Rule 24(a)(2) intervention, including adequacy of representation, with Rule 24(a)(1)).

A. Hedican has an unconditional right to intervene in this litigation under Title VII.

As the "aggrieved person" identified in this lawsuit, Hedican has an unconditional right to intervene under 42 U.S.C. § 2000e-5: "The aggrieved person may also intervene in the EEOC's enforcement action." *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (expounding 42 U.S.C. § 2000e-5). *See also EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) ("sound construction of the statute" that "[t]he person aggrieved may intervene as a matter of right."); *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 540 (10th Cir. 2016) (42 U.S.C. § 2000e-5 "unambiguously

---

[1] "Appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24" to assess whether to permit a party to intervene on appeal. *Sierra Club*, 358 F.3d at 517-18.

gives employees an unconditional right to intervene in EEOC enforcement actions"); *EEOC v. STME, LLC*, 938 F.3d 1305, 1322 (11th Cir. 2019) ("Under Title VII, 42 U.S.C. § 2000e-5(f), as the aggrieved employee, Lowe had a right to intervene in this action brought by the EEOC."); *EEOC v. Woodmen of World Life Ins. Soc.*, 479 F.3d 561, 569 (8th Cir. 2007) (same).

The reason aggrieved persons have a unique and independent right to intervene is because "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions subject to Rule 23." *Gen. Tel. Co.*, 446 U.S. at 326. "Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" *Id.* (quoting 118 Cong. Rec. 4941 (1972)). "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* Hedican therefore has an unconditional right to intervene in this case.

B. Hedican's motion to intervene is timely.

Hedican's motion is timely because the lawsuit has very recently reached a juncture where his interests and the government's interests diverge. Indeed, "[t]imeliness is not limited to chronological considerations but is to be determined from all the circumstances." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 388 (7th Cir. 2019) (internal citation and quotation marks omitted).

Accordingly, this Court typically considers four factors when assessing timeliness: "'(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances.'" *Id.* (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000)). Where "intervention of right is sought . . . 'courts should be reluctant to dismiss such a request for intervention as untimely[.]'" *Id.* at 388-89 (quoting 7C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 1916 (3d ed. 2018)). Here, the four timeliness factors all support intervention.

1. Length of time. Because timing is measured from when the "need for intervention" is no longer "speculative" and instead became "urgent," *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006), this Court and others have explained that post-judgment motions to intervene for purposes of appeal are timely if filed promptly after the decision for which review is sought and before the time to seek further review expires. *See Flying J*, 578 F.3d at 572 (association's motion to intervene for purposes of appeal was timely even though it came after final judgment); *Ross v. Marshall*, 426 F.3d 745, 754-55 (5th Cir. 2005) ("A common example of post-judgment intervention that satisfies [the timeliness] criteria is intervention for the purpose of appealing a decision that the existing parties to a suit have decided not to pursue."); *see also City & County of San Francisco v. USCIS*, 992 F.3d 742, 750-51 (9th Cir. 2021) (VanDyke, J., dissenting) ("Because the states quickly intervened when they discovered that the federal government had abandoned their interests, and the

federal government has asserted no apparent prejudice in allowing intervention, the motion to intervene is timely.").[2]

Here, because Hedican seeks to intervene for the purpose of seeking Supreme Court review, his motion is timely: It was filed only two days after this Court's denial of the EEOC's rehearing petition, which triggers the opportunity to seek Supreme Court review and thus the Solicitor General's control over the case under 28 U.S.C. § 518 and *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988) ("reserving litigation in this Court to the Attorney General and the Solicitor General").[3] Under current COVID-related rules, the Solicitor General or Hedican (should intervention be authorized) will have until October 29,

---

[2] In the ongoing *San Francisco* litigation, thirteen states sought intervention in the Ninth Circuit to defend a federal immigration regulation, when the federal government dismissed its own petition for writ of certiorari. 992 F.3d at 743. This week, the Supreme Court ordered the parallel Supreme Court intervention motion "held in abeyance pending the timely filing and disposition of the petition for a writ of certiorari respecting the denial of intervention below." Order, 593 U.S. --- (June 1, 2021).

[3] The EEOC retains independent litigating authority through court of appeals proceedings, but authority transfers to the Attorney General for "all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter." 42 U.S.C. § 2000e-4. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. Law Rev. 255, 278-79 (1994) ("For the SEC, EEOC, and FERC, independent litigating authority extends to the federal courts of appeals."); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 n.12 (2d Cir. 2018) (noting that the EEOC and the Department of Justice filed separate and opposing *amicus* briefs on appeal).

or 150 days after June 1, to petition the Supreme Court for certiorari. *See* Order, 589 U.S. --- (Mar. 19, 2020) (categorically extending deadline for petitioning for a writ of certiorari from 90 days to 150 days). Since only two days of the 150-day period to seek Supreme Court review have elapsed, Hedican's intervention is timely.

2. Prejudice to original parties. Where intervention is sought for the purpose of seeking further appellate review, this Court has long confirmed that post-judgment intervention will not prejudice the existing parties. In *Flying J*, this Court rejected the argument that post-judgment intervention after "the losing party had abandoned the case" would be prejudicial because it "would result in an appeal that is otherwise not forthcoming." 578 F.3d at 573. Instead, as the Court explained, intervention causes "no prejudice to [the prevailing party below], because it could not have assumed that, if it won in the district court, there would be no appeal." *Id*. Especially given several Supreme Court Justices' signaling that *Hardison* should be reconsidered, Walmart cannot have been under any illusion that Supreme Court review would not occur. *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ.) For its part, EEOC's interest in vindicating the public interest would not be prejudiced by allowing Hedican to vindicate his own interest.

3. Prejudice to proposed intervenor. Absent intervention, Hedican will be unable to protect his interests in this litigation. As explained above, the federal government's interests in this litigation have now diverged from Hedican's, making his involvement

as a party in this case necessary to protect his independent interests. That is especially so here because under the Title VII statutory scheme, the EEOC's lawsuit precludes a later lawsuit by Hedican. *See Harris Chernin, Inc.*, 10 F.3d at 1291 (affirming that "when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied." (quoting *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990)). Furthermore, as discussed in more detail below, the government's decisions going forward will be impacted by the fact that the Solicitor General represents all of the government's interests, including its interests as an employer. Thus even if certiorari is granted, Hedican will be prejudiced if he is not included in the case.

4. Unusual circumstances. The unusual role of the EEOC in appeals like this one constitutes "unusual circumstances" that favor intervention. The EEOC suddenly loses control over its own appeal at the point that Supreme Court review can occur, creating a springing divergence of interests between the federal government on one hand and Hedican on the other.

II. Hedican is also entitled to intervene under Fed. R. Civ. P. 24(a)(2).

Hedican is separately entitled to intervene under Fed. R. Civ. P. 24(a)(2). Under this provision, a "court *must* permit intervention if (1) the motion is timely; (2) the moving party has an interest relating to the property or transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case. A proposed intervenor who satisfies these three

elements is *entitled* to intervene *unless* existing parties adequately represent his interests." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020) (emphases original).

A. Hedican's motion is timely.

For the reasons described above, Hedican's motion is timely.

B. Hedican has an interest relating to the dispute at issue in the litigation.

There also can be no dispute that Hedican has an interest related to the EEOC's lawsuit against Walmart—he was the aggrieved person directly harmed by Walmart, and this case seeks to obtain injunctive and monetary relief in part specific to Hedican's injuries. Indeed, this Court has long "embraced a broad definition of the requisite interest" sufficient to justify intervention, requiring only that it be a "direct and substantial" interest. *Lake Investors Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1259, 1261 (7th Cir. 1983); *see also Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) ("'interest'" is "broadly construed" under Rule 24). Hedican's interest easily comes within that broad category.

C. Hedican's interest may, as a practical matter, be impaired or impeded by disposition of the lawsuit.

Since the district court dismissed the EEOC's lawsuit, and the existence of the EEOC's lawsuit means that Hedican cannot bring his own lawsuit later, Hedican's interest will be impaired because it will be eliminated entirely. *Harris Chernin*, 10 F.3d at

1291 (EEOC lawsuit seeking individual relief precludes later-filed private suit by charging party). As this Court has repeatedly held, if the EEOC does not seek Supreme Court review, or the EEOC seeks Supreme Court review and is denied, Hedican will lose his "'one and only opportunity'" to obtain redress. *Lopez-Aguilar*, 924 F.3d at 390.

"[D]emonstrat[ing] the direct and significant nature of [the proposed intervenors'] interest" often alone "meets the impairment prong of Rule 24(a)(2)." *Reich*, 64 F.3d at 323. As the advisory committee to the Federal Rules of Civil Procedure explained, "[i]f an [intervenor] would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24 (advisory comm. Note to 1966 am.) And because Rule 24 simply requires "potential impairment" of the intervenor's interest, this factor is easily established here. *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002).

D. Hedican's interests cannot be adequately represented by the federal government.

The federal government cannot represent Hedican's interests because the lawsuit is now at the juncture where the Solicitor General decides whether and how to seek Supreme Court review, and the interests of the United States government as a whole significantly diverge from Hedican's.

To determine whether a proposed intervenor's interests are adequately represented by an existing party requires "a contextual, case-specific analysis," and a"discerning comparison of [the] interests" of the existing parties and those of the proposed intervenor.

Driftless, 969 F.3d at 748. If "the interest of the absentee is identical to that of an existing party, or if a governmental party is charged by law with representing the absentee's interest," a "rebuttable presumption of adequate representation arises." *Id.* at 747. Otherwise, "[a] party seeking intervention as of right must only make a showing that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

Here, the federal government's litigation on behalf of the "public interest" does not trigger this presumption; Hedican thus must show only that the government's representation of his interests "may be" inadequate.

First, the government and Hedican do not have "identical" legal interests in this litigation. When comparing interests, it is not enough that two parties "share the same goal" at a high level of generality. *Driftless*, 969 F.3d at 748. Instead, "Rule 24(a)(2) requires a more discriminating comparison of the absentee's interests and the interests of existing parties" to determine whether Hedican's "interests are independent of and different from" those of the federal government. *Id.*

The federal government is charged with advancing the public interest in this case. The government is "obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009); *EEOC v. N. Gibson Sch. Corp.*, 266 F.3d 607, 613 (7th

Cir. 2001) ("The EEOC's role in preventing employment discrimination serves a public interest broader than that of an individual."); *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 845 (7th Cir. 2017) (same). This is because the government is "litigating on behalf of the general public," not advancing the unique interests of any one individual. *WildEarth*, 573 F.3d at 996. As the EEOC itself explains to charging parties, the agency's "primary purpose in filing this suit is to further the public interest in preventing employment discrimination," not obtaining relief for the charging party. *EEOC Compliance Manual*, *Appendix: Model Letter Notifying Charging Party of Commission Title VII/ADA Suit*, https://perma.cc/8RBL-JW3W.

Thus far in the litigation, the government and Hedican's interests have been generally aligned. At the trial and appellate levels the parties (and the courts) had to treat *Hardison* as binding precedent. *See Walmart Stores E., L.P.*, 992 F.3d at 660 (applying *Hardison* until the Supreme Court "discard[s]" it). But now, with the opportunity to petition the Supreme Court for review, reconsideration of the *Hardison* standard is on the table for the first time.

On this issue, the federal government does not adequately represent Hedican's interests. As discussed above, the federal government must balance its role in combating employment discrimination with its role as the nation's largest employer. By contrast, Hedican does not have to trim his sails when it comes to combating employment discrimination.

In addition, past experience shows that the Solicitor General will not make the strongest arguments available to the Supreme Court in favor of Hedican's right to a religious accommodation under

Title VII. For example, the Solicitor General's recent response to the Supreme Court's call for the views of the Solicitor General in *Patterson*, 140 S. Ct. 685, serves only to emphasize that the "equities" of other agencies will bear on its decisionmaking. In that case, the Solicitor General expressly recommended *against* the Court addressing two of the three questions presented, saying they "d[id] not warrant the Court's review" with "no clear division in the circuits on either question," including a question on the role of speculation in the undue hardship analysis. U.S. Br. at 7, *Patterson*, No. 18-349 (Dec. 9, 2019). And on the third question—the definition of "undue hardship"—the Solicitor General recommended review but offered no definitive position on what should replace the *Hardison de minimis* standard. *Id.* at 19-22. Put simply, the federal government is not likely to embrace the strongest arguments available in light of its competing institutional pressures, as reflected in *Patterson*.

Hedican, as the aggrieved party, is interested in obtaining relief in this particular case, and in obtaining a better legal standard for religious accommodation claims at the Supreme Court. *Supra* 13. He will thus advocate for the strongest possible arguments in favor of a religious accommodation for Sabbath observers. If the government does not seek Supreme Court review in this matter, Hedican will lose his "one and only opportunity," to obtain redress of the injuries he suffered and which underlie this litigation. *Lopez-Aguilar*, 924 F.3d at 390 (quoting *Reich*, 64 F.3d at 322).

This divergence confirms that the government and Hedican do not have "identical" interests in the litigation.

Second, the presumption of adequacy does not apply because the federal government is not "charged by law" with representing Hedican's interests. *Driftless*, 969 F.3d at 747. The EEOC has disclaimed its representation of Hedican's interest in this litigation, *supra* 17, and even if the EEOC were charged with advancing Hedican's interest, the decision whether to seek Supreme Court review rests ultimately with the Solicitor General—not the EEOC.[4] *Sierra Club*, 358 F.3d at 518 ("[T]he Solicitor General may decide that the matter lacks sufficient general importance to justify proceedings before . . . the Supreme Court."). *See also* Dmitry Karshtedt, *Acceptance Instead of Denial: Pro-Applicant Positions at the PTO*, 23 B.U. J. Sci. & Tech. L. 319, 340 (2017) ("when the 'Solicitor General decides what the US Government position will be, it solicits input from the various executive agencies with equities in the subject matter at hand. To reach a consensus Government opinion, the Solicitor General must often adjudicate disputes between executive agencies . . . .'" (quoting Colleen V. Chien, Thomas E. Cotter & Richard A. Posner, Redesigning Patent Law (unpublished

---

[4] Just last Term, the Solicitor General took a position at the Supreme Court directly contrary to the EEOC's prior position in the same litigation. *Compare* U.S. Br. at 8, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (Nos. 19-267 & 19-348) (arguing that ministerial exception applied) *with* EEOC Br. at 24, *Biel v. St. James School*, No. 17-55180 (9th Cir. Sept. 27, 2017) (arguing that ministerial exception did not apply).

manuscript)); Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 Harv. Envtl. L. Rev. 339, 404 n.286 (2017) ("[t]he term 'equities' just means interests; it is part of the vernacular of the inter-agency process").

Accordingly, the possibility that the federal government may not seek Supreme Court review, combined with the government's conflicted interests in this litigation even if review is sought, easily satisfy the "minimal" burden necessary to show that the federal government's representation "may be" inadequate. *Ligas*, 478 F.3d at 774.

Since Hedican is entitled to intervene and the federal government cannot adequately represent his interests at the stage where Supreme Court review must be sought, Hedican must be allowed to intervene under Fed. R. Civ. P. 24(a)(2).

III. Alternatively, Hedican should be permitted to intervene under Rule 24(b).

Should the Court determine that Hedican cannot intervene as of right, permissive intervention is appropriate. Rule 24(b) authorizes intervention when an applicant's "claim or defense" and the main action have a "common question of law or fact." Fed. R. Civ. P. 24(b). The determination of whether a party will be able to intervene is within the discretion of the court, which should consider whether intervention will unduly delay the main action or unfairly prejudice the existing parties. Fed. R. Civ. P. 24(b)(3).

This potential for a direct and adverse ruling impairing Hedican's rights raises common questions of law and fact with those of the existing parties. In addition, Hedican's involvement will not complicate or

delay the case. The Court should thus grant Hedican permissive intervention.

CONCLUSION

For the foregoing reasons, Hedican's motion to intervene should be granted. In order to allow time for the Court to consider the motion to intervene, the Court should either expedite briefing or stay the mandate.

Dated: June 3, 2021

Respectfully submitted,

/s/ *Eric C. Rassbach*
Eric C. Rassbach
Counsel of Record
Mark L. Rienzi
Nicholas R. Reaves
Christopher Pagliarella
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Counsel for Proposed Intervenor
Edward Hedican

No. 20-1419

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

WALMART STORES EAST, L.P., and WAL-MART STORES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 18-cv-804-bbc — **Barbara B. Crabb**, *Judge*.

MOTION FOR PANEL OR *EN BANC* RECONSIDERATION OF DENIAL OF INTERVENTION FOR PURPOSES OF APPEAL BY CHARGING PARTY EDWARD HEDICAN

Eric C. Rassbach
Counsel of Record
Mark L. Rienzi
Nicholas R. Reaves
Christopher Pagliarella
The Becket Fund
for Religious Liberty

1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Counsel for Proposed Intervenor Edward Hedican

MOTION

Charging Party Edward Hedican respectfully requests reconsideration of his motion to intervene for the limited purpose of seeking Supreme Court review, ECF 50, by panel or en banc review. *See* Seventh Circuit IOP 1(a)(2).[1] On June 4, this Court denied Hedican's motion for intervention, stating that Hedican "had opportunity to intervene before the case was argued to the panel many months ago." ECF 55. Because this phrasing suggests possible misunderstanding as to Hedican's narrow request to intervene for the limited purpose of seeking Supreme Court review, and the reasons for its timing, Hedican offers three points of clarification in support of reconsideration.

First, until very recently Hedican has not been represented by counsel at any point in this litigation.

---

[1] IOP 1(a)(2) reads in relevant part: "If en banc reconsideration of the decision on a motion is requested, the motion will be considered by the same judge or judges who acted on the motion originally and, if and to the extent necessary to constitute a panel of three, one or more members of the motions panel. A judge may request that any motion be considered by the court en banc." Counsel therefore styles this motion as one for en banc reconsideration on the understanding that this is the appropriate way to seek panel review.

Hedican retained counsel regarding this matter for the first time late on Wednesday, May 26, 2021, while the EEOC's en banc petition was pending. On Tuesday, June 1, this Court denied the EEOC's en banc petition without calling for a response. ECF 49. Hedican's counsel (who are representing Hedican *pro bono*) then drafted the motion for intervention for the purpose of seeking Supreme Court review, filing on Thursday, June 3, after confirming that day that the EEOC would not commit to filing a petition for writ of certiorari.

Second, Hedican does not seek to take any further action in this Court. Hedican requests intervention for the limited purpose of seeking Supreme Court review, since the federal government has not committed to petitioning for certiorari and the Solicitor General (in contrast to the EEOC) has adopted positions contrary to Hedican's. ECF 50 at 1. Intervention by a real party in interest seeking solely "to take an appeal" is timely when that party otherwise represented by a government entity moves to intervene promptly after the government entity indicates that it "decided not to appeal." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (distinguishing timeliness analysis where party seeks only to appeal from analysis where a party "wants to present [new] evidence").

By contrast, earlier intervention in this appeal would have posed far greater timeliness problems and would have unnecessarily expended this Court's resources. Until control over this appeal moved from the EEOC to the Department of Justice, 28 U.S.C. § 518, raising the prospect of the U.S. government abandoning the appeal, the EEOC's interests were generally aligned with Hedican's. Timeliness would

thus have been judged from the initiation of the case. But once "the existing parties to a suit have decided not to pursue" an appeal, a post-judgment intervention solely for the purpose of appeal then "satisfies [the timeliness] criteria." *Ross v. Marshall*, 426 F.3d 745, 754-55 (5th Cir. 2005). This Court has expressly warned that "[w]e don't want a rule that would require a potential intervenor to intervene at the drop of a hat" while their "need for intervention . . . remain[s] speculative," which is why timeliness is properly measured from when the need becomes "urgent." *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006).[2] Had Hedican intervened at an earlier stage of the appeal, this Court's resources would have been unnecessarily expended.

Third and finally, the intervention here arises in a posture parallel to the *San Francisco* litigation, where thirteen states sought post-judgment intervention in the Ninth Circuit to defend an immigration regulation once the federal government had abandoned its petition for certiorari. *See City & County of San Francisco v. USCIS*, 992 F.3d 742 (9th Cir. 2021) (divided panel denying intervention); *see id.* at 750-51 (VanDyke, J., dissenting) (explaining why intervention was timely and noting that the existing

---

[2] As more fully elaborated in the motion to intervene, transfer of control over the appeal from the EEOC to the DOJ also creates a divergence of interest as to *what* to argue at the Supreme Court. ECF 50 at 16-20 (discussing the Solicitor General's prior record on the Title VII religious-accommodation rule). The prior panel majority correctly noted that multiple Justices have recently suggested that the core Title VII standard at issue in this case "should be changed" in a more employee-favorable direction, which Hedican would advocate at the Supreme Court. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 660 (7th Cir. 2021).

parties' "main response" against intervention was mootness, not timeliness). On June 1, the Supreme Court invited a petition for certiorari on whether intervention should have been granted. Order, 593 U.S. --- (June 1, 2021) (ordering the parallel Supreme Court intervention motion "held in abeyance pending the timely filing and disposition of the petition for a writ of certiorari respecting the denial of intervention below"). The Supreme Court's order suggests that such limited intervention was at least not untimely, and counsels in favor of permitting intervention for the limited purpose of seeking Supreme Court review here, rather than requiring Hedican to seek reversal of an intervention denial like the thirteen states in *San Francisco*.

CONCLUSION

For the foregoing reasons, the Court should allow Hedican to intervene for the limited purpose of seeking Supreme Court review.

Dated: June 7, 2021

Respectfully submitted,

/s/ *Eric C. Rassbach*

Eric C. Rassbach
Counsel of Record
Mark L. Rienzi
Nicholas R. Reaves
Christopher Pagliarella
The Becket Fund for
Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Counsel for Proposed
Intervenor Edward Hedican

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 733 words.

1. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) as modified by Circuit Rule 32(b) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12point Century Schoolbook font, with 11-point Century Schoolbook font for footnotes.

/s/ *Eric C. Rassbach*

Eric C. Rassbach
The Becket Fund for
Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

/s/ *Eric C. Rassbach*
Eric C. Rassbach
The Becket Fund for
Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

4/29/2019

CONFIDENTIAL

RELIGIOUS ACCOMMODATIONS GUIDELINES

At Walmart, we recognize the diversity of religious beliefs, creeds, practices and observances of all our associates. We will provide reasonable accommodations for applicants and associates to comply with their sincerely held religious beliefs unless the requested accommodation will pose an undue hardship on the operation of our business.

These guidelines should be used by all managers and HR professionals who work for Wal mart, Inc., or one of its subsidiary companies, in the United States and Puerto Rico ("Walmart"), when reviewing requests from applicants and associates for religious accommodations.

Sincerely held religious beliefs

The obligation to accommodate religious beliefs applies to any sincerely held religious belief, whether or not the associate practices an established or organized religion. Even an individual's personal beliefs may qualify. While there is no specific definition of religious beliefs, they generally must involve fundamental ideas about subjects such as life, death, purpose or morality. On the other hand, social, political or economic ideas, or personal preferences, typically are not religious beliefs.

Although a religious belief must be sincerely held to warrant accommodation, as a general rule you should not challenge the sincerity of an individual's

belief unless there is clear evidence that the belief is not sincere.

Responding to a request for religious accommodations

The religious accommodation process begins with a dialogue between the applicant or associate and the company. The purpose of this process is to determine whether the requested accommodation or an alternative accommodation can be provided to resolve the conflict between religious practice, conviction or belief and work without negatively impacting the business.

Associate responsibilities

The applicant or associate is responsible to provide notice of a need for accommodation due to a conflict between religion and work, including an explanation of the religious belief involved. Associates and applicants have an obligation to cooperate with management in attempting to resolve the conflict between work and religious beliefs.

Manager responsibilities

If you receive a request for religious accommodation, it's your responsibility to engage in a dialogue with the associate. If needed, you may request additional information to determine the extent of the conflict and possible accommodations. For example, if an associate requests time off for a religious ceremony, you may ask for the specific time of the ceremony to determine if the associate can work part of the day.

- If the requested accommodation is easily achievable and will not cause an undue hardship on the business, you may grant the request without *delay*. Advise the associate that his/her request has been approved and the specific duration. Advise that the terms of the accommodation are subject to change depending on business needs. Explain that if there is a business need to discontinue the specific accommodation, you will work with the associate to determine if an alternative accommodation could be considered.
- If the requested accommodation is not easily achievable or you believe it may cause an undue hardship on the business, consult with your HR representative to discuss the possibility of an alternative accommodation. **Do not deny** an associate's request for religious accommodation without first consulting with your HR representative.

HR responsibilities

The HR representative is responsible to provide support and guidance to the manager in determining possible accommodations. The company is not required to grant the specific requested accommodation if an alternative accommodation will resolve the conflict between religion and work. For example, if an associate requests to be excused from evening work hours for religious purposes, you may provide the alternative accommodation of having the associate work an earlier shift, as long as the hours do not conflict with the religious practice.

If you and the manager determine that the specific requested accommodation is not achievable, assist the manager in exploring other options and continuing the dialogue with the associate. If more than one reasonable accommodation can be provided, you should offer the accommodation with the least negative impact on the business, the applicant or associate, and any co-workers.

- If an alternative accommodation is identified, have the manager discuss the accommodation with the applicant or associate. If all parties agree, *you may* grant the alternative accommodation without delay.
- If the applicant or associate rejects the offered alternative accommodation, and/or you are unable to identify a viable alternative accommodation, consult with the Legal Department **prior to denying** the request.
- If, after consulting with the Legal Department, the determination is made that there are no alternative accommodations without creating **an** undue hardship on the business, assist the manager in advising the applicant or associate and explaining the business reason for denial.

Undue hardship

You are not required to provide an accommodation if it will impose an undue hardship on the operation of our business. Following are examples of circumstances that may be undue hardships:

- More than minimal cost
- Diminished efficiency
- Infringement of other associates' rights or benefits
- Impaired workplace safety
- Conflict with other laws or regulations

Whether an undue hardship exists must be determined on a case-by-case basis.

- With respect to cost, ordinary administrative costs or the occasional payment of overtime wages to other associates generally are minimal and are not undue hardships, but the payment of overtime wages to other associates on a regular basis is an undue hardship.
- The objections or resentment of other associates is not an undue hardship. However, an accommodation does create an undue hardship if it actually infringes on the rights of other associates. For example, another associate cannot be required to swap shifts with an associate who needs time off for religious reasons.
- The mere objection of customers to religious dress or practices is generally not an undue hardship. However, it may be an undue hardship if an associate attempts to impose religious beliefs on customers through words or actions.

Types of accommodation

While an applicant or associate may request an accommodation for any conflict between religious beliefs and work, following are types of commonly-requested accommodations.

- Time off for religious holidays or observances
- Time and/or a place to pray during work
- Transfer to another position, if an associate cannot be accommodated in his/her current job
- A particular manner of dress or appearance
    - As provided in the Dress Code Section of the Wardrobe Standards Policy you must accommodate a specific manner of dress or appearance required by an associate's religious beliefs unless it will cause a safety hazard or other undue hardship on the company.
- Relief from a work **task** that conflicts with religious beliefs
    - For specific guidance on accommodating pharmacy associates who object to fulfilling patient requests for certain products, see Section 204 of the Pharmacy Operations manual.
- A schedule that does not require work on the applicant's or associate's Sabbath.
    - When time off or a schedule change is requested, the following accommodations may be necessary, unless providing the

accommodation will result in an undue hardship:

- Flexible arrival
- Flexible arrival and departure times
- Floating or optional holidays
- Flexible breaks
- Staggered work hours
- Voluntary swaps with other associates

Schedule changes for salaried manager on rotating schedules

If a salaried manager on a rotating schedule requests a schedule that will allow him/her to never work a particular day:

Discuss with the manager the existing rotation schedule to determine the frequency with which he/she is actually scheduled to work on the particular day in question. For example, a manager with a three on, three *off* schedule will work _____ _____ Sundays in a _____week period.

- Advise that he/she may be able to arrange a shift swap with another manager and that we can help facilitate that by providing an email or other means of communication.
- Encourage all managers to work collaboratively and swap shifts as needed for personal or religious reasons - be flexible, supportive and positive about shift swapping.
- On the rare occasion the manager is unable to find another manager to switch with, he/she *may* be permitted to take a PTO day in lieu of

working his/her Sabbath. In this case, the accommodation being given is a change to the PTO process for managers who must take PTO a minimum of one week/rotation period at a time. A blanket exception should not be given, rather each occasion should be considered separately. In determining whether a PTO day will be permitted, consider any potential impact on business operations, e.g., adequate management coverage, potential adverse impact to other managers' schedules, etc.

- Assure the manager we will revisit the situation *if* it becomes an issue.
- Remember to contact your HR representative for additional assistance, and he/she will consult with the Legal Department if needed.

Things to remember

- A Sabbath may be a day other than Sunday.
- As long as a religious belief is sincere, you may not challenge it even if it is unpopular or not in accord with generally-recognized religious doctrine.
- If a requested accommodation cannot be provided, explore options and discuss them with the associate.

Legal assistance

The Legal Department may be contacted for assistance with religious accommodation issues. The Legal Department should always be contacted if you intend to deny a request for accommodation on the grounds that the asserted religious belief is not sincere; or if you intend to deny a request on the

grounds that the requested accommodation is an undue hard ship.

Last Modified: September 10, 2013

Luke Schafer
Sr. Talent Coordinator
479-277-0337

April 25, 2016

Edward Hedican
59005 Bill Anderson Rd
Mason, WI 54856

Dear Edward,

We are pleased to confirm our offer to you for the position of Assistant Manager Trainee for store #3245 in Hayward, WI. This position reports to Dale Buck. Store placement location may change in which case travel to new store will not be more than 50 miles from your home.

The following outlines the terms and conditions of the offer:

1. Compensation

a) **During the AMT training program:** Your hourly rate of pay will be **$20.00.**

b) **After successful completion and graduation of the AMT program;** You will be a salaried member of management, and you are anticipated to be placed in Store #3245. Your annual base pay will be **$45,000.00.** This will be paid bi-weekly. Salaries are typically reviewed during the annual process that takes place during the first quarter of the Company's fiscal year. Management level Associates employed prior to

November 1 may be eligible for a salary increase the following fiscal year based upon their individual performance ratings and the Company's financial performance.

c) Upon successful completion of the training and beginning with the fiscal year ending January 31, 2017, you will be eligible to participate in the Wal-Mart Stores, Inc. Management Incentive Plan (the "MIP"). The MIP currently allows you to earn a target of up to 5% of your annual salary in an incentive award based on the Company and/or other appropriate business unit(s) reaching certain pre-established performance measures. Your maximum incentive opportunity is 10%. Your date of hire is a factor that determines MIP eligibility. Generally, salaried Associates hired prior to November 1 will be eligible to participate in the incentive plan for the current fiscal year (February 1 to January 31). Your incentive award will be pro-rated based on your hire date, your eligible base wages as of the end date in each incentive plan eligible position, and movement between Incentive plans. Associates must remain employed through January 31 of the fiscal year to receive the incentive award payout, unless otherwise required by applicable state law.

2. Benefits

a) Your Paid Time Off (PTO) program includes time for vacation, sick, personal and holiday time off. As a salaried associate, you will receive a grant of PTO each February 1 for the plan year ending on January 31 of the following calendar year. While your entire PTO grant will be advanced and available for use on February 1, you accrue PTO each month. You will receive 21 days of PTO on the first full plan year after

your hire date with the company. For your first year, your PTO as a salaried associate will be pro-rated relative to your month of transfer if that date is after February 1. As your tenure with the company increases, your PTO grant also increases according to PTO guidelines. Please see the *Paid Time Off-Salaried Associates* policy to determine your pro-rated PTO grant. If you have questions or need further guidance, please contact your HR representative.

b) You will be eligible to participate in the Associate Stock Purchase Plan, which allows you to purchase Wal-Mart stock through payroll deductions. You can choose from $2 per pay period up to $1,000 per pay period, and the Company will match fifteen (15%) on the first $1,800 of your purchases per plan year. You should review the Stock Purchase Plan brochure before completing an enrollment card to begin purchases.

c) Effective February 1, 2015, associates are eligible to make their own contributions to the Plan as soon as administratively feasible after their date of hire is entered into the payroll system. You can contribute from 1 % to 50% of each paycheck to the Plan.

Associates will begin receiving matching contributions on the first day of the calendar month following their first anniversary of employment with Walmart if credited with at least 1,000 hours of service during the first year and are contributing to your 401 (k) Account. (Matching contributions will not be made with respect to contributions you make before you become eligible for matching contributions.) You must personally contribute to your 401 (k) in order to receive a company matching contribution. You can save as much as 50% of your eligible pre-tax pay in your 401

(k) Plan up to the maximum contribution limits set by the IRS. You will always be 100% vested in both your personal contributions and company contributions to your 401 (k). Matching contributions will be made each paycheck. Enrollment materials will be sent to your home address on file when you become eligible. You may roll over funds from another qualified plan at any time after you are hired by calling (888) 968-4015 and completing the appropriate documents.

d) You will be immediately eligible for medical and dental coverage, consistent with the Company's health insurance plan(s). HMOs (where available) may not have first year limitations. The current dental plan at Walmart has a one-year waiting period for orthodontia and major care services.

e) You will be eligible for the Walmart Associate Discount Card after ninety (90) calendar days of continuous employment. The Discount Card allows Associates to purchase most regularly priced general merchandise in Walmart stores, as well as fresh fruits and vegetables, at a ten percent discount. To receive the discount, simply present your Associate Discount Card at the time you make a purchase.

You will receive further details in the days prior to your start date in regards to your first day.

Federal law requires that you present documentation that establishes your identity and legal right to work in the U.S. You must bring this documentation with you on your first day of employment. If you are unable to present the appropriate documents within three days of employment, Walmart will be required to terminate your employment. Because this is federal law, no exceptions to this requirement are permitted.

This offer is conditioned upon your passing a drug screen test, which must be administered within 24 hours after you receive this offer. This offer is also contingent upon your passing a background check. Details regarding the drug testing process are attached. If you previously have been employed by Walmart Stores, Inc., in any capacity, your rehire status with the Company must be confirmed as eligible for rehire.

This offer is conditioned upon your agreement to accept the position. This offer letter does not create an express or implied contract of employment or any other contractual commitment. Your employment relationship with Walmart is on an at-will basis, which means that either you or Walmart may terminate the employment relationship at any time for any or no reason, consistent with applicable law.

By signing below, you confirm that you are not subject to any non-compete agreement or other contractual obligations that could, or could be construed to, prohibit you from accepting the position outlined in this letter or interfering with your ability to perform the duties associated with this position.

Edward, we look forward to you joining Walmart. We ask that you acknowledge your acceptance of the terms of this written offer by signing below and returning the signed letter to Luke Schafer at Luke.schaffer@walmart.com or by fax at 479-204-9880.

Congratulations and welcome to Walmart!

EMAIL CORRESPONDENCE

* * *

From: Lori Ahern <Lori.Ahern@walmart.com>
Sent: Monday, May 2, 2016 5:12 PM
To: Ed Hedican
Subject: RE: CONFIDENTIAL: Walmart Offer- Edward Hedican

Thank you. I will let you know once a determination has been made.

Regards,
Lori Ahern, SHRM-CP
Market Human Resource Manager
Markets 434 & 436
Reg. 53, North Central Division
Office: 715-855-0321 | Cell: 715-514-7885
lori.ahern@walmart.com

From: Ed Hedican [redacted]
Sent: Monday, May 02, 2016 3:16 PM
To: Lori Ahern
Subject: RE: CONFIDENTIAL: Walmart Offer - Edward Hedican

Good afternoon Lori,

I have attached the Request for Accommodation Form to this email. If there is anything else that needs to be filled out please let me know. Thank you again, and have a great rest of the day/evening.

Sincerely,

-Ed Hedican

From: Lori.Ahern@walmart.com
To: [redacted]
Date: Mon, 2 May 2016 15:44:23 +0000
Subject: RE: CONFIDENTIAL: Walmart Offer- Edward Hedican

Ed-

Yes, you sure can. Thanks for the quick response.

Regards,
Lori Ahern, SHRM-CP
Market Human Resource Manager
Markets 434 & 436
Reg. 53, North Central Division
Office: 715-855-0321 I Cell: 715-514-7885
lori.ahern@walmart.com

From: Ed Hedican [redacted]
Sent: Monday, May
To: Lori Ahern
Subject: RE: CONFIDENTIAL: Walmart Offer - Edward Hedican

Thank you Lori I will get this filled out and sent back this afternoon. Can I scan it and email it back to you?

Thank you again,
Ed

--------Original message--------
From: Lori Ahern <Lori.Ahern@walmart.com>
Date: 5/2/2016 10:25 AM (GMT-06:00)
To: Ed Hedican [redacted], Luke Schafer <Luke.Schaffer@walmart.com>

Subject: RE: CONFIDENTIAL: Walmart Offer- Edward Hedican

Ed-

I am attaching an ADA Accommodation Request Form for you to complete and send back. You will need to apply for an accommodation to the schedule due to your religious needs. All accommodation requests are handled by our ADA department at our Home Office for consistency purposes. If it is approved, then we can proceed with the offer. If it is denied, the ADA department will list options of other positions that may fit with your needs. Please reach out to me if you have any additional questions. Thanks!

Regards,
Lori Ahern, SHRM-CP
Market Human Resource Manager
Markets 434 & 436
Reg. 53, North Central Division
Office: 715-855-0321 I Cell: 715-514-7885
lori.ahern@walmart.com

From: Ed Hedican [mailto: [redacted]
Sent: Sunday, May 01, 2016 9:45 AM
To: Luke Schafer
Cc: Lori Ahern
Subject: RE: CONFIDENTIAL: Walmart Offer - Edward Hedican

Dear Mr. Schafer and Ms. Ahern,

I am writing to thank you for the offer of employment with Walmart, I greatly appreciate the opportunity.

I am **very excited to accept** the position and begin my career with the Walmart family.

I have to let you know that my religious faith is extremely important to me and as a devout Seventh Day Adventist Christian and an Elder in my church, I believe and keep the biblical 7th day Sabbath in the 10 Commandments which is Saturday.

Having said that I will not able to work any Saturdays until after sundown. I am available any other day of the week and can be available after sundown on Saturday nights if needed.

I have completed the drug screening test on time, and have the other paperwork filled out to be sent back tomorrow upon confirmation that I will not be required to work on Saturdays until after sundown.

Thank you again for this wonderful opportunity and I greatly appreciate your time.

I will wait to hear from you Monday. Have a great day.

Sincerely,

-Edward Hedican

From: Luke.Schaffer@walmart.com
To: [redacted]
CC: Lori.Ahern@walmart.com
Subject: CONFIDENTIAL: Walmart Offer- Edward Hedican
Date: Thu, 28 Apr 2016 19:39:25 +0000

Edward,

Congratulations! On behalf of Walmart Stores, Inc. below is the process to follow on our offer of employment to you for the *Assistant Manager* position. Please take the time to review this message and its documents thoroughly before acceptance.

Drug Screen

- Please go to the closest Walmart location and ask for the personnel coordinator at the service desk.
- Please take a photo ID with you to the drug testing facility.
    - This must be accomplished by **4/29/2016 2:45:00 PM** (CST), or this offer will be withdrawn. You will not be eligible to work for Walmart Stores, Inc. for one year.

PLEASE NOTE: If you leave the testing facility for any reason before you've completed the test, it will be considered an automatic fail.

Criminal Background Check

- This will not include your credit history.
- Once the criminal background check form is entered into our system, you will get an email with login instructions.

PLEASE NOTE: Once you have returned your signed forms, you will need to complete your portion of the background check request within 48 hours. The system will not recognize entries completed from a Mac, tablet or smart phone.

Offer Letter

For your review, I have attached your offer letter, Equal Employment Opportunity (EEO) form, and the Benefits at a Glance flyer.

Upon acceptance please sign and return all pages of the following documents either by fax at 479-204-9880, or via email at Luke.schaffer@walmart.com

- Criminal Background Check Consent form
- Signed Offer Letter (Please include all 3 pages)

- Completed EEO form
- Emergency Contact Form

Please feel free to contact me directly with any questions or concerns you may have. Once again, congratulations on your offer!

Luke Schafer,
Sr. Coordinator- North Central Division
Walmart U.S. Field Talent Management
Email: Luke.Schaffer@walmart.com
Phone:479-277-0337
Fax: 479-204-9880

Walmart Home Office
702 SW 81h Street
Bentonville, AR 72716
Save Money. Live Better.

This email and any files transmitted with it are confidential and intended solely for the individual or entity to whom they are addressed. If you have received this email in error destroy it immediately.*** Walmart Confidential***

EMAIL CORRESPONDENCE

* * *

From: Lori Ahern <Lori.Ahern@walmart.com>
Sent: Wednesday, May 18, 2016 10:56 AM
To: Ed Hedican
Cc: Luke Schafer
Subject: Assistant Manager Offer/ Accommodation Request

Dear Mr. Hedican-

Thank you for your email inquiry in regards to your religious accommodation request that I received on 5/14/16. You have requested to have a full day off for religious purposes each and every Saturday going forward for the duration of your employment with Walmart. Given the particular position at issue and the specific breadth of the accommodation requested, we denied the request. Our decision remains the same. Please advise me of any interest that you may have in other positions in the store and I can assist you in the application process for them.

Given your inability to perform the essential functions of the job, we are rescinding the offer for the Assistant Manager in Training position effective immediately.

Regards,

Lori Ahern, SHRM-CP
Market Human Resource Manager
Markets 434 & 436
Reg. 53, North Central Division
Office: 715-855-0321 1 Cell: 715-514-7885
lori.ahern@walmart.com

This email and any files transmitted with it are confidential and intended solely for the individual or entity to whom they are addressed. If you have received this email in error destroy it immediately. *** Walmart Confidential ***

EMAIL CORRESPONDENCE

* * *

From: donotreply@wal-mart.com <Enterprise@trm.brassring.com>
Sent: Friday, May 20, 2016 2:51 PM
To: [redacted]
Subject: Wal-Mart: Your Application for Assistant Mgr Trainee (#647157BR)

Dear Edward Hedican,

Thanks for your interest in joining the Walmart team. At this time, we are considering other candidates for the following position: Assistant Mgr Trainee (647157BR).

We encourage you to visit www.walmart.com/careers again and take advantage of our search tool. It will help you find other Walmart opportunities that best match your unique qualifications.

Thanks again.

* *Please do not reply to this email.*

In the Matter Of:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION vs WALMART STORES EAST, et al.

3:18-cv-00804

Transcript of the Testimony of:

LORI S. AHERN
July 09, 2019

Excerpts from Transcript of Deposition of Lori S. Ahern

* * *

[Page 65]

Q. Have you had training from Walmart specifically regarding religious discrimination?

A. Yes.

Q. And just without, you know, refreshing by looking, what do you remember about the—well, when did you have training from Walmart regarding religious discrimination?

A. I believe it would have been around June of 2015 **[Page 66]** we went to Bentonville and did a week of MHRM training, so had training in various topics or areas, learned different systems and processes, and then I know kind of employment law and practices was one of the areas that was discussed or covered.

Q. And when you said MHRM in that answer, that stands for market human resource manager?

A. Yes.

Q. So the one-week training in Bentonville, Arkansas was with other new market human resource managers.

A. Yes.

Q. How big was your class, do you recall?

A. I do not.

Q. And if it's a one-week training, how much of that time was dedicated to this employment discrimination section?

A. I don't recall that either.

Q. Do you think that of the time that was dedicated to employment discrimination, more than half an hour or less than half an hour of that time involved religious, specifically religious discrimination?

A. I don't remember that either.

[Page 67]

Q. Do you recall whether in that one-week training you got any direction about how to—how Walmart wants you to process or procedures from Walmart for a request for a religious accommodation?

A. Yes.

Q. What do you recall?

A. That they would fill out the accommodation request form, it then would go to the Accommodation Center. The Accommodation Center would then either give guidance if that was not their area of decision-making or they would make a determination. In this specific case, it came back to the MHRM. I felt comfortable making that decision. I took the appropriate partnerships and responded.

Q. In this specific incident, the Accommodation Service Center you said—just now you testified that Accommodation Service Center will either give guidance or make a determination. In Edward Hedican's case, which did they do?

A. They gave guidance that it was the MHRM's decision.

Q. And then—okay. We'll come back to that. Do you know of any management guidelines for **[Page 68]** requests for religious accommodations that were in effect at Walmart in 2016?

A. I don't know if I understand the question.

Q. Were there any—so I think your—I'm asking were there—do you have familiarity with Walmart's management guidelines?

A. No, I don't have familiarity.

Q. Do you know whether there were any management guidelines for requests for religious accommodations in effect in 2016?

A. I don't know.

Q. Okay. And then let's look at the exhibit of the—if I can ask you to look for Exhibit 2.

A. I don't believe I have 2.

Q. Okay. We'll find it. So handing you what's been marked as Exhibit 2, do you recognize that document?

A. It's a discrimination and harassment policy of Walmart.

Q. And when you did your training in Bentonville, Arkansas, is this one of the policies you were trained on?

A. Yes.

Q. And to your knowledge, is there—well, does this policy govern religious discrimination?

[Page 69]

A. It would fall under this because it does talk about an individual status and then it also talks about prohibiting conduct for discrimination, so yes.

Q. And to your knowledge, did Walmart have any other policies that governed discrimination on the basis of religion?

A. I don't recall.

Q. And if we look about a little less than halfway down, there's a reference, "Managers and supervisors should use the appropriate supplemental management guidelines," and then there's this list, "Discrimination and Harassment Prevention Management Guidelines – Field" and then the same thing for the home office. Do you see where I'm reading?

A. I see where you're pointing.

Q. Do you have any recollection of seeing the Discrimination and Harassment Prevention Management Guidelines for the field?

A. I don't recall it off the top of my head.

Q. So you don't know whether you were trained on the management guidelines in Bentonville?

A. I don't recall that specific guideline. I've been gone too long to recall what that is, first **[Page 70]** off, and what it all encompasses or to remember specifically what my training was about.

Q. And it was June of 2017 that you left; is that right?

A. Uh-huh.

Q. 25 months ago?

A. (Nods head up and down.)

Q. If in—so let me back up. You said you were trained one week in Bentonville. Was that near the beginning of your employment?

A. It would have been June of 2015.

Q. The first month. No, within the first three months that you started?

A. Correct. I started in April.

Q. Okay. And then so if the offer letter went out in April of 2016, if you had wanted to reference—like re-reference this policy during the hiring process of Mr. Hedican, how would you have found this policy?

A. On the Walmart intranet.

Q. Do you recall whether or not you did that?

A. I did.

Q. What do you recall?

A. I recall when he emailed back in regards to the schedule and his need for Saturdays, I did **[Page 71]** reference this to ensure that we were following the correct steps and I was taking the correct partnerships along the way.

Q. And can you show me if there's anything in that policy that guided any of the steps that you took through that process?

A. (Reads document.) Well, this specifically doesn't talk about the process. This just talks about what discrimination is and what is not necessarily

tolerated, but there are steps or a process in regards to what we do when someone requests an accommodation.

Q. And do you have a recollection of what that policy is called?

A. I do not.

Q. But let's back up. You're saying there's a policy other than this one that governs religious accommodation requests?

A. I don't know if it's a policy, but there's steps to talk about what you do when you get a request.

Q. And is that specific to a request for a religious accommodation?

A. It was in general for accommodations.

Q. And do you recall the title of that policy?

[Page 72]

A. I don't.

MS. ZOELLER: Objection, misstates the witness's prior testimony.

Q. And do you recall whether the term "medical related" was in the title for that policy?

A. I don't.

Q. And it's not the policy that represents Exhibit 2, correct?

A. Well, I guess what I'm saying is there's a process, not a policy, that talks about what to do when someone requests an accommodation, So Edward requested a schedule accommodation because he wasn't able to work Saturdays. So again, I don't recall the exact

document that talks through the steps. I referenced that and had him fill out the form to start the process.

Q. In your career at Walmart, did you ever receive any request for religious accommodations other than Mr. Hedican's?

A. Yes.

Q. And how many?

A. There would be two others.

Q. And what stores were they from?

A. One was Eau Claire. The other one I don't remember.

[Page 73]

Q. And do you recall what the requests were?

A. One was for religious attire, for a head scarf, and that was the one I don't recall which store. That was an hourly employee. The one for Eau Claire was an hourly supervisor employee who had a request for being able to work Saturdays after sundown, an hourly position that I believe we accommodated and he took like a stocking supervisor position, that CAP acronym that I can't remember or like a cleaning supervisor. I don't recall how we resolved it.

Q. And do you remember that man's name?

A. I do not.

Q. Do you remember the name of the religion that his request was based on?

A. I do not.

Q. And do you remember what religion the head scarf request was based on?

A. I do not.

Q. Do you remember if that was a woman?

A. It was.

Q. And the head scarf request is the store you can't remember?

A. Correct.

Q. And do you recall whether the religious **[Page 74]** accommodation request to wear a head scarf was denied or granted?

A. It was granted.

Q. And the Eau Claire man, was the request to work Saturdays after sundown made around the time of hiring or within his employment?

A. It was within his employment.

Q. Do you have a recollection of whether or not he had been employed with Walmart for years?

A. I don't remember.

Q. But at any rate, he wasn't new to Walmart?

A. No, he was an existing employee that had an accommodation. So I don't know if he had changed religions. I don't recall the circumstances of why he had the request.

Q. Can you remember if—let me make sure I've got this right. So the Eau Claire man's request was granted. He took the stocking supervisor job, correct?

A. Yes, some sort of position similar to that.

Q. That had him working nights it sounds like?

A. Correct. It was in an hourly capacity.

Q. Is that different—is that a set shift like an 8:00 p.m. to 8:00 a.m.?

A. I believe so. Again, I don't recall the exact **[Page 75]** days of the week, if that was set or not. Again, scheduling wasn't my area.

Q. Do you recall whether taking that stocking supervisor position as an accommodation required this Eau Claire man to accept a lower rate of pay?

A. I don't recall.

Q. And do you recall whether it was a full-time position?

A. Yes, it was full time.

Q. He moved into a full-time position?

A. Or he may have stayed. I don't know what he was previous. The majority of the employees at Walmart are full time, so I would assume he stayed full time to full time.

Q. And this stocking supervisor position was hourly, correct?

A. Yes.

Q. So when you're saying full time, you mean 40 hours, right?

A. Yes.

Q. Okay. And to your knowledge, do stocking supervisors have the ability to earn overtime if they work more than 40 hours?

A. Yes.

[Page 76]

Q. And do you know whether or not it was a position that had 12-hour shifts?

A. I don' t recall.

Q. And to your recollection, how did you become aware—how did this request for the head scarf accommodation come to your attention?

A. She reached out or called the market office and said she had a request.

Q. Oh, the employee did. So you didn't speak with her store manager?

A. No, I believe the employee contacted me directly.

Q. Then what happened?

A. Listened to her concern, had her fill out the form, sent the form in to the Accommodation Center, and I believe from there it was granted. Then I talked through the response with the employee as well as the store manager so everyone was aware of what was approved.

Q. What is your best memory—to the best of your recollection, estimate how long the Accommodation Service Center took to make a final determination.

A. I would guess a week. I mean, I would say on average that is probably what it was.

* * *

[Page 105]

Q. So you testified then you partnered with who you had to partner with to make the decision. Talk me through that process. What was your next step after that phone call with Accommodation Service Center?

A. I don't remember the exact steps in the exact **[Page 106]** order, but some of the things that I looked into and considered was talking to both the store manager and the market manager about the request and the scheduling needs of the store and how that could impact it, looking at the different points, metrics, I don't know what you want to call it, in terms of the sales, average sales for a Saturday, the average customer traffic, some of the operations, if the store received a shipment, how many people are typically on staff, how do they assign the assistants in terms of what areas they are covering, looking at the schedule.

It is a resort store so that means that they do the majority of their business May through probably September, so a lot of the people are new and temporary during that time frame. So I know one thing to kind of consider is a lot of their traffic is during the weekends. A lot of the staff is new and maybe not as familiar, so there's a little bit more in regards to management calls and coverage that's needed for the demands of the business then. We looked at that, I did talk to our general counsel as well just in regards to, you know, guidance on **[Page 107]** resolutions and what were options in terms of trying to accommodate this request or other options to be able to resolve it.

Q. So I heard you testify that you talked to the store manager. That would be Dale Buck; is that right?

A Yes.

Q. And the market manager, Tim?

A. Tim Hullett.

Q. Hullett. Thank you. And general counsel. What was that person's name?

A. I don't recall.

Q. Does the name Kimberly Royal ring a bell?

A. Yes.

Q. Do you believe that is the name of the general counsel you were just testifying about?

A. I believe it was.

Q. Do you know where the office of Kimberly Royal is?

A. She was based out of Bentonville at my time of employment.

Q. In the home office?

A. Yes.

Q. How many conversations do you believe you had with Tim Hullett about Mr. Hedican's **[Page 108]** accommodation request?

A. One.

Q. What is everything you remember about that conversation?

A. I don't remember all the details, but just operationally he didn't feel that that would work because it would cause us to have to add additional head count as assistant managers to be able to staff to the needs of the business which would be an added expense that was not budgeted in and it would be an undue hardship to Walmart.

MS. VANCE: Can you read back that answer? There was a word she used that I need to understand.

(Requested portion of record read.)

MS. VANCE: Thank you.

Q. Ms. Ahern, when you said "add to the head count," what does that mean?

A. Well, I believe I stated earlier in an answer that each store was given a head count or a recommended number of managers and types of managers based off their sales volume. So this store based off of its volume it was determined how many assistant managers it could have.

* * *

[Page 113]

Q. I want to ask you about that sentence "inability to perform the essential functions of the job." Can you explain how Mr.—can you explain what constituted the inability to perform the essential functions of the job?

A. Not being able to work the various shifts.

Q. And did you come up with that determination in consultation with the other people or is that kind of your wording that you decided on?

[Page 114]

A. That was my wording.

Q. And when you say "we denied the request," do you mean Wal—what do you mean by "we denied the request"?

A. I guess I mean Walmart. It ultimately was my decision. I just probably used the wrong pronoun.

Q. Did you blind copy anybody on this email?

A. No.

Q. Did you forward this email to anyone at any point?

A. I don't know. I don't recall.

Q. Did your regional human resources director in this May 18, 2016 time frame know that you were denying a religious accommodation request?

A. No.

Q. That's Mr. Malavet, correct?

A. Yes.

Q. You testified that you looked at sales for Saturdays and customer traffic for Saturdays as part of the steps you took when considering the request; am I right?

A. I wouldn't say I looked at all the days, but in my finding that was my analysis in regards to that's when they did the majority of their **[Page 115]** business.

Q. And was there a specific report that you consulted for that information?

A. I don't recall the name.

Q. But is there a specific report for Walmart that would give—that you could look up to find the sales for a specific store separated by day?

MS. ZOELLER: Objection, foundation.

Q. So I'm asking is there one.

MS. ZOELLER: Foundation.

A. There's sales reports that would give that information.

Q. And that's what you are testifying that you looked at?

A. Yes.

Q. Do you recall whether the sales report tracks more than just a day? Does it also track time of day?

A. It does.

Q. Is it separated by hour?

A I believe so.

Q. And then you testified that you looked at customer traffic; is that right?

A. Right.

Q. And does Walmart have a specific report that **[Page 116]** gave you the information about customer traffic by store?

A It does.

Q. And is that separated by day increments?

A It would tell you the same as sales, so however you want to narrow it down.

Q. You could find the hour?

A. Yes.

Q. Okay. I believe you also testified that you consulted—you took into account staffing needs at the Hayward store, right?

A Right, As I stated earlier, it's a resort store so they have a lot of temp associates that may not be as knowledgeable on product information, so there may be more manager calls.

Q. What kind of—is there documentation or some kind of report that you have to find to look at—to learn that information about staffing needs at the Hayward store?

A You just look at past schedules.

Q. Past schedules, okay. That's what you did in the case for Mr, Hedican's request?

A Yes, and then Dale also gave input.

* * *

[Page 133]

Q. I mean, my question is when you were considering do I deny Mr. Hedican or do I grant Mr. Hedican's accommodation, you testified, "I considered the metrics for the sales for the store, the metrics for the customer traffic from the store, and the scheduling needs of the store," right?

A. Yes.

Q. So in that time frame when you were considering do I deny or grant Mr. Hedican's accommodation, what did you find out about the scheduling needs of the store?

A. I don't recall the specifics, but in general I would like to see how many assistants are scheduled on a Saturday on average. What is the **[Page 134]** minimum amount that they need to be able to operate? I would look at like what typical shifts had been scheduled for those assistant managers and then went from there. I don't remember the specifics on my findings as to the numbers or the times.

Q. Do you have any memory of what you learned about the scheduling needs of the store that informed your decision to deny Mr. Hedican's accommodation?

A. I think I answered that before, that the majority of the store's business is done on a Saturday and that the majority of its business is done in the months of May through September. And just in regards to, I guess, the

management support that was needed and the leadership to see all the operational needs, I felt that having him not be able to work Saturdays would be a hardship on the business because it could cause them to be understaffed or to have to add an additional assistant manager to ensure that we have the coverage. I don't remember the details.

Q. In that time frame where you were deciding to deny or grant Mr. Hedican's accommodation, did **[Page 135]** you have any discussions about whether or not any of the current assistant managers working the night shift wanted to switch off the night shift to days?

A. No, because that really didn't impact it. He would still have to be able to rotate at some point to the other shifts and the other areas of the store.

Q. Did you have any conversations in that time frame with any assistant managers?

A. No.

Q. Did you have any conversations specifically about any difficulties in scheduling Saturday shifts for assistant managers at the Hayward store?

A Could you repeat the question?

Q. In this time frame while you were deciding whether to deny or grant Mr. Hedican's accommodation, did you have any conversations about any difficulties scheduling Saturday shifts for assistant managers at the Hayward store?

A I don't recall.

Q. Did you have any conversations about whether any of the current assistant managers at the Hayward

[Page 136] store asked to switch days with other assistant managers?

A. I don't recall.

Q. So if Edward Hedican had specifically said, "My availability is to work—I would like to start out on nights and my availability is to work Sunday, Monday, Tuesday, Wednesday, and then I'd like, you know, the three days off, four nights, three days off," could Mr. Hedican have worked that schedule?

A. I don't know. I didn't review for that request.

Q. And if Mr. Hedican was willing to work Saturday nights, like Saturday nights, Sunday nights, Monday nights, Tuesday nights, three days off, Saturday nights, Sunday nights, Monday nights, Tuesday nights, three days off, could you have granted that accommodation?

A. I don't know. I didn't look into that request either. Ultimately though he would still need to have the various shifts and the various days because he would rotate areas at some point. And that specific example that you gave may not be the needs of the business for his new section, you know, of the store.

Q. Okay. So if he had started—am I right to say **[Page 137]** if he had started at that schedule, the hypothetical of Saturday night, Sunday night, Monday night, Tuesday night, three days off, repeat, that could have lasted until the assistant managers changed areas?

A. I don't know, I didn't research that specific request, but I guess what I looked into in general for the request is managers need to have various schedules, so maybe they work overnights if they're the overnight

assistant but then they go to grocery and maybe their schedule's going to be more days or second shift per se because they will have to close, like til 10:00, some shifts. So again, I don't know what the store manager's need for the rotation would be. Again, he may change that in three months or six months, but ultimately if he can't rotate, then that allows all the other assistant managers not to be able to experience that part of the store or to have to work more Saturdays because he can't.

Q. Did you have any conversations about that problem of not being able to rotate an area assignment in that time frame while you were deciding whether to deny or grant Mr. Hedican's **[Page 138]** request?

A. I don't recall if it came up in conversation.

Q. You do recall that you specifically had conversations about an inability to work Saturday shifts—

A. Right.

Q. — for the duration of his employment?

Okay. Do you have any knowledge of whether or not some assistant managers stay in their area assignment longer than a year?

A. I don't know. Again, it's not a company practice that they have to stay for a specific amount. Each store will determine what dictates the rotation, I think I stated that earlier. Sometimes it's three months, sometimes it's six months, sometimes it's a year, but on average stores will rotate them annually.

Q. Okay. And help re understand that because I want to make sure I'm hearing it right. Is the rotation of the

area assignments of assistant managers the discretion of the store manager?

A. Yes.

Q. Is the store manager's discretion reviewed by anybody else up the—

A. Yes.

[Page 139]

Q. —chain of command? Who?

A. Market manager.

Q. And in this case that would be Tim?

A. Tim Hullett.

Q. Tim Hullett. To your knowledge, is the store manager's decision about rotating area assignments dictated by a Walmart policy?

A. No.

MS. ZOELLER: Objection, foundation. The witness has already testified she doesn't have familiarity with the scheduling.

MS. VANCE: Well, I'm not asking about scheduling. I'm asking about the area assignments.

A. No. They have to go through every area. They need to learn every area. That's an expectation of Walmart. I don't believe it's written down anywhere. I'm not an expert and can't answer that verbatim; however, an example may be if a difficult area opens up, we'll say fresh, so that would be like the bakery, the deli, the meat area, that's a difficult area because there's a lot of compliance that you have to learn, much less everything else that goes into it, so if that opens up, they may rotate the **[Page 140]** assistants to put

someone who is a little more tenured into there even though their year is not up in their original area just so someone brand new doesn't walk into having to learn Walmart plus a difficult area. So that would be an example of why store managers may rotate them earlier than the year.

Q. And that's not required; it's decided—

A. Discretionary, yeah.

Q. —by the store manager?

A. Store manager.

Q. And what is the longest you've seen an assistant manager stay in an assignment?

A. I don't know. I don't recall.

Q. Because you never had part in that decision-making process as a market human resource manager, right?

A. Correct. And I oversaw 16 stores and the average of eight assistants at each store, so I don't always know the tenure of each area or department that they work.