No. 24-

IN THE

Supreme Court of the United States

DR. DAN GIURCA,

Petitioner,

v.

BON SECOURS CHARITY HEALTH SYSTEM, WESTCHESTER MEDICAL CENTER HEALTH NETWORK, AND GOOD SAMARITAN HOSPITAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII makes it an unlawful "for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's . . . religion," which "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."

Here, Petitioner alleged that Respondents denied him employment because, citing his own non-Catholic faith as prohibiting him from so committing, he objected to signing an employment agreement that would have required him to agree that his employment be "subject to," or that his services be "provided in accordance with," the Ethical and Religious Directives of the Roman Catholic Church, and that Respondents refused to accommodate him by modifying this standard contractual language.

The question presented is:

Does an employer violate Title VII when it fails to hire a person because his sincerely held religious beliefs prohibit him from agreeing to recognize and adhere to the employer's religious views and, if so, did Petitioner plausibly allege he was denied employment because of his religious beliefs such that he amply stated a claim for religious discrimination under Title VII?

PARTIES TO THE PROCEEDING BELOW

Petitioner Dr. Dan Giurca was the plaintiff in the United States District Court for the Southern District of New York and the appellant in the United States Court of Appeals for the Second Circuit. Respondents Bon Secours Charity Health System, Westchester Medical Center Health Network, and Good Samaritan Hospital were the defendants in the District Court and appellees in the Court of Appeals.

RELATED CASES

Giurca v. Bon Secours Charity Health System, et al., No. 19-cv-7761 (CS), United States District Court for the Southern District of New York (March 23, 2021) (order granting in part motion to dismiss)

Giurca v. Bon Secours Charity Health System, et al., No. 19-cv-7761 (CS), United States District Court for the Southern District of New York (January 18, 2023) (order granting summary judgment)

Giurca v. Bon Secours Charity Health System, et al., No. 23-200, United States Court of Appeals for the Second Circuit (January 26, 2024 (summary order affirming district court judgment)

Giurca v. Bon Secours Charity Health System, et al., No. 23-200, United States Court of Appeals for the Second Circuit (February 26, 2024 (amended summary order affirming district court judgment)

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PETITION FOR CERTIORARI

A medical doctor and board-certified psychiatrist, Petitioner sued Respondents claiming, *inter alia*, that they denied him employment opportunities at their hospitals because of religious discrimination. Specifically, as a member of the Romanian Orthodox religion, Petitioner claimed religious discrimination because, as a condition of employment, Respondents required him to sign an agreement, which stated that his services were "subject to . . . the Ethical and Religious Directives of the Roman Catholic Church [("ERDs")]" and "shall be provided in accordance with . . . the [ERDs] promulgated by the United States Conference of Catholic Bishops, as interpreted by the Sisters of Bon Secours." Agreeing to this, he alleged, would violate his sincerely held religious beliefs, and Respondents refused to accommodate him by modifying their standard contractual language.

Affirming dismissal of this claim, the Second Circuit held that Petitioner failed to plausibly state a Title VII religious discrimination claim because he (1) did not allege that Respondents were aware of his Romanian Orthodox faith or took any action based thereupon, and (2) failed to plausibly allege that agreeing to be "subject to" or to perform his services "in accordance" with the ERDs actually conflicted with his sincerely held religious beliefs.

The Second Circuit's holding unduly inquired into the centrality and verity of Petitioner's sincerely held religious beliefs in a manner inconsistent with this Court's precedent. It also conflicts with this Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), which held that an employer violates Title VII when

its denial of employment was motivated, at least in part, by a desire to avoid accommodating a potential employee's need for an accommodation of his religious practice or belief, irrespective of whether the employer has actual knowledge that the applicant requires an accommodation.

Petitioner alleged that he was denied employment because his faith prohibited him from signing the proposed employment agreements containing language requiring that he be "subject to" or perform his services "in accordance with" the ERDs. These allegations amply state a claim of intentional religious discrimination under *Abercrombie* because, but for his sincerely held religious belief that agreeing to be bound by the ERDs signaled his recognition of the Catholic Church and the primacy of the dogmatic underpinnings of this code of conduct, he would have been hired. Put differently, he was denied employment because his religious beliefs prevented him from complying with this religious-sensitive job requirement, and Respondents refused to accommodate him.

It matters not that Respondents were unaware that he was Romanian Orthodox and did not overtly act with hostility or animus to *that* religion. What matters is that Respondents knew that he was *not* Catholic and that he asserted his sincerely held religious belief as the ground for refusing to agree to be bound by the ERDs. This was sufficient under Title VII as this Court interpreted it *Abercrombie*, and the Second Circuit's affirmance of the dismissal of Petitioner's claim directly contravened this Court's precedent.

This Court should grant *certiorari* to resolve an important issue about how a Title VII plaintiff properly alleges a violation of his sincerely held religious beliefs and to reaffirm that courts should not wade into the verity or centrality of such beliefs.

OPINIONS BELOW

The District Court's Decision and Order dismissing Petitioner's Title VII religious discrimination and failure to accommodate claims is unpublished and is reproduced herein at 60a-94a. The Second Circuit's Amended Summary Order is unpublished and is reproduced herein at 1a-9a. The Second Circuit's Order denying the Petition for Rehearing *En Banc* is unpublished and is reproduced herein at 95a-96a.

JURISDICTION

The Court of Appeals entered its order denying Petitioner's timely petition for rehearing *en banc* on April 12, 2024 and this Petition is filed within ninety days thereof. *See* 95a. This Honorable Court has jurisdiction under 28 U.S.C. § 1254 and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(a)(1)

> It shall be an unlawful employment practice for an employer . . . 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
>
> **42 U.S.C. § 2000e(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.

STATEMENT OF THE CASE

A. Factual background.

1. Overview.

Petitioner is a physician, board certified in Psychiatry and Neurology, and is a member of the Eastern [Romanian] Orthodox religion (¶ 6).[1] He fled Romania with his family 1981 and obtained asylum in the United States in 1982 (*Id.*). His Orthodox Christian faith is strong and prohibits him from respecting the Roman Catholic Church and its religious teachings and traditions (JA-213 ¶ 13).

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1. Citations to "¶ ___" refer to the Paragraphs of Petitioners, Amended Complaint, the operative pleading, which is found at JA-17-31 of the Joint Appendix filed in the Second Circuit.

Respondent Bon Secours Charity Health System is also a member of WMCHN and includes Good Samaritan Hospital in Suffern, New York, Bon Secours Community Hospital in Port Jervis, New York, and St. Anthony Community Hospital in Warwick, New York (¶ 8). None of the Respondents is organized as a religious corporation (¶ 10).

2. The Ethical and Religious Directives for Catholic Health Care Services.

As a Catholic-affiliated institution, Bon Scours adopted the ERDs, which dictate the manner in which it must provide healthcare services to the community (JA-1381 ¶¶ 6-7; JA-114-156).[2] As a condition of employment and obtaining privileges, Bon Secours requires its employees and physicians to adhere to the ERDs (JA-1382 ¶ 8; JA-125 ¶ 5).

On their face, and as a whole, the ERDs are more than a code of medical practice (JA-114-156). Rather, each set of prescriptive Directives embedded within the full text is prefaced by a religious justification, grounding its rules of conduct in the teachings of the Catholic faith (*Id.*). As its Preamble explains:

> The Directives begin with a general introduction that presents ***a theological basis for the Catholic health care ministry***. Each of the six parts that follow is divided into two sections. The first section is an expository form; it serves

2. Citations to "JA-___" refer to the pages of the Joint Appendix filed in the Second Circuit.

> as an introduction and provides the context in which concrete issues can be discussed *from the perspective of the Catholic faith*. The second section is in prescriptive form; ***the directives promote and protect the truths of the Catholic faith as those truths are brought to bear on concrete issues in health care***.

(JA-17-18 [emphasis added]).

Not only do these expository sections ground the prescriptive Directives in Catholic dogma, but some of the Directives themselves mandate adherence to certain religious precepts. For instance, Directive 1 provides: "A Catholic institutional health care service is a community that provides health care to those in need of it. This service ***must be animated by the Gospel of Jesus Christ and guided by the moral tradition of the Church***" (JA-124 ¶ 1 [emphasis added]). Likewise, Directive 9 provides, *inter alia*: "Employees of a Catholic health care institution must respect and uphold the religious mission of the institution and adhere to these Directives" (JA-126 ¶ 9). Thus, as condition of employment, Bon Secours' physicians must animate and guide their provision of care by the Gospel and traditions of the Catholic Church and respect and uphold the organization's Catholic mission.

3. Bon Secours requires Dr. Giurca to be bound by the ERDs as a condition of employment, thus preventing employment.

In 2016 Giurca turned down an employment opportunity at Bon Secours and accepted a position at Orange Regional Medical Center ("ORMC") (JA-1389 ¶ 14; JA-356-57). In doing so, he asked to be kept in mind for other opportunities at Good Samaritan (*Id.*). Thereafter, in February 2017, Naim Korka, a Bon Secours employee, forwarded Dr. Giurca a proposed Professional Services Contract for a Bon Secours position (JA-365-81). One of the terms of that Agreement provides, *inter alia*: "Physicians agree to ensure that the Services shall be provided in accordance with: (i) the Ethical and Religious Directives for Catholic Health Care Services, promulgated by the United States Conference of Catholic Bishops, as interpreted by the Siters of Bon Secours . . . ." (JA-367 ¶ 1.2).

After reviewing the proposed contract, Dr. Giurca emailed Korka citing certain issues in the contract, including provisions regarding insurance and on call duties (JA-387). During this process, he also noted: "There are some other issues such as agreeing to the polices of a religious organization. This is very unusual language for employment" (*Id.* [Feb. 27, 2017 8:31AM email]).

Addressing Dr. Giurca's concern about insurance, Korka responded that a *per diem*, rather than a service, contract might be necessary (JA-386 [Feb. 28, 2017 7:51AM email]). Addressing Dr. Giurca's concern about agreeing to religious polices, Korka responded: "Bon Secours is a faith based organization, created by the sisters of Bon

Secours and the value [sic] of the organization are in the line with catholic church values of serving the poor and most vulnerable categories of society. The values do not impede with your practice as psychiatrist and are conform [sic] the laws of New York and US." (JA-386 [Feb. 28, 2017 7:51AM email]).

Dr. Giurca noted his preference for a *per diem* contract (*Id.* [Feb. 28, 2017 9:03AM email]) and added: "I appreciate serving the poor but signing a contract recognizing the catholic church, can be problematic for some people. I have a right to practice my own religion." (*Id.*).

About three weeks later, Korka sent Dr. Giurca a proposed *per diem* contract (JA-390-401). Among other terms, the contract provides: "Your employment is subject to the policies, procedures and guidelines of the PC and Hospital, including but not limited to . . . the Ethical and Religious Directives of the Roman Catholic Church" (JA-393 ¶ 4). Since he believed his faith prohibited him from signing either the service agreement or *per diem* contract, Dr. Giurca was not hired.

B. Prior proceedings.

1. District Court Proceedings.

Dr. Giurca commenced this action on August 19, 2019, alleging claims for religious discrimination and state tort claims for intentional and negligent infliction of emotional distress (JA-648-90). He filed his Amended Complaint [the operative pleading] on February 10, 2020, adding a claim for retaliation under Title VII (JA-17-61). On May 29, 2020, Appellees moved to dismiss the Amended Complaint under Fed. R. Civ. P.12(b)(6) (JA-62-210).

On March 23, 2021, in a bench ruling, the district court granted in part and denied in part Appellees' motion, dismissing all of Dr. Giurca's claims except his Title VII retaliation claim arising from the denial of his application for employment in August 2019. *See* 60a-94a.

At the close of discovery, Appellees moved for summary judgment (JA-237-1409). By Opinion and Order entered January 18, 2023, the district court granted Appellees' motion and dismissed Dr. Giurca's remaining claims. *See* 18a-59a. It entered final judgment that same day (JA-16 [ECF No. 105]). On February 14, 2023, Dr. Giurca timely filed his notice of appeal (JA-1983-84).

2. Proceedings in the Court of Appeals for the Second Circuit.

Petitioner timely appealed from the district court's judgment, challenging its Rule 12(b)(6) dismissal of his religious discrimination claim and summary judgment dismissal of his retaliation claim. By Summary Order dated January 26, 2024, the Second Circuit affirmed the district court's orders. *See* 10a-17a.

On February 9, 2024, Petitioner timely filed a Petition for Panel Rearing or Rehearing *En Banc*. On February 26, 2024 without having entered an order on his petition for rehearing, the Second Circuit panel issued an Amended Summary Order. *See* 1a-9a. On March 11, 2024 Petitioner filed a petition for rehearing of the Amended Summary Order. On April 12, 2024, the Second Circuit entered its Order denying Petitioner's petition for panel/*en banc* review. *See* 95a-96a.

3. Second Circuit's Amended Summary Order.

Affirming dismissal of Petitioner's Title VII religious discrimination/accommodation claim, the Second Circuit concluded that the Amended Complaint "alleges, in conclusory fashion, that the Hospital Defendants 'fail[ed] to process his employment applications by reason of Plaintiff's religion' . . . [,] [b]ut he does not allege that the Hospital Defendants were aware of his Romanian Orthodox religion, much less that they took any actions based upon that religion." *See* 3a. The Court also held that, even though the Amended Complaint "allege[s] that Defendants 'failed to accommodate Plaintiff's request for a reasonable accommodation, relating to modification of its standard employment agreement' . . . [,] this is insufficient to state a claim for failure to accommodate." 4a. The Court continued:

> It is not enough for plaintiff to assert that he *desired* an accommodation; he must plausibly allege that he actual required an accommodation of his religious practice – in other words, that his *religious beliefs* made such an accommodation necessary. Even accepting the sincerity of his religious beliefs, Giurca's Amended Complaint does not adequately plead a conflict between those beliefs and the alleged employment requirement – that Giurca agree that his employment be 'subject to' and services be 'provided in accordance with' the [ERDs].

* * * * *

> [G]iurca's Amended Complaint is devoid of any facts plausibly alleging that signing either contract, and therefore agreeing that his employment be 'subject to' or that he would provide services 'in accordance with' the ERDs, would actually conflict with his personal religious beliefs. Without sufficient allegations of an actual conflict, Giurca has not stated a 'plausible claim for relief' as to this accommodation claim.

4a-5a (emphasis in original) (citations omitted).

REASONS FOR GRANTING THE PETITION

1. This Court should grant *certiorari* to resolve an important question about when and how a Title VII plaintiff properly alleges a violation of his sincerely held religious beliefs.

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Discrimination on the basis of religion includes failing to reasonably accommodate an employee's religious beliefs, unless doing so would cause an undue hardship on the conduct of the employer's business. *See Id.* § 2000e(j); 29 C.F.R. § 1605.2; *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771-75 (2015); *TWA v. Hardison*, 432 U.S. 63, 73-74 (1977).

As defined by statute, the "term 'religion' includes all aspects of religious observance and practice, as well as belief . . . ." 42 U.S.C. § 2000e(j). Consistent with

this Court's precedent, the EEOC interprets the term "religion" extremely broadly as including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1650.1 (citing *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970)). Moreover, "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee." *Id.*

Indeed, the law does not require an employee to establish the truth of his or her religious beliefs because an individual "may believe what they cannot prove" and "the fact that [the truth of religious beliefs] may be beyond the ken of mortals does not mean they can be made suspect before the law." *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). The relevant inquiry is limited to whether the belief is sincerely held and religious, which does not require a court to reach the conclusion that the belief be "acceptable, logical, consistent or comprehensible to others." *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 US 707, 714 (1981); *See also Fulton v. City of Philadelphia, Pa.*, 141 S.Ct. 1868, 1876 (2021); *Kravitz v. Purcell*, 87 F.4th 111 (2d Cir. 2023) (Free Exercise plaintiff need not establish "substantial burden" to sincerely held religious beliefs because, *inter alia*, such requirement impermissibly questions centrality of one's beliefs).

In *Abercrombie*, this Court recognized that an employer engages in intentional religious discrimination under Title VII when a potential employee's religious practice or belief is a factor in its refusal to hire that

candidate, such as when its denial of employment arises from its failure to accommodate the candidate's religious practice or belief. *See* 575 U.S. at 773-74. There, the EEOC sued Abercrombie & Fitch Stores on behalf of a Muslim applicant, whose religiously-mandated headscarf violated the store's otherwise neutral dress policy prohibiting "caps." The Tenth Circuit reversed denial of Abercrombie's summary judgment motion, holding that the EEOC could not make out a *prima facie* case of religious discrimination because the record lacked evidence that the candidate expressly notified Abercrombie of her need for an accommodation from the "no-cap" policy to allow her to wear her headscarf at work. Reversing, this Court held that the statute does not require the employer to have actual knowledge of the candidate's need for a religious accommodation; "[i]nstead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." *Id.* at 772.

Here, in affirming dismissal of his Title VII claim, the Second Circuit first held that Petitioner did "not allege that [Respondents] were aware of his Romanian Orthodox religion, much less that they took any actions based upon that religion." *See* 3a. It also held that, even though the Amended Complaint "allege[s] that Defendants 'failed to accommodate Plaintiff's request for a reasonable accommodation, relating to modification of its standard employment agreement' . . . [,] this is insufficient to state a claim for failure to accommodate." 4a. The Court continued:

> It is not enough for plaintiff to assert that he *desired* an accommodation; he must plausibly allege that he actual required an accommodation

> of his religious practice – in other words, that his *religious beliefs* made such an accommodation necessary. Even accepting the sincerity of his religious beliefs, Giurca's Amended Complaint does not adequately plead a conflict between those beliefs and the alleged employment requirement – that Giurca agree that his employment be 'subject to' and services be 'provided in accordance with' the [ERDs].
>
> * * * * *
>
> [G]iurca's Amended Complaint is devoid of any facts plausibly alleging that signing either contract, and therefore agreeing that his employment be 'subject to' or that he would provide services 'in accordance with' the ERDs, would actually conflict with his personal religious beliefs. Without sufficient allegations of an actual conflict, Giurca has not stated a 'plausible claim for relief' as to this accommodation claim.

4a-5a (emphasis in original) (citations omitted).

In so holding, the Second Circuit improperly held Petitioner to an unduly high pleading standard, which focused on and emphasized the centrality and verity of his sincerely held religious beliefs as well as Respondents' actual knowledge of same and of Petitioner's need for an accommodation. Instead, the Court should have simply considered whether Petitioner's Amended Complaint plausibly alleged that (1) he sincerely held a religious belief, which (2) required an accommodation from a

particular work rule. Had it done so, the Court would have concluded that Petitioner's pleading amply stated a claim. It alleged as follows:

(1) Petitioner is a member of the Eastern [Romanian] Orthodox religion (¶ 6).

(2) Respondents' proposed employment contracts required Petition to perform his services (1) "in accordance with . . . the [ERDs] promulgated by the United States Conference of Catholic Bishops, as interpreted by the Sisters of Bon Secours"; and (2) "subject to . . . the ERDs" (JA-22 ¶¶ 28-29).

(3) "Upon review of the [first] Agreement, Dr. Giurca noticed language in the contract that ***he believed to be at odds with his own religious beliefs***" and "[a]ccordingly, ***he believed he was religiously prohibited from subscribing*** to said Agreement (¶¶ 17-18 [emphasis added]).

(4) Petitioner emailed one of Respondents' agents "seeking an accommodation with regard to the contract language in the Agreement, stating: 'There are some issues ***such as agreeing to the policies of a religious organization***. This is very unusual language for employment'" (¶ 19 [emphasis added] [cleaned up]).

(5) "While Dr. Giurca clearly communicated his need for a religious accommodation, Bon Secours nonetheless refused to even engage in the sort of dialogue that would explore Dr. Giurca's concern" (¶ 21).

(6) In another email, he stated, "I appreciate serving the poor ***but signing a contract recognizing the [C]atholic [C]hurch, can be problematic for some people. I have the right to practice my own religion***" (¶ 23 [emphasis added]).

(7) After asserting his objection to the contractual language, Respondent's agent sent him another version for per diem work and which still included reference to the ERDs (¶¶ 26-29).

(8) "[D]ue to the Defendants' indifference and failure to accommodate Dr. Giurca's religious needs, he was unable to sign this Agreement as well"; it "was clear that ***Dr. Giurca's issues with the Agreement related solely to the commitment it required to the Church***, not a particular code of conduct"; and "***the only impediment to beginning employment was to accept adherence to the objectionable religious directives***. Moreover, Defendants knew Dr. Giurca was well qualified to perform the job, and realized that [he] was not objecting to something that would affect his ability to perform the duties and responsibilities of a psychiatrist (¶¶ 30-32 [emphasis added]).

In short, the Amended Complaint plainly alleges that, as a member of a particular faith [Romanian Orthodox], Petitioner sincerely believed it would be inconsistent with his religious views to sign a contract requiring him to agree that that his employment shall be "subject to," and that he must perform his work "in accordance with," the ***religious directives*** of an entirely different faith [Catholicism], and that this was the reason he could not

sign either employment agreement in the form proposed, resulting in the denial of employment. Under Title VII, as this Court interpreted it in *Abercrombie*, that is all he was required to do, and dismissal of this claim at the pleading stage was clearly erroneous.

2. This Court should grant *certiorari* because the question presented has broad, national implications beyond just this case.

To be clear, the issue is not whether Petitioner can practice medicine in accordance with the specific standards of conduct required under the ERDs; he can. But he is unable to agree to be bound by and adhere to the formal document comprising the ERDS, which he sincerely perceived as requiring him, contrary to his own faith, to acknowledge and respect the dogmatic justifications for and underpinnings of the standards of practice and conduct embodied therein. All he needed was a simple accommodation modifying the standard contractual language in a manner that would have divorced the underlying standards of conduct from the formal ERD document, which emphasized its religious justifications.

This issue is prevalent because the number of hospitals adhering to the ERDs is on the rise. According to one study, the number increased 22 percent between 2001 and 2016 to 548 hospitals nationwide, with one in six hospital beds residing in such an institution. *See* ACLU, *Health Care Denied* (May 2016) at 22, available online at https://assets.aclu.org/live/uploads/publications/healthcaredenied.pdf (last visited July 10, 2024). With more and more hospitals requiring their employees to agree to be bound by the

ERDs and their religious justifications, it is critical that this Court address the propriety of same under Title VII, where an employee or potential employee cites a religious objection and seeks an accommodation.

CONCLUSION

For the reasons set forth above, a writ of certiorari should enter.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — AMENDED SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED FEBRUARY 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-200

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 26th day of February, two thousand twenty-four.

PRESENT: BARRINGTON D. PARKER,
MYRNA PÉREZ,
SARAH A. L. MERRIAM,
Circuit Judges.

DR. DAN GIURCA,

Plaintiff-Appellant,

v.

BON SECOURS CHARITY HEALTH SYSTEM, WESTCHESTER COUNTY HEALTH CARE CORPORATION, GOOD SAMARITAN HOSPITAL,

Defendants-Appellees.[*]

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* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York. (Seibel, *J.*).

AMENDED SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Dan Giurca seeks review of two district court rulings in favor of Defendants-Appellees Good Samaritan Hospital ("Good Samaritan"), Bon Secours Charity Health System ("Bon Secours"), and Westchester County Health Care Corporation ("WMCHealth")[1]: (1) dismissal of his religious discrimination and failure to accommodate claims under Title VII; and (2) summary judgment on his retaliation claim under Title VII.

For the reasons set forth below, we conclude that the district court did not err in dismissing Giurca's claims. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we reference only as necessary to explain our decision to affirm.

I Religious Discrimination and Failure to Accommodate

First, we conclude that the district court did not err in granting the Hospital Defendants' motion to dismiss.

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1. Defendants-Appellees will hereinafter be referred to as the "Hospital Defendants."

"To survive a motion to dismiss under [Rule] 12(b)(6), a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). The Court reviews de novo the grant of a motion to dismiss under Rule 12(b)(6). *See Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006).

"[I]n an employment discrimination case, a plaintiff must plausibly allege that (1) the employer took adverse action against him and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." *Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72, 86 (2d Cir. 2015). Plaintiff alleges, in a conclusory fashion, that the Hospital Defendants "fail[ed] to process his employment applications by reason of Plaintiff's religion." Joint App'x at 28. But he does not allege that the Hospital Defendants were aware of his Romanian Orthodox religion, much less that they took any actions based upon that religion. His religious discrimination claim therefore fails.

Moreover, with respect to reasonable accommodation claims, a plaintiff may satisfy their minimal burden on a motion to dismiss by plausibly alleging that they: (1) "actually require[] an accommodation of [his or her] religious practice"; and (2) that "the employer's desire to

avoid the prospective accommodation [was] a motivating factor in [an employment] decision." *Lowman v. NVI LLC*, 821 F. App'x 29, 31 (2d Cir. 2020) (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773-74, 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015)). The Amended Complaint does allege that Defendants "failed to accommodate Plaintiff's request for a reasonable accommodation, relating to modification of its standard employment agreement." Joint App'x at 28. But this is insufficient to state a claim for failure to accommodate. It is not enough for plaintiff to assert that he *desired* an accommodation; he must plausibly allege that he actually required an accommodation of his religious practice—in other words, that his *religious beliefs* made such an accommodation necessary. Even accepting the sincerity of his religious beliefs, Giurca's Amended Complaint does not adequately plead a conflict between those beliefs and the alleged employment requirement—that Giurca agree that his employment be "subject to" and services be "provided in accordance with" the Ethical and Religious Directives of the Roman Catholic Church ("ERDs"). Joint App'x at 22.

In discussing an offer of employment with Bon Secours in 2017, Giurca was presented with two contracts. The Professional Services Contract provided:

> 1.2 Standards. Physician agrees to ensure that the Services shall be provided in accordance with: (i) the Ethical and Religious Directives for Catholic Health Care Services promulgated by the United States Conference of Catholic Bishops, as interpreted by the Sisters of Bon Secours . . . .

Joint App'x at 47. The Per Diem Contract provided:

> Your employment is subject to the policies, procedures and guidelines of the PC and Hospital, including but not limited to . . . the Ethical and Religious Directives of the Roman Catholic Church.

Id. at 37 ¶ 4.

However, Giurca's Amended Complaint is devoid of any facts plausibly alleging that signing either contract, and therefore agreeing that his employment would be "subject to" or that he would provide services "in accordance with" the ERDs, would actually conflict with his personal religious beliefs. Without sufficient allegations of an actual conflict, Giurca has not stated a "plausible claim for relief" as to his accommodation claim. *Johnson*, 711 F.3d at 275 (citing *Twombly*, 550 U.S. at 555-56).

II. Retaliation

We further conclude that the district court properly granted summary judgment on Giurca's claim for retaliation under Title VII.

On appeal, a court will affirm a grant of a motion for summary judgment only if, construing the evidence in the light most favorable to the nonmoving party, "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). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Like a grant of a motion to dismiss, the Court conducts a de novo review of a district court's grant of summary judgment. *See Fabrikant v. French*, 691 F.3d 193, 205 (2d Cir. 2012).

Retaliation claims are analyzed using the *McDonnell Douglas* burden-shifting framework. *See Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 843 (2d Cir. 2013) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). The first step of the *McDonnell Douglas* framework requires the plaintiff to establish a prima facie case of retaliation. *See id.* at 844. "Once the plaintiff has established a prima facie showing of retaliation, the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for the [adverse] employment action." *Id.* at 845. If the defendant carries this burden, the plaintiff must then present evidence demonstrating that retaliation was a "but-for" cause of the adverse action. *Id.* at 845.

Here, summary judgment was appropriate because, even if Giurca had adequately established a prima facie case of retaliation, the Hospital Defendants presented legitimate, non-retaliatory reasons for their decision to not hire Giurca, and Giurca failed to carry his burden of demonstrating that retaliation was the but-for cause of the adverse employment action.

A. Legitimate, Non-Retaliatory Reasons

The Hospital Defendants clearly identified "legitimate, non-retaliatory reason[s]" for declining to hire Giurca.

Zann Kwan, 737 F.3d at 845. When Giurca inquired about employment with Good Samaritan in March 2019, the hospital was not considering applications for the consultant liaison position in which he expressed an interest. Colavito—the recruiter with whom Giurca had been communicating—then learned that Giurca had lied during his interview about being presently employed at another hospital, despite having been terminated "due to bizarre behavior." Joint App'x at 1218. Due to his lack of candor, Colavito chose not to consider Giurca for subsequent job openings. In July 2019, after Giurca interviewed for a consultant liaison position, the only position he expressed an interest in, at WMCHealth, Bartell and Ferrando—the decisionmakers—recommended against hiring Giurca because he did not have the necessary experience or certifications.

B. But-For Cause

Because the Hospital Defendants met their burden at the second step of the *McDonnell Douglas* framework, the burden then shifted to Giurca to demonstrate that retaliation was a but-for cause of their failure to hire him. But Giurca failed to do so.

First, the record does not support Giurca's assertion that the proffered reasons for hiring another candidate for the consultant liaison position at Good Samaritan are pretextual. By the time Giurca inquired about the position in March 2019, Good Samaritan had already extended an offer of employment to Afful and his contracts were under review.

Second, Giurca's challenge to WMCHealth's conclusion that he was unqualified for the consultant liaison position is similarly unavailing. Although Afful was not board-certified when offered the consultant liaison position at Good Samaritan, the consultant liaison position for which Giurca was deemed unqualified was an entirely separate position at an entirely different hospital. The record does not suggest that the position for which Afful was hired and the position from which Giurca was rejected required the same qualifications, much less that the Hospital Defendants chose to enforce qualifications for one position but not the other.

Finally, in the absence of other evidence of a retaliatory motive, the temporal proximity between Giurca's allegedly protected activity and the adverse employment action is insufficient to support an inference of retaliation. *See Ya-Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59, 72 (2d Cir. 2015) ("'[T]emporal proximity' between a protected complaint and an adverse employment action 'is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext . . . ." (quoting *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) (per curiam))). We therefore conclude that Giurca failed to present sufficient evidence from which a reasonable jury could conclude that retaliation was the but-for cause for the decision to not hire Giurca.

* * *

We have considered Giurca's remaining arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Appendix A

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

/s/ Catherine O'Hagan Wolfe

APPENDIX B — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JANUARY 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-200

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 26th day of February, two thousand twenty-four.

PRESENT: BARRINGTON D. PARKER,
MYRNA PÉREZ,
SARAH A. L. MERRIAM,
Circuit Judges.

DR. DAN GIURCA,

Plaintiff-Appellant,

v.

BON SECOURS CHARITY HEALTH SYSTEM, WESTCHESTER COUNTY HEALTH CARE CORPORATION, GOOD SAMARITAN HOSPITAL,

Defendants-Appellees.[*]

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* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

Appendix B

Appeal from a judgment of the United States District Court for the Southern District of New York. (Seibel, *J.*).

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Dan Giurca seeks review of two district court rulings in favor of Defendants-Appellees Good Samaritan Hospital ("Good Samaritan"), Bon Secours Charity Health System ("Bon Secours"), and Westchester County Health Care Corporation ("WMCHealth")[1]: (1) dismissal of his religious discrimination and failure to accommodate claims under Title VII; and (2) summary judgment on his retaliation claim under Title VII.

For the reasons set forth below, we conclude that the district court did not err in dismissing Giurca's claims. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we reference only as necessary to explain our decision to affirm.

I. Religious Discrimination and Failure to Accommodate

First, we conclude that the district court did not err in granting the Hospital Defendants' motion to dismiss.

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1. Defendants-Appellees will hereinafter be referred to as the "Hospital Defendants."

Appendix B

"To survive a motion to dismiss under [Rule] 12(b)(6), a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). The Court reviews de novo the grant of a motion to dismiss under Rule 12(b)(6). *See Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006).

"Under Title VII, an employer cannot discriminate against any employee on the basis of the employee's religious beliefs unless the employer shows that he cannot 'reasonably accommodate' the employee's religious needs without 'undue hardship on the conduct of the employer's business.'" *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (quoting 42 U.S.C. § 2000e(j)). A plaintiff claiming discrimination under Title VII must first "make out a prima facie case of discrimination." *Id.*

> A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (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. (quoting *Tupen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)).

Here, dismissal was appropriate because Giurca fails at the very first step. Even accepting the sincerity of his religious beliefs, Giurca's Amended Complaint does not adequately plead a conflict between his Orthodox Christian faith and the alleged employment requirement—that Giurca agree that his employment be "subject to" and services be "provided in accordance with" the Ethical and Religious Directives of the Roman Catholic Church ("ERDs"). Joint App'x at 22.

In discussing an offer of employment with Bon Secours in 2017, Giurca was presented with two contracts. The Professional Services Contract provided:

> 1.2 Standards. Physician agrees to ensure that the Services shall be provided in accordance with: (i) the Ethical and Religious Directives for Catholic Health Care Services promulgated by the United States Conference of Catholic Bishops, as interpreted by the Sisters of Bon Secours . . . .

Joint App'x at 47. The Per Diem Contract provided:

> Your employment is subject to the policies, procedures and guidelines of the PC and Hospital, including but not limited to . . . the Ethical and Religious Directives of the Roman Catholic Church.

Id. at 37 ¶ 4.

However, Giurca's Amended Complaint is devoid of any facts plausibly alleging that signing either contract, and therefore agreeing that his employment would be "subject to" or that he would provide services "in accordance with" the ERDs, would actually conflict with his personal religious beliefs. Without sufficient allegations of an actual conflict, Giurca has not stated a "plausible claim for relief" as to his accommodation claim. *Johnson*, 711 F.3d at 275 (citing *Twombly*, 550 U.S. at 555-56).

II. Retaliation

We further conclude that the district court properly granted summary judgment on Giurca's claim for retaliation under Title VII.

On appeal, a court will affirm a grant of a motion for summary judgment only if, construing the evidence in the light most favorable to the nonmoving party, "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). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Like a grant of a motion to dismiss, the Court conducts a de novo review of a district court's grant of summary judgment. *See Fabrikant v. French*, 691 F.3d 193, 205 (2d Cir. 2012).

Retaliation claims are analyzed using the *McDonnell Douglas* burden-shifting framework. *See Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 843 (2d Cir. 2013)

(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). The first step of the *McDonnell Douglas* framework requires the plaintiff to establish a prima facie case of retaliation. *See id.* at 844. "Once the plaintiff has established a prima facie showing of retaliation, the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for the [adverse] employment action." *Id.* at 845. If the defendant carries this burden, the plaintiff must then present evidence demonstrating that retaliation was a "but-for" cause of the adverse action. *Id.* at 845.

Here, summary judgment was appropriate because, even if Giurca had adequately established a prima facie case of retaliation, the Hospital Defendants presented legitimate, non-retaliatory reasons for their decision to not hire Giurca, and Giurca failed to carry his burden of demonstrating that retaliation was the but-for cause of the adverse employment action.

A. Legitimate, Non-Retaliatory Reasons

The Hospital Defendants clearly identified "legitimate, non-retaliatory reason[s]" for declining to hire Giurca. *Zann Kwan*, 737 F.3d at 845. When Giurca inquired about employment with Good Samaritan in March 2019, the hospital was not considering applications for the consultant liaison position in which he expressed an interest. Colavito—the recruiter with whom Giurca had been communicating—then learned that Giurca had lied during his interview about being presently employed at another hospital, despite having been terminated "due to bizarre

behavior." Joint App'x at 1218. Due to his lack of candor, Colavito chose not to consider Giurca for subsequent job openings. In July 2019, after Giurca interviewed for a consultant liaison position, the only position he expressed an interest in, at WMCHealth, Bartell and Ferrando—the decisionmakers—recommended against hiring Giurca because he did not have the necessary experience or certifications.

B. But-For Cause

Because the Hospital Defendants met their burden at the second step of the *McDonnell Douglas* framework, the burden then shifted to Giurca to demonstrate that retaliation was a but-for cause of their failure to hire him. But Giurca failed to do so.

First, the record does not support Giurca's assertion that the proffered reasons for hiring another candidate for the consultant liaison position at Good Samaritan are pretextual. By the time Giurca inquired about the position in March 2019, Good Samaritan had already extended an offer of employment to Afful and his contracts were under review.

Second, Giurca's challenge to WMCHealth's conclusion that he was unqualified for the consultant liaison position is similarly unavailing. Although Afful was not board-certified when offered the consultant liaison position at Good Samaritan, the consultant liaison position for which Giurca was deemed unqualified was an entirely separate position at an entirely different hospital. The record does not suggest that the position for which Afful was hired

and the position from which Giurca was rejected required the same qualifications, much less that the Hospital Defendants chose to enforce qualifications for one position but not the other.

Finally, in the absence of other evidence of a retaliatory motive, the temporal proximity between Giurca's allegedly protected activity and the adverse employment action is insufficient to support an inference of retaliation. *See Ya-Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59, 72 (2d Cir. 2015) ("'[T]emporal proximity' between a protected complaint and an adverse employment action 'is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext . . . ." (quoting *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) (per curiam))). We therefore conclude that Giurca failed to present sufficient evidence from which a reasonable jury could conclude that retaliation was the but-for cause for the decision to not hire Giurca.

* * *

We have considered Giurca's remaining arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

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

/s/ Catherine O'Hagan Wolfe

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 18, 2023

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 19-CV-7761 (CS)

DR. DAN GIURCA,

Plaintiff,

- against -

GOOD SAMARITAN HOSPITAL, BON SECOURS CHARITY HEALTH SYSTEM, AND WESTCHESTER MEDICAL CENTER HEALTH NETWORK,

Defendants.

January 18, 2023, Decided; January 18, 2023, Filed

OPINION & ORDER

Seibel, J.

Before the Court is the motion for summary judgment of Defendants Good Samaritan Hospital ("Good Samaritan"), Bon Secours Charity Health System ("Bon Secours"), and Westchester Medical Center Health Network ("WMC") (collectively, "Defendants"). (ECF No. 84.) For the following reasons, the motion is GRANTED.

Appendix C

I. BACKGROUND

The following facts are based on the parties' Local Civil Rule 56.1 Statements, responsive 56.1 Statements, declarations, and supporting materials.[1] The facts are undisputed except as noted.

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1. I will refer to Defendants' "Local Rule 56.1 Statement of Material Undisputed Facts," (ECF No. 95), as "Ds' 56.1 Stmt." I will refer to "Plaintiff's Response to Defendants' Local Rule 56.1 Statement of Material Undisputed Facts," (ECF No. 86 at 1-47), as "P's 56.1 Resp.," and Plaintiff's Counterstatement, (*id.* at 47-51), as "P's 56.1 Stmt." The Counterstatement—which includes facts that Plaintiff finds helpful and contends are not in dispute—violates Local Rule 56.1, which permits only a counterstatement of "additional material facts as to which it is contended that there exists a genuine issue to be tried." Local Civ. R. 56.1(b). "There is no provision for a responsive 56.1 Statement to include additional facts that are not in dispute but that a party opposing summary judgment simply thinks are important; any additional facts should be confined to material facts in dispute." *Ostreicher v. Chase Bank USA, N.A.*, 19-CV-8175, 2020 U.S. Dist. LEXIS 217024, 2020 WL 6809059, at *1 n.1 (S.D.N.Y. Nov. 19, 2020). I have considered Plaintiff's counterstatement to the extent it raises material facts contended to be in dispute. I also note that the counterstatement, or at least portions of it, appears to have been drafted by Plaintiff personally, as it refers to him in the first person. (*See, e.g.*, P's 56.1 Stmt. ¶¶ 25, 30, 32.) In addition, where a statement in Defendants' Rule 56.1 Statement is properly supported, and Plaintiff does not specifically deny it with evidence, the statement is deemed admitted for purposes of this motion. *See, e.g., Feis v. United States*, 394 F. App'x 797, 799 (2d Cir. 2010) (summary order); *Wallace v. City of N.Y., Dep't of Educ.*, No. 20-CV-1424, 2021 U.S. Dist. LEXIS 246760, 2021 WL 6127386, at *1 n.1 (S.D.N.Y. Dec. 28, 2021); *Universal Calvary Church v. City of N.Y.*, No. 96-CV-4606, 2000 U.S. Dist. LEXIS 17037, 2000 WL 1745048, at *2 n.5 (S.D.N.Y. Nov. 28, 2000); L.R. 56.1(c); L.R. 56.1(d).

Appendix C

Westchester County Health Care Corporation ("WMCHealth") is a network of affiliated hospitals in the Hudson Valley, including WMC. (Ds' 56.1 Stmt. ¶ 1.) Bon Secours, also a part of WMCHealth, is a Catholic not-for-profit health system that includes Good Samaritan, located in Suffern, among other hospitals. (*Id.* ¶ 2.) As all Catholic hospitals are required to do, the hospitals of Bon Secours have adopted a code of conduct called the Ethical and Religious Directives for Catholic Health Care Services (the "ERDs"). (*Id.* ¶ 3.) As a condition of employment, all Bon Secours employees must agree to follow the ERDs. (*Id.*)

A. Bon Secours Position

Plaintiff Dr. Dan Giurca is a psychiatrist board-certified in Adult Psychiatry. (*Id.* ¶¶ 12-13.) In 2016, he was

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Defendants' counsel submitted a declaration in support of the motion, (ECF No. 89), but "[u]nlike the typical attorney affirmation, which simply attaches and identifies exhibits for the Court," *Dejana Indus. Inc. v. Vill. of Manorhaven*, No. 12-CV-5140, 2015 U.S. Dist. LEXIS 34384, 2015 WL 1275474, at *2 (E.D.N.Y. Mar. 18, 2015), this declaration included an argumentative summary of the evidence. Such a declaration is "improper and inadmissible" because it "could not possibly be based on personal knowledge because it is based entirely on counsel's own interpretation of the evidence in the record," *id.*; *see H.B. v. Monroe Woodbury Cent. Sch. Dist.*, No. 11-CV-5881, 2012 U.S. Dist. LEXIS 141252, 2012 WL 4477552, at *5-6 (S.D.N.Y. Sept. 27, 2012), and may be an improper attempt to bypass the page limits on memoranda of law set by my individual practices, *see Quattlander v. Ray*, No. 18-CV-3229, 2021 U.S. Dist. LEXIS 209442, 2021 WL 5043004, at *2 n.4 (S.D.N.Y. Oct. 29, 2021). Accordingly, I consider the declaration only to the extent it identifies the attached exhibits.

offered employment at Bon Secours but turned it down to work at Orange Regional Medical Center ("ORMC"), which is unaffiliated with WMCHealth. (*Id.* ¶ 14.) Plaintiff nevertheless asked to be kept in mind for moonlighting opportunities at Good Samaritan and began the process of submitting his application for medical staff privileges. (*Id.* ¶ 15.) Plaintiff received an employment contract on February 24, 2017, (*id.*), to which he raised several objections, including—referring to the ERDs—that in his view, it required physicians to "agree[] to the policies of a religious organization," (ECF No. 89-9 at 3).[2] In response, Naim Korca, a Bon Secours employee, told Plaintiff:

> Bon Secours is [a] faith based organization, created by the sisters of Bon Secours and the value[s] of the organization are in line with [the] catholic church values of serving the poor and most vulnerable categories of society. The values do not impede with your practice as [a] psychiatrist and [] conform [to] the laws of New York and [the] US.

(*Id.* at 2.) In response to Plaintiff's separate objection that the contract did not include insurance coverage, Korca

2. Citations to ECF Nos. 89-9 through 89-11, 89-18, 89-19, 89-35 through 89-37, 89-40, 89-42, 89-44, 89-46, and 89-55 refer to page numbers set by the Electronic Case Filing ("ECF") system.

The February 24, 2017 contract required all medical services provided at the facility to "be provided in accordance with (i) the [ERDs] . . . [and] the administrative and ethical policies of the Hospital, including the Bon Secours Health System Code of Conduct." (Ds' 56.1 Stmt. ¶ 18.)

said that the hospital might be able to cover Plaintiff's insurance if he were hired as a *per diem* physician rather than under a service contract. (*Id.*) Plaintiff responded that "[p]er diem without contract would be better," and added:

> I appreciate serving the poor but signing a contract recognizing the catholic church, can be problematic for some people. I have the right to practice my own religion. Keep in mind the catholic church has molested children—I have an issue with that, regardless of how many poor people they serve.

(*Id.*) Korca responded that he would work on making Plaintiff a *per diem* physician. (*Id.*)

On March 2, 2017, Plaintiff submitted some of his application materials to Bon Secours through an online portal and noted that "there were some issues with the contract but I will be per diem." (ECF No. 89-11 at 4-5.) On March 9, 2017, Bon Secours asked Plaintiff to provide application materials that were still outstanding. (*Id.* at 3.) On March 22, 2017, Bon Secours sent Plaintiff a letter agreement. (ECF No. 89-10.) The new contract included a provision on the ERDs: "Your employment is subject to the policies, procedures and guidelines of [Bon Secours] and Hospital, including but not limited to . . . the [ERDs]." (*Id.* at 5.) On April 17, 2017, after not receiving the outstanding application materials, Bon Secours followed up with Plaintiff, asking him whether he intended to continue his application process. (ECF No. 89-11 at 2.)

Plaintiff responded, "We are still discussing the terms but the contract language needs to state it is only for call from home via phone, not coming onsite." (*Id.*) The Bon Secours employee responded, "I will hold the processing of the application until contacted to begin again or to cease any further." (*Id.*)

B. Position at Good Samaritan

On October 4, 2018, ORMC terminated Plaintiff's employment without cause. (ECF No. 89-12.) On November 5, 2018, Plaintiff reached out to an employee at Good Samaritan regarding his interest in an "ER + medical floor consultation psy job in the Suffern location." (ECF No. 89-13 at 3.) The employee forwarded Plaintiff's resumé to Tera Colavito, who was responsible for recruiting at Good Samaritan and who thought Plaintiff's interest "may be worth exploring" because another doctor was looking to give up his "good Sam day." (*Id.*) Colavito forwarded Plaintiff's resumé to Corey Deixler, Senior Vice President of Physician Services for Bon Secours, among others, and in response, Deixler "recall[ed] there was an issue with this provider in the past." (*Id.* at 2.) When asked what the issue was, Deixler responded that Plaintiff never worked at Good Samaritan but had been interviewed. (*Id.*)

Colavito testified that at some point she reached out to Korca—whose name Plaintiff had mentioned in a conversation he had had with the Bon Secours Medical Director for Psychiatry, (*id.*)—and was told that Plaintiff had backed out of a previous contract because he did not want to work for a Catholic facility. (ECF No. 89-77

("Colavito Depo 1") at 38:15-23; *see also* ECF No. 89-78 ("Colavito Depo 2") at 73:12-17 (Korca told Colavito that Plaintiff "had a problem with the contract around the language related to our Catholic identity.").)

On February 15, 2019, Plaintiff contacted Colavito directly, inquiring as to whether there were any open psychiatry jobs at Good Samaritan. (ECF No. 89-18 at 4; *see* D's 56.1 Stmt. ¶ 25.) Plaintiff followed up on March 5 by telephone and recorded the conversation without Colavito's knowledge, (Ds' 56.1 Stmt. ¶ 27), as he did with all other phone calls that are part of the record. Plaintiff again asked about openings at Good Samaritan in Suffern and Colavito said that her understanding was that Plaintiff "had previously been offered a contract here and then took the contract back because of . . . our Catholic . . . affiliation," and then asked whether anything had changed. (ECF No. 89-19 at 2.) Plaintiff responded that he declined the position because he was offered a better one at ORMC. (*Id.*) When Colavito asked whether Plaintiff was still at ORMC, he responded that he was, (*id.*), which he now admits was a lie, (Ds' 56.1 Stmt. ¶ 30).[3]

3. Plaintiff claims he lied about still being employed at ORMC because Colavito had "lied to me and said she had not received the [*curriculum vitae* ("CV")] that I had submitted in November [2018]." (ECF No. 99 ¶ 10.) Putting aside the logic of that claim, the transcript of the conversation reveals that Colavito did not deny having received Plaintiff's CV back in November. Rather, when Plaintiff said he had inquired of another employee "a week or two ago" about open positions, and he thought he had emailed Colavito his CV, she responded, "I don't know if I received that in my email." (ECF No. 89-19 at 2.) Not only was her response hardly a denial, but in context it refers to "a week or two ago," not November 2018.

Following this conversation, Plaintiff emailed Colavito, stating, "In our telephone conversation today you mentioned something about a clause in the contract offer from 2017 related to the Catholic Church. Is this the reason my application is not considered?" (ECF No. 89-18 at 4.) Colavito replied:

> I asked about the clause because it is my understanding that you backed out previously because you did not want to work for a Catholic Facility. If that information is inaccurate then I stand corrected. Our affiliation has not changed so I just didn't want to pursue anything further if that remained a possible concern for you. I will review further and be in touch.

(*Id.* at 3-4.) Plaintiff responded that "[t]here was a clause in the contract language that seemed strange and I asked Na[i]m Korca about it," but confirmed that he was still interested in pursuing a job at Good Samaritan. (*Id.*)

After speaking with Plaintiff, Colavito texted Dr. Nambi Salgunan, a psychiatrist at ORMC, and asked whether Plaintiff still worked there. (Ds' 56.1 Stmt. ¶ 34.) After "check[ing] it out," Dr. Salgunan responded on March 11, stating that "[n]o such name doctor" worked there. (*Id.*) Colavito testified that she also spoke with Dr. Bhupinder Gill, a psychiatrist from Bon Secours, who told her that Plaintiff had been terminated from ORMC due to "bizarre behavior." (Colavito Depo. 2 at 70:15-24.)[4]

4. At his deposition, Dr. Gill did not recall having this conversation with Colavito. (ECF No. 98-4 at 34:25-35:7.) But "a

Plaintiff followed up on March 7, clarifying that when he previously applied to Bon Secours, he had a question about the *per diem* contract, "not that I 'did not want to work for a Catholic facility.'" (ECF No. 89-18 at 3.) He also asked for a copy of the ERDs, but Colavito did not respond. (*Id.*) When asked at her deposition why she did not send Plaintiff a copy of the ERDs, Colavito stated, "There wasn't a job available at that point and he had lied about his employment so I had no interest in pursuing anything further with him." (Colavito Depo. 2 at 63:2-13.)[5] When asked why she lost interest in interviewing Plaintiff, she testified, "Because when I had spoken to him he had told me that he was still employed by Orange Regional. When I learned that he was fired from there, I didn't want to hire a psychiatrist that lied right from the start." (Colavito Depo. 1 at 26:8-15.)

On March 8, 2019, Plaintiff called Colavito inquiring as to whether there were any open psychiatrist positions at Good Samaritan. (ECF No. 89-21; Ds' 56.1 Stmt. ¶ 39.) Colavito responded that there were no open positions but

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deponent's failure to remember a particular event is insufficient to create a genuine issue of fact for summary judgment purposes." *Alessi Equip., Inc. v. Am. Piledriving Equip., Inc.*, 578 F. Supp. 3d 467, 480 n.7 (S.D.N.Y. 2022) (cleaned up).

5. Plaintiff argues that this is not the actual reason that Colavito did not respond because she was not made aware of Plaintiff's lie until March 11, when Dr. Salgunan texted Colavito, four days after Plaintiff's email. (ECF No. 89-20.) But Colavito did not recall, (Colavito Depo. 2 at 71:8-21), and the record does not otherwise reflect, when her conversation with Gill took place. And two of the intervening days between March 7 and 11 were a weekend.

there might be some in the near future and she would reach out to him then. (ECF No. 89-21.) Plaintiff emailed her after the call, stating,

> It does not seem appropriate to be denied a job, and be discriminated against on the basis of religion. It appears that after I inquired about the clause in 2017, I was blacklisted. At present I was denied the consultation liaison position that I have been inquiring about since Oct 2018. The clause states that I have a right to ask questions, and the issue is legitimate. If a child comes to the ER distraught due to being raped by a Catholic priest, do you expect the doctor to call the Justice Center or follow the "[ERDs]" to cover up the crimes? As an Orthodox Christian do I have to become Catholic as a condition of employment?

(ECF No. 89-18 at 2-3.) Colavito did not respond.

On June 24, Plaintiff emailed Colavito once more, stating,

> I have not heard from you after my last email from Mar 8. . . . As directed by the contract terms, on Mar 7 I asked you for a copy of the [ERDs] and on Mar 8 you told me no jobs are available, even though one was available on Mar 5. I was not applying for a job as a priest (religious position), but as a doctor (secular position). The hospital cannot invoke the

> First Amendment defense. Asking a doctor to accept religious directives as a condition of employment, is effectively asking that doctor to change his existing religion. The EEOC stated that is illegal in the USA.

(*Id.* at 2.) Colavito forwarded this email to Deixler with the text "Fyi . . ." (ECF No. 89-25 at 2.) On the same day, Plaintiff emailed an administrator named Loretta Modesto asking about job openings and attaching a January 2019 post about an open psychiatrist job at Bon Secours. (Ds' 56.1 Stmt. ¶ 43.) Plaintiff did not receive a response. (P's 56.1 Resp. ¶ 43.)

On June 6, Plaintiff filed a charge of religious discrimination and retaliation with the EEOC, stating that Good Samaritan blacklisted him after he questioned a religious clause in the contract, resulting in him being denied a position in March 2019. (ECF No. 89-23.)

C. Position at WMC

In July 2019, Plaintiff sought a position at WMC and contacted Andrea Ruggiero, a recruiter responsible for filling positions at WMC, Mid-Hudson Regional Hospital in Poughkeepsie, and the Health Alliance Hospitals in Kingston. (Ds' 56.1 Stmt. ¶ 50.) WMC had a separate hiring process from Bon Secours, which used administrators who only recruited for Bon Secours. (*Id.* ¶ 4.) WMC made hiring decisions based on the opinions of Dr. Stephen Ferrando, the chair of the Department of Psychiatry (the "Department"), and Dr. Abraham Bartell, the vice-

chair of the Department. (*Id.* ¶ 5.) The screening process at WMC began with Bartell and Ferrando establishing the criteria for the position; then Human Resources ("HR") helped the doctors identify potential candidates; and Bartell conducted an initial phone screen to gauge whether each candidate had a genuine interest and to identify the people he wanted to bring in for an in-person interview. (*Id.* ¶ 6.) The decision to call back candidates for in-person interviews rested with Bartell and Ferrando, but Ferrando largely deferred to Bartell. (*Id.*)

If Bartell and Ferrando made the decision to hire a psychiatrist, that candidate would need to successfully apply for and obtain clinical privileges and a medical staff appointment through the WMCHealth Medical Staff Office as a pre-condition of employment. (*Id.* ¶ 7.) The credentialing and privileging process involves collecting information about the applicant's background including past employment verifications, public profiles, medical malpractice, legal information and case logs. (*Id.* ¶ 8.) The reasons why the applicant left prior positions are also obtained. (*Id.* ¶ 9.) Generally, after all information is collected, the Credentialing Committee decides to grant or deny clinical privileges and a medical staff appointment. (*Id.* ¶ 10.) If "red flags" are uncovered, the application will not go to the Credentialing Committee, and instead the Medical Staff Office will alert the personnel who made the offer and ask them to reconsider. (*Id.* ¶ 11.) If the "red flags" are significant, "such as a questionable work history or lawsuits against prior employers, the person would not be credentialed." (*Id.*)[6]

6. The quoted language is from D's 56.1 Stmt., but it does not precisely summarize the underlying evidence, which is a declaration

On July 18, Ruggiero forwarded Plaintiff's CV to members of the Department, including Ferrando and Bartell. (*Id.* ¶ 55.) Bartell responded that it was "[w]orth looking at perhaps we can set up a phone interview and go from there." (*Id.* ¶ 56.) Ferrando responded, "nocturnist?" which was one of the open positions at a WMC hospital in Valhalla, New York, and Bartell replied that they would need to see in what positions Plaintiff was interested. (*Id.*)

On July 22, Ruggiero called Plaintiff, who expressed interest in relevant open positions. (*Id.* ¶ 57; *see* ECF No. 89-35.) At this time, there were three open positions at WMC: (1) an adult consultation-liaison psychiatrist ("CL") position in Valhalla, (2) a nocturnist position in Valhalla, and (3) an outpatient and child/adolescent psychiatrist position in Poughkeepsie. (ECF No. 90 ("Bartell Decl.") ¶ 3.) Defendants contend that CL positions at WMC require subspecialty board certification—specifically, fellowship training and board certification in "Consultation-Liaison Psychiatry," (*id.*)—but the job posting stated only that candidates should be board-certified or board-eligible in psychiatry, (P's 56.1 Resp. ¶ 83). During the call, Plaintiff expressed interest in positions at Good Samaritan, Bon

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from the Director of Medical Staff Administration and Quality Special Projects at WMC. (ECF No. 92.) Her declaration states that "[r]ed flags include lawsuits against prior employers, lawsuits involving patients, misrepresentations made by the applicant during the employment application process, or questionable quality of care information," (*id.* ¶ 9), and that she had "never seen an applicant who sued a prior employer and/or lied during an interview make it through the credentialing process," (*id.* ¶ 12). But she did not say a person who had previously sued an employer could never be credentialed.

Secours, and the WMC Valhalla hospital because of their proximity to his home, (ECF No. 89-35 at 6), but Ruggiero did not recruit for Bon Secours or Good Samaritan, (Ds' 56.1 Stmt. ¶ 63). Nevertheless, during the phone call, Plaintiff asked Ruggiero to check whether Bon Secours has a religious affiliation, to which Ruggiero responded that it did not. (ECF No. 89-35 at 7.) Plaintiff further stated, "[S]omebody told me if that if [you] get a job at . . . that hospital or within that Bon Secours . . . core, you know, you have to, like, follow the directives of the Catholic Church as part of employment or something like that." (*Id.*) Ruggiero responded, "No, that's not accurate. There, WMC, our network is an equal opportunity employer." (*Id.*) Plaintiff also inquired into a Bon Secours job posting from January 2019 and Ruggiero told him that she would look into it but the position was likely no longer available. (*Id.*)

Following her conversation with Plaintiff, Ruggiero emailed Bartell and Ferrando, stating that she considered Plaintiff to be a viable candidate and that he would be open to positions in Valhalla. (ECF No. 89-41 at 3.) Bartell then asked Ruggiero to set up a telephone interview with Plaintiff. (*Id.*) Ruggiero followed up with Plaintiff by email later that day, stating that the Bon Secours position was open and that she would like to set up a phone interview for the CL position in Valhalla as soon as possible. (ECF No. 89-36 at 2.) Plaintiff replied with his availability for a phone interview and stated, "I am interested in the Bon Secours position. Someone told me that as a condition of employment the contract requires all doctors to abide by the religious directives of the Catholic church. Please advise if true." (ECF No. 89-37 at 4.) Ruggiero responded

that, to her knowledge, that information was inaccurate but she would clarify and get back to him. (*Id.* at 3.) Ruggiero and Plaintiff agreed that he would speak with Bartell at 10 a.m. the next day, July 23, 2019. (*Id.*)

Ruggiero then requested assistance from her manager, Emily Mehedin, (ECF No. 89-76 at 61:6-20), who forwarded Plaintiff's email to Deixler, who still worked for Bon Secours, (ECF No. 89-38 at 3-4). Deixler responded, "We were not aware you were talking to this individual. Please discuss with Barbara." (*Id.*) Deixler was referring to Barbara Kukowski, in-house counsel for WMCHealth. (Ds' 56.1 Stmt. ¶ 69.) On July 23 at 9:40 a.m., Ruggiero emailed Bartell, but the substance of that email was redacted in discovery as an attorney-client communication, (ECF No. 89-41; ECF No. 89-26 at 8), and at 9:54 a.m., Ruggiero emailed Plaintiff telling him that Bartell was not available to speak that morning at 10 am and they would need to reschedule, (ECF No. 89-40 at 5; ECF No. 89-75 at 42:23-43:10).

Meanwhile, Kukowski discussed Plaintiff's application with Jordy Rabinowitz, the chief HR officer for WMCHealth. (Ds' 56.1 Stmt. ¶¶ 72-73.) During their conversation, Kukowski told Rabinowitz that Plaintiff had previously applied to Good Samaritan but his application was ultimately rejected because "he had certain inconsistencies in his background." (ECF No. 88-4 at 20:3-21:20, 25:9-21.) Nevertheless, they agreed that "there was nothing necessarily in Dr. Giurca's past that would prohibit him being interviewed by Dr. Bartell, and so we agreed that we would let that interview go forward."

(*Id.* at 26:9-13.) On July 24, Ruggiero wrote to Bartell, "I apologize for the back and forth regarding this candidate. [redacted text] We will wait for your feedback after your interview on how you would like to proceed with this candidate. Please let me know when would work best for a phone screen." (ECF No. 89-41 at 1.) Bartell responded, "Yes please lets set this up ASAP." (*Id.*) Ruggiero emailed Plaintiff that Bartell's schedule had opened up and they arranged the phone interview for July 26, 2019. (ECF No. 89-42.)

Bartell conducted the telephone interview on that date. (Ds' 56.1 Stmt. ¶ 76.) He stated in his declaration that he was not aware that Plaintiff had previously applied to Good Samaritan or that Plaintiff had filed complaints against that entity for religious discrimination until Plaintiff sought to depose him for purposes of this action.[7] (Bartell Decl. ¶¶ 9-10.) Bartell also stated in his declaration that he and Ferrando were looking for two specific categories of psychiatrists to fill the CL position at Valhalla: "(1) psychiatrists who were already subspecialty board certified, and (2) those who had freshly completed a fellowship (or at least would so by the start date) and

7. In Plaintiff's 56.1 Resp. he denies Defendants' claim that "[t]he only information that Dr. Bartell had about Plaintiff came from his CV and a quick review of his fellowship file," and adds that "Bartell knew that HR had cancelled two interviews with the candidate" and "Bartell also knew whatever Ruggiero conveyed to him on July 23 and July 24 [which has been redacted and made unavailable to plaintiff and his counsel]." (P's 56.1 Resp. ¶ 77 (alteration in original).) Plaintiff provides no citations reflecting the cancellation of a second interview, and as far as the Court can tell, only one interview was cancelled and then rescheduled.

therefore would be likely to pass the board examination right away." (*Id.* ¶ 7.)

During the interview, Plaintiff expressed interest in a position at Bon Secours and the CL position at Valhalla. (ECF No. 89-44 at 3.) Bartell did not hire for Bon Secours, so this position was "outside of [his] purview." (Bartell Decl. ¶ 15.) Bartell avers that he also determined that Plaintiff was not qualified for the CL position solely by looking at Plaintiff's CV;[8] Plaintiff did not have subspecialty fellowship training or board certification in Consultation-Liaison Psychiatry, and had completed his training five years ago and so was not prepared to sit for that certification exam. (Bartell Decl. ¶ 13.) Bartell states in his declaration that he interviewed Plaintiff knowing he was not qualified for the CL position because he "thought it would be worthwhile to see if Plaintiff might be interested in a different role, such as the nocturnist position," (*id.* ¶ 14), but Plaintiff stated during the interview that he was only interested in the CL role at Valhalla, (*id.* ¶ 15; ECF No. 89-44 at 2). During the interview—the transcript of which is seven single-spaced pages, (ECF No. 89-44)—most of the conversation concerned the pay and hours of

8. During the interview, Bartell took handwritten notes on a copy of Plaintiff's CV. (Ds' 56.1 Stmt. ¶ 78.) The CV included a line that read, "ABPN Certified Sep 2014, Board Eligible child & adolescent psychiatry Jul 2014." (ECF No. 89-45.) Bartell circled the word "Eligible" and wrote next to the circle "no brds," meaning "no boards." (ECF No. 89-45; Bartell Decl. ¶ 17.) "ABPN" apparently stands for American Board of Psychiatry and Neurology. American Board of Psychiatry and Neurology, Inc., https://www.abpn.com/wp-content/uploads/2014/12/ABPNAcronymsTerms.pdf (last accessed Jan. 3, 2023).

the job, (*id.* at 3-6), and Plaintiff mentioned that he had "a board in adult psychiatry" and asked if that would get him extra money, (*id.* at 5). Bartell responded that the "number of years out" was built into the pay scale. (*Id.*) Bartell testified that he found Plaintiff's focus on compensation to be "off putting," (ECF No. 89-79 ("Bartell Depo. 1") at 46:19-22), and made a handwritten note on Plaintiff's CV stating "$focus" because he thought that "Plaintiff was overly concerned with money for an initial interview," (Bartell Decl. ¶ 17).

At the end of the call, when Plaintiff asked what the next step would be, Bartell stated that ideally it would be an in-person interview, but that Ferrando would be out until early August. (ECF No. 89-44 at 7.) On August 6, Bartell called Plaintiff and provided him with information about an open position at Good Samaritan. (ECF No. 89-46.) In response, Plaintiff asked whether Good Samaritan or Bon Secours "have like a religious affiliation with the Catholic Church, that one part of and a condition of employment is that you have to accept the directives of the Roman Catholic Church." (*Id.* at 2.) Bartell responded that it was his understanding that both Good Samaritan and Bon Secours were equal opportunity employers but he would double check. (*Id.*)

The following day, Plaintiff called Ruggiero to follow up on the "Bon Secours . . . issue" and the open position at Good Samaritan that Bartell had mentioned, and she told him she had not had the chance to get the answer to his question regarding the ERDs but would follow up with Bartell as to the position. (Ds' 56.1 Stmt. ¶ 89.) On

August 9, Plaintiff called Bartell to ask again about the Good Samaritan position, and Bartell replied that he was still confirming details, but told Plaintiff, regarding the ERDs, "There's no issues in terms of the tene[]ts of the church. Number one, it's no longer a Catholic Charities hospital. Number two, you're an [Advance Physician Services ("APS")] employee at Westchester Medical Center." (ECF No. 89-48.) APS is a corporate entity that hires physicians for the network. (Ds' 56.1 Stmt. ¶ 88.)[9] On August 9 and 16, Plaintiff emailed Ruggiero asking for further details related to the Good Samaritan position. (ECF No. 89-49 at 3.)

Sometime after Plaintiff's interview, Bartell and Ferrando met and discussed Bartell's impressions of Plaintiff. (Bartell Depo. 1 at 46:3-9.) Bartell testified that he told Ferrando,

> The concern about the CL position was that [Plaintiff] was not trained—fellowship trained or board eligible so he wouldn't be eligible for that position, that he—I had shared the information about the nocturnist position and that there might be another position within the network. I shared with [Ferrando] that the conversation was heavily focused on compensation, which I found a little off putting in a first screen.

9. Bartell testified that he conveyed his "impression," which was limited because he did not recruit for Bon Secours, and that his referral of Plaintiff to Bon Secours was just a "collegial" action, given that WMC could not use Plaintiff. (ECF No. 88-5 at 42:13-43:11.)

(*Id.* at 46:10-23.) Ferrando testified that Bartell told him Plaintiff "was not interested in a nocturnist position" and that Bartell "used a strong adjective, something like slimy or swarmy. He said he was primarily interested in money. He said that he was not board certified, at which point I recall saying forget it." (ECF No. 89-81 ("Ferrando Depo.") at 18:8-20.) According to Ferrando, Bartell "is a very excellent judge of character" and if he used "strong language like that . . . and somebody's money hungry and . . . not board certified after a number of years," that person was not worth pursuing. (*Id.* at 27:18-28:6.) When Bartell referred to Plaintiff's lack of board certification, he was referring to the fact that Plaintiff was neither board certified nor board eligible in CL. (*See* ECF No. 88-5 at 35:14-36:2, 46:12-19.) After Dr. Bartell told Ruggiero that they were not interested in hiring Plaintiff for the CL position, (ECF No. 89-80 ("Bartell Depo. 2") at 67:10-18), Ruggiero confirmed that Bartell did not need to reach out to Plaintiff because he would receive a rejection letter from the network, (ECF No. 89-53).

On December 14, 2019, Plaintiff filed an EEOC charge against WMC alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). (ECF No. 89-55.)

D. Prior Employment History

On December 10, 2018, Plaintiff filed a lawsuit against Montefiore Health System, Inc. ("Montefiore"), *Giurca v. Montefiore Health Sys., Inc.*, No. 18-CV-11505 (S.D.N.Y.), where Plaintiff had been employed from March 2013 to

January 2017, (ECF No. 89-1). In his Amended Complaint in that case, Plaintiff stated that he had: received a "Focused Professional Practice Evaluation" accusing him of deficiencies in "performance, professionalism, and communication," (ECF No. 89-27 ¶ 44); recorded conversations with his colleagues and supervisors, (*id.* ¶¶ 20, 67, 70); reported his colleagues to supervisors as well as the New York State Office for Mental Health, (*id.* ¶¶ 17, 28, 31-39, 41-42, 66-70); been put on a probation plan and told that his employment was "not sustainable," (*id.* ¶ 49); lost his privileges to moonlight, (*id.* ¶ 67); and been deemed a security risk by the Montefiore security office, (*id.* ¶ 73).

On February 5, 2019, Plaintiff filed a lawsuit against ORMC, *Giurca v. Orange Reg'l Med. Ctr.*, No. 19-CV-1096 (S.D.N.Y.), where he worked from January 2017 until January 2019, (ECF No. 89-1). In the Amended Complaint in that case, Plaintiff stated that he had: been accused of making residents perform the bulk of the work for an article he wrote, (ECF No. 89-17 ¶¶ 42-43); recorded conversations with his colleagues, (*id.* ¶¶ 43, 50); reported his colleagues to supervisors and the New York Office of Mental Health, (*id.* ¶¶ 21, 24-26, 56); and been fired from ORMC, (*id.* ¶ 47).

The Amended Complaints in both cases were publicly available as of August 2019. (ECF Nos. 89-14, 89-15.)

E. Procedural History

Plaintiff filed the original complaint in this action on August 19, 2019. (ECF No. 1.) On December 4, 2019,

the Court granted Defendants' request for a pre-motion conference concerning a proposed motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 19.) At the conference on January 10, 2020, the Court gave Plaintiff leave to amend. (*See* Minute Entry dated Jan. 10, 2020.) Plaintiff filed an Amended Complaint on February 10, 2020, (ECF No. 21 ("AC")), alleging violations of Title VII for religious discrimination, failure to accommodate, and retaliation, as well as state law claims for intentional infliction of emotional distress and negligent infliction of emotional distress, (*id.* ¶¶ 56-73). Following briefing, the Court issued a bench ruling dismissing all of the claims except the Title VII retaliation claim. (ECF No. 89-66.) Discovery ensued, followed by the instant motion. (ECF Nos. 84-103.)

II. LEGAL STANDARD

Summary judgment is appropriate when "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). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to "present evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), and "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (cleaned up).

"A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1). Where a declaration is used to support or oppose the motion, it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated." *Id.* 56(c)(4); *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008). In the event that "a party fails . . . to properly address another party's assertion of fact as

required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

III. DISCUSSION

A. Legal Framework

Title VII prohibits employers from discriminating against any "employee[] or applicant[] for employment" who "has opposed any practice [that is] made an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-3(a). "Retaliation claims under Title VII . . . are . . . analyzed . . . pursuant to the *McDonnell Douglas* burden-shifting evidentiary framework." *Littlejohn v. City of N.Y.*, 795 F.3d 297, 315 (2d Cir. 2015). Under that framework, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination or retaliation. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). The burden of proof at this stage is "'*de minimis*,'" *Moccio v. Cornell Univ.*, 889 F. Supp. 2d 539, 582 (S.D.N.Y. 2012) (quoting *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010)), "but it is not non-existent," *Pleener v. N.Y.C. Bd. of Educ.*, No. 05-CV-973, 2007 U.S. Dist. LEXIS 103165, 2007 WL 2907343, at *11 (E.D.N.Y. Oct. 4, 2007) (cleaned up), *aff'd*, 311 F. App'x 479 (2d Cir. 2009) (summary order).

To establish a *prima facie* case of retaliation, the plaintiff must show: (1) participation in a protected activity, (2) that the defendant was aware of that activity,

(3) that the plaintiff suffered a materially adverse action, and (4) a causal connection between the protected activity and that adverse action. *Agosto v. N.Y.C. Dep't of Educ.*, 982 F.3d 86, 104 (2d Cir. 2020) (cleaned up).

As to the first element, the plaintiff "need not establish that the conduct she opposed was actually a violation of Title VII, but only that she possessed a good faith, reasonable belief that the underlying employment practice was unlawful under that statute." *Summa v. Hofstra Univ.*, 708 F.3d 115, 126 (2d Cir. 2013) (cleaned up).

"As to the second element of the *prima facie* case, implicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII." *Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C.*, 716 F.3d 10, 15 (2d Cir. 2013) (*per curiam*) (cleaned up). That is, there must be something in the protests "that could reasonably have led [the employer] to understand that [unlawful discrimination] was the nature of her objections." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998).

As to the third element of the retaliation test, a materially adverse action is one that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (cleaned up); *see Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 720 (2d Cir. 2010). A failure

to hire is an adverse employment action. *See Hughes v. Twenty-First Century Fox, Inc.*, 304 F. Supp. 3d 429, 445 (S.D.N.Y. 2018).

Finally, "Title VII retaliation claims must be proved according to traditional principles of but-for causation." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013). "This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.* A plaintiff can establish the requisite causal connection in one of two ways: "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *McDowell v. North Shore-Long Island Jewish Health Sys.*, 839 F. Supp. 2d 562, 2012 WL 850607, at *8 (E.D.N.Y. Mar. 13, 2012) (cleaned up).

Once the plaintiff makes a *prima facie* showing of discrimination or retaliation, a "rebuttable presumption of retaliation arises" and the burden of production shifts to the defendant "to articulate a legitimate, non-discriminatory [or non-retaliatory] reason" for the adverse employment action. *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000); *see Ya-Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59, 70 (2d Cir. 2015) (*prima facie* "showing creates a presumption of retaliation, which the defendant may rebut by articulating a legitimate, non-retaliatory reason for the adverse employment action.") (cleaned up). "The

defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination [or retaliation] was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (emphasis in original) (cleaned up).

If the defendant proffers a legitimate, non-discriminatory or non-retaliatory reason for the challenged employment action, the presumption drops away, and the plaintiff must prove that the reason offered by the defendant was not its true reason but rather a pretext for unlawful discrimination or retaliation. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *Ya-Chen Chen*, 805 F.3d at 70. The plaintiff must produce "sufficient evidence to support a rational finding that the legitimate, non-discriminatory [or non-retaliatory] reasons proffered by the defendant were false, and that more likely than not discrimination [or retaliation] was the real reason for the employment action." *Weinstock*, 224 F.3d at 42 (cleaned up). "To get to the jury, it is not enough to disbelieve the employer; the factfinder must also believe the plaintiff's explanation of intentional discrimination [or retaliation]." *Id.* (cleaned up). "In short, the question becomes whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination [or retaliation]." *Id.* The ultimate burden of persuasion remains with the plaintiff to show that the defendant intentionally discriminated or retaliated. *See Reeves*, 530 U.S. at 143.

B. Analysis

In ruling on Defendants' motion to dismiss, I held that the only plausible allegation underlying Plaintiff's retaliation claim was that the failure to hire Plaintiff in August 2019 could have been in retaliation for his raising concerns and objections to the ERDs earlier in August 2019. (ECF No. 89-66 at 24:23-25, 33:1-3.) I also mentioned that Colavito had told Plaintiff she would contact him if a position opened up, and she did not. (*Id.* at 24:8-11.) In their summary judgment papers, the parties have gone well beyond these allegations, but I am going to address only the claims that survived the motion to dismiss.

1. Failure to Hire

a. Summer 2019 speech

As to Defendants' alleged failure to hire Plaintiff in retaliation for his July and August 2019 objections to the ERDs, I found at the motion to dismiss stage that Plaintiff's questions regarding the religious clause were plausibly protected activity, and had a close temporal relationship to Plaintiff's rejection. (*Id.* at 20:13-21:9, 23:21-24:25.) But with the benefit of the transcripts of Plaintiff's conversations regarding the religious clause, I conclude that his statements in July and August 2019 are not protected activity. In Plaintiff's conversations with Ruggiero and Bartell, he did not raise any objection to or protest the ERDs; he simply asked if the jobs at issue required adherence to the precepts of the Catholic church. (ECF No. 89-35 at 7 (Plaintiff stating to Ruggiero,

"somebody told me if that if you get a job at uh that hospital or within that Bon Secours uh core, you know, you have to, like, follow the directives of the Catholic Church as part of employment or something like that"); (ECF No. 89-37 at 4 (Plaintiff stating to Ruggiero, "Someone told me that as a condition of employment the contract requires all doctors to abide by the religious directives of the Catholic church"); (ECF No. 89-46 at 2 (Plaintiff asking Dr. Bartell whether Good Samaritan or Bon Secours "have like a religious affiliation with the Catholic Church, that one part of and a condition of employment is that you have to accept the directives of the Roman Catholic Church").) Plaintiff did not say that such a requirement would be a dealbreaker for him, let alone protest that it would be an unlawful employment practice if the answer were yes.[10] Asking is not the same as protesting, so the employer could not have understood Plaintiff's inquiries as the latter. *See Chacko v. DynAir Servs., Inc.*, 272 F. App'x 111, 113 (2d Cir. 2008) (summary order) (no protected activity where "[t]he record reflects that although [plaintiff] asked about the promotion policy, he did not suggest that he was complaining about discrimination"); *Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 264 (S.D.N.Y. 2000) (no protected activity where employee asked if there was a policy but never said she believed it was discriminatory or linked it to her protected status). Indeed, both Ruggiero and Bartell understood Plaintiff's

10. Even if Plaintiff had voiced actual opposition to the ERDs in August 2019, as he had earlier, he could not have had a good-faith reasonable belief that he was opposing a practice prohibited by Title VII, for the reasons discussed below in connection with his 2017 speech.

question to be whether Defendants were equal opportunity employers—in other words, whether there was a religious qualification for the jobs. (ECF No. 89-35 at 7; ECF No. 89-46 at 2.) *See Colon v. New York City Hous. Auth.*, No. 16-CV-4540, 2021 U.S. Dist. LEXIS 100601, 2021 WL 2159758, at *12 (S.D.N.Y. May 26, 2021) ("[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by the statute.") (cleaned up).

Even if Plaintiff's August 2019 inquiries were protected activity, and causation could be inferred by temporal proximity to get Plaintiff past the *prima facie* stage, and even if there were a question of fact as to whether Defendants' proffered legitimate, nondiscriminatory reasons were pretextual, a reasonable jury could not ultimately find that Plaintiff would have been hired at WMC but for his inquiries because he was not qualified for the position, in that he could not have been credentialed. Defendants have shown, and Plaintiff has not disputed, that Plaintiff would not have been able to obtain clinical privileges and a medical staff appointment, as is required for every candidate hired at WMC. (Ds' 56.1 Stmt. ¶ 7.) The credentialing and privileging process that the WMCHealth Medical Staff Office conducts involves the collection of information about Plaintiff's background, including past employment verifications, public profiles, medical malpractice, legal information and case logs. (*Id.* ¶ 8.) That process would have revealed Plaintiff's lawsuits against Montefiore and ORMC, and

the facts alleged in his underlying Amended Complaints, including that he was fired from ORMC, (ECF No. 89-17 ¶ 47), lost privileges at Montefiore, (ECF No. 89-27 ¶ 67), was accused of misconduct, (*id.* ¶¶ 44, 49; ECF No. 89-17 ¶¶ 42-43), recorded his colleagues and supervisors, (ECF No. 89-27 ¶¶ 20, 67, 70; ECF No. 89-17 ¶¶ 43, 50), made repeated allegations about his colleagues to supervisors and state regulatory agencies, (ECF No. 89-27 ¶¶ 17, 28, 31-39, 41-42, 66-70; ECF No. 89-17 ¶¶ 21, 24-26, 56), and had been deemed a security risk at Montefiore, (ECF No. 89-27 ¶ 73). These allegations would constitute significant "red flags" that would have prevented Plaintiff from being credentialed. (Ds' 56.1 Stmt. ¶ 11 ("If the 'red flags' were significant, such as a questionable work history or lawsuits against prior employers, the person would not be credentialed, *i.e.*, given clinical privileges to work at a WMCHealth facility, and therefore could not be employed."); ECF No. 92 ¶ 9 ("Red flags include lawsuits against prior employers, lawsuits involving patients, misrepresentations made by the applicant during the employment application process, or questionable quality of care information.").)

Plaintiff does not dispute the above facts, but argues that there can be more than one butfor cause of an event. (ECF No. 85 ("P's Opp.") at 10.) That may be so, but a Title VII retaliation plaintiff must still show "that the unlawful retaliation"—here, the failure to hire—"would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Nassar*, 570 U.S. at 360; *see Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 846 (2d Cir. 2013) ("'[B]ut-for' causation does not require proof that

retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive.").[11] Plaintiff cannot show that he would not have been rejected for the job—in other words, that he would have been hired—in the absence of retaliatory motive, because his inability to get credentialed would have prevented his hiring.[12] *See Saji*, 724 F. App'x at 15-16 (affirming grant of summary judgment on retaliatory failure-to-hire claim when plaintiff was not qualified for the open position); *Menoken v. Weichert*, No. 16-CV-83, 2019 U.S. Dist. LEXIS 157497, 2019 WL 4418757, at *10 (D.D.C. Sept. 16, 2019) (granting

11. *Zann Kwan* noted in a footnote that "[t]he determination of whether retaliation was a 'but-for' cause, rather than just a motivating factor, is particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact." 737 F.3d at 846 n.5. That may usually be the case—where, for example, the plaintiff claims retaliation, which the defendant disputes, and the defendant claims poor performance, which the plaintiff disputes—and the question is the extent to which each factor existed, and if so, the extent to which it contributed to the decision. But here it is undisputed that the factor to which Defendants point—Plaintiff's disqualifying work history—would have prevented him from meeting a precondition of employment. The Second Circuit has recognized that even where the employer's intent is at issue, "to defeat a motion for summary judgment, [a plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts." *Saji v. Nassau Univ. Med. Ctr.*, 724 F. App'x 11, 15 (2d Cir. 2018) (summary order) (cleaned up).

12. In other words, if Defendants show that Plaintiff would not have been hired for reason A (because he could not be credentialed), then Plaintiff cannot show that he would have been hired but for reason B (retaliatory animus).

summary judgment on retaliatory failure-to-hire claim in part because Plaintiff would not have been hired because of her low examination score), *aff'd sub nom. Menoken v. Cabaniss*, No. 19-5319, 2020 U.S. App. LEXIS 8031, 2020 WL 1487743 (D.C. Cir. Mar. 12, 2020); *cf. Crespo v. Harvard Cleaning Servs.*, No. 13-CV-6934, 2014 U.S. Dist. LEXIS 157812, 2014 WL 5801606, at *6 (S.D.N.Y. Nov. 7, 2014) (collecting cases for proposition that passing background check is legitimate job qualification). Even under the more plaintiff-friendly motivating-factor standard applied in discrimination claims, causation cannot be shown where the employee would not have qualified for the job in any event. *See E.E.O.C. v. Con-Way Freight, Inc.*, 622 F.3d 933, 936 (8th Cir. 2010) ("Because [applicant] would not have been hired regardless of the discriminatory animus, the plaintiffs cannot establish a causal link between the alleged discriminatory animus and the decision not to hire her."); *Robair v. CHI St. Luke's Sugarland*, No. 16-CV-776, 2017 U.S. Dist. LEXIS 100156, 2017 WL 2805190, at *11 (S.D. Tex. June 12, 2017) ("[T]estimony that a successful background check was a requirement for employment was uncontroverted. . . . [I]n the case of a failure to hire, an employee should not be placed in a better position than he would have been but for the discrimination . . . ."), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 99915, 2017 WL 2805000 (S.D. Tex. June 28, 2017).

Moreover, Plaintiff's argument regarding Defendants' hiring policy misconstrues the evidence. Plaintiff contends that Defendants have admitted that they do not hire candidates that have sued prior employers and that this policy demonstrates their retaliatory animus. (P's Opp. at

10; *see* P's 56.1 Resp. ¶ 11.)[13] But reviewing the evidence in context demonstrates that it is not merely the fact of the prior lawsuit but the information contained in the lawsuit that Defendants review during the credentialing and privileging process. (ECF No. 92 ¶ 5 (Medical Staff Office reviews entire work history and hospital affiliations, personal references, case logs and malpractice history); *id.* ¶ 6 (credentialing specialist collects public profiles and lawsuit information via Google or media searches and inquiry into National Practitioner Data Bank, which maintains records of privilege revocations and events that may reflect on professional competence or conduct); *id.* ¶ 7 (credentialing specialist seeks verification of employment, appointments and reasons why applicant left, and follows up if reasons are not provided).) This inquiry would have, in Plaintiff's case, revealed the allegations against Plaintiff that he recounted in his Montefiore and ORMC lawsuits. (*Id.* ¶ 11.) It is these allegations that would have prevented Plaintiff from being credentialed. (*See id.* ¶ 12 ("Indeed, during my tenure, a physician applicant has never applied with as negative a past employment history as the history summarized above. Based on my thirty-three years of experience vetting physicians, I would firmly recommend against credentialing or offering Medical Staff membership to Plaintiff because there is a clear professional risk to WMCHealth. Based on that same experience, I am sure my recommendation would be followed, and Plaintiff would not be credentialed and therefore could not meet the contractual conditions of employment.").)

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13. Defense counsel's wording of paragraph 11 of Ds' 56.1 Stmt. did not help matters, as noted in footnote 6 above.

Because the temporally proximate speech was not protected activity, and because no rational jury could find that Plaintiff would have been hired at WMC but for retaliatory motive, the retaliation claim based on Plaintiff's statements during the summer of 2019 fails.

b. 2017 speech

The only activity identified in the AC that could be interpreted as Plaintiff protesting an allegedly discriminatory practice was Plaintiff's objection to the ERDs in 2017, (AC ¶¶ 19, 23), but that was too far removed temporally from any of the surviving adverse actions to plausibly allege causation, *Cobian v. New York City*, No. 99-CV-10533, 2000 U.S. Dist. LEXIS 17479, 2000 WL 1782744, at *18 (S.D.N.Y. Dec. 6, 2000) ("Standing alone, the lapse of more than four months . . . is insufficient evidence of a causal connection."), *aff'd*, 23 F. App'x 82 (2d Cir 2001) (summary order).[14] And upon reflection, I find that Plaintiff's objection to the ERDs cannot be a protected activity because it was not objectively reasonable for Plaintiff to think he was protesting an employment practice made illegal by Title VII. To establish engagement in a protected activity, a plaintiff "need not establish that the conduct she opposed was actually a violation of Title VII, but only that she possessed a good faith, reasonable belief that the underlying employment practice was unlawful under that statute." *Galdieri-Ambrosini*, 136 F.3d at 292 (cleaned up). "The

14. The same would be true of Plaintiff's statements to Colavito in March 2019.

objective reasonableness . . . is to be evaluated from the perspective of a reasonable similarly situated person." *Kelly*, 716 F.3d at 17. I explained at the motion to dismiss stage why Plaintiff's reading of the employment contracts was not reasonable:

> Plaintiff has not described how his agreement to adhere to the ERDs in the conduct of his profession would conflict with his adhering to his personal religious beliefs, nor has he identified any tenet of his religion that prohibits him from agreeing to adhere to the ERDs in the conduct of his professional life. He is able to attempt to fit the square peg of professional conduct into the round hole of religious belief only by characterizing the ERDs or the Agreements as a statement of personal adherence to Catholicism. But that is not a reasonable reading of the documents, which quite plainly are statements of how the signer will conduct his medical practice while employed by the hospital, not a statement of religious belief.
>
> The Professional Services Agreement simply requires that physicians provide services in accordance with the ERDs, and the Per Diem Agreement likewise says, "Your employment is subject to" the ERDs. Nothing in the Agreements requires Plaintiff to practice, agree with, or profess a belief in Catholicism or its tenets.

Put another way, all Plaintiff was required to do was say that he agreed to comply with ERDs at work; he was not required to say he personally agreed with the ERDs or the views of the Roman Catholic Church. He was not, as he argues, asked to make a "formal statement in writing . . . that he would formally recognize as well as agree to be bound to the Religious Directives of the Roman Catholic Church," . . . or "attest to 'the principles of . . . the Catholic faith," . . . he was asked to agree to be bound to particular conduct in working at Defendants' facilities. He remained entirely free to disagree with and disregard the directives of the Church in his personal life.

He claims he was required to sign a contract that "in and of itself requir[ed] him to state something he found religiously objectionable," . . . but all it required him to say is that he would provide services in accordance with the ERDs—which he says . . . did not conflict with his beliefs and which he would have been perfectly willing to do. To the extent he believed the Agreements required him to state he would be bound by Church doctrine in general, that is an implausible reading.

For example, if Plaintiff were an observant Muslim or Jew and said he refused to sign the Agreement because it required him to eat pork and therefore violated his bona fide religious

> belief against consumption of pork, he would not have a Title VII claim unless the contract plausibly required him to eat pork. His refusal to eat pork would be a bona fide religious belief but his belief that the contract required him to eat pork would not be. Likewise here, Plaintiff's belief that signing the contract would amount to adoption of Catholic dogma is an idiosyncratic, subjective misreading of the contract, which is secular conduct, not a bona fide religious belief.

(ECF No. 89-66 at 14:1-16:4 (second alteration in original) (emphasis added).) Because there was nothing in the ERDs or the contract, read objectively reasonably, that conflicted with Plaintiff's (or anyone's) religious beliefs, a reasonable person in Plaintiff's position could not regard them as an unlawful employment practice. Thus, even if Plaintiff's protest against them was not too remote, his protest would not constitute a protected activity because it was based on an objectively unreasonable misreading of the employment contracts.[15]

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15. The same is true of Plaintiff's email communications with Colavito in March and June 2019, the latter of which is in any event unmentioned in the AC. The unreasonableness of Plaintiff's interpretation is manifest. He wrote, "If a child comes to the ER distraught due to being raped by a Catholic priest, do you expect the doctor to call the Justice Center or follow the '[ERDs]' to cover up the crimes? As an Orthodox Christian do I have to become Catholic as a condition of employment?," (ECF No. 89-18 at 2-3), and, "I was not applying for a job as a priest (religious position), but as a doctor (secular position). The hospital cannot invoke the First Amendment defense. Asking a doctor to accept religious directives as a condition of employment, is effectively asking that doctor to change his existing

Even if Plaintiff's objection to the ERDs in 2017, or March or June 2019, was protected activity, there is no evidence of retaliatory animus in the decision not to hire Plaintiff in August 2019. There is no evidence that the decisionmakers, Bartell and Ferrando, knew of those objections, let alone wanted to retaliate against him for them. Plaintiff's only argument on this point is that Bartell knew that Ruggiero canceled and then rescheduled his interview, and that Bartell received an email from Ruggiero the morning of the originally scheduled interview, the contents of which were redacted in discovery. (P's 56.1 Stmt. ¶ 77; *see* ECF No. 89-41; ECF No. 89-26 at 8.) To conclude that those emails informed Bartell of Plaintiff's previous protests would be sheer speculation, as the content of the emails is unknown to Plaintiff and would never be put before a jury. To allow Plaintiff to argue to a jury about the possible content of the emails would put Defendants in the impermissible position of having to waive privilege or risk a verdict based on speculation. The one thing that is known is that whatever was in the emails did not derail Bartell's interest, as his response, once told that he could go forward with the interview, was that he would like to do so as soon as possible. It is obvious that whatever was communicated

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religion," (*id.* at 2). There is nothing in the ERDs remotely requiring the covering up of crimes or conversion to Catholicism, (ECF No. 89-2), and thus those objections are objectively unreasonable and cannot constitute protected activity. Indeed, the ERDs direct all health care professionals employed by Bon Secours to "report cases of abuse to the proper authorities in accordance with local statutes." (*Id.* at 21.)

to Bartell did not provoke any hostility toward Plaintiff,[16] and there is not a shred of evidence that Bartell knew of Plaintiff's previous objections to the ERDs or of his communications with Colavito—who was not involved in hiring for WMC and had nothing to do with Plaintiff's August application—earlier that year.[17]

Plaintiff has therefore failed to raise a triable issue of fact as to WMC's decision not to hire him in August 2019.

2. Failure to Follow Up

As to Colavito not reaching out to Plaintiff regarding an open position at Bon Secours in the summer of 2019, I find that this does not rise to the level of an adverse action. Colavito offered to keep an eye out for open positions as a courtesy, but such notification was not something to which Plaintiff was entitled, and withholding that favor does not amount to an adverse action. *See Burlington N.*, 548 U.S. at 68 (action that might well have dissuaded reasonable worker from making or supporting charge of discrimination does not include "petty slights, minor

16. Having reviewed the emails *in camera*, I can assure Plaintiff that they do not contain any mention of Plaintiff's alleged protected activity.

17. The AC does not suggest that Plaintiff was retaliated against for filing his EEOC complaint against Good Samaritan in June 2019, but even if it did, that is likely not protected activity for the same reasons as Plaintiff's request for accommodation discussed above. And even if it were protected activity, there is again no indication that the decisionmakers, Bartell and Ferrando, were aware of it at the time of the adverse action.

annoyances, and simple lack of good manners"); *cf. Pierre v. Napolitano*, 958 F. Supp. 2d 461, 483-84 (S.D.N.Y. 2013) (snubbing by supervisor too trivial to constitute adverse action for retaliation claim). Additionally, Plaintiff was aware of the open position, (ECF No. 89-46), and there is no evidence that he actually applied, *see Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998) ("We read *McDonnell Douglas* and *Burdine* generally to require a plaintiff to allege that she or he applied for a specific position or positions and was rejected therefrom . . . ."); *Johnson v. U.S. Dep't of Homeland Sec.*, No. 09-CV-975, 2010 U.S. Dist. LEXIS 69251, 2010 WL 2773541, at *4 (N.D.N.Y. July 12, 2010) ("Plaintiff must show that he applied for a specific vacant position for which he was qualified, and that he did not get the job.'") (cleaned up).

Further, even if Plaintiff could establish a *prima facie* case based on Colavito's failure to follow up, Plaintiff cannot show that he would have been hired but for Defendants' retaliatory intent, because by his own account he never would have agreed to the ERDs, (D's 56.1 Stmt. ¶ 98), which were mandatory, (*id.* ¶ 3). Accordingly, he would never have been hired at Bon Secours or Good Samaritan. Plaintiff makes only two arguments to the contrary. First, he contends that whether he would have signed the ERDs is irrelevant to whether Defendants were motivated by retaliatory intent. (P's Opp. at 10.) That is true, but whether Plaintiff would have signed is relevant to whether any such intent was a but-for cause of his not being hired at Bon Secours, and precludes such a finding. He also alleges that he "may have been able to come to some resolution that would have allowed him to work there

despite the ERDs." (*Id.*) But the evidence is undisputed that all physicians were required to sign them to work at Bon Secours hospitals, (D's 56.1 Stmt. ¶ 3), and indeed, Plaintiff acknowledged as much in the AC, when he alleged that Bon Secours would not modify its standard contract with respect to the ERDs or even engage in a dialogue about doing so, (AC ¶¶ 21-22).

Thus, there is no fact dispute requiring trial as to Colavito not reaching out to Plaintiff about the open position.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED. The Clerk of Court is respectfully directed to terminate the pending motion, (ECF No. 84), enter judgment for Defendants, and close the case.

SO ORDERED.

Dated: January 18, 2023
White Plains, New York

/s/ Cathy Seibel
CATHY SEIBEL, U.S.D.J.

APPENDIX D — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MARCH 23, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 CV 7761 (CS)

DR. DAN GIURCA,

Plaintiff,

v.

BON SECOURS CHARITY HEALTH SYSTEM, WESTCHESTER MEDICAL CENTER HEALTH NETWORK, GOOD SAMARITAN HOSPITAL,

Defendants.

U.S. Courthouse
White Plains, N.Y.
March 23, 2021
10:00 a.m.

Before: HON. CATHY SEIBEL,
United States District Judge

Sue Ghorayeb, R.P.R., C.S.R.
Official Court Reporter

Appendix D

[2] THE COURT: Good morning, Walter.

THE CLERK: Good morning, Judge. Judge, this matter is Giurca v. Bon Secours. We have on the line the Plaintiff, Dr. Giurca. We have Plaintiff's counsel, Mr. Joseph Aron on, and we have on representing the Defendants Mr. Michael Keane and Ms. Gillian Barkins.

THE COURT: All right. I'm going to probably be doing most of the talking, but let me remind counsel that if they speak, the first word out of your mouth should be your last name. Please do not say, "this is Joseph Aron for Plaintiff," just say "Aron." We have a court reporter and she needs to know right upfront who is speaking. If you forget to say your last name first, you're going to get interrupted, which, of course, we don't want. So, please, whenever you open your mouth, make sure you say your last name first. And that goes even if I put a question directly to you or you think it's otherwise clear from the context who is speaking. Just every time you open your mouth say your last name first, and you'll be doing the court reporter and me a big favor.

I have the Defendants' motion to dismiss. Is there anything either side wants to add that's not covered by the papers?

MR. KEANE: Nothing for Defendants.

MR. ARON: We'll just rest on our papers as well, Your Honor. Thank you.

Appendix D

[3] THE COURT: All right. Then let me tell you where I come out.

It's a motion to dismiss of Defendants Good Samaritan Hospital, which I may from time to time call GSH, the Bon Secours Charity Health System, which I may from time to time call Bon Secours, and Westchester Medical Center Health Network, which Plaintiff abbreviates two different ways, WMCHN and WMCHC. Those terms seem to be used interchangeably. I'm probably going to call it Westchester Medical.

For purposes of the motion, I accept as true the facts, although not the conclusions, set forth in Plaintiff 's Amended Complaint, which is docket entry 21, which I'm going to call the AC.

And the facts in summary are the following:

Plaintiff Dr. Giurca – am I pronouncing that right, by the way?

DR. GIURCA: It's Giurca.

THE COURT: Giurca.

DR. GIURCA: Yes.

THE COURT: Okay. Plaintiff Dr. Giurca is a board-certified psychiatrist and neurologist and is of the Eastern Orthodox faith. In October 2016, he sought employment as a psychiatrist within Bon Secours, which is a catholic

health system. It includes the Good Samaritan Hospital in Suffern [4] and Bon Secours Community Hospital, which I may abbreviate BSCH, in Port Jervis. Both Good Samaritan Hospital and Bon Secours Community Hospital are catholic-affiliated health care providers.

On October 15th, 2016, Plaintiff submitted his CV to Naim Korca, the Administrator of Behavioral Health Services at Bon Secours. Two days later, he spoke with Bon Secours' Medical Director and subsequently received an offer of a full-time position at BSCH.

Korca sent Plaintiff the terms of his offer in November 2016, but Plaintiff declined the offer and instead accepted a position at Orange Regional Medical Center. While declining his offer at BSCH, Plaintiff asked to be kept in mind for moonlighting openings for evenings and weekends at Good Samaritan.

In December 2016, the Coordinator for Medical staff Services of BSCH sent Plaintiff a medical staff pre-application, and in February 2017, Korca sent Plaintiff an employment agreement for moonlighting on nights and weekends. I'm going to call that agreement the Professional Services Agreement. It is attached to the original Complaint, which is docket entry 1, as Exhibit C.

Plaintiff incorporates by reference in the AC the exhibits that were attached to his original Complaint. See AC Paragraph 29. On this motion to dismiss, I can properly [5] consider "documents attached to the complaint or incorporated in it by reference." See Weiss

v. Incorporated Village of Sag Harbor, 762 F.Supp.2d 560, at 567 (Eastern District 2011).

While reviewing the Professional Services Agreement, Plaintiff come across language that "he believed to be at odds with his own religious beliefs." That's from the AC Paragraph 17.

Plaintiff alleges that "he believed that he was religiously prohibited from subscribing" to that Professional Services Agreement." That's Paragraph 18.

The Professional Services Agreement contained language stating as follows:

"Physician agrees to ensure that the Services shall be provided in accordance with: (i) the Ethical and Religious Directives for Catholic Health Care Services promulgated by the United States Conference of Catholic Bishops, as interpreted by the Sisters of Bon Secours" and in accordance with several other secular sources governing the provision of medical services. See Paragraph 29, and the original Complaint, Exhibit C, Paragraph 1.2.

I will refer to the Ethical and Religious Directives for Catholic Health Services, as described in that paragraph, as the ERDs, and they are found at docket entry 33-2.

[6] On February 27th, 2017, Plaintiff informed Korca by email that he found the language in the Professional Services Agreement to be "very unusual" and that he had an issue "agreeing to the policies of a religious organization." That's Paragraph 19.

The next day Korca replied, "Bon Secours is a faith-based organization created by the Sisters of Bon Secours and the values of the organization are in line with catholic Church values of serving the poor and most vulnerable categories of society. The values do not impede with your practice as psychiatrist and are conform to the laws of New York and U.S." That's Paragraph 20.

Plaintiff contends that this exchange amounts to a clear communication of his need for a religious accommodation and Bon Secours' refusal to address his concern, and that, as a result, he asked about "getting a position where signing such an agreement was not required." Paragraphs 21 to 22.

The Plaintiff informed Korca that "per diem work without a contract would be preferable," because "signing a contract recognizing the Catholic Church can be problematic for some people." That's Paragraph 23. Plaintiff added, "I have the right to practice my own religion. . . ." Also Paragraph 23.

Korca responded stating, "I will work to get you as per diem MD." That's Paragraph 25.

[7] A few days later, the Coordinator for Medical staff Services of BSCH asked Plaintiff if he would be continuing the application process. Plaintiff replied, "Yes, there were some issues with the contract but I will be per diem. She is changing it," referring to Korca. That's Paragraph 26. Plaintiff then submitted his application, as instructed, and on March 22nd, 2017, Korca sent Plaintiff a per diem

contract, which I'm going to call the Per Diem Agreement, and together with the Professional Services Agreement, I'm going to refer to them as the Agreements.

Although Plaintiff found the language in the Per Diem Agreement to be less restrictive than that in the Professional Services Agreement, see AC Paragraphs 28 and 29, he still regarded it as "religiously objectionable." Paragraph 27.

It provided, in relevant part, that: "Your employment is subject to" various secular rules and policies as well as the ERDs. See AC Paragraph 28 and Complaint Exhibit B, Paragraph 4.

Plaintiff did not sign the Per Diem Agreement and did not proceed with his application.

Over a year later, Plaintiff contacted Good Samaritan Hospital for a position. He submitted his résumé in November 2018, expressing interest in an open emergency room and medical floor psychiatry consultation-liaison [8] position, and again, in December 2018, offering to work full-time or part-time.

He sent his résumé a third time in February 2019, again, for a position in emergency psychiatry and consultation-liaison.

Eventually, Plaintiff spoke with Tera Colavito, who, while speaking with Plaintiff, referenced Plaintiff's "issue with the contractual terms relating to adherence to the

Directives of the Roman Catholic Church," told him that GSH was still a Catholic institution, and advised that, in any event, the position for which he was applying had already been filled. AC Paragraph 38.

Later that day, Plaintiff emailed Colavito asking if he was not being considered for the position because of his issue with the contractual clause about the Directives of the Catholic Church.

Colavito replied, "I asked about the clause because it is my understanding that you backed out previously because you did not want to work for a Catholic Facility. If that information is inaccurate then I stand corrected. Our affiliation has not changed so I just didn't want to pursue anything further if that remained a possible concern for you. I will review further and be in touch." That's AC Paragraph 39.

On March 7th, 2019, Plaintiff explained to Colavito [9] that the ERDs "were problematic for him to subscribe to, not that he did not want to work for a Catholic facility." Paragraph 49. Plaintiff then asked for a copy of the ERDs to see if there was "some work around" whereby he would not have to subscribe to the ERDs directly, but Defendants refused to disclose the ERDs.

On the next day, on March 8, Plaintiff called Colavito, who informed him that GSH did not have any open psychiatry positions.

Appendix D

On August 6th, 2019, Plaintiff learned from a doctor at Westchester Medical that there was an available psychiatrist position at GSH.

Plaintiff alleges that in 2015 or '16, Westchester Medical had purchased GSH, BSCH, and Saint Anthony Hospital such that all facilities fell under the umbrella of Westchester Medical. Defendants argue in their brief that Westchester Medical "did not 'purchase' these hospitals, but the erroneous statement is not relevant for purposes of the motion." That's in Defendants' brief, which is docket entry 34, at Page 2 note 3.

Plaintiff asked the doctor from Westchester Medical about the employment clause that required adherence to the ERDs and was told that "Westchester Medical is an equal opportunity employer, and that the Bon Secours group of hospitals . . . were purchased five years ago, so the clause [10] requiring adherence to the Roman Catholic Church should have been removed." That's in Paragraph 53.

Plaintiff followed up with Westchester Medical's Human Resources department by email on August 9th, noting that he had not gotten any details about the position at GSH and asking whether the recruiter "had a chance to clarify the religious clause." Paragraph 54.

Plaintiff did not receive a response, so he followed up again on August 16th and he got a response on August 20th. He was told, "Thank you for your interest in positions within the WMC Health Network. After

further consideration, the department has decided not to proceed with your candidacy at this time. We appreciate your interest in the position, as well as the time and effort that went into the process, and we wish you every possible success in your future professional career." That's Paragraph 54.

Turning now to the procedural history.

Plaintiff filed the original Complaint on August 19th, 2019. On December 4th, I granted the Defendants' request for a pre-motion conference to discuss their proposed motion to dismiss under Rule 12(b)(6).

At the conference on January 10th, I gave Plaintiff leave to amend and Plaintiff filed the AC. on February 10th, 2020. He brings this action alleging violations of Title VII for religious discrimination, failure to accommodate, and [11] retaliation, as well as state law claims for intentional and negligent infliction of emotional distress, which I'm going to call IIED and NIED.

Plaintiff seeks both monetary damages and injunctive relief that would require Defendants to modify their employment Agreements and remove Plaintiff 's name from an alleged blacklist.

Defendants move to dismiss under Rule 12(b)(6). I'm not going to take the time to detail the standards that govern Rule 12(b)(6) motions. We are all familiar with Ashcroft against Iqbal, 556 U.S. 662, at 678, and Bell Atlantic v. Twombly, 550 U.S. 544, at 570. The touchstone

of an adequate complaint under those cases is plausibility based on the factual allegations, but conclusions are not entitled to the presumption of truth that factual allegations are.

As noted under Weiss, 762 F.Supp.2d at 567, on a motion to dismiss, I'm "entitled to consider the facts alleged in the complaint and documents attached to it or incorporated in it by reference." I can also "consider documents integral to the complaint and relied upon in it; documents in the defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint . . . ," as well as facts of which I may take judicial notice.

Plaintiff alleges that Defendants intentionally [12] discriminated against him "by failing to process his employment applications" because of his religion and that, more specifically, Defendants' conduct "was due to Defendants' requirement that Plaintiff adhere to" the ERDs, which they declined to disclose. See Paragraphs 58 and 59.

Defendants counter that Plaintiff's claim is based on "the faulty premise" that Defendants' requirement of "adherence to the ERDs interfered with Plaintiff's right to believe in his chosen religion." That's Defendants' memorandum of law at Page 9. Defendants argue that the ERDs "are a code of conduct that regulate actions, such as the ability to provide abortion or sterilization-related services at a Catholic facility, not personal beliefs." That's their brief at Page 8.

Appendix D

"To defeat a motion to dismiss . . . in a Title VII discrimination case, a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." Vega v. Hempstead, 801 F.3d 72, at 87.

The parties agree – see docket entry 34 at Page 9 and docket entry 35 at Page 3·- that in the context of an employer's alleged failure or refusal to hire on religious grounds, this means that Plaintiff must plausibly allege "that: (1) he has a sincere religious belief that conflicted [13] with an employment requirement; (2) he informed his prospective employer of his religious views or practices; and (3) he was not hired because of his inability to comply with the conflicting employment requirement." Shapiro-Gordon v. MCI, 810 F.Supp. 574, at 578 (Southern District 1993); see Zavala v. Dovedale, 2006 Westlaw 8439562, at Page 3 (Eastern District March 11, 2006).

At the motion to dismiss stage, a plaintiff "need only provide plausible support to a minimal inference of discriminatory motivation," Vega at 84, but a plaintiff still must meet his burden of showing "that the adverse employment decision was motivated at least in part by an impermissible," in other words, "a discriminatory reason." Stratton v. Department for the Aging, 132 F.3d 869, at 878. "A plaintiff can meet that burden through direct evidence of intent to discriminate or by indirectly showing circumstances giving rise to an inference of discrimination." Vega at 87.

Here, I find Plaintiff has not plausibly alleged a religious discrimination claim for two reasons.

First, he does not plausibly allege sufficient, non-conclusory facts suggesting that his sincere religious belief conflicted with an employment requirement. He merely alleges in conclusory fashion that he "believed that he was religiously prohibited from subscribing to" the Agreement. That's Paragraph 18.

[14] Plaintiff has not described how his agreement to adhere to the ERDs in the conduct of his profession would conflict with his adhering to his personal religious beliefs, nor has he identified any tenet of his religion that prohibits him from agreeing to adhere to the ERDs in the conduct of his professional life. He is able to attempt to fit the square peg of professional conduct into the round hole of religious belief only by characterizing the ERDs or the Agreements as a statement of personal adherence to Catholicism. But that is not a reasonable reading of the documents, which quite plainly are statements of how the signer will conduct his medical practice while employed by the hospital, not a statement of religious belief.

The Professional Services Agreement simply requires that physicians provide services in accordance with the ERDs, and the Per Diem Agreement likewise says, that "Your employment is subject to" the ERDs. Nothing in the Agreements requires Plaintiff to practice, agree with, or profess a belief in Catholicism or its tenets.

Put another way, all Plaintiff was required to do was to say that he agreed to comply with the ERDs at work; he was not required to say he personally agreed with the ERDs or the views of the Roman Catholic Church. He was not, as he argues, asked to make a "formal statement in writing . . . that he would formally recognize as well as agree to be bound to [15] the Religious Directives of the Roman catholic Church," that's docket entry 35 at Page 1, or "attest to the principles of . . . the catholic faith," docket entry 35 at Page 6; he was asked to agree to be bound to particular conduct in working at Defendants' facilities. He remained entirely free to disagree with and disregard the directives of the Church in his personal life.

He claims that he was required to sign a contract that "in and of itself required him to state something he found religiously objectionable," that's docket entry 35 at Pages 1 and 2, but all it required him to say is that he would provide services in accordance with the ERDs – which he says, in his brief at Pages 2, 3 and 4, did not conflict with his beliefs and which he would have been perfectly willing to do. To the extent he believed the Agreements required him to state that he would be bound by Church doctrine in general, that is an implausible reading.

For example, if Plaintiff were an observant Muslim or Jew and said he refused to sign the Agreement because it required him to eat pork and therefore it violated his bona fide religious belief against consumption of pork, he would not have a Title VII claim unless the contract plausibly required him to eat pork. His refusal to eat pork would be a bona fide religious belief, but his belief that the contract

required him to eat pork would not be. Likewise here, [16] Plaintiff 's belief that signing the contract would amount to adoption of Catholic dogma is an idiosyncratic, subjective misreading of the contract, which is secular conduct, not a bona fide religious belief.

Plaintiff thus fails to identify any actual conflict between his religious beliefs and the condition that he agree to conform to the ERDs in his workplace conduct.

Second, Plaintiff 's claim also fails because he has not offered the Court any basis to infer that he was not hired for a discriminatory reason. In the absence of direct evidence of discrimination, a plaintiff can raise an inference of discrimination "by showing that the employer subjected him to disparate treatment – that is, treated him less favorably than a similarly situated employee outside his protected group." Ramirez v. Hempstead, 33 F.Supp.3d 158, at 168 (Eastern District 2014). Plaintiff has not raised such an inference here.

And while a plaintiff "need only give plausible support to a minimal inference of discriminatory motivation," Littlejohn v. City of New York, 795 F.3d 297, at 311, "a Title VII plaintiff must still identify at least one comparator to support a minimal inference of discrimination; otherwise the motion to dismiss stage would be too easy to bypass." Goodine v. Suffolk County, 2017 Westlaw 1232504, at Page 4 (Eastern District March 31st, 2017); see Taylor v. [17] City of New York, 207 F.Supp.3d 293, at 305 to 06 (Southern District 2016), where the court granted a motion to dismiss Title VII claims because the complaint was

devoid of facts giving rise to an inference that the plaintiff was not hired on account of her race, color, or national origin, but denied the claim as to sex discrimination because plaintiff identified "multiple male applicants who were hired over the period in which she submitted applications."

Plaintiff has not pleaded any facts suggesting that Defendants treated Plaintiff differently than any other applicant. He has not made even a conclusory allegation suggesting that comparators were better treated. Without such facts, and without any other evidence of discriminatory intent, such as insensitive remarks, Plaintiff has not raised even a minimal inference that Defendants were motivated by discriminatory intent based on Plaintiff's religion.

Even if I were to read into Plaintiff's Complaint that Catholics were treated better than non-Catholics, which is plainly not in the AC, this would still be insufficient because identification of a "generic class of similarly situated . . . employees" that allegedly received better treatment is "insufficient even at the pleading stage." Goodine at 4; see T.P. v. Elmsford, 2012 Westlaw 860367, at Page 6 (Southern District February 27th, 2012), which points out a plaintiff's obligation to allege specific examples of [18] others similarly situated who were treated more favorably." Here, Plaintiff has not done that, and, of course, not hiring someone because they will not sign their employment contract is not a discriminatory reason.

In short, there are no facts from which I could plausibly infer that Plaintiff being of the Eastern Orthodox faith, or even Plaintiff not being catholic, was the reason he was not hired. For these reasons, the religious discrimination claim is dismissed.

Plaintiff also alleges that Defendants failed to accommodate his religious objection to agreeing to adhere to the ERDs. I'm not even sure that this is a different claim than the discrimination claim because to state a claim for a failure to provide a reasonable accommodation under Title VII, the factors are basically the same. The Plaintiff has the burden of showing that he had a bona fide religious belief conflicting with an employment requirement; that he informed the employer of this belief, and that he suffered an adverse action for failure to comply with the conflicting requirement. Handverger v. City of Winooski, 605 Fed. Appendix 68, at 70; see Chavis v. Wal-Mart, 265 F.Supp.3d 391, at 398 (Southern District 2017).

The failure to accommodate claim fails for the same reason as the discrimination claim. That is, Plaintiff has not plausibly alleged that signing the Agreements or adhering [19] to them conflicts with his religion. See Weber v. City of New York, 973 F.Supp.2d 227, at 259 to 60 (Eastern District 2013), which dismissed a religious discrimination claim based on failure to accommodate where plaintiff failed to identify an employment requirement that conflicted with his religious beliefs and practices; Hussein, 134 F.Supp.2d 591, at 597 (Southern District 2001), that says, "Title VII does not require the accommodation of personal preferences, even if wrapped

in religious garb." See also EEOC v. Abercrombie & Fitch, 135 Supreme Court 2028, at 2033, explaining that a plaintiff must have – must "actually require an accommodation of his religious practice."

Because the Complaint fails to meet the first element of a failure to accommodate claim, I need not address the sufficiency of the AC as to the other elements of the claim.

Plaintiff also alleges that Defendants retaliated against him by blacklisting him from future employment. Specifically, he argues that he was blacklisted from future employment at Defendants' various facilities because he had requested a modification of the Agreements. See Paragraph 68.

Title VII prohibits employers from discriminating against any "employee or applicant" who "has opposed any practice ma.de unlawful" under Title VII. Thus, for a [20] retaliation claim to survive a motion to dismiss, the plaintiff must plausibly allege that the defendant discriminated – or took an adverse employment action – against him, and that it did so because he opposed an unlawful employment practice. Vega at 90.

An adverse employment action is defined broadly, Vega at 90, as any action that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern v. White, 548 U.S. 53, at 57. Here, Plaintiff alleges that the Defendants refused to hire or even interview him and that constitutes an adverse employment action.

Additionally, I find that Plaintiff was engaging in opposing what he believed in good faith to be an unlawful employment practice. The challenged practice "need not have actually amounted to a violation of Title VII," but the plaintiff need only have had "a good faith, reasonable belief that the underlying actions of the employer violated the law." McMenemy v. City of Rochester, 241 F.3d 279, at 283.

Here, Plaintiff alleges he opposed religious discrimination by seeking accommodation for his religious objection to signing the Agreements.

Moreover, Title VII protects an employee, or prospective employee, "from any employer, present or future, who retaliates against him because of his prior or ongoing [21] opposition to an unlawful employment practice or participation in Title VII proceedings." McMenemy at 283 to 84. In other words, Plaintiff is protected from retaliation even if the opposition or participation was with a different employer. This is especially "appropriate" where two or more employers have a relationship that might give one an incentive to retaliate for the employee's protected activities against the other. McMenemy at 284 to 85. It is plausible here that Defendants have such a relationship.

Therefore, Plaintiff's retaliation claim turns on the element of causation. For an adverse retaliatory action to be "because of" Plaintiff's protected activity, "the plaintiff must plausibly allege that the retaliation was a 'but-for' cause of the employer's adverse action," and "it is not enough that retaliation was a 'substantial' or

'motivating' factor in the employer's decision." Vega at 90 to 91.

A plaintiff need not plead retaliation was the only cause of the employer's action, "but only that the adverse action would not have occurred in the absence of the retaliatory motive." Vega at 91.

A plaintiff may establish the causal connection indirectly by showing that the protected activity was closely followed by adverse action, or directly by showing evidence of retaliatory animus; see Cosgrove v. Sears Roebuck, 9 F.3d [22] 1033, at 1039; even after University of Texas v. Nassar, 570 U.S. 338, at 360, which established the but-for standard. See Vega at 90 to 91.

While there is no bright line rule as to the outer limits of temporal proximity, the Second Circuit has previously held that five months in some cases is not too long to find a causal relationship. See Gorzynski v. JetBlue, 596 F.3d 93, at 110.

Here, Plaintiff can offer four potential instances of retaliation involving Defendants' failure to hire:

Plaintiff first raised his religious objection to the Professional Services Agreements in February 2017, but Defendants continued to try to employ Plaintiff after that objection. Accordingly, this instance cannot be the basis of a retaliation claim as Defendants' efforts to hire Plaintiff are obviously not an adverse action that would deter a reasonable employee from making a discrimination claim.

Second, Plaintiff did not work for Defendants after receiving and not signing the Per Diem Agreement in March 2017. But the AC does not allege any facts about what happened after he was sent the Per Diem Agreement, let alone sufficient facts from which a plausible inference could arise that his objections to the Agreements were a but-for cause of his not working for Defendants at that time. There is simply no information about what happened after the Agreement was [23] sent, so I can't draw any inference there.

Third, Plaintiff was not hired when he approached the Good Samaritan Hospital between October 2018 and March 2019. By that time, almost two years had passed since Plaintiff raised his objections to the Agreements. The only individual to whom Plaintiff spoke during this period who he alleges was aware of his prior objection to the language in the Agreements was Colavito. See Paragraphs 33 to 39. But he acknowledges that she told him in their first conversation that the position had already been filled, which he does not allege was untrue. See Paragraph 38. Further, their follow-up email exchange raises no inference of retaliation and, if anything, suggests the absence of retaliation.

Accordingly, I find that the distance in time between Plaintiff 's prior complaints and Defendants' actions in this instance is too great to sustain a plausible inference of retaliation under Second Circuit precedent, see Vega at 90 to 91, and that nothing else about Plaintiff 's interactions with Defendants' employees in this period raises such an inference.

Finally, I turn to August 2019, when Plaintiff learned – from a doctor at Westchester Medical – that there was an available position at Good. Samaritan. In response, Plaintiff reached out to the recruiter, asking about the opening and whether she had been able to clarify the [24] religious clause. His application was denied less than two weeks after he asked about the religious clause. See Paragraph 54. This temporal proximity supports Plaintiff's argument that his "concerns, questions, and objections to signing the" ERDs, see Paragraph 42, could plausibly be a but-for cause of Defendants' failure to hire him in August of 2019.

In addition, on March 8th, 2019, Colavito had said she would contact Plaintiff if something opened up, but apparently something opened up and she never did contact him, see Paragraph 51. And after Plaintiff inquired about the religious clause, Defendants sent him an email saying that, "after further consideration," they were taking a pass. See Paragraph 54.

Defendants do not address these facts, instead arguing "there is no allegation that Plaintiff applied for work at 'WMC campuses' in 2019." That's in docket entry 37 at Page 8 note 2. But Defendants' argument does not square with the facts and email I've just described, which are alleged in Paragraph 54 of the AC, and which suggest that Plaintiff did seek a position in 2019, or at least that his candidacy was rejected in 2019.

Ultimately, I find that Plaintiff has plausibly alleged that his inquiry into the religious clause could have prompted the email rejection two weeks later.

[25] I note that in his memorandum of law Plaintiff argues he can state a retaliation claim based on some "audio recording." That's in his opposition brief at Page 19. But he does not provide any details about this recording, so I do not know what it entails, and even if he had, I couldn't consider it, because there is no reference to any audio in the AC. The claim regarding August 2019 survives in any event.

I note further that Plaintiff pleads a legitimate, nondiscriminatory reason for Defendants' failure to hire, which is Plaintiff 's refusal to sign the Agreements and adhere to the ERDs, a condition that Defendants require of all their employees.

While this may suffice for Defendants to prevail at summary judgment, in the absence of evidence of pretext, it is not grounds for granting a motion to dismiss. See Green v. District Council 1707, 600 Fed. Appendix 32, at 33, which says, even where the complaint points to legitimate, nondiscriminatory reasons for the adverse action, whether there were non-pretextual explanations is not properly decided on a motion to dismiss; and Brophy v. Chao, 2019 Westlaw 498251, at Page 5 (Southern District February 7th, 2019), which says, even where the complaint includes the defendant's legitimate, nondiscriminatory reason, failure to plead pretext is not fatal at the motion to dismiss stage.

[26] At summary judgment, Plaintiff will have to come up with evidence that his failure to sign the Agreements was a pretext for discrimination based on religion, but for

now, the Title VII retaliation claim survives with respect to the employment Plaintiff allegedly sought in August 2019.

I also note that Plaintiff filed his charge with the EEOC some time in 2019. I so infer based on the number that the EEOC assigned to it. So, it appears that the events in 2016 and 2017 would be time-barred in any event as they occurred more than 300 days before the filing of the EEOC charge. But because the 300-day requirement is not jurisdictional and can be waived, see, for example, Castro v. Yale University, 2021 Westlaw 467026, at Page 9 (District of Connecticut February 9th, 2021), and because Defendants have not raised the issue on this motion, I need not consider it further at this stage.

Plaintiff also brings state law claims for IIED and NIED. A plaintiff claiming IIED must plead: "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." Friedman v. Self Help Community Services, 647 Fed. Appendix 44, at 47.

"New York courts are particularly cautious in finding intentional infliction of emotional distress in employment discrimination suits." Riscili v. Gibson Guitar, [27] 2007 Westlaw 2005555, at Page 4 (Southern District July 10, 2007); see Curto v. Medical World Communications, 388 F.Supp.2d 101, at 112 (Eastern District 2005), where the court said, "The rare instances where the New York courts have found the complaint sufficient to state an intentional

infliction of emotional distress claim in the employment context generally involve allegations of more significant battery or improper physical contact."

Similarly, "under New York law, a claim of NIED requires a showing of (1) extreme and outrageous conduct, (2) a causal connection between the conduct and the injury, and (3) severe emotional distress." Green v. City of Mount Vernon, 96 F.Supp.3d 263, at 297 to 98 (Southern District 2015).

A plaintiff can establish a claim for NIED under the "bystander theory," which requires "a plaintiff to allege that (1) he was threatened with physical harm as a result of the defendant's negligence and (2) consequently suffered an emotional injury from witnessing the death or serious bodily injury of a member of his immediate family." Truman v. Brown, 434 F.Supp.3d 100, at 123 (Southern District 2020). That theory obviously doesn't apply here.

Another theory under which a plaintiff can argue NIED under New York law is the "direct duty theory," which requires a plaintiff to show that he "suffered an emotional [28] injury from Defendants' breach of a duty which unreasonably endangered his own physical safety or caused him to fear for his physical safety." Wahlstrom v. Metro-North, 89 F.Supp.2d 506, at 531 (Southern District 2000). And this theory, obviously, also doesn't apply here. There's been no allegation of threat or risk of physical harm or any endangering of physical safety because of the Defendants' action.

Appendix D

New York law also recognizes specific special circumstances for NIED where there is "an especial likelihood of genuine and serious mental distress arising from special circumstances," such as "a hospital negligently" telling someone "that her parent had died, a negligent misdiagnosis of HIV, or the mishandling of a loved one's remains." Truman at 123.

Plaintiff 's Complaint does not resemble the contexts in which "special circumstances" have been recognized. So, the NIED claim fails because Plaintiff does not meet any of the three possible theories under which such a claim can be brought. It also fails for the reasons I'm about to discuss.

For either claim, IIED or NIED, the first element of "extreme and outrageous conduct" sets a high bar to relief, requiring "extreme and outrageous conduct" which so transcends the bounds of decency as to be regarded as [29] atrocious and intolerable in a civilized society." Turley v. ISG Lackawanna, 774 F.3d 140, at 157. See Green, 96 F.Supp.3d, at 298.

Plaintiff argues that Defendants' "religious discrimination" and "their refusal to accommodate his religious beliefs" were "very traumatic" given his past experience in Romania. See Plaintiff 's memorandum at 21, as well as his affidavit.

He asserts that he "fled Romania to avoid communist persecution, including having his career being destroyed, only to have his career destroyed in the U.S.A. "by agents

of the Vatican and catholic Church who were negotiating in 2019 with the same communist secret police that Dr. Giurca fled from." That's in Plaintiff 's brief at 21.

Plaintiff fails to state an IIED claim or a NIED claim because he does not allege facts showing that the Defendants' conduct – as opposed to the conduct of nonparties in a foreign country – was extreme and outrageous. He may have experienced severe emotional distress because of his personal background, but the conduct on the Defendants' part does not rise to the level of extreme and outrageous.

To the extent that he is alleging religious discrimination, failure to accommodate, and retaliation constitute extreme and outrageous conduct by themselves, that is simply not the law. See: Padilla v. Sacks & Sacks, 2020 [30] Westlaw 5370799, at Page 2 (Southern District September 8th, 2020), where the court said, "Courts are generally loath to find that conduct involving discrimination or harassment in the course of employment is sufficient for a claim of IIED."

Paulson v. Tidal, 2018 Westlaw 3432166, at Page 4 (Southern District July 16th, 2018), which said that, "In the employment context, harassment or discrimination alone is insufficient to state an IIED claim," and "wrongful termination alone" does "not rise to the level of outrageousness New York law demands for a viable IIED claim."

Ibraheem v. Wackenhut, 29 F.Supp.3d 196 (Eastern District 2014), where ordinary workplace disputes,

including discrimination, harassment, and hostile work environment do not rise to the level of extrema and outrageous conduct.

Lydeatte v. Bronx Overall Economic Development Corporation, 2001 Westlaw 180055, at Page 2 (Southern District February 22nd, 2001), which said, "Acts which merely constitute harassment, disrespectful or disparate treatment, a hostile work environment, humiliating criticism, intimidation, insults or other indignities fail to sustain a claim for IIED because the conduct alleged is not sufficiently outrageous."

See also Shukla v. Deloitte, 2020 Westlaw 3181785, at Page 13 (Southern District June 15th, 2020), which pointed out that the same standard is used in evaluating extreme and [31] outrageous conduct for both IIED and NIED. Because extreme and outrageous conduct has not been plausibly alleged, both claims are dismissed.

I also note that Plaintiff with respect to – sorry, that Plaintiff with respect to IIED pleads no facts plausibly showing that Defendants intended to cause Plaintiff emotional distress.

Finally, I address leave to amend, which should be freely given "when justice so requires" under Rule 15. It is within the discretion of the Court whether to grant or deny leave to amend. Kim v. Kimm, 884 F.3d 98, at 105.

Although liberally granted, leave to amend may properly be denied for repeated failure to cure deficiencies

by amendments previously allowed or by futility, among other reasons. Ruotolo v. City of New York, 514 F.3d 184, at 191.

Plaintiff has already amended once, after having the benefit of a pre-motion letter from Defendants stating the grounds on which they would move to dismiss, which is docket entry 13, as well as the Court's observations during the pre-motion conference.

In general, a plaintiff 's failure to fix deficiencies in the previous pleading, after being provided notice of them, is alone sufficient ground to deny leave to amend. See National Credit Union v. U.S. Bank, 898 F.3d 243, at 257 to 58, where the Second Circuit said, "When a [32] plaintiff was aware of the deficiencies in his complaint when he first amended, he clearly has no right to a second amendment even if the proposed second amended complaint in fact cures the defects of the first. Simply put, a busy district court need not allow itself to be imposed upon by the presentation of theories seriatim."

See also In re Eaton Vance, 380 F.Supp.2d 222, at 242 (Southern District 2005), where leave to amend was denied because "the plaintiffs had two opportunities to cure the defects in their complaints, including a procedure through which" they "were provided notice of the defects by the defendants and given a chance to amend," and because they had not submitted a proposed amended complaint that would cure those defects; affirmed 481 F.3d 110, at 118, which said, "Plaintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies

in the complaint and then an opportunity to cure those deficiencies."

Further, Plaintiff has not asked to amend again or otherwise suggested that he is in possession of facts that would cure the deficiencies identified in this opinion. See TechnoMarine v. Giftports, 758 F.3d 493, at 505; Gallop v. Cheney, 642 F.3d 364, at 369; and Horoshko v. Citibank, 373 F.3d 248, at 249 to 50.

Accordingly, I decline to grant leave to amend sua sponte.

[33] In conclusion, the motion to dismiss is granted in large part but denied in part with respect to the last part of the retaliation claim.

The Clerk of Court is directed to terminate motion number 32.

And now we need to talk about a Case Management Plan with respect to the remaining claim. I assume the parties have not talked about that because they didn't know how this ruling was going to come out.

Is there any reason why the customary six months would not be sufficient for discovery?

MR. KEANE: The answer to that question, Your Honor, is probably no, with the only caveat that I represent a lot of hospitals, it's hard with what everybody working 24/7 on COVID sometimes to get them to focus on

litigation. But I think six months with this very limited retaliation claim would be okay, and that will be the only problem that I anticipate. I will tell you that even administrators are taking shifts on Saturdays and Sundays to work vaccination centers.

THE COURT: All right. Why don't we – we'll set a six months schedule, but if it turns out that you can't get everybody to pay attention because of COVID, just make sure you bring it to my attention promptly.

I have a bit of a pet peeve about requests for discovery extensions that come on the eve of the cutoff or, [34] worst yet, after the cutoff.

I understand that sometimes there are good reasons why you need an extension, and what you're describing might be one. And, you know, if you have a good reason and you bring it to my attention promptly when you know about it, I will be reasonable and you'll get your extension. But, you know, if you just let the deadline run or you wait until two days before the deadline and then you tell me about your problem, that's going to tell me that you haven't been paying attention to the case, and in that event, I may say, "well, sorry, you're out of luck."

You'll see that my Case Management Plan has a procedure you should follow if you – if the other side is not playing ball or if a third-party is not playing ball, the same principle should apply. It requires you to bring discovery problems to my attention on a fairly short string. That's because I want to get involved and keep you on track.

If you come in at the next conference and you say, "well, I couldn't depose so-and-so because so-and-so owes me documents," I'm going to say, "well, so-and-so is in trouble for not giving you the documents but you're in trouble for not bringing it to my attention as required, so you're both out of luck." And I'm mentioning this not because I expect any problems in this case, I do it whenever I enter a scheduling order, because sometimes lawyers seem surprised [35] later on when I thought my order was an order when they thought it was just a suggestion.

So, you know, we'll set the customary six months, and, you know, if as you go along, Mr. Keane, you find that for a good reason your clients are not able to get documents or information, just make sure you bring that to my attention promptly, because if you wait until the last minute, my nose is going to be out of joint.

Let's see. We are in March, so six months will be September. So, we'll say September 23rd will be the fact discovery cutoff.

I'm filling out a case Management Plan as we speak and you'll see it on ECF later today.

And I'm going to set a deposition cutoff on August 23rd. I like to have the deposition cutoff be a month before the final discovery cutoff, because lawyers being lawyers, they leave the depositions to the last minute and then when there is followup, they haven't left themselves time.

Is either side expecting expert discovery in this case?

MR. KEANE: I would think the only expert discovery would be damages.

THE COURT: Well, I don't know if the Plaintiff is claiming garden variety distress or if he's going to have a professional who will testify as to his distress.

[36] So, are you planning on experts or treating doctors, Mr. Aron?

MR. ARON: So, potentially, emotional distress. I'm not certain at this point.

THE COURT: Well, then, I think what I'll do is, I'll put in an expert discovery cutoff a couple of months after the fact discovery cutoff, but we will set our next conference for after the close of fact discovery.

If we're going to have motions, it may make sense to hold off on damages discovery. Let's – you know what, I'm going to say – instead, I'm going to say TBD, to be determined, for expert discovery, because it may be if expert discovery is going to go only to damages, we'd want to have – it would make more sense to have summary judgment motions first, if there are going to be any, before both sides spend money on experts.

So, let me ask Mr. Clark to find a conference date for the beginning of October.

THE CLERK: Yes, Judge. October 6, 2021, at 12:00 p.m.

MR. KEANE: Your Honor, excuse me. The week of October 4th and October 11th, I have an arbitration that's certainly scheduled, although Friday, October 8th, is not an arbitration hearing date. So, I would ask, if possible, if that could be moved to the 8th, the week of the 18th or the [37] end of September.

THE COURT: Not a problem.

MR. ARON: Your Honor, the October dates are fine, just the end of September I have a lot of the holidays. So, the October dates work fine.

THE COURT: Okay. Mr. Clark will find a date.

THE CLERK: Judge, October 8, 2021, at 10:00 a.m.

THE COURT: October 8th, at 10:00 a.m.

All right. And if anybody is contemplating a motion at that time, let me have the pre-motion letter on September 24th, or no later than September 24th, and the response October 1, and we'll talk about it on October 8th.

And you'll see the Case Management Plan go up later today. Is there anything else that we should do now?

Oh, I know what I wanted to ask. We will need an Answer and when that Answer is filed, I think it will

trigger an automatic referral to mediation, and with the case narrowed as it has been, you know, maybe this could be a good candidate for an early resolution. You know, it's quite possible that the value of the claim is less than what it will cost to litigate it. I don't know if either side has any interest in that.

If the Plaintiff is really looking for an injunction against Catholic hospitals requiring them to have to agree not to provide abortions and stuff like that, I [38] can't imagine that the Defendants are going to agree to that, but if he's looking for something more modest, maybe there is something you can work out.

I don't know if the parties have had any discussions, but when the Answer is filed, that will lead to an automatic referral to mediation, so you've got time to think about it.

All right. Anything else we need to do now?

All right. Thank you all. Everybody stay healthy. Bye-bye.

MR. KEANE: Thank you.

(Case adjourned)

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 12th day of April, two thousand twenty-four.

Docket No: 23-200

DR. DAN GIURCA,

Plaintiff - Appellant,

v.

BON SECOURS CHARITY HEALTH SYSTEM, WESTCHESTER COUNTY HEALTH CARE CORPORATION, GOOD SAMARITAN HOSPITAL,

Defendants - Appellees.

ORDER

Appellant, Dan Giurca, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix E

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe