NO. _____

IN THE

Supreme Court of the United States

RAYMOND ZDUNSKI,

Petitioner,

v.

ERIE 2-CHAUTAUGUA-CATTARAUGUS BOCES, DAVID O'ROURKE, in his official capacity, JOHN O'CONNOR, in his official capacity, BRIAN LIEBENOW, LAURIE BURGER, TRACY SMITH-DENGLER,

Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Raymond Zdunski ("Ray") was an account clerk employed by the Respondent, a public school district ("the School District") in upstate New York. Ray was terminated by the School District because he sought a religious accommodation exempting him from attending a training mandated for all district employees aimed at "LGBTQ Cultural Competency". Ray expressed that the ideology that was the subject of the training is in conflict with his sincerely held religious beliefs as he is a devout Christian. He further informed his employer that the Bible clearly instructs to avoid false teaching, and therefore even mere attendance at the full-day training would violate his faith.

The Second Circuit, relying upon this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) erroneously held that Petitioner pointed to no evidence in support of his claims that a jury could rely upon, and that an award of summary judgment to the School District was therefore appropriate. Thus, the Second Circuit effectively held that mandating LGBTQ Cultural Competency can be mandated for all employees notwithstanding their religious objection thereto and the requirements imposed by Title VII. Likewise, the Second Circuit found no violation of Equal Protection. The questions presented are:

1. Whether terminating the employment of an employee for failure to attend a training that conflicts with the employee's sincerely held religious beliefs and from which the employee sought and was denied

religious accommodation violates Title VII of the Civil Rights Act of 1964.

2. Whether it was error for the lower court to award summary judgment to Respondents where a disputed issue of material fact exists as to whether granting the requested accommodation would have caused the Respondent school district undue hardship (particularly in view of the recently issued opinion of this Court in *Groff v. DeJoy*, 600 U.S. ____ (2023) clarifying that the undue hardship standard is not met by merely showing a more than de minimis burden).

3. Whether mandating public employees to receive training on cultural sensitivity towards members of the LGBTQ community while denying a request of a Christian employee to require employees to be trained on workplace sensitivity towards persons of faith is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Raymond Zdunski, an individual person.

Respondents are the Erie 2-Chautauqua-Cattaraugus BOCES, a public school district in upstate New York (hereinafter "School District"); David O'Rourke, in his official capacity as Superintendent and Chief Executive Officer of the School District; John O'Connor, in his official capacity as Assistant Superintendent of the School District; and Brian Liebenow, Laurie Burger and Tracy Smith-Dengler, individual employees of the School District directly involved in the discriminatory treatment and termination of Petitioner.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Second Circuit, Case No. 22-547, *Zdunski* v. *Erie 2-Chautauqua-Cattaragus BOCES, et. al*, Summary Order issued March 13, 2023, Judgment/Mandate issued April 3, 2023.

U.S. District Court for the Western District of New York, Case No. 1:19-cv-940-GWC, Order entered February 16, 2022.

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The district court's order granting Respondents' Motion to for Summary Judgment is reported at *Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES*, 2022 U.S. Dist. LEXIS 51575 and reprinted at App. 7a.

The Second Circuit's opinion affirming the district court's order is reported at *Zdunski v. Boces*, 2023 U.S. App. LEXIS 5865and reprinted at App.1a.

STATEMENT OF JURISDICTION

The Second Circuit entered judgment on April 3, 2023 and it opinion was rendered on March 13, 2020.[1] Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides: "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

Relevant portions of the Title VII of the Civil Rights Act of 1964 provide:

(a) Employer practices

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[1] A motion requesting that the Clerk be directed to accept this petition for filing is filed herewith due to the error in calculating the deadline for the submission of this petition.

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;...Sec. 2000e-2. (Section 703)

And:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. Sec. 2000e. (Section 701)

INTRODUCTION

There is a mighty push in society today to eradicate the acknowledgment of biologically assigned sex. When the facts underlying this case occurred five years ago, this movement was not as widespread or prevalent. But now that the case is poised to be heard by the highest court in the land, the attack on truth is more prevalent and palpable than it ever before has been, thereby making it necessary for this Court to take up this case to elucidate what the bounds of the law are.

Raymond Zdunski, and so many bible believing Christians like him, just wanted to continue doing his desk job effectively and peacefully as he had been for many years when all of the sudden the culture war inflicted itself upon him...ultimately costing him his

job and his livelihood. Raymond Zdunski was forced by his employer – a public school district - to attend a "cultural competency" training regarding persons identifying as members of the LGBTQ persuasion. According to Respondents, this training was brought about by a person in the office transitioning from male to female and requesting that his co-workers receive formal training on the subject. The government employer acquiesced. Mr. Zdunski, in turn, sought a religious accommodation pursuant to Title VII exempting him from the training because, as he articulated in detail to his employer, attending the training and the contents thereof conflicted with his sincerely held religious beliefs. Alternatively, he proposed that his employer provide a similar training on cultural competency regarding persons of faith. This request was not taken seriously by the employer, Mr. Zdunski's accommodation was summarily denied without due consideration, and Mr. Zdunski's employment was terminated due solely to his refusal to violate the dictates of his conscience.

We have reached a tipping point in our society where the rights of those adhering steadfastly to traditional values are overrun by the claimed rights of those who have deemed those values antiquated and bigoted. Christians need this Court to make clear that the constitution and longstanding statutory law that reflects our nation's heritage as a nation committed to protection of robust religious practice and speech in the public sphere. Discrimination against Christians violates clearly established law. The termination of Raymond Zdunski was an act of unlawful discrimination that cannot stand.

STATEMENT OF THE CASE

Petitioner Ray Zdunski was employed by the School District as an account clerk since 2011. He worked in the School District's central business office located in Fredonia, New York and his duties included processing payroll, retirement reporting, quarterly tax preparation, and W-2 preparation. Ray had an unblemished record of employment.

In February 2018, the School District issued a mandate to all employees in the business center to attend a training later that month. This was not a training related to the duties of Ray's employment, however. Rather, the mandatory training was to be put on by the local "Pride Center" and was titled "LGBTQ Cultural Competency".

Petitioner did not want to attend the training on the basis that he is a devout Christian and, as such, his beliefs regarding homosexuality and gender are dictated to him by Holy Scripture. Petitioner did not want to be forced to listen to indoctrination that is in contradiction to the tenets of his faith.

Ray advised his supervisor via e-mail that he would be unable to attend the training due to the subject matter of the training being in conflict with his sincerely held religious beliefs, and sought a religious accommodation exempting him from the training. In that same email, Ray also requested that a similar training be offered to teach employees greater cultural sensitivity towards persons of faith to hopefully curtail the offensive religious slurs that petitioner regularly heard in the office. That request was not acknowledged.

Petitioner did not attend the February training and received no formal discipline or reprimand at that time. Then, in May 2018, plaintiff received an e-mail from his supervisor advising that all employees who were not in attendance at the February LGBTQ training must attend a make-up session to be held that month. Ray responded to that e-mail inquiring as to the specific objectives of the training. In response, his supervisor wrote that the topics to be covered at the training would include: "Recognizing the difference between sex & gender, understanding aspects of identity, understanding how beliefs/feelings/values perpetuate oppression" etc. In light of his deeply and sincerely held religious beliefs on the enumerated topics, which are dictated to him by God and His Holy Word, Ray responded to his employer advising that he was unable to attend the training. Ray explained that he believes in the Bible's teachings on these subjects and attending and listening to contradictory teaching at the training would cause him to violate his religious beliefs. Petitioner further wrote in his responsive email that he loves all people and does not treat any co-worker or any other person differently based upon their sexual orientation. Finally, petitioner reiterated his request that the School District provide a similar training to counter discrimination in the workplace against Christians, which he himself had experienced.

Defendants again denied plaintiff's request for a religious accommodation exempting him from the LGBTQ training. Ray was informed by his employer that he must attend the May training or face disciplinary action including possible termination. Further, Ray's request that his employer provide

alternative or supplemental training that teaches employees about cultural sensitivity towards Christians and other persons of faith was ignored.

The day before the mandated training was to occur, Ray was summoned to a meeting by his employer and issued a "counseling memo" accusing him of insubordination. The memo also contained a directive to Ray that he attend the training the following day or else face discipline up to and including termination.

Ray did not attend the LGBTQ Cultural Competency training, but chose instead to uphold his commitment to the dictates of conscience and his faith.

Several days thereafter, an attorney with the School District directed Ray into an impromptu meeting with him asked him why he did not attend the training. Ray explained that he is a Christian and that attending the training would have violated his sincerely held religious beliefs. That attorney, Respondent Brian Liebenow, immediately handed Ray a letter terminating his employment effective immediately.

Respondents subsequently opposed petitioner's application for unemployment benefits on the basis that he was terminated for "misconduct", and those benefits were denied to petitioner.

Petitioner brought suit against his former employer lawsuit because he believes no employee in this country should be forced to choose between their faith and their employment as he was. Attendance at the training would have caused Ray to violate the

religious teachings to which he adheres, which include avoiding false teaching. Ray believed he could not simultaneously live out his Christian faith and attend the mandatory training. Respondents, without even exploring the possibility of granting Ray a religious accommodation, denied his request. When Ray stood by his choice to not defy God and his conscience, the School District summarily terminated his employment.

In spite of petitioner not being provided with sufficient discovery and the district court denying petitioner's counsel's repeated requests to compel production and extend discovery deadlines (during the COVID-19 pandemic), Respondents moved for and were awarded summary judgment on all causes of action. Even though the district court found that petitioner established a prima facie failure to accommodate case, it found that awarding summary judgment to Respondents was appropriate because Peititioner "has not cited to or provided any actual evidence that would establish a genuine dispute of material fact." *Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES*, 2022 U.S. Dist. LEXIS 51575, *13-14. The Court curiously reasoned, "Even drawing all reasonable inferences in Mr. Zdunski's favor, none of the facts alleged support the claim that his termination was tainted by an inference of unlawful discrimination. Rather, the facts alleged make clear that BOCES terminated Mr. Zdunski in response to his failure to comply with his employer's policy mandating anti-discrimination training, even after Mr. Zdunski was made aware that his misconduct could result in termination." *Id.* at *24-25. A distinction without a difference.

Most importantly, perhaps, in warranting this Court's review is the lower court's clearly erroneous assertion that "in the context of Title VII claims of religious discrimination, an "undue hardship" is anything "more than a de minimis cost" to the employer. *Trans World Airlines*, 432 U.S. at 84." Id. *at* *34 and that therefore "the "mere possibility of an adverse impact on co-workers as a result of [a religious accommodation] is sufficient to constitute an undue hardship") (citing *Trans World Airlines*, 432 U.S. at 81)" *Id.* at *34.

Ultimately, the district court ruled and that Second Circuit upheld the finding – on summary judgment relying upon only Respondents bald assertions in support – that "Mr. Zdunski's proposed accommodation—that he be excused from the mandatory LGBTQ anti-discrimination training—amounts to more than a de minimis cost to his employer's business operations."[2] *Id.* *35

The Second Circuit affirmed. Relying upon *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986),

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[2] The court relied upon Respondents assertion that they were required by New York State Law to provide such training, but the law referred to (the Dignity for All Students Act) only requires training aimed at providing a positive school environment free from discrimination, harassment, and bullying. The law does not explicitly require training on sexual orientation and gender identity and, even if it did, this would not negate the employer's requirements pursuant to Title VII. It is also relevant that Mr. Zdunski had no contact with students and did not work in a school building. *See* N.Y. Educ. Law Tit. 1 Art. 2 §§ 10, 13.

the court held that Petitioner "failed to point to "sufficient evidence favoring" him that would allow "a jury to return a verdict" for him on any of his claims." *Zdunski v. Boces*, 2023 U.S. App. LEXIS 5865, *2

REASONS FOR GRANTING THE WRIT

It is imperative that this Court grant certiorari in this case because the Second Circuit in this matter has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Not only is the Second Circuit's reliance upon *Liberty Lobby* misplaced and erroneous, but, more significantly, the Second Circuit's opinion results in a unjust outcome that violates clearly established law. This opinion effectively gives license to employers to terminate the employment of Christians, who, by virtue of the dictates of their faith must necessarily reject attempts at indoctrination against biblical truth. Particularly in light of this Court's recent holding in *Groff v. DeJoy*, 600 U.S. ____ (2023), it is abundantly clear that summary judgment is not appropriate in a Title VII accommodation case where a plaintiff has laid out a prima facie case of discrimination and the issue of whether a requested accommodation would cause an undue burden to the employer – a necessarily factual inquiry – remains a disputed issue.

I. The Second Circuit's decision contradicts this Court's religious accommodation precedents, particularly as recently elucidated by this Court's holding in *Groff v. DeJoy*.

The Second Circuit's opinion eviscerates this Court's protection for accommodation of religious adherence in the workplace and rights of conscience generally.

The district court wrote and the Second Circuit affirmed:

> The fact remains that Mr. Zdunski was employed by a State agency in a State—and post-*Bostock*, a country—that recognizes gender expression and sexual orientation as protected classes on equal footing with religion for purposes of Title VII. Just as it would be "anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others," so too would it be anomalous to allow an employer to deny a transgender employee's legal right to a workplace free of discrimination and harassment in order to accommodate the conflicting religious beliefs of other employees. *Trans World Airlines*, 432 U.S. at 64. Accordingly, Plaintiff's disparate treatment claims brought under Title VII and NYSHRL are without merit.
>
> *Zdunski v. Erie 2-Chautauqua-Cattaraugus* BOCES, 2022 U.S. Dist. LEXIS 51575, *29

This is in direct contradiction to this Court's precedent. As this Court articulated in *Groff v. DeJoy*, "showing "more than a de minimis cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII [and] *Hardison* cannot be reduced to that one phrase." Further, as this Court clearly explained, "An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself."

In the case of Raymond Zdunski, the lower courts reasoned that Respondents could not accommodate Petitioner's religious beliefs because that would necessarily cause it to favor the rights of religious adherents over persons identifying as members of the LGBTQ community. In so doing, the lower courts effectively held that LGBTQ rights are superior to faith-based rights, thereby rendering religious accommodation under Title VII nonexistent. To borrow this Court's analogy, Title VII did go to war with itself in this matter, and hostility towards religious practice won.

II. The Second Circuit's opinion effectively allows the government to strip Christians – and all persons unwilling to submit to the orthodoxy of the day – of their livelihood.

If the Second Circuit's opinion is allowed to stand, it means that all employees can be compelled to sit through and participate in (and even affirm[3]) teaching that directly contradicts the sincerely held tenets of their face or be terminated. This compulsory re-education is characteristic of a dictatorial or communist state and contravenes the most basic precepts of a free society.

The district court held and the Second Circuit affirmed:

> In essence, Mr. Zdunski argues that the tenets of his religious beliefs run counter to New York State and Federal law insofar as these laws require employers to ensure the employment rights of individuals of varying sexual orientations and gender expressions are respected. Religious beliefs are as varied as the individuals who hold them, and the court will not pass judgment on the "diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated." *United States v. Seeger*, 380 U.S. 163, 183, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965). But Plaintiff's former employer is required by law to ensure the legal rights of LGBTQ employees are protected. Allowing individuals who personally

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[3] See *Brennan v. Deluxe Corp.*, 2021 US Dist LEXIS 100006 (D. Md May 26, 2021, Civil Action No. ELH-18-2119).

> oppose the rights of transitioning individuals in the workplace to forego anti-discrimination LGBTQ trainings would stifle their effect and would adversely impact transitioning employees. Because the relief Mr. Zdunski seeks would require the court to "construe the statute to require an employer to discriminate against some employees in order to enable others to observe their [religious beliefs]," Plaintiff's Title VII claims shall be dismissed. *Trans World Airlines*, 432 U.S. at 85.
>
> *Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES*, 2022 U.S. Dist. LEXIS 51575, *35-36

This deeply flawed reasoning is reflective of the widespread misinterpretation of *Hardison* this Court's opinion in *Groff v. DeJoy* was aimed at correcting. The unjust result in this matter cannot be allowed to stand, not only for the sake of Petitioner but for all Christian employees who are now subject to termination merely for adhering to the dictates of their faith.

III. The Second Circuit's opinion distorts and misapplies *Anderson v. Liberty Lobby.*

The Second Circuit relied almost entirely upon this Court's ruling in *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986) in upholding the district court's award of summary judgment to Respondents. The Second Circuit found that Petitioner did not present evidence upon which a jury could reasonably find in its favor, but completely disregarded the rule that a non-movant bears no burden unless and until a movant establishes that no disputed issue of material fact

exists and its entitlement to judgment as a matter of law. In this Title VII accommodation case, Respondents did not present any evidence that in engaged in any analysis of whether and to what extent Petitioner's requested accommodation would create an undue burden. Thus, Respondents failed to establish their entitlement to summary judgment and the determinations of the lower courts were clear error.

The district court held and the Second Circuit affirmed:

> It is reasonable to infer that Mr. Zdunski's religious beliefs, insofar as they concern sexual orientation and gender expression, are bona fide and sincerely held, and that Mr. Zdunski believes his religious views conflicted with the substance of the mandatory employment trainings. All parties agree Mr. Zdunski communicated his religious beliefs to Defendants and expressed his personal opposition to the mandatory trainings. (Doc. 1 at 5; Doc. 4 ¶ 21.) Similarly, all parties agree Mr. Zdunski was terminated for his failure to attend the mandatory trainings. (Doc. 1 at 7; Doc. 4 ¶ 35.) Therefore, Plaintiff has pleaded sufficient facts to make out *a prima facie* failure to accommodate claim.
>
> *Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES*, 2022 U.S. Dist. LEXIS 51575, *32-33.

Thus, the burden shifted to Respondents to establish that the requested accommodation would have caused it undue hardship. This is necessarily a fact-specific inquiry. See *DeJoy* ("As explained below,

because we—like the Solicitor General—construe *Hardison* as consistent with the ordinary meaning of "undue hardship," we need not reconcile any divergence between *Hardison* and the statutory text. ...This fact-specific inquiry comports with both Hardison and the meaning of "undue hardship" in ordinary speech."). Respondents presented no evidence that it engaged in any meaningful inquiry or analysis regarding any potential hardship that would be caused by granting Petitioner's requested accommodation, nor that it engaged in the requisite interactive process, or even explored possible alternative accommodations. Rather, Respondent made the conclusory assertion that granting the accommodation would have caused it undue hardship. Clearly, this does not meet the requirements of Title VII, nor the burden imposed by law upon a party seeking summary judgment. The lower courts did not acknowledge that the establishment of undue hardship is a necessarily fact-specific inquiry. Had they done so, such acknowledgment likely would have led those courts to the conclusion that this matter is properly left to the finder of fact and cannot be decided at the summary judgment stage, particularly in the complete absence of any evidence supporting such assertion.

The Second Circuit likewise ignored that this Court's holding in *Liberty Lobby* and the requirement therein imposed upon a nonmovant applies only in the case of a "properly supported motion for summary judgment". In explaining the Federal Rule of Civil Procedure that governs summary judgment, this Court explained in *Liberty Lobby*:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.
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> *Id.* at 247-248.

Here, the substantive law pertaining to Title VII required an evidentiary showing by the movant that granting Petitioner's requested accommodation would have caused it undue hardship or substantial burden. No such showing was made. Therefore, summary judgment was clearly inappropriate and must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2023

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of March, two thousand twenty-three.

PRESENT: JOSÉ A. CABRANES,

ROSEMARY S. POOLER,

JOSEPH F. BIANCO,

Circuit Judges.

RAYMOND ZDUNSKI,

Plaintiff-Appellant, 22-547-cv

v.

ERIE 2-CHAUTAUQUA-CATTARAUGUS BOCES,

DAVID O'ROURKE, in his official capacity, JOHN O'CONNOR, in his official capacity, BRIAN LIEBENOW, LAURIE BERGER, TRACY SMITH DENGLER,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT: KRISTINA S. HEUSER, Kristina S. Heuser, PC, Locust Valley, N.Y.

FOR DEFENDANTS-APPELLEES: ADAM C. FERRANDINO, Feldman Kieffer, LLP, Buffalo, N.Y.

Appeal from an order of the United States District Court for the Western District of New York (Geoffrey W. Crawford, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED,

ADJUDGED, AND DECREED that the February 16, 2022 judgment of the District Court beand hereby is **AFFIRMED**.

Plaintiff-Appellant Raymond Zdunski appeals from the February 16, 2022 judgment of the District Court denying his motion to compel discovery and granting summary judgment to Defendants-Appellees. Zdunski generally alleges that Erie 2-Chautauqua-Cattaraugus BOCES unlawfully terminated him and discriminated against him on the basis of his religion. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review the District Court's denial of Zdunski's

motion to compel discovery for abuse of discretion. *See Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 204 (2d Cir. 2014). Zdunski's counsel failed to comply with the District Court's scheduling orders and discovery deadlines and offered no compelling justifications for her admitted failure to do so. The District Court acted well within its discretion when it denied Zdunski's motion to compel discovery, and we therefore affirm the District Court's denial of that motion.

"We review the grant of summary judgment de novo, drawing all inferences in favor of the nonmoving party." *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010). Based on our de novo review, the District Court properly granted summary judgment to Defendants on all of Zdunski's claims. Zdunski failed to point to "sufficient evidence favoring" him that would allow "a jury to return a verdict" for him on any of his claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). We therefore affirm the District Court's grant of summary judgment to Defendants.

CONCLUSION

Having reviewed all of the arguments raised by Zdunski on appeal and finding them to be without merit, we **AFFIRM** the February 16, 2022 judgment of the District Court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

MANDATE

22-547-cv
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UNITED STATES COURT OF APPEALS
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CONCLUSION

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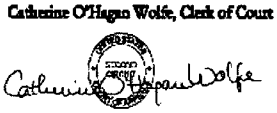
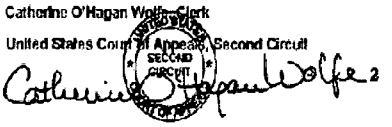
FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

RAYMOND ZDUNSKI,

Plaintiff, Case No. 1:19-cv-940-GWC

v.

ERIE 2-CHAUTAUQUA-CATTARAUGUS BOCES, DAVID O'ROURKE, in his official capacity, JOHN O'CONNOR, in his official capacity, BRIAN LIEBENOW, LAURIE BERGER, TRACY SMITH DENGLER,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT (Doc. 26)

Plaintiff Raymond Zdunski has sued Defendants Erie 2-Chautauqua-Cattaraugus Board of Cooperative Educational Services ("BOCES" or "E2CCB"), and BOCES officials David O'Rourke, John O'Connor, Brian Liebenow, Laurie Burger, and Tracy Smith-Dengler (collectively, "Defendants"), for claims arising from Mr. Zdunski's termination of employment following his failure to attend mandatory LGBTQ anti-discrimination trainings. (Doc. 1.) The complaint alleges religious discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, disparate treatment and

retaliation in violation of 42 U.S.C. § 1983, and conspiracy to interfere and neglect in preventing interference with civil rights in violation of 42 U.S.C. §§ 1985 and 1986. Plaintiff also asserts claims under New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296.

Defendants have moved for summary judgment under Fed. R. Civ. P. 56 on the grounds that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. (Doc. 26-26 at 1.) In response, Plaintiff opposes Defendants' motion for summary judgment or, in the alternative, requests entry of summary judgment in favor of Plaintiff. (Doc. 27.)

Factual Background

Plaintiff has brought several constitutional and statutory claims against Defendants. Because Defendants have moved for summary judgment, the court views the facts in the light most favorable to Plaintiff and resolves all factual disputes in Plaintiff's favor. Fed. R. Civ. P. 56(c). Where a party fails to support an assertion of fact or fails to properly address another party's assertion of fact, the court may grant summary judgment if the motion and supporting materials show that the movant is entitled to it. Fed. R. Civ. P. 56(e).

I. Plaintiff's Employment and Termination

Plaintiff began working at BOCES beginning in June 2011 as an Account Clerk in the BOCES Central Business Office. (Doc. 26-25 ¶ 7; Doc. 27-1 ¶ 7.)

BOCES is a public education collaborative in New York State that functions as an extension of local school districts. (*See* Doc. 1 at 2.) Under BOCES policy, "all E2CCB employees are required to complete training in conjunction with existing professional development training to raise staff awareness and sensitivity of harassment and discrimination directed at students." (Doc. 26-25 ¶ 4.) After becoming aware that a transgender BOCES employee had requested accommodations to facilitate a gender transition, BOCES leadership decided that, in addition to providing gender-neutral bathrooms, LGBTQ anti-discrimination training was necessary to "maintain an environment free of harassment and discrimination." (Doc. 25 ¶ 6; Doc. 26-5 ¶ 4.) This training supplemented the mandatory Dignity for All Students Act ("DASA") anti-discrimination training all BOCES employees are required to undertake as a condition of their employment. (Doc. 26-2 ¶ 8; Doc. 26-16 at 1 ("Training will be provided each school year for all E2CC BOCES employees in conjunction with existing professional development training...").) BOCES non-discrimination and anti-harassment policies apply to all employees, regardless of whether the employee has contact with students, including by applying "to the dealings between or among employees with employees . . . and others who do business with the School District, as well as school volunteers, visitors, guests and other third parties." (Doc. 26-14 at 1.) The E2CCB non-discrimination training policy requires training on, among other topics, "awareness and sensitivity to discrimination or harassment and civility in the relations of people of different . . . religions, religious practices.., sexual

orientations, genders and sexes." (Doc. 26-26 at 2.)

In February 2018, Plaintiff was directed to attend a mandatory training facilitated by the local "Pride Center" on "LGBTQ Cultural Competency." (*Id.*) Plaintiff declined to attend the training on the basis that "he is a devout Christian and, as such, his beliefs regarding homosexuality are dictated to him by holy scripture. Plaintiff did not want to be forced to listen to indoctrination that is in contradiction to the tenets of his faith." (Doc. 1 at 4-5.) Plaintiff notified his supervisor Ms. Smith-Dengler via email that he would not be attending the training and requested a training to teach greater cultural sensitivity towards persons of faith. (Doc. 4 ¶ 21.) Plaintiff did not attend the February 2018 training. (Doc. 1 at 5; Doc. 4 ¶ 22.)

Around the same period, Plaintiff posted a public statement on his Facebook page during working hours that criticized BOCES' choice to conduct a mandatory "sensitivity training session on the LGBTQ community" and stated that he would not be "forced to condone this lifestyle." (Doc. 26-12.) BOCES Executive Director of Human Resources Ms. Burger documented this incident because she was concerned that this post violated BOCES Policy Use of Computerized Information which prohibits personnel from posting "any material which may result in the disruption of classroom or E2CCB activities" on social networking sites. (*See* Doc. 26-3 ¶ 8; Doc. 26-5 ¶ 9.)

Following Plaintiff's failure to attend the February 2018 training, Ms. Burger sent an email advising all employees who did not attend the first training to attend a make-up training session in May 2018. (Doc. 1 at 5; Doc. 4 ¶ 23.) Plaintiff replied to this

email inquiring about the specific objectives of the training. (Doc. 1 at 5; Doc. 4 ¶ 24.) Ms. Burger responded that the topics to be covered included, among other things, "[r]ecognizing the difference between sex & gender, understanding aspects of identity, understanding how beliefs/feelings/values perpetuate oppression." (*Id.*) Plaintiff again requested that BOCES provide a similar training aimed at countering discrimination against Christians. (Doc. 1 at 6; Doc. 4 ¶ 27.) Although Plaintiff alluded to concerns with workplace discrimination against Christians in this email, he did not ever lodge a formal grievance or complaint alleging religious discrimination. (Doc. 26-3 ¶ 22.) Ms. Burger's response notified Plaintiff that all employees must attend the May 2018 training or face disciplinary action, including possible termination. (Doc. 1 at 6; Doc. 4 128.)

On May 18, 2018, Ms. Smith-Dengler directed Plaintiff to attend a meeting with BOCES leadership and Plaintiff's union representative on May 21, 2018. (Doc. 1 at 6; Doc. 4 ¶ 31.) The purpose of this meeting was to discuss his failure to attend the first training. (*Id.*) This meeting followed standard BOCES practices for addressing workplace expectations and conflicts through counseling with the employee, supervisor, and Human Resources or union representative. (Doc. 26-3 ¶ 12.) Ahead of this meeting, Mr. Liebenow, Executive Director of Labor Relations and General Counsel for BOCES, discussed Plaintiff's refusal to attend the first anti-discrimination training with District Superintendent David O'Rourke, Ph.D. (Doc. 26-3 ¶ 11.) Dr. O'Rourke and Mr. Liebenow determined that there were

sufficient grounds to terminate his employment prior to the rescheduled training due to then-existing insubordination, but instead decided to give Plaintiff another opportunity "to learn more about the training and to follow all reasonable directives of his supervisor." (*Id.*)

During the May 21, 2018 meeting, Ms. Smith-Dengler issued Plaintiff a "counseling memo" for alleged insubordination, which directed Plaintiff to attend the LGBTQ training the following day or else face discipline up to and including termination. (Doc. 1 at 6; Doc. 4 ¶ 33.) Plaintiff, Ms. Smith-Dengler, Mr. Liebenow, and Plaintiff's union representative attended this counseling meeting to discuss Plaintiff's Facebook post and to clarify that the training was not about religion, but rather was "an informational session mandatory for all E2CCB staff." (*Id.* ¶ 13.) Plaintiff signed the counseling memo and stated he would not be attending the rescheduled training. (*Id.* ¶ 16; Doc. 26-10.) Although he was at work on the day of the rescheduled training, he did not attend. (Doc. 1 at 6; Doc. 4 ¶ 34.)

Following Plaintiff's failure to attend the rescheduled training, Mr. Liebenow met again with Plaintiff, Ms. Smith-Dengler, Ms. Burger, and Plaintiff's union representative. (Doc. 1 at 6; Doc. 4 ¶ 35.) During this meeting, Plaintiff acknowledged that he knew that his refusal to attend the make-up training could result in his termination. (Doc. 26-3 ¶ 19.) On May 30, 2018, Mr. Liebenow terminated Plaintiff's employment for insubordination due to his failure to attend the LGBTQ anti-discrimination training. (*Id.*) Following his termination, Plaintiff filed an application for unemployment benefits which

was denied on the basis that Plaintiff had been fired for misconduct. (Doc. 1 at 7.)

II. Administrative Proceedings

Plaintiff filed a complaint with the New York State Division of Human Rights alleging unlawful discriminatory practice related to employment in violation of N.Y. Exec. Law, § 296, Art. 15. (Doc. 23-21 at 1.) On February 27, 2019, the State Division of Human Rights determined there was no probable cause to believe Plaintiff suffered any unlawful discrimination. (*Id.*) On appeal, the U.S. Equal Employment Opportunity Commission ("EEOC") adopted the findings of the State Division of Human Rights and dismissed the complaint. (Doc. 26-22 at 1.) Plaintiff's exhaustion of available administrative remedies provides this court with jurisdiction to adjudicate Plaintiff's Title VII claims. 42 U.S.C. § 2000e-5(c).

Analysis

Plaintiff argues that the LGBTQ training was "aimed at changing his religious beliefs about gender and sexuality," and that attending the training "would have caused him to violate the religious teachings to which he adheres." (Doc. 1 at 1.) Plaintiff alleges seven causes of action arising out of BOCES' decision to terminate his employment due to his refusal to attend the trainings: (1) violation of the Due Process Clause of the 14th Amendment under 42 U.S.C. § 1983; (2) violation of the Equal Protection Clause of the 14th Amendment under 42 U.S.C. § 1983; (3) conspiracy to interfere with civil rights

under 42 U.S.C. § 1985; (4) neglect in preventing interference with civil rights under 42 U.S.C. § 1986; (5) failure to accommodate under Title VII; (6) disparate treatment and disparate impact under Title VII; and (7) religious discrimination in employment under the NYSHRL, N.Y. Exec. Law § 296.

Defendants seek summary judgment on each of these claims, which the court considers below. First, the court recites the applicable standard of review and addresses an issue regarding the adequacy of discovery in this case.

I. Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At this stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "[T]he court must draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). However, "to show a genuine dispute, the nonmoving party must provide hard evidence, from which a reasonable inference in its favor may be drawn. Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuinely disputed fact." *Hayes v. Dahlke*, 976 F.3d 259, 267-68 (2d Cir. 2020) (cleaned up). Although the court "must disregard all evidence favorable to the moving party

that the jury is not required to believe," the court credits "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* The district court is empowered to enter summary judgment to the nonmoving party *sua sponte* so long as the moving party was on notice. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing 10A Wright & Miller, *Federal Practice and Procedure* § 2720 (3d ed. 1983)).

II. Discovery Disputes and Compliance

As a preliminary matter, the court addresses Plaintiff's arguments raised in opposition to Defendants' motion for summary judgment regarding the "incomplete" discovery in this case. (*See* Doc. 27 at 5.) Plaintiff writes that "Defendants and the Court have precluded meaningful discovery in this case . . . [and] nearly the entirety of the 'evidence' presented in support of Defendants' motion for summary judgment are self-serving affidavits," and thus argues summary judgment at this phase is premature. (*Id.* at 6.) Defendants respond that the lack of discovery in the case "is due to Plaintiff's repeated failure to comply with the Scheduling Orders of this Court," and so should not form the basis of any decision. (Doc. 28 at 5.)

"The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the [record] that demonstrate the absence of a genuine issue of material fact." Fed. R. Civ. P. 56(c). This

initial burden must be met by citing relevant portions of pleadings, interrogatories, depositions, and other materials in the record, or by providing additional affidavits. *Id.* Once the moving party's burden has been met, the nonmoving party is then obliged to proffer evidence showing a dispute of material fact or by showing that the materials do not establish the presence of a genuine dispute, as "unsupported allegations do not create a material issue of fact." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000); *see also* Fed. R. Civ. P. 56(c)(1)(A)—(B). If the nonmoving party shows by affidavit or other affirmative proof that it cannot present facts essential to justify its position, the court may defer consideration of summary judgment, permit additional time for discovery, or issue any other appropriate order. Fed. R. Civ. P. 56(d).

1. Fed. R. Civ. P. 56(d)

To the extent that Plaintiff's assertion that "Defendants and the Court have precluded meaningful discovery in this case," seeks a deferral under Fed. R. Civ. P. 56(d), the court will address whether Plaintiff has been deprived of discovery materials sufficient to support a delay in judgment. A party seeking to delay resolution of a summary judgment motion under Rule 56(d) must submit an affidavit describing the discovery materials sought, and must include more than "a bare assertion that the evidence supporting a plaintiff's allegation in the hands of the defendant is insufficient." *Alphonse Hotel Corp. v. Tran*, 828 F.3d 146, 151 (2d Cir. 2016) (citing *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994)). Here, Plaintiff has not

provided an affidavit identifying any specific reasons why it cannot present facts essential to justify its opposition as required by Rule 56(d). Prior discovery delays largely resulted from Plaintiff's counsel joining a new law firm, undertaking an "extremely busy" schedule, and falling "woefully behind in meeting the agreed upon discovery deadlines." (Doc. 13 at 2-3.) Defendant's Rule 26 disclosures dated July 7, 2021 included a list of individuals likely to have discovery information, internal BOCES human resources correspondence and documentation, BOCES policies and procedures, records of Plaintiff's application for unemployment benefits, and extensive documentation from the prior proceedings before the New York State Division of Human Rights, which Defendant notes contained the same affidavits now submitted in the present proceeding. (Doc. 22-4; Doc. 28 at 4, n.2.) Plaintiff's counsel's failure to depose any witnesses within the set discovery schedule does not now justify a finding that summary judgment is premature. The court declines to defer judgment under Rule 56(d).

2. Fed. R. Civ. P. 56(c)

Plaintiff disputes many of Defendants' factual allegations surrounding his termination. (*See* Doc. 27 at 6; Doc. 27-1.) But Plaintiff has not cited to or provided any actual evidence that would establish a genuine dispute of material fact. *See Weinstock*, 224 F.3d at 41 ("[U]nsupported allegations do not create a material issue of fact."). Rather, Plaintiff argues that Defendants' evidence is not in an "admissible form" and that "[a] self-serving affidavit by a party to the action is insufficient." (Doc. 27-1 ¶ 1.) In sum, Plaintiff

reasons that because the court "must disregard all evidence favorable to the moving party that the jury is not required to believe," and because a jury would not necessarily be required to believe witness testimony, the court must therefore disregard all affidavits attached to Defendants' motion for summary judgment .(*Id.* (citing, among other cases, *Reeves*, 530 U.S. at 151; *Fiacco v. City of Rensselaer, N.Y.*, 783 F.2d 319, 332 (2d Cir. 1986)).)

Although Plaintiff is correct in writing that a party may object to a fact that is not supported by admissible evidence, *see* Fed. R. Civ. P. 56(c)(2), "material relied on at summary judgment need not be admissible in the form presented to the district court. Rather, so long as the evidence in question will be presented in admissible form at trial, it may be considered on summary judgment." *Smith v. City of New York*, 697 F. App'x 88, 89 (2d Cir. 2017). Here, the witness affidavits contain sworn testimony, based on the firsthand knowledge of the testifying sources, and would likely be admissible testimony at trial in some form. The fact that the witnesses have not been cross-examined does not render their testimony inadmissible. Indeed, Plaintiff had the opportunity to confront the named witnesses in deposition, but the court sees no evidence that he elected to do so.

In addition, by asking the court to have "occasion to observe the witness and assess their demeanor and other indicia of credibility," (*see* Doc. 27 at 6) Plaintiff asks the court to reach a credibility determination, a role strictly reserved to the jury at trial. *See Proctor v. LeClaire*, 846 F.3d 597, 607-08 (2d Cir. 2017) ("In reviewing the evidence and the inferences that may reasonably be drawn on a motion for summary

judgment, a court may not make the credibility determinations or weigh the evidence; credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") (cleaned up). The line of cases Plaintiff cites for the proposition that because the affidavits could be rejected by a jury at trial the court must now disregard them is inapposite, as those cases involve credibility, weight, or persuasiveness determinations reached by the jury at trial and may not be undertaken by the judge at summary judgment.

Last, in response to Plaintiff's 'objection to Defendants' attorney affidavit, Defendants are correct in noting that the moving attorney affidavit is the procedural mechanism through which factual information is conveyed to the court and is not itself considered as evidence. (Doc. 28 at 4, n. 2.); *See* W.D.N.Y. Loc. R. Civ. P. 7(a)(3) ("motions and opposition to motions shall be supported by at least one (1) affidavit, declaration, or affirmation, and by other such evidence . . . as appropriate to resolve the particular motion."). Defendants' use of affidavits, correspondence, and documentation to support their motion for summary judgment is both proper and necessary in establishing the factual basis for their motion. *See* Fed. R. Civ. P. 56(c) (allowing the moving party to meet their burden of proof by providing affidavits); W.D.N.Y. Loc. R. Civ. P. 7(a)(3) (noting that failure to include an affidavit or other evidence in support of the motion or opposition may be grounds for resolving the motion against the non-complying party). Once a defendant has alleged sufficient facts to support judgement in their favor, it becomes the

plaintiff's burden to rebut the allegations with specific evidence showing that material facts remain in dispute. *See Celotex*, 477 U.S. at 324 (1986) ("Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own [evidence] . . . designate specific facts showing that there is a genuine issue for trial.") (cleaned up). Whether Plaintiff has met this burden shall be addressed below.

III. Religious Discrimination Claims

Mr. Zdunski seeks a religious exemption from a policy that concerns trainings on gender expression. Mr. Zdunski believes his compliance with the policy would render him complicit in conduct he considers contrary to his religious beliefs. (Doc. 27 at 1.) With this context in mind, the court turns to Mr. Zdunski's religious discrimination claims.

A. Disparate Treatment and Disparate Impact (Counts 2, 6, and 7)

Claims of employment discrimination under the NYSHRL are analyzed under the same framework applied to Title VII and § 1983 Equal Protection claims for employment discrimination, and so the court addresses counts 2, 6, and 7 together. *See Chick v. Cnty. of Suffolk*, 546 F. App'x 58, 59 (2d Cir. 2013) ("Section 1983 employment [*18] discrimination claims asserted as equal protection violations are evaluated under the same standards as Title VII claims"); *see also Spiegel v. Schulmann*, 604 F.3d 72, 80 (2d Cir. 2010) ("[A] plaintiff's discrimination claims under . . . NYSHRL . . . are subject to the burden-shifting analysis applied to discrimination claims

under Title VII"); *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 576 (S.D.N.Y. 2011) ("Claims of employment discrimination under the NYSHRL are analyzed under the same *McDonnell Douglas* framework applied to Section 1983 and Title VII claims of employment discrimination.").

Title VII of the Civil Rights Act of 1964 prohibits both intentional discrimination (known as "disparate treatment") and, in some cases, facially neutral policies and practices that have a "disproportionately adverse effect on minorities" (known as "disparate impact"). *See Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009). To prevail on a disparate treatment claim, the plaintiff must show "that the defendant had a discriminatory intent or motive" for taking an adverse action. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985-86, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). To prevail on a disparate impact claim, the plaintiff must show that an employer uses "a particular employment practice that causes a disparate impact on the basis of [a protected class]." 42 U.S.C. § 2000e-2(k)(1)(A)(i). An employer may defend against a disparate impact claim by showing the practice is "job related for the position in question and consistent with business necessity," and that an alternative employment practice with a less disparate impact that serves the employer's legitimate needs is unavailable. *Id.* § 2000e-2(k)(1)(A)(ii) and (C). *See Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 382 (2d Cir. 2006) (describing the burden-shifting analysis for disparate impact claims). Each of these claims are discussed in turn.

1. Disparate Treatment

Plaintiff's Title VII, § 1983, and NYSHRL disparate treatment claims are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003) (applying the *McDonnell Douglas* framework to a religious discrimination claim). Under this framework, plaintiff bears the burden of establishing a *prima facie* case of discrimination by showing that he: (1) is a member of a protected class; (2) was performing his duties satisfactorily; (3) was discharged; and (4) that his discharge occurred under circumstances giving rise to an inference of discrimination on the basis of his membership in the protected class. *See Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000). If *a prima facie* showing is made, the burden then shifts to the defendant to proffer a non-discriminatory reason for their action. *Bentley v. AutoZoners, LLC*, 935 F.3d 76, 88 (2d Cir. 2019). After the employer articulates legitimate, non-discriminatory reasons for the employee's discharge, the employee "must be afforded an opportunity to prove the existence of factual issues demonstrating that the stated reasons were merely a pretext for discrimination." *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir. 1985). An employee meets this ultimate burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Tex. Dep't of Ginty. Affairs v. Burdine*, 450 U.S. 248, 256-57, 101 S. Ct. 1089, 67 L.

Ed. 2d 207 (1981).

There is no real dispute as to the first and third prongs of the *McDonnell Douglas* framework because Mr. Zdunski was an adherent of the Christian faith and he was fired. Despite Defendants' conclusory assertion that Mr. Zdunski is not a member of a protected class, it is not unheard-of for a court to permit non-minority plaintiff's to proclaim membership in a protected class. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977) ("[D]iscrimination is proscribed when it is directed against majorities as well as minorities"); *see also Chukwueze v. NYCERS*, 891 F. Supp. 2d 443, 455 (S.D.N.Y. 2012) (finding an evangelical Christian a member of a protected class). Although an individual with an "objection to homosexuality" would not suffice as a protected class (*see* Doc. 1 at 8), Mr. Zdunski's assertion of genuine religious faith is sufficient to establish his membership in a protected class. Accordingly, the court finds Mr. Zdunski may assert membership in a protected class on the basis of his religion, and in so doing takes Congress at its word: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1).

As to the second prong, Defendants do not dispute that Mr. Zdunski was qualified to serve as an Account Clerk and generally performed his duties satisfactorily, though the parties dispute whether Mr. Zdunski enjoyed an "unblemished record of employment," prior to his decision to boycott the anti-discrimination trainings. (*See* Doc. 1 at 4; Doc. 4 ¶ 15.)

Turning to the fourth prong, the parties dispute whether Plaintiff has provided record evidence which if believed by the factfinder would prove that his termination occurred under circumstances giving rise to an inference of discrimination. An inference of discrimination can arise from a variety of circumstances "including, but not limited to, 'the employer's criticism of the plaintiff's performance in degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or in the sequence of events leading to the plaintiff's discharge.'" *Littlejohn v. City of New York*, 795 F.3d 297, 312 (2d Cir. 2015) (quoting *Liebowitz v. Cornell Univ.*, 584 F.3d 487, 502 (2d Cir. 2009)). A showing of disparate treatment—that is, a showing that Plaintiff was treated "less favorably than a similarly situated employee outside his protected group"—also supports an inference of discrimination for purposes of making out *a prima facie* case. *Graham*, 230 F.3d at 39. The court considers the totality of the evidence in the light most favorable to Mr. Zdunski to evaluate whether he has met the requirements for *a prima facie* Title VII discrimination claim. *See Bockus v. Maple Pro, Inc.*, No. 5:19-cv-237, 2020 U.S. Dist. LEXIS 155540, 2020 WL 5015432, at *4 (D. Vt. June 19, 2020). Although the "burden of establishing *a prima facie* case of disparate treatment is not onerous," the plaintiff must still prove by a preponderance of the evidence that he or she suffered adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed.

2d 207 (1981). At the summary judgment phase, this requires the nonmoving party to cite to evidence in the record from which a reasonable inference of discrimination may be drawn. *See Hayes*, 976 F.3d at 267-68; Fed. R. Civ. P. 56(c).

The court has considered the alleged sequence of events leading to Mr. Zdunski's discharge. Defendants allege, and Mr. Zdunski does not provide any evidence to the contrary, that prior to Mr. Zdunski's termination, he had told a colleague that she was "living in sin" because she was in a relationship with a man to whom she was not married (Doc. 26-25 ¶ 11; Doc. 26-6 ¶ 7), and discussed his "unwavering intolerance for those who did not share his heteronormative views about gender and sexuality" with colleagues. (Doc. 26-4 ¶ 9.) When Mr. Zdunski learned the "male" bathroom at the office had been converted into a gender-neutral bathroom, he said he would not share a bathroom with "those people," and said there "should be locks on the door to prevent 'those people' from walking in on him." (Doc. 26-6 at 6.)

After becoming aware that a transgender BOCES employee had requested accommodations to facilitate a gender transition, BOCES leadership decided that all employees must undergo training to "maintain an environment free of harassment and discrimination," as was their legal obligation under New York State Law. (*See* Doc. 25 ¶ 6; Doc. 26-2 ¶ 8; Doc. 26-5 ¶ 4); DASA, N.Y. Educ. Law Tit. 1 Art. 2 § 13 (McKinney 2018) (requiring all school employees, regardless of whether they work directly with students, to undergo annual trainings in, among other areas, "the social patterns of harassment, bullying and discrimination .

. . based on a person's actual or perceived sexual orientation, gender or sex"). According to Mr. Zdunski, Defendants' decision to terminate his employment for refusing to attend this training "amounts to unlawful religious discrimination." (Doc. 27 at 2.) Defendants maintain that Mr. Zdunski was not terminated because of his religion; "he was terminated because he did not attend a mandatory training session." (Doc. 26-26 at 8-9.)

Plaintiff's blanket denials of the allegations contained in the motion for summary judgment are insufficient to create a genuine dispute of material fact. To assert a genuine dispute of material fact, a party must cite to particular materials in the record that support their assertion. Fed. R. Civ. P. 56(c)(1). "[R]eliance on legal conclusions—unsupported by specific facts—and general denials does not create a genuine factual dispute under Rule 56." *Montauk Oil Trans. Corp. v. Sonat Marine Inc.*, No. 84 Civ. 4405, 1986 U.S. Dist. LEXIS 29729, 1986 WL 1805, at *8 (S.D.N.Y. Feb. 3, 1986); *see also Hayes*, 976 F.3d at 267-68 ("Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuinely disputed fact."). Any failure to specifically controvert facts set forth by the moving party with "record references allows the Court to deem the facts proffered by the moving party admitted for purposes of a summary judgment motion." *Edmonds v. Seavey*, No. 08 Civ. 5646 (HB), 2009 U.S. Dist. LEXIS 84397, 2009 WL 2949757, at *1 n.2 (S.D.N.Y. Sept. 15, 2009).

Even drawing all reasonable inferences in Mr. Zdunski's favor, none of the facts alleged support the claim that his termination was tainted by an inference of unlawful discrimination. Rather, the

facts alleged make clear that BOCES terminated Mr. Zdunski in response to his failure to comply with his employer's policy mandating anti-discrimination training, even after Mr. Zdunski was made aware that his misconduct could result in termination. Mr. Zdunski does not allege that the anti-discrimination training would have been conducted in a malicious or discriminatory manner or would otherwise have subjected him to unlawful harassment or ridicule. *Cf Hartman v. Pena*, 914 F. Supp. 225 (N.D. Ill. 1995) (finding anti-harassment trainings violated Title VII where female employees were invited to grope male colleagues and make derogatory comments toward male employees). Nor does Mr. Zdunski allege that his employer segregated its employees and required only Christian employees to attend the anti-discrimination training. *Cf. Devine v. Pittsburgh Bd. of Educ.*, No. 2:13-cv-220, 2015 U.S. Dist. LEXIS 74988, 2015 WL 3646453 (W.D. Pa. June 10, 2015) (allowing a Title VII claim for racial discrimination to proceed where only white teachers were required to undergo racial-sensitivity trainings, but similarly situated Black teachers were not). Rather, the training sought to avoid harassment and discrimination directed at transgender employees in a manner consistent with internal E2CCB policy, NYSHRL, and Federal Title VII law forbidding employment discrimination on the basis of gender expression. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020); N.Y. Exec. Law § 296 (McKinney 2018).

Mr. Zdunski has not presented any evidence that the trainings were directed toward him or other Christian employees in a discriminatory manner. Ms.

Burger initiated the LGBTQ trainings in September 2018 in response to a meeting with a transgender employee who requested accommodations to facilitate a gender transition, more than four months before she learned that Mr. Zdunski harbored personal opposition to the subject of the training. (Doc. 26-5 at ¶¶ 4-8.) There is no evidence that Ms. Mittner ever reported Mr. Zdunski's comments that she was "living in sin" or any other opinions regarding gender expression to human resources. (*See* Doc. 26-2.) Therefore, even drawing all reasonable inferences in Mr. Zdunski's favor, there is no evidence supporting an inference that BOCES required the supplemental training because of Mr. Zdunski's religious beliefs or his comments toward coworkers about traditional gender roles and gender expression.

Mr. Zdunski has not presented any evidence of discriminatory intent or malice, nor any evidence that he was treated differently than other employees who refused to attend anti-discrimination trainings. There is no evidence that BOCES employees criticized Mr. Zdunski's job performance in religion-related degrading terms, nor that BOCES employees directed invidious religion-related comments to Mr. Zdunski or to other Christian employees. In the Complaint, Mr. Zdunski argues that his former supervisor, Ms. Smith-Dengler, is "an avowed atheist and discriminated against plaintiff in the context of his employment solely because she knew him to be a person of faith." (Doc. 1 at 8.) But unsupported factual allegations contained in a complaint are not evidence, and Mr. Zdunski has offered no actual showing that Ms. Smith-Dengler' s acted with any discriminatory intent or malice. In fact, Ms. Smith-Dengler writes

that even though she and Mr. Zdunski "shared a different way of viewing the world," Mr. Zdunski "was never defensive or hostile, and we often ended those conversations with an agreement to disagree about such topics." (Doc. 26-4 ¶¶ 7, 9.) Even assuming that Ms. Smith-Dengler is indeed "an avowed atheist," there is no reasonable inference that her atheism rendered all of her actions toward Mr. Zdunski discriminatory. If this reasoning were true, any adverse employment action taken by one individual of a particular faith practice against another individual of a different faith practice would be, on its own, evidence of religious discrimination. Fortunately, that is not the law. Construing the evidence in the light most favorable to Mr. Zdunski, the court finds no evidence that Ms. Smith-Dengler exhibited any discriminatory animus toward Mr. Zdunski.

The Complaint lacks any allegations about any similarly-situated employees—either less favorable treatment of other Christian individuals or more favorable treatment of other non-Christian individuals. Plaintiff's unsupported assumption that Defendants believe him to be "bigoted" due to his religious beliefs is insufficient to support an inference of discrimination. (*See* Doc. 27 at 4.) In sum, no facts in the record support a finding that Mr. Zdunski was terminated because of his religion; rather, the evidence in the record supports Defendants' position that his termination was due to repeatedly refusing to attend a mandatory employee training. (*See* Doc. 26-26 at 9-10) ("Plaintiff was terminated for insubordination for his failure to attend a mandatory training program, not due to his religious beliefs.").

The fact remains that Mr. Zdunski was employed

by a State agency in a State—and post-*Bostock*, a country—that recognizes gender expression and sexual orientation as protected classes on equal footing with religion for purposes of Title VII. Just as it would be "anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others," so too would it be anomalous to allow an employer to deny a transgender employee's legal right to a workplace free of discrimination and harassment in order to accommodate the conflicting religious beliefs of other employees. *Trans World Airlines*, 432 U.S. at 64. Accordingly, Plaintiff's disparate treatment claims brought under Title VII and NYSHRL are without merit.

Plaintiff also brings a § 1983 claim for violation of his constitutional right to equal protection under the law pursuant to the Fourteenth Amendment of the U.S. Constitution. (Doc. 1 at 8.) Once a plaintiff has established action under color of state law, the same analytical framework applies to discrimination claims brought under Title VII and § 1983. *See Abdul-Hakeem v. Parkinson*, 523 F. App'x 19, 20 (2d Cir. 2013) ("In the context of a § 1983 suit where the color of state law is established, an equal protection claim parallels a Title VII employment discrimination claim.") (cleaned up). "[Section] 1983 and the Equal Protection Clause protect public employees from various forms of discrimination, including . . . disparate treatment" claims. *Demoret v. Zegarelli*, 451 F.3d 140, 149 (2d Cir. 2006). Plaintiff has failed to establish a claim for disparate treatment pursuant

to Title VII, and so his § 1983 claim is dismissed.

2. Disparate Impact

Plaintiff also brings a disparate impact claim under Title VII of the Civil Rights Act of 1964. The Second Circuit follows a three-part burden shifting analysis for disparate impact claims:

> The Title VII plaintiff bears the initial burden of establishing *a prima facie* showing of disparate impact. To do so, the plaintiff must first identify the employment practice allegedly responsible for the disparities. The plaintiff must then produce statistical evidence showing that the challenged practice 'causes a disparate impact on the basis of race, color, religion, sex, or national origin.' Once the plaintiff has established a *prima facie* case of disparate impact discrimination, the defendant has two avenues of rebuttal. First, the defendant may directly attack plaintiff's statistical proof by pointing out deficiencies in data or fallacies in the analysis. Second, the defendant may rebut a plaintiff's prima facie showing by demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity.' . . . Finally, if the defendant meets the burden of showing that the challenged practice is job related, the plaintiff can only prevail by showing that 'other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.

Gulino, 460 F.3d at 382 (cleaned up). The "touchstone" of the disparate impact analysis is

business necessity, since a practice that is irrelevant to job performance that operates to exclude individuals of a protected class is per se prohibited. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

Plaintiff has failed to make out *a prima facie* case of disparate impact discrimination. Although Plaintiff identified an employment practice allegedly responsible for disparate impact—mandatory anti-discrimination trainings on sexual orientation and gender expression—he has not proffered any evidence showing how this employment practice had a disparate impact on members of his protected class. Indeed, Plaintiff does not provide any evidence that even one other employee also suffered a negative employment action due to the policy, let alone other members of his protected class. Nor has Plaintiff directly challenged the constitutionality of the DASA requirement for annual anti-discrimination trainings. Accordingly, Plaintiff's disparate impact claim is dismissed.

B. Failure to Accommodate (Count 5)

An employer must reasonably accommodate an employee's religious observance or practice unless the accommodation would exert undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985). To assert a failure to accommodate claim, a plaintiff must show that (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was

disciplined for failure to comply with the conflicting employment requirement. *Id.; see also Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Baker v. The Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006). If the Plaintiff makes a *prima facie* showing of failure to accommodate, "the burden shifts to the employer to show that it cannot reasonably accommodate the plaintiff without undue hardship on the employer's business." *Philbrook*, 757 F.2d at 481.

It is reasonable to infer that Mr. Zdunski's religious beliefs, insofar as they concern sexual orientation and gender expression, are bona fide and sincerely held, and that Mr. Zdunski believes his religious views conflicted with the substance of the mandatory employment trainings. All parties agree Mr. Zdunski communicated his religious beliefs to Defendants and expressed his personal opposition to the mandatory trainings. (Doc. 1 at 5; Doc. 4 ¶ 21.) Similarly, all parties agree Mr. Zdunski was terminated for his failure to attend the mandatory trainings. (Doc. 1 at 7; Doc. 4 ¶ 35.) Therefore, Plaintiff has pleaded sufficient facts to make out *a prima facie* failure to accommodate claim.

Defendants argue that accommodating Mr. Zdunski's religious beliefs by permitting him to forego mandatory anti-discrimination trainings would have created undue hardship on the employer's business operations because this accommodation would have thwarted BOCES' legal obligation to protect employees from harassment and discrimination. (Doc. 26-26 at 10.) Mr. Zdunski requested an exemption from attending the training and suggested that BOCES "provide a similar training to counter

discrimination against Christians." (Doc. 1 ¶¶ 14-16.) Dr. O'Rourke considered Mr. Zdunski's request for an exception but was "unable to identify a reasonable accommodation" that did not weaken BOCES' unified message to support a transitioning employee. (*Id.*)

In the context of Title VII claims of religious discrimination, an "undue hardship" is anything "more than a de minimis cost" to the employer. *Trans World Airlines*, 432 U.S. at 84. A hardship need not be financial in nature to represent more than a de minimis cost. For instance, an accommodation that causes an employer to "lose control of its public image" is an undue hardship. *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 137 (1st Cir. 2004) (granting religious exemptions for grooming and presentation requirements would cause employer to lose control over its public image, which constitutes an undue hardship). Courts have also found that a religious accommodation that imposes an "adverse impact" or "substantial hardship" on co-workers or the employer constitutes an undue hardship. *See Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000) (finding that the "mere possibility of an adverse impact on co-workers as a result of [a religious accommodation] is sufficient to constitute an undue hardship") (citing *Trans World Airlines*, 432 U.S. at 81); *see also Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341 (8th Cir. 1995) (allowing an employee to wear an anti-abortion button at work caused disruption and discord among employees and represented an undue hardship). Given that the phrases "undue hardship" and "reasonable accommodation" are relative terms and undefined by statute, "[e]ach case necessarily

depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably." *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977).

Here, Mr. Zdunski's proposed accommodation—that he be excused from the mandatory LGBTQ anti-discrimination training—amounts to more than a de minimis cost to his employer's business operations. BOCES is bound by New York State law to provide annual anti-discrimination trainings for all employees and to maintain "an environment free of discrimination and harassment." *See* N.Y. Educ. Law Tit. 1 Art. 2 §§ 10, 13. Allowing Mr. Zdunski's requested accommodation to forego anti-discrimination trainings would have put his employer in the position of violating the training requirements set forth in DASA. An accommodation that would require an employer to run afoul of state law constitutes a substantial hardship and would be more than a de minimis cost to the employer. *See Weber*, 199 F.3d at 273.

In essence, Mr. Zdunski argues that the tenets of his religious beliefs run counter to New York State and Federal law insofar as these laws require employers to ensure the employment rights of individuals of varying sexual orientations and gender expressions are respected. Religious beliefs are as varied as the individuals who hold them, and the court will not pass judgment on the "diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated." *United States v. Seeger*, 380 U.S. 163, 183, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965). But Plaintiff's former employer is

required by law to ensure the legal rights of LGBTQ employees are protected. Allowing individuals who personally oppose the rights of transitioning individuals in the workplace to forego anti-discrimination LGBTQ trainings would stifle their effect and would adversely impact transitioning employees. Because the relief Mr. Zdunski seeks would require the court to "construe the statute to require an employer to discriminate against some employees in order to enable others to observe their [religious beliefs]," Plaintiff's Title VII claims shall be dismissed. *Trans World Airlines*, 432 U.S. at 85.

IV. Section 1983 Due Process Clause Claim (Count 1)

Plaintiff alleges a deprivation of his 14th Amendment right to due process arising out of the circumstances of his termination. (Doc. 1 at 7.) The Due Process Clause of the Fourteenth Amendment provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. In evaluating § 1983 due process claims, courts undertake "a two-part inquiry to first determine whether plaintiff was deprived of a protected interest, and, if so, what process was his due." *Rosu v. City of New York*, 742 F.3d 523, 526 (2d Cir. 2014) (citation omitted). In New York State, probationary employees have no property rights in their position for due process purposes, and "may be lawfully discharged without a hearing and without any stated specific reason." *Meyers v. City of New York*, 208 A.D. 2d 258, 262, 622 N.Y.S.2d 529 (N.Y. App. Div. 1995). Tenured public employees are entitled to notice and the opportunity to be heard

prior to termination. *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 319 (2d Cir. 2002).

Although the parties do not agree on whether Mr. Zdunski was a tenured or probationary employee at the time of his termination (*see* Doc. 27-1 ¶ 24), the issue is irrelevant because Mr. Zdunski received the pre-termination due process owed to tenured public employees, and so his procedural due process claim fails regardless of his employment status. The uncontested facts in the record establish that Mr. Zdunski received at least three written pre-termination notices from Defendants explaining that any failure to attend the LGBTQ training would result in disciplinary action, up to and including termination. (*See* Doc. 1 at 6; Doc. 26-11 at 4; Doe. 26-10; Doc. 26-3 ¶ 19.) Mr. Zdunski attended two separate in-person meetings prior to his termination where he was given the opportunity to be heard on the issues now at issue. (Doc. 1 at 6; Doc. 24.) The facts in evidence more than satisfy the process to which Mr. Zdunski was due pursuant to the 14th Amendment. Accordingly, Plaintiff's procedural due process claim is dismissed.

V. Section 1985 Conspiracy to Interfere with Civil Rights and § 1986 Neglect in Preventing Interference with Civil Rights Claims (Counts 3 and 4)

To prevail on § 1985 and § 1986 claims, a plaintiff must show: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3)

an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States. *United Bhd. of Carpenters & Joiners of Am. Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). In addition, the plaintiff must show that some "class-based, invidious discriminatory animus" motivated the conspiracy. *Id.* at 829. To prevail upon a § 1986 claim, a plaintiff must also allege facts illustrating neglect by individuals in preventing the conspiratorial acts set forth in § 1985. "Liability [*39] under § 1986 is derivative of § 1985 liability, *i.e.*, there can be no violation of § 1986 without a violation of § 1985." *Jews for Jesus, Inc. v. Jewish Cmty. Rels. Council of N.Y., Inc.*, 968 F.2d 286, 292 (2d Cir. 1992).

As discussed *supra*, Defendants did not deprive Plaintiff of any civil rights when they terminated his employment. Plaintiff has failed to identify any further facts suggesting the existence of a conspiracy. Plaintiff's conclusory accusations of conspiracy do not provide sufficient basis from which a reasonable inference in his favor may be drawn. *See Hayes*, 976 F.3d at 259. Accordingly, Plaintiff's § 1985 claim is dismissed. Plaintiff's failure to assert a colorable § 1985 claim bars the § 1986 neglect claim, which shall also be dismissed.

Conclusion

For the foregoing reasons, the court GRANTS Defendants' Motion for Summary Judgment (Doc. 26) in its entirety. All counts are dismissed with prejudice.

Dated this 16 day of February, 2022.

/s/ Geoffrey W. Crawford

Geoffrey W. Crawford, Judge

United States District Court

CERTIFICATE OF COMPLIANCE

No. 23-_____

RAYMOND ZDUNSKI,

Petitioner,

v.

ERIE 2-CHAUTAUGUA-CATTARAUGUS BOCES, DAVID O'ROURKE, in his official capacity, JOHN O'CONNOR, in his official capacity, BRIAN LIEBENOW, LAURIE BURGER, TRACY SMITH-DENGLER,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 4,552 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 3, 2023.

/s/ Robert Wanker
Robert Wanker