APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JASON SMALL,

Plaintiff-Appellant,

v.

MEMPHIS LIGHT, GAS AND WATER,

Defendant-Appellee.

No. 19-5710

Appeal from the United States District Court or the Western District of Tennessee at Memphis. No. 2:17-cv-02118—Sheryl H. Lipman, District Judge.

Decided and Filed: March 12, 2020

Before: DAUGHTREY, KETHLEDGE, and THAPAR, Circuit Judges.

COUNSEL

ON BRIEF: Maureen T. Holland, Yvette Kirk, HOLLAND & ASSOCIATES, Memphis, Tennessee, for Appellant. Rodrick D. Holmes, Brooks E. Kostakis, Aubrey B. Gulledge, BOYLE BRASHER LLC, Memphis, Tennessee, for Appellee.

The court delivered a PER CURIAM opinion. THAPAR, J. (pp. 7–11), delivered a separate concurring opinion in which KETHLEDGE, J., joined.

OPINION

PER CURIAM. Jason Small claims that his employer, Memphis Light, Gas and Water, violated federal disability and civil-rights law when it reassigned him to a new position. The district court rejected his claims as well as his motion to enforce an alleged settlement agreement. We affirm.

I.

For over a decade, Small worked as an electrician at Memphis Light. But in early 2013, he suffered an on-the-job injury that required him to change positions. At first, Small expressed interest in a position as a revenue inspector. Instead, Memphis Light offered him a position as a service dispatcher. Without another offer—and at the risk of otherwise being terminated—Small accepted the dispatcher position.

Around the same time, Small raised concerns with Memphis Light that his new position would conflict with the practice of his religion (Jehovah's Witness). Small explained that he had services on Wednesday evenings and Sundays and that he had community work on Saturdays. He asked the company to reassign him to a different position or to different shifts. But Memphis Light denied the request, explaining that the accommodations would impose an undue hardship on the company and that its union required shifts be assigned based on seniority. Instead, the company

suggested that Small swap shifts with his co-workers or use paid time off. Small renewed the same request without success. Yet later, Memphis Light reconsidered its decision and offered Small the option to "blanket swap" shifts—meaning that he could swap his shifts with another employee for an entire quarter.

Since then Small has remained in the dispatcher position. The parties dispute whether his schedule still conflicts with his religious commitments.

In 2017, Small sued Memphis Light for disability and religious discrimination as well as retaliation. On the eve of trial, the district court granted summary judgment to the company.

Almost immediately, Small filed a motion with the district court to enforce an alleged settlement agreement between the parties. According to Small, the parties had agreed on a settlement right before the summary judgment ruling. But the district court rejected the motion, finding that the parties had never agreed on all the material terms. This appeal followed.

II.

A.

Small first challenges the district court's grant of summary judgment. We review that decision de novo. *Groening v. Glen Lake Cmty. Sch.*, 884 F.3d 626, 630 (6th Cir. 2018).

Disability Discrimination. To begin with, Small argues that Memphis Light discriminated against him based on his disability when it refused to offer him a position as a revenue inspector. But Memphis Light has offered a legitimate, non-discriminatory reason for its decision: namely, that Small physically could not do the work of an inspector. *See*, e.g., *McFadden v.*

Ballard Spahr Andrews & Ingersoll, LLP, 611 F.3d 1, 4 (D.C. Cir. 2010). To rebut that explanation, Small must offer evidence that the company's stated reason was pretextual. *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 895 (6th Cir. 2016).

Small contends that Memphis Light has presented shifting accounts of who determined he could not do the work of an inspector—a disability committee or an HR employee, Eric Conway. This suggests (he says) that the company has concealed the true reasons for its decision. For instance, Small stresses that Conway claimed to have made the final decision to reassign Small to a new position. Yet as Conway himself explained, the disability committee (on which he sat) determined whether Small physically could do the work; Conway then determined where to reassign him. Small offers no evidence to the contrary. Small also questions whether Memphis Light even had a disability committee. But multiple members of the committee confirmed that it existed and that it determined whether Small could do the work of an inspector. Again, Small cannot beat this evidence with nothing. *See Cripe v. Henkel Corp.*, 858 F.3d 1110, 1113 (7th Cir. 2017); *Wysong v. City of Heath*, 260 F. App'x 848, 858 (6th Cir. 2008).

Small further points to various company policies that, he says, gave him a "right" to be reassigned to a different position. But Small never explains how these policies show that the company's reason for not reassigning him to a particular position was pretextual. And for what it is worth, he has not identified any other open positions for which he was qualified. *Cf. Henschel v. Clare Cty. Rd. Comm'n*, 737 F.3d 1017, 1025 (6th Cir. 2013) (explaining that companies need not create new positions for disabled employees).

Finally, Small says that there are factual disputes about whether he could do the work of an inspector. But the question is not whether Memphis Light was correct that Small could not do the work. Rather, it is whether the company "honestly believed" that to be the case at the time. *Ferrari*, 826 F.3d at 895. And Small has not offered any evidence that casts doubt on the company's honest belief. Hence, he cannot show pretext.

Aside from pretext, Small argues in his reply brief that Memphis Light failed to accommodate his disability and that the district court evaluated this claim under the wrong legal standard. But Small forfeited this argument—which involves an entirely different theory of liability—when he did not raise it in his opening brief. *See United States v. Carson*, 560 F.3d 566, 587 (6th Cir. 2009); *see also Hostettler v. Coll. of Wooster*, 895 F.3d 844, 852 (6th Cir. 2018) (explaining the importance of distinguishing between these theories of liability because they involve entirely different frameworks). To hold otherwise would allow the appealing party to raise new issues to which the other party could not respond—as happened here. *See, e.g., Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015); *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 123 (D.C. Cir. 2010).

Religious Discrimination. Small next argues that Memphis Light discriminated against him when it failed to accommodate his religion. But the company did not have to offer any accommodation that would have imposed an "undue hardship" on its business—meaning (apparently) anything more than a "de minimis cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007). Memphis Light says that additional

accommodations would have impeded the company's operations, burdened other employees, and violated its seniority system. Our court has found similar costs to be more than de minimis. *See Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517–21 (6th Cir. 2002); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994). And in any event, Small has not challenged whether the accommodations would have imposed an undue hardship on the company—beyond a passing assertion in his brief. Instead, he argues only about whether the company *did* accommodate his religious beliefs. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986) (distinguishing these issues); *Cooper*, 15 F.3d at 1379–80 (same). Hence this claim cannot proceed. *See White Oak Prop. Dev., LLC v. Washington Twp.*, 606 F.3d 842, 854 (6th Cir. 2010).

In the alternative, Small argues that Memphis Light subjected him to a hostile work environment. But Small has not offered any evidence that the harassment he experienced (if any) was because of his religion. So, this argument fails from the outset. *See Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999).

Retaliation. Small also argues that Memphis Light retaliated against him because he complained about the alleged discrimination. But again, Small has not offered any evidence that the retaliation he experienced (if any) was because of his complaints. So, this argument fares no better. *See Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 471–72 (6th Cir. 2012).

B.

Small also challenges the district court's refusal to enforce an alleged settlement agreement between the parties. We review the court's finding that the parties had never reached an agreement for clear error.

Therma-Scan, Inc. v. Thermoscan, Inc., 217 F.3d 414, 418–19 (6th Cir. 2000).

Small first argues that the parties had formed a binding settlement agreement. To form a binding agreement, the parties had to agree on all the material terms. *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988); *see also Sweeten v. Trade Envelopes, Inc.*, 938 S.W.2d 383, 385 (Tenn. 1996). The record shows that Memphis Light made its final settlement offer to Small on a Friday around noon. Among other things, that offer required Small to agree to a non-disparagement provision. Within minutes, Small's counsel responded that her client could not agree to a non-disparagement provision because it might bar him from filing future claims. She also said that she would talk to Small about the offer. Memphis Light soon acknowledged her response with an "O.K. Thanks." The company followed up a few hours later asking for an update on its offer. Small's counsel responded, "Not yet." She explained that she could not talk to Small because he was in a mandatory meeting. Finally, two hours later—after no further emails—Memphis Light revoked its offer.

Given this evidence, it almost goes without saying that the parties never agreed on all the material terms. Memphis Light insisted on a non-disparagement provision; Small resisted that provision. Nothing in the record suggests that the district court erred—let alone clearly so—when it found that the parties had not reached an agreement. *See Therma-Scan*, 217 F.3d at 420.

Small also argues that Memphis Light promised to keep its settlement offer open until the district court issued a summary judgment ruling. Yet Small offers

no evidence of such a promise. Instead, he offers evidence that the company warned that it would revoke its offer if the court issued a ruling. And he says that his counsel understood this to be a promise to keep the offer open. But none of this amounts to an *actual* promise to keep the offer open. So, this argument fails too. *See Safeco Ins. Co. of Am. v. City of White House*, 36 F.3d 540, 548 (6th Cir. 1994) (explaining that, under Tennessee law, an offeror ordinarily may withdraw an offer at any time before acceptance).

We affirm.

CONCURRENCE

THAPAR, Circuit Judge, concurring. Almost fifty years ago, Congress struck a balance between the rights of religious employees and the interests of their employers. According to that compromise, companies must accommodate religious practices and beliefs unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). To be sure, Congress codified this requirement "somewhat awkwardly" in Title VII's statutory definition of "religion." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986). And Congress failed to specify exactly *what* it meant by "undue hardship." But most likely, everyone assumed that courts would clarify this standard over time, using the traditional tools of statutory interpretation.

So, what do those tools tell us? Well, start with the text. Congress didn't define the term "undue hardship," so we should give that term its ordinary,

contemporary meaning. *See, e.g., Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). Dictionaries from the period define a "hardship" as "adversity," "suffering" or "a thing hard to bear." *The American Heritage Dictionary of the English Language* 601 (1969); *Black's Law Dictionary* 646 (5th ed. 1979); *Webster's New Twentieth Century Dictionary of the English Language* 826 (2d ed. 1975). On its own terms, then, the word "hardship" would imply some pretty substantial costs.

But Congress didn't leave matters there. Instead, it specified that the "hardship" must be "undue." *See, e.g., Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013) ("Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that."); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975). That means that the hardship must "exceed[] what is appropriate or normal"; in short, it must be "excessive." *The American Heritage Dictionary of the English Language* 1398; *Black's Law Dictionary* 1370; *Webster's New Twentieth Century Dictionary of the English Language* 826. So together the phrase "undue hardship" tell us that the accommodation must impose significant costs on the company.

Not surprisingly, Congress has typically defined "undue hardship" in exactly this way. Take the Americans with Disabilities Act, which (like Title VII) requires companies to provide reasonable accommodations unless doing so would impose an "undue hardship" on their business. 42 U.S.C. § 12112(b)(5)(A). In that context, Congress defined an "undue hardship" as "an action requiring significant difficulty or expense" in light of certain enumerated factors (such as the size

of the company). *Id.* § 12111(10). Nor does the meaning of "undue hardship" change if one ventures further afield in the United States Code. *See, e.g.*, 28 U.S.C. § 1869(j) (explaining that an "undue hardship or extreme inconvenience" for jury service means "great distance . . . from the place of holding court," "grave illness in the family," or "any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror"); 29 U.S.C. § 207(r)(3) (explaining that an "undue hardship" under the Fair Labor Standards Act means "significant difficulty or expense"); 38 U.S.C. § 4303(15) (explaining that an "undue hardship" for veteran employment means "significant difficulty or expense").

Or consider how courts define "undue hardship" when Congress has failed to provide a statutory definition. For instance, the Bankruptcy Code allows debtors to discharge a student loan if they can show that the debt imposes an "undue hardship." 11 U.S.C. § 523(a)(8). "The plain meaning" of that term, courts have said, requires the debtor to show that the debt imposes "intolerable difficulties . . . greater than the ordinary circumstances that might force one to seek bankruptcy relief." *In re Thomas*, 931 F.3d 449, 454 (5th Cir. 2019). Indeed, "the adjective 'undue' indicates that Congress viewed garden-variety hardship as [an] insufficient excuse[.]" *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005) (quoting *In re Rifino*, 245 F.3d 1083, 1087 (9th Cir. 2001)). And the same holds true when courts consider (or use) the phrase "undue hardship" in other contexts. *See, e.g., Teamsters Local Union No. 171 v. N.L.R.B.*, 863 F.2d 946, 957 (D.C. Cir. 1988) (explaining that an "undue hardship" requires "significant mitigating circumstances"); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1241 (5th

Cir. 1982) (explaining that an "undue hardship" might exist when there is an "unusual expense").

Given all this, one would think that the term "undue hardship" would have a similar meaning under Title VII. After all, courts typically try "to make sense rather than nonsense out of the *corpus juris*." *Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991). But the Supreme Court has said otherwise.

The source of the problem is *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). That decision primarily addressed whether Title VII's accommodation provision required employers to violate seniority systems created by their collective-bargaining agreements. *See id.* at 78–84. But in two brief paragraphs at the end of the opinion, the Court also asserted—almost as an afterthought—that requiring an employer "to bear more than a de minimis cost" in order to accommodate an employee's religion would be "an undue hardship." *Id.* at 84. The cost found to be more than de minimis: $150. *Id.* at 92 n.6 (Marshall, J., dissenting). And the employer unduly burdened by that cost: one of the largest airlines in the world.

At this point, you might be wondering where the "de minimis" test even came from? Certainly not the text of Title VII. The *Hardison* majority never purported to justify its test as a matter of ordinary meaning. And how could it? "De minimis" means a "very small or trifling matter[.]" *Black's Law Dictionary* 388. That seems like the opposite of an "undue hardship." *See Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) ("I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost.'"). The "de minimis" test also seems in conflict with the background

legal maxim *de minimis non curat lex* ("the law does not care for trifling matters"). *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992); *Black's Law Dictionary* 388. The law usually does not care for trifling matters but apparently Title VII does.

Nor can one blame the parties in *Hardison*. None of them proposed the "de minimis" test—and probably for good reason. In fact, most of their briefing focused on other issues in the case.

As best one can tell, the *Hardison* majority adopted the "de minimis" test for two reasons: one explicit and one implicit. As for the explicit reason, the majority said that religious accommodations that involved more than "de minimis" costs would cause employers to "discriminate" against their non-religious employees. *See Hardison*, 432 U.S. at 84–85. But that reasoning seems unreasonable on its face. Consider again the Americans with Disabilities Act, which requires employers to provide accommodations to their disabled employees. No rightminded person would call such accommodations a form of impermissible discrimination against *non*-disabled employees. *Cf. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002); *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) ("But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment[.]").

As for the implicit reason—acknowledged only by the *Hardison* dissent—the majority may have construed Title VII so narrowly because it feared that a broader reading might run afoul of the Establishment Clause. *See Hardison*, 432 U.S. at 89–90 (Marshall, J.,

dissenting). Yet whatever doctrinal merit that concern once may have had, I seriously doubt that it remains valid. Even properly read, Title VII doesn't require employers to provide any and all accommodations; it requires them to provide only those accommodations that won't impose an "undue hardship" on the company—meaning significant costs. That seems more than fine under the Establishment Clause. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 722–24 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711–12 (1985) (O'Connor, J., concurring); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 704 (1992); *see generally* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871 (2019) (challenging the theory that religious accommodations violate the Establishment Clause whenever they impose more than de minimis costs).

In any event, the doctrine of constitutional avoidance doesn't give courts license to rewrite a statute. *See, e.g., Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). But the *Hardison* majority appears to have done exactly that. The only other explanation is that the majority stumbled through the looking glass and into "an Alice-in-Wonderland world where words have no meaning[.]" *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring in the judgment).

Of course, all this does not mean that employers must *always* accommodate their employees' religious beliefs and practices. The term "undue hardship" makes clear "that this is a field of degrees, not a matter for extremes" or "absolutes." *E.E.O.C. v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 313 (4th Cir. 2008); *cf. Barnett*, 535 U.S. at 402. But *Hardison* itself

adopted an "absolute" when it "effectively nullifi[ed]" the accommodation requirement. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). And without any real reason.

The irony (and tragedy) of decisions like *Hardison* is that they most often harm religious minorities—people who seek to worship their own God, in their own way, and on their own time. See McConnell, *supra*, at 693, 721–22; Storslee, *supra*, at 873–74, 877. The American story is one of religious pluralism. The Founders wrote that story into our Constitution in its very first amendment. And almost two-hundred years later, a new generation of leaders sought to continue that legacy in Title VII. But the Supreme Court soon thwarted their best efforts. Even at the time, this "ultimate tragedy" was clear. *Hardison*, 432 U.S. at 97 (Marshall, J., dissenting) ("[O]ne of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded.").

In the end, this case doesn't involve a challenge to the "de minimis" test. Indeed, Jason Small hasn't even contested—at least in a meaningful way—his employer's claim of "undue hardship." But litigants should consider such challenges going forward. *See Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, J., concurring in the denial of certiorari). As the *Hardison* dissent explained, "All Americans will be a little poorer until [the] decision is erased." *Hardison*, 432 U.S. at 97 (Marshall, J., dissenting).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JASON SMALL, Plaintiff, v. MEMPHIS LIGHT, GAS & WATER, Defendant.	No. 2:17-cv-02118-SHL

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Mr. Jason Small, filed this suit on February 21, 2017, alleging discrimination, harassment and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"). ECF No. 1. Mr. Small's claims stem from his time as an employee with Defendant Memphis, Light, Gas & Water ("MLGW"), specifically from his experience being reassigned from his original post to a new post as a result of his work-related injury and resulting disability. *Id.* Mr. Small alleges that MLGW, through its reassignment and subsequent treatment of him in his new position, discriminated against him based on his disability and religion, created a hostile work environment and retaliated against him for reporting that discrimination. *Id.*

Now before the Court is Defendant's Motion for Summary Judgment, filed on January 19, 2018. ECF No. 49. Defendant argues that Mr. Small is unable to provide sufficient evidence to establish a prima facie case for any of his claims, or to create a disputed fact as to his prima facie burdens. In addition, Defendant contends that there is no evidence that MLGW's non-discriminatory reasons for assigning him to his current position and denying his requests for accommodation were pre-textual. Based on these deficiencies, Defendant submits that summary judgment is appropriate. *Id*. Plaintiff responded in opposition on March 2, 2018, arguing that he is able not only to establish a prima facie case but to demonstrate that Defendant's non-discriminatory reasons for its treatment of Mr. Small were pre-textual, or at minimum to establish sufficient disputes of material facts to support denial of the motion. ECF No. 63 at 5, 7. Defendant replied on April 18, 2018, restating its initial argument for summary judgment. ECF No. 70 at 2, 3.

For the reasons more fully outlined below, the Court concludes that there are no genuine issues of material fact and Mr. Small's claims fail as a matter of law. Defendant's Motion for Summary Judgment is **GRANTED**.

FACTS

Mr. Small, a practicing Jehovah's Witness, alleges discrimination by Memphis Light, Gas & Water based on his religious beliefs and disability. ECF No. 1. The following facts are taken from the evidence provided to the Court in the pleadings and subsequent filings, including depositions, documents and stipulations of

undisputed facts.[1] Disputed facts that are immaterial to the relevant legal questions will not be included in the Court's summary of facts or in the evaluation of Mr. Small's claims.

From 2002 to March of 2013, Mr. Small was a Substation Electrician making approximately $64,521 per year. ECF No. 62 at 20. The Substation Electrician position had standard hours that allowed Mr. Small to complete his weekly religious obligations, which include services on Wednesdays and Sundays and community work on Saturdays. ECF No. 1 at 4. In early 2013, Dr. Fahey, Mr. Small's treating physician, determined that he could no longer safely perform the Substation Electrician position as a result of an injury that occurred on the job. *Id.* at 3. Plaintiff was removed from this position, given permanent restrictions related to his injury, and placed on reduced salary pending reassignment to a job he could perform without substantial risk of further injury. *Id.*

Mr. Eric Conway, a Human Resources ("HR") employee, was assigned to help Mr. Small find a new position. *Id.* Individuals subject to reassignment are given a year in which to find a new position. *Id.* Early in his time in this process, Mr. Small expressed an

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[1] Facts cited from Mr. Small's Complaint are either undisputed by MLGW or later supported by other evidence. Additionally, the Court cannot accept certain of Mr. Small's unsubstantiated assertions of fact as true. Mr. Small relies on some of these conclusions to support his assertion that there are genuine disputes of material fact that defeat summary judgment. The Court provides explanatory footnotes outlining the reasoning behind the exclusion of these conclusions, which have been presented as facts.

interest in the position of Inspector in the Revenue Protection Department. *Id.* at 4. One of the reasons this position interested Mr. Small was that it allowed him to work hours similar to his previous position and thus would not interfere with his religious obligations.[2] *Id.* at 6. Mr. Small told Mr. Conway of his interest in the position. *Id.* at 4. Mr. Conway first mistakenly informed Mr. Small that he was not qualified for the position, but Mr. Conway's supervisor corrected him, and Mr. Small's application proceeded. ECF No. 54-1 at 6.

Dr. Fahey was charged with evaluating Mr. Small's ability to safely perform the essential functions of any new position to which he might be assigned. ECF No. 1 at 5. Dr. Fahey evaluated Mr. Small for the Inspector position based on MLGW's published job description for the position. *Id.* This description noted that, "**THIS LIST OF ESSENTIAL FUNCTIONS IS NOT EXHAUSTIVE AND MAY BE SUPPLEMENTED AS NECESSARY.**" ECF No. 62 at 8. Based on the information he had, Dr. Fahey determined that the job seemed reasonable for Mr. Small and that Plaintiff "should be capable of performing"

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[2] There is some dispute as to when Mr. Conway was informed of Mr. Small's religious obligations. Mr. Small alleges that he told Mr. Conway about his services early in the reassignment process, but Mr. Conway asserts that he did not know until July of 2013, after he had assigned Mr. Small to the Dispatcher position discussed below. ECF No. 54-1 at 34. However, as is more fully discussed below in the Analysis section, MLGW was not obligated to keep Mr. Small in the reassignment process in order to accommodate him, making the dispute immaterial. ECF No. 54-1 at 31.

the required tasks without significant risk of further injury. ECF No. 62-7.

However, at some point after Dr. Fahey's initial determination, Vernica Davis (Medical Coordinator at MLGW) requested that David Staggs, the Supervisor of Revenue Protection at the time, produce additional information about the Inspector position, including a physical demand analysis and list of additional responsibilities. ECF No. 62 at 13. According to Mr. Conway, Ms. Davis asked for this additional information because she had concerns "[b]ased on [Mr. Small's] physical limitations or restrictions, [about] him being able to perform this job. Due to her experience with other employees being hurt in that job, she knew that it has physical aspects that he may not be able to do."[3] ECF No. 62-19 at 6. Without knowledge

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[3] Mr. Small alleges that Ms. Davis and Mr. Conway asked for this separate information because of animus against disabled individuals; however, Mr. Small provides no evidence of this other than the request and creation of the information itself and his subsequent assignment to the Service Dispatcher position. Moreover, the additional job requirements were provided by Mr. Staggs, who had no knowledge of Mr. Small's circumstances. ECF No. 62 at 13.

Additionally, Mr. Small later asserts that Mr. Conway sees disabled individuals as a "burden" on MLGW. ECF No. 63 at 13. This conclusion is apparently based on a statement Mr. Conway made in his deposition that paying individuals who are in the reassignment pool and able to work but without a job is a "financial burden" on MLGW that can be "extreme." ECF 62-19 at 14. Mr. Conway's position on this issue is inconsistent with Mr. Small's allegation that Mr. Conway wanted to keep him from the Inspector position, as the financial burden that Mr. Conway references

that Mr. Small was applying for the position, (ECF No. 62 at 13), Mr. Staggs produced information about physical demands and responsibilities not contained in the original job description, such as lifting heavy objects with some regularity and the need for annual firearm certification.[4] ECF No. 62-10. The information also noted that Inspectors generally work alone in the field.[5] *Id.*

Mr. Staggs's set of new qualifications and essential functions was given to Dr. Fahey for the purpose of reevaluating Mr. Small's ability to perform the job. ECF No. 62 at 17. Dr. Fahey expressed concern about some of the responsibilities, writing, "[W]hat I can say

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would in fact incentivize him to find Mr. Small a position for which he was qualified as quickly as possible.

Given Mr. Small's failure to support his conclusory statements with evidence from the record and the fact that the record tends to support the opposite conclusion, the Court disregards Mr. Small's conclusory statements on this issue.

[4] Specifically, Mr. Staggs states that "Inspectors spend 33% of their time carrying objects weighing over 60 pounds, including lifting or removing box tops that weigh over 100 lbs. Additionally, gas valves and meters can weigh up to 100 lbs. Inspectors frequently (as in 34% - 66% of the time) twist and turn gas valves and meters." ECF No. 71 at 8.

[5] Additionally, Mr. Stagg notes that "work[ing] in the field independently" is an "essential function" of the Inspector position and that "if an inspector could not lift or remove a box top or twist and turn a gas valve or meter, and needed assistance doing so, MLGW could not make sure this assistance would always be available unless the company hired someone specifically to provide assistance or removed someone from their regular job to assist." ECF No. 71 at 8.

is there are several duties described in this Inspector duty which I do not think he can do, but I do not see them as core activities to the job." ECF No. 62-11 at 2. He also noted that Mr. Small was insistent that he could perform the job. *Id.* Despite Dr. Fahey's recommendation, Plaintiff was not given the Inspector position based on MLGW's position that he could not perform the essential functions of the job with or without reasonable accommodation, and he continued to wait for reassignment. ECF No. 62 at 19.

Around the same time, Mr. Conway asked Mr. Small about another available position, that of Service Advisor. ECF No. 1 at 6. Mr. Small declined the position because the shift work and mandatory overtime would have conflicted with his religious obligations. ECF No. 1 at 6. Shortly after, Mr. Conway informed Plaintiff that a Service Dispatcher position was available, that he was qualified for the position, and that he was obligated to accept the position or risk termination. ECF No. 54-1 at 14. This ultimatum is in line with MLGW policy, which states, in relevant part: "If an employee refuses to accept a reassignment, the employee shall be determined eligible for termination for just cause." ECF No. 71-2 at 11. Mr. Small, feeling pressured by Mr. Conway to take the position, accepted, despite the fact that the position required shift work and mandatory overtime that would cause conflict with his religious obligation. ECF No. 62 at 22. Mr. Small notes that at this time he did not believe Mr. Conway was acting out of religious animus. ECF No. 54-1 at 17–18. The Service Dispatcher position had a similar pay range to the Inspector position, with the

midpoint actually being higher in the Dispatcher position.[6] ECF No. 1 at 4.

Around the time he began his job as Dispatcher in the summer of 2013, Mr. Small emailed Mr. Conway to inform him that he would like a religious accommodation to be able to attend his religious services and complete his community work and that this accommodation could either take the form of being put back into the reassignment pool[7] or given an exemption from

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[6] Mr. Small alleges that the Inspector position was better, but his only evidence, aside from the shift times, is that he might, in future, have been able to advance to a higher level of pay. ECF No. 63 at 9. He does not dispute that the Dispatcher position actually provided a higher salary midpoint. ECF No. 1 at 4.

[7] Mr. Small asserts that MLGW's failure to allow him to re-enter the reassignment pool was a violation of policy and further evidence of discrimination, as another employee placed in the same department from the reassignment pool was allowed to do so. ECF No. 54-1 at 16. However, the individual to whom Mr. Small compares himself left the position because of unsatisfactory job performance, and Mr. Small had not received any unsatisfactory reviews. ECF No. 54-1 at 13–14. Mr. Phelon Grant, a Supervisor who responded to Mr. Small's request, informed him of the policy: "[A]n employee may be returned to their prior position during the trial period on the basis of performance deficiencies. There have been no performance deficiencies during your trial period." ECF No. 71-1 at 1.

Mr. Small provides no evidence of an unsatisfactory performance on his part, noting only that his religious obligations should have sufficed. ECF No. 54-1 at 13–14. This is insufficient to create a genuine dispute and, accordingly, the Court cannot accept as fact Mr. Small's assertion that

certain shifts and the mandatory overtime. ECF No. 62 at 22. A few months later, Mr. Conway informed Mr. Small that his request had been denied as it would cause an undue hardship because MLGW assigns shifts according to a seniority policy. ECF No. 54-1 at 38. Mr. Conway also noted that Mr. Small could swap shifts as long as he did so according to MLGW policy and that he could use vacation time.[8] ECF No. 62 at 22. Mr. Small filed a complaint with the Equal Employment Opportunity Commission ("EEOC") that fall, alleging disability and religious discrimination. *Id.*

In October of 2014, after an accommodation request had been denied, Mr. Small was informed that MLGW had reconsidered, and Mr. Small was granted the option to "blanket swap" his shifts, which would allow him to change shifts with another employee each quarter if necessary to attend his services. *Id.* at 23. At the time the accommodation was granted, Mr. Small no longer worked Wednesdays but he chose not to use the "blanket swap" for Sundays (ECF No. 54-1 at 15–16), and missed work on multiple occasions to attend religious services.[9] ECF No. 62-10. On the last occasion,

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there was an applicable policy or that he was treated differently than others in the same situation.

[8] In correspondence with Mr. Grant dated August 8, 2013, Mr. Small was informed that he would be allowed Saturdays and Sundays off but that being off on Wednesdays as well would not be possible because of the burden it would cause. ECF No. 71 at 9.

[9] Mr. Small argues that he was wrongfully denied vacation time for at least one of these services. ECF No. 62 at 27. Though it is true that vacation had been approved for that Wednesday evening, Mr. Small's shift had switched at that point so that he was no longer working Wednesdays.

Mr. Small was suspended for two days for failing to report for his scheduled shifts. *Id.* Mr. Small has, from the time of his first written request in 2013, renewed his request for accommodation through reassignment or limited hours several times and has been denied each time on the same grounds and with the same reminders. *Id.* at 23.

Mr. Small is still a Service Dispatcher. Though he has been required to perform mandatory overtime that conflicts with his beliefs at times, his regular shift allows him to attend the necessary services on Wednesdays and Sundays (ECF No. 54-1 at 12), and MLGW has allowed him to use a "blanket swap," which would allow him to avoid conflicts by swapping shifts with another employee each quarter. *Id.* at 15–16. Though Mr. Small has noted that the "ideal time" to complete his religious outreach is during his current Saturday shift, it is undisputed that he can fulfill his obligations after his shift as well. ECF No. 70-3.

ANALYSIS

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Once a properly supported motion for summary judgment has been made, the party opposing summary judgment must show that there is a genuine dispute of material fact by pointing to evidence in the record or must argue that the moving party is not entitled to judgment as a

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Id. at 28. As a result of this shift change, Mr. Small's vacation was voided as he no longer needed vacation on Wednesday evenings. *Id.* Instead, Mr. Small was called in to work mandatory overtime on a Wednesday night but did not show up. *Id.*

matter of law. Fed. R. Civ. P. 56(a), (c)(1). The evidence is viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

While the Court views all evidence and factual inferences in the light most favorable to the non-moving party, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247–48. Moreover, the opposing party "cannot rest solely on the allegations made in [his] pleadings" but must cite to appropriate evidentiary support. *Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009) (quoting *Skousen v. Brighton High Sch.*, 305 F.3d 520, 527 (6th Cir. 2002)) (alteration in original). The Court's role is not to weigh evidence or assess witness credibility but to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 623 (6th Cir. 2014) (quoting *Anderson*, 477 U.S. at 251–52).

Here, Defendant moves for summary judgment on all of Plaintiff's claims, arguing that he fails to establish the prima facie elements (or a disputed fact as to the elements) of his claims for discrimination, harassment and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") and under the Americans with Disabilities Act ("ADA") and fails to point to any evidence of pretext by MLGW. At times, Plaintiff alleges that there was discrimination based on religious

animus "and/or" disability. ECF No. 1 at 5, 8. The Court assumes that Mr. Small believes that the discrimination could have been rooted in both at the same time; however, the standards for evaluating whether discrimination has occurred are different for each.

Consequently, the Court will first address Plaintiff's discrimination claims brought under the ADA before moving to those brought under Title VII. Because claims of retaliation under Title VII and the ADA are evaluated using the same set of factors and because Mr. Small alleges the same actions constitute retaliation, those claims are then evaluated together.

I.
Mr. Small's Claims under the Americans with Disabilities Act

Defendant argues that the undisputed facts demonstrate that Mr. Small was not qualified for the Inspector position and that his placement in the Dispatcher position did not constitute an adverse action, defeating two prima facie elements of his ADA claim. ECF No. 49-1 at 4–7. It further argues that, even if the Court were to determine that Mr. Small could establish a prima facie case, the undisputed proof indicates that the decisions to deny Mr. Small the Inspector position and place him in the Dispatcher position were rooted in non-discriminatory reasons, namely Mr. Small's inability to perform essential functions of the Inspector position (and his ability to perform the Dispatcher position). Thus, according to Defendant, Mr. Small cannot demonstrate that the reasons for denying him the Inspector position and reassigning him to the Dispatcher are pre-textual. *Id.* at 8–9. Defendant presents the same argument to rebut Mr. Small's failure to accommodate claim, noting his

inability to perform the essential functions of the Inspector job serves to defeat that claim as well. *Id.* at 10.

To demonstrate a prima facie case of discrimination under the ADA, a plaintiff must show that "1) he or she is disabled; 2) otherwise qualified for the position, with or without reasonable accommodation; 3) suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced." *Whitfield v. Tennessee*, 639 F.3d 253 (6th Cir. 2011). Similarly, to demonstrate a failure to accommodate, an employee must demonstrate that she is able to complete the job with or without accommodation. *Penny v. UPS*, 128 F.3d 408, 414 (6th Cir. 1997). An employee who cannot perform the job's essential functions is not a qualified individual under the ADA. *Hoskins v. Oakland Cnty. Sherriff's Dep't*, 227 F.3d 719, 724 (6th Cir. 2000).

Once a prima facie case is established, the burden shifts to the employer to provide a nondiscriminatory reason for the actions in question and then back to the plaintiff to demonstrate that the non-discriminatory reason provided is pre-textual. *Whitfield*, 639 F.3d at 259. At the summary judgment stage, a plaintiff only has to demonstrate a genuine issue of fact as to whether the reasons offered are pre-textual. *Id.* at 260.

Because Mr. Small has failed to establish a prima facie case, the Court need not reach the issues of burden-shifting. First, it is assumed that Mr. Small can show that he is a disabled individual, that MLGW knew or had reason to know of his disability, and that the position of Inspector remained open while MLGW

looked for someone to fill it. However, as to evidence that he is qualified with or without reasonable accommodation and that there has been any adverse employment action, he fails. Mr. Small argues that his assignment to the Service Dispatcher Position instead of the Inspector position is a manifestation of animus against him as a person with a disability and constitutes a failure to accommodate and an adverse employment action. His claim appears to be based on his assertion that he can perform the true essential functions of the Inspector position. However, examining the evidence in the light most favorable to Mr. Small, he cannot meet the standard necessary to demonstrate either an adverse action or a failure to accommodate, and thus this claim fails as a matter of law.

Beginning with Mr. Small's qualification for the Inspector position, it is undisputed that Dr. Fahey, Mr. Small's treating physician, initially indicated that Mr. Small should be able to fulfill the responsibilities of the Inspector position without serious risk of further injury. Mr. Small claims that what happened next is a clear indicator of animus sufficient to establish both his ability to fulfill the essential functions of the job and an adverse employment action. The Court cannot agree.

As noted above, Mr. Small was, as Dr. Fahey acknowledged, unable to complete some of the essential functions of the job outlined by Mr. Staggs because of his restrictions. ECF No. 62-11 at 2. Key to Mr. Small's argument is the assertion that the tasks included with the new information were not essential functions of the job and thus Mr. Small was wrongly denied the position. Specifically, he asserts that the list of additional responsibilities did not constitute essential functions of the job because: (1) Mr. Small

spoke with others about the job and felt he had an idea of what was involved (ECF No. 54-1 at 7); (2) Dr. Fahey did not see them as core functions (ECF No. 62-11 at 2) and (3) these responsibilities were not on the initial job description published by MLGW (ECF No. 1 at 6). Some of the factors courts consider when determining whether or not something is an essential function are the experience of past and current individuals on the job, the employer's judgment, whether or not the information was put into a job description before the employer began advertising or interviewing, and the amount of time spent performing the function. 29 C.F.R. § 1630.2(n)(3).

As to the first consideration, Mr. Small cannot identify a single individual with whom he spoke about the position, making it difficult to take his assertion of his second-hand knowledge of the job and of the frequency of the performed functions as establishing a fact that can be used as evidence of experience of past or current Inspectors. ECF No. 54-1 at 7. Moreover, the additional requirements were provided by the Supervisor in the department, who, as Mr. Small acknowledges, had no knowledge of him or his physical restrictions, and who had direct and daily contact with Inspectors and detailed knowledge of their duties, thus a source of information rooted in the experience of past and current employees.

As to the second point, while Dr. Fahey was charged with evaluating Mr. Small's fitness for the position, he has no expert knowledge of the essential functions of an Inspector, so his comment that he did not see the duties Mr. Small could not perform as "core functions" cannot create a genuine issue of material facts on this issue. He is a medical doctor, not qualified to assess which are the essential functions.

Finally, though MLGW did not initially publish this additional information, it was produced by the Supervisor of the department for the specific purpose of making sure that someone being assigned to the position would be qualified without knowledge that the "someone" was Mr. Small. It is also undisputed that MLGW reserved the right to supplement the information in the job description with additional essential functions, as noted on the bottom of the description itself. While Mr. Small's frustration at being denied the position he wanted based on information not initially available to him is understandable, because there is not sufficient evidence in the record, the Court cannot present as fact Mr. Small's conclusion that these were not essential functions of the job.

Because Inspectors work alone in the field, and because an Inspector may be required to perform these functions with some frequency, it would be difficult and impractical for MLGW to provide Mr. Small with the necessary assistance in the Inspector position without providing him an assistant or someone otherwise on call, an action that would shift some of the essential functions to another employee, which MLGW is not required to do. *See Hoskins*, 227 F.3d at 729. Thus, Mr. Small cannot demonstrate that he was qualified for the position with or without accommodation and his claim of discrimination under the ADA fails. Because Plaintiff must also show an ability to perform the job with or without accommodation to make a showing of failure to accommodate, Mr. Small's claim for failure to accommodate fails as well.

Even assuming Mr. Small could make a showing that he was qualified with accommodation, he cannot show an adverse employment action. When determining whether an adverse action has occurred, courts

look to evidence such as demotion, decrease in pay, or a move to a less prestigious position. *See Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999). The position to which Mr. Small was assigned allowed him to maintain his rate of pay and Mr. Small does not argue that there was any difference in prestige, aside from the above noted argument that a future pay rate could have been higher in the Inspector position. That difference does not create an adverse job action.

For the foregoing reasons, Defendant's Motion for Summary Judgment as to the claim of discrimination under the ADA is **GRANTED**.

II.
Mr. Small's Claims under Title VII

Plaintiff's Title VII claim based on religious discrimination is two-fold, specifically that he experienced both discrimination and a hostile work environment rooted in religious animus. However, Defendant argues that Plaintiff cannot establish a prima facie case for either theory of his Title VII claim. ECF No. 49-1 at 12–14, 24. As to his claim of religious discrimination, MLGW argues that Mr. Small's religious beliefs did not conflict with his employment requirements, defeating an essential element of the prima facie case. *Id.* at 12–13.

Additionally, MLGW argues that accommodating Mr. Small would create undue hardship, which the law does not require. *Id.* at 14. Thus, he cannot meet two of the requirements necessary to establish a prima facie case of religious discrimination. *Id.* at 12–14. As to his hostile work environment claim, Defendant against asserts that he cannot establish a prima facie case because he cannot show that, (1) the alleged harassment was based on religion or that (2) the alleged

harassment was severe or pervasive enough to constitute a hostile work environment, two of the necessary elements. *Id.* at 24–26.

Title VII prohibits, in relevant part, discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C.S. § 2000e-2 (2018). As noted, Mr. Small contends that he suffered discrimination in the form of a failure to accommodate and the creation of a hostile work environment. These claims will be addressed in turn.

A. Religious Discrimination and Accommodation

To establish religious discrimination, an employee must show that: "(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement." *Smith v. Pyro Min. Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987). Once an employee has established a prima facie case, the burden shifts back to the employer to show that it is not possible to accommodate the employee without undue hardship. *Id.* An employee must attempt to cooperate with an employer's proposed accommodation. *Id.* Because the question of "undue hardship" versus a "de minimis burden" will naturally shift from employer to employer, the Court looks to the specific situation in each case. *Id.* Accommodations that would interfere with union agreements, shift assignments and seniority policies have been deemed to place an undue hardship on employers. *See TWA v. Hardison*, 432 U.S. 63, 80 (1977) (Title VII does not require employers to "deny the shift and job preference of some employees, as well as deprive them of their contractual

rights, in order to accommodate or prefer the religious needs of others.")

It is undisputed that Mr. Small has sincere religious beliefs and that MLGW is aware of these beliefs. Moreover, the Court cannot agree with MLGW's assertion that Mr. Small could merely attend the services of another congregation to satisfy his obligations as a leader in his specific congregation, and so it will be assumed for the purpose of this Motion that there was at some time a conflict between Mr. Small's obligations and his employment. Additionally, for this Motion, it will be assumed that the suspension Mr. Small received when he failed to show up for mandatory shifts constitutes discipline sufficient to meet the third element of the prima facie case. However, MLGW has demonstrated, through undisputed facts, that it has offered accommodations where possible by allowing a "blanket swap" and that where it has not offered accommodations, it is because accommodations would result in an undue hardship.

Smith is instructive in evaluating the facts of the instant case. In *Smith*, the employee believed it was a sin to work on Sundays, informed his employer of his beliefs and was consequently fired. 827 F.2d at 1086. The mining company for which Mr. Smith worked had a policy somewhat similar to MLGW, allowing employees who could not work on Sundays to swap with other employees. *Id.* at 1083. If no other employee would swap, the individual then had to report to a supervisor so that the problem could be resolved. *Id.* Mr. Smith failed to take the necessary steps to swap his shift because he also believed it would be a sin to ask another person to work on Sunday, though he informed the company of this belief and noted that he would accept a swap arranged by the company. *Id.* at 1084. Because

the mining company had a policy of terminating anyone who had three unexcused absences and because Mr. Smith did not report to work as required, he was terminated. *Id.*

In evaluating whether the ability to swap shifts was an appropriate accommodation, the Sixth Circuit found for Mr. Smith with an important caveat: his belief that asking another individual to work on Sunday was a sin was key to determining the sufficiency of the accommodation. *Id.* at 1088. In fact, the court noted: "We think it clear that if Smith had no religious qualms about asking others to work the Sundays he was scheduled to work, then Pyro's proposed accommodation would have been reasonable." *Id.*

There are some similarities between Mr. Smith and Mr. Small beyond their sincere religious beliefs: both were disciplined for failing to show up to work and both were asked to work shifts that interfered with their religious obligations. In contrast to Mr. Smith, however, Mr. Small's opportunity to swap shifts was an effective accommodation as it did not interfere with his beliefs. Moreover, when Mr. Small failed to show up to work, it was not because he was assigned to a regular shift that conflicted with his obligations but because he was being asked to work mandatory overtime, assigned based on seniority status. MLGW's obligation to upset seniority status related to how shifts are assigned is, as noted, limited because it is seen as an undue hardship. *See Hardison* 432 U.S. at 81–82 (noting not only that violating seniority systems causes undue hardship but also that "seniority systems are afforded special treatment under Title VII itself"); *see also Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 518 (6th Cir. 2002) (holding violation of a seniority system to accommodate religious preference

would cause an undue hardship). Similarly, shifting all of the relevant mandatory overtime obligations to other employees or placing Mr. Small back in the reassignment pool on reduced pay to wait for a job with hours more in line with Mr. Small's religious obligations would, as a matter of law, place more than a de minimis burden on MLGW.

MLGW has thus sufficiently satisfied its obligation to demonstrate undisputed attempts at accommodation where possible and undue hardship where attempts were not made, and thus its motion for summary judgment as to the Title VII claims of religious discrimination and failure to accommodate are **GRANTED**.

B. Hostile Work Environment

Mr. Small also alleges a hostile work environment in violation of Title VII, which Defendant argues, among other points, does not meet the legal standard of an "objectively" hostile environment. To demonstrate a hostile work environment under Title VII, Plaintiff must demonstrate that he was (1) a member of a protected class; (2) subjected to unwelcomed religious harassment; (3) the harassment was based on religion; (4) the harassment had the effect of unreasonably interfering with Plaintiff's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the existence of employer liability. *See Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). To determine whether a hostile work environment existed, courts examine the totality of the circumstances and evaluate the situation both objectively and subjectively. *See Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993); *see also Rabidue v. Osceola Ref. Co., Div. of Tex. Am. Petrochemicals*, 805 F.2d 611, 620 (6th

Cir. 1986). "Conduct that is not severe or pervasive enough to create an objectively hostile or abuse work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." *Harris*, 510 U.S. 17 at 21; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788, (1998) ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.")

It is undisputed that Mr. Small is (1) a member of a protected group and that he has sincerely held religious beliefs, but Mr. Small fails to point to facts in dispute which would meet his burden as to the remaining elements. As noted above, such claims are evaluated both objectively and subjectively, and the Court concludes that there is a genuine issue of fact as to the subjective part of the test, given Mr. Small's stress related to the tension between his work and his religious obligations. Moreover, Mr. Small has indicated that he experienced increased stress and emotional and mental turmoil resulting from his assignment to the Service Dispatcher position and was seeing a mental health professional to help work through these issues. ECF No. 62-14.

Moving to the objective evaluation, however, Mr. Small's allegations, assumed to be true for purposes of this Motion, do not rise to the level necessary to establish the existence of a hostile workplace. Even as the Court reads the evidence in the light most favorable to Mr. Small, there is not sufficient evidence that, objectively, Mr. Small experienced (2) unwelcome harassment (3) based on his religion that (4) created a hostile work environment. As noted above, there are high standards for establishing the existence of a hostile

work environment in the workplace, rooted in courts' hesitancy to use the law as a means of regulating everyday social interactions or to flood dockets with cases that are more appropriately dealt with through workplace mediation or other on-the-ground options.[10] Though it is not necessary to demonstrate "tangible psychological injury," conduct that is "merely offensive" will not be enough to demonstrate a hostile work environment. *Harris*, 510 U.S. 17 at 21. Here, Mr. Small rests the entirety of his case on a series of actions that, as discussed more fully below, he cannot tie to any hostility toward his religious identity, forcing the Court to conclude that his claims cannot survive summary judgment.

First, it is difficult to construe what Mr. Small experienced as harassment based on religion. There were never any comments made to him about his religious beliefs, nor does he present any evidence that the decision to employ Mr. Small as a Dispatcher instead of an Inspector was rooted in animus, aside from the fact that one required shift work and mandatory overtime while the position he preferred did not.[11]

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[10] *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (noting Title VII is not meant to be expanded into a "general civility code").

[11] Mr. Small provided the following information about religious animus during his deposition:

Q: Do you have any evidence of Mr. Conway's actions of harassment were because of your religion in emails?

A: Well, when I made the request to receive a first shift position like I had during my entire time with Light, Gas and Water because of my religious obligation I feel that, yes, that was a form of discrimination and harassment.

Moreover, his initial placement in the Dispatcher position rather than the Inspector position was a single action resulting from a reassignment program meant to place individuals who can work into appropriate positions. There is no dispute that Mr. Small was qualified for the Dispatcher position.

Looking at the harassment claim via the lens of the requested accommodations and disciplinary actions, it is still difficult to find an instance of harassment. While MLGW did initially deny some of Mr. Small's requests, they later reversed course and allowed him the opportunity to "blanket swap" as necessary. Moreover, Mr. Small himself acknowledges that his community obligations can be performed when he is not on shift on Saturdays. As it stands, Mr. Small has been granted the opportunity to shift swap, no longer works on two of the days on which he is required to worship and is able to fulfill his other religious obligations without issue on Saturdays. He has been disciplined for failure to show up for mandatory shifts, but, as

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Q: Did Mr. Conway ever make any negative comments about you being a Jehovah's Witness?

A: No.

Q: Did he ever make any comments that led you to believe that he held some sort of animus about you being a Jehovah's Witness?

A: Just the statement that – when I told him that I couldn't work a shift, he basically said that I would have to. And I told him I couldn't work the shift because of my religion.

Q: Do you have anything else?

A: No.

ECF No. 54-1 at 20.

previously noted, MLGW is under no obligation to accommodate Mr. Small's requests related to these shifts because doing so would result in an undue burden.

Mr. Small presents no evidence that MLGW's actions were based on his religion, and, as he himself notes, he did not initially believe what was happening had anything to do with his religion. At one point, Mr. Small indicates that a supervisor told him that "everybody here has religion but the job comes first."[12] ECF No. 54-1 at 19. Similarly, as noted above, Mr. Small's only evidence that his placement in the Dispatcher position over the Inspector position constituted harassment was that the position required shift work where the Inspector position did not. As a matter of law, this is not sufficient evidence for a reasonable juror to conclude that religiously-based discrimination motived MLGW's reassignment and accommodation decisions.

Mr. Small's evidence does not, as a matter of law, establish unwelcome harassment or harassment based on his religion. Thus, Mr. Small fails to provide allegations sufficient to demonstrate the elements necessary to establish an actionable hostile work environment claim under Title VII. Therefore, Defendant's

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[12] *See Hafford v. Seidner*, 183 F.3d 506, 514 (6th Cir. 1999) (holding an individual whose supervisor accused him of preparing for a "holy war" and mocked the Muslim greeting h ad not established sufficient evidence of a hostile work environment because the incidents could be seen as "simple teasing"); *see also Burnett v. Tyco Corp.*, 203 F.3d 980, 985 (6th Cir. 2000) (holding that a "single battery" and "two merely offensive remarks," including one that was profane and sexual, were insufficient to demonstrate a hostile work environment).

Motion for Summary Judgment as to the Title VII hostile work environment claim is **GRANTED**.

III.
Retaliation under both the ADA and Title VII

Defendant argues that Plaintiff's retaliation claims fail because he cannot demonstrate either an adverse employment action or a causal connection between an adverse action and his participation in a protected activity. ECF No. 49-1 at 18. Defendant again asserts that, even if Plaintiff were able to establish a prima facie case, his claims fail because MLGW had legitimate reasons for taking the actions at issue and Mr. Small cannot provide evidence that those reasons were pre-textual. *Id.* at 22–24.

Both Title VII and the ADA prohibit retaliation. Title VII prohibits an employer from discriminating against an individual "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. § 2000e-3 (2018). Similarly, the ADA states: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." 42 U.S.C. § 12203 (2018).

To make out a prima facie case of retaliation, Plaintiff must show that (1) he engaged in protected activity; (2) Defendant knew he exercised his civil rights; (3) Defendant took adverse employment action against him; and (4) there was a causal connection between

Plaintiff's protected activity and the adverse employment action. *See Wasek v. Arrow Energy Servs.*, 682 F.3d 463, 468–69 (6th Cir. 2012). Retaliation claims should be evaluated separately from discrimination claims in part because a violation of a retaliation provision "can be found whether or not the challenged practice ultimately is found to be unlawful." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000).

It is undisputed that Mr. Small engaged in a protected activity when he brought complaints against MLGW and that MLGW had knowledge of this action, but Mr. Small fails to make a showing of adverse job action and thus also of a causal connection. As a start, Mr. Small was reassigned as a result of his injury. His reassignment did occur only after he reported his injury, but that is the natural and necessary result of a permanent work restriction, not an indicator of retaliation, and Mr. Small had taken no protected action at that time. Therefore, the Court does not assess Mr. Small's initial assignment to the Dispatcher position as potentially retaliatory.[13] Mr. Small's retaliation

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[13] Additionally, Mr. Small makes no showing that the Inspector position was more prestigious, that the Dispatcher position was a "wretched backwater" alternative or that pay discrepancy occurred. *See Mattei v. Mattei*, 126 F.3d 794, 808 (6th Cir. 1997). Instead, he notes only that the assignment required shift work where an alternate assignment, for which it has been established that he was not qualified, did not. As noted, a change in hours can be sufficient to demonstrate adverse action under certain circumstances, specifically, in the case of retaliation claims, when the change clearly put the employee in a worse position and occurred after a protected action. Here, importantly, Mr.

claim appears to be based on his continued employment in the Service Dispatcher position despite his repeated requests for reassignment, as well as the disciplinary actions taken against him for missing shifts.[14]

The Court finds no evidence of adverse employment action. A job transfer can constitute an adverse action for the purposes of establishing a Title VII retaliation claim. *See White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 803 (6th Cir. 2004); *see also Spees v. James Marine, Inc.*, 617 F.3d 380, 391 (6th Cir. 2010) (noting changes in shifts can constitute adverse action in certain circumstances). A salary difference or difference in prestige can constitute an adverse action. *Id.* Additionally, even when an employee maintains the same salary, if she is placed in a "wretched backwater," an adverse action has likely occurred. *Mattei*, 126 F.3d at 808. Similarly, disciplinary action can serve as evidence of retaliation if a plaintiff can demonstrate sufficient loss. *See Blackburn v. Shelby Cty.*, 770 F. Supp. 2d 896, 925 (W.D. Tenn. 2011).

None of these situations is present here. There is no proof that MLGW's denial of Mr. Small's accommodation request to be reassigned was retaliatory. As discussed above, MLGW allowed transfer back into the reassignment pool when performance was unsatisfactory; Mr. Small's was not. Moreover, because Mr.

Small had made no complaint at the time that his shift changed, making it impossible for the change to be retaliatory.

[14] Though a brief discussion is included below, Mr. Small's claims here have been discussed in detail above in relation to the Title VII and ADA claims, and the Court incorporates the relevant portions of that analysis here.

Small could not perform the essential functions of the Inspector position, MLGW would have had to pay Mr. Small 66 2/3 pay until a job with Mr. Small's requested shifts became available. Given these undisputed facts, MLGW's decision not to put Mr. Small in the Inspector position or otherwise reassign him cannot, as a matter of law, be construed as retaliatory.

As discussed above, the disciplinary action, while related to Mr. Small's religious beliefs, resulted from a failure to work mandatory overtime rather than any improper denial of vacation time requested for a day that Mr. Small did not normally work. Because neither Mr. Small's placement nor the disciplinary action taken against him is sufficient to establish adverse or discriminatory action, Defendant's Motion for Summary Judgment as to the retaliation claims is **GRANTED**.

CONCLUSION

Because Mr. Small fails to establish a genuine issue of material fact as to his prima facie case of discrimination under Title VII or the ADA and because he cannot sufficiently demonstrate a retaliatory action, his claims fail as a matter of law. Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED, this 11th day of September 2018.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

Hometown Energy 11/20/2017
MLGW
Working for You

SERVICE DISPATCH- SUPERVISORS OFFICE

From: Phelon Grant
To: Service Dispatchers & Chiefs
Date: April 1st 2015
Subject: SERVICE DISPATCH: Work Rules

RESPONSIBILITY AND ACCOUNTABILITY

1. The supervisor is responsible for the Chief Dispatcher and the overall operation of Service Dispatching.

2. Each Chief Dispatcher is responsible for the Dispatchers assigned to his/her shift.

3. Documentation, methods and procedural corrections will be the responsibility of the Chief Dispatcher and Area Supervisor. Oral reprimands, dispatcher evaluations and job assignments will be the responsibility of the Chief Dispatcher.

4. The assigned Chief of training will be responsible for providing documentation, method and procedure corrections, oral reprimands, evaluations and job assignments for Dispatcher trainees and trainers.

5. Any written reprimands will be administered by the supervisor.

6. Each dispatcher is directly accountable to the Chief Dispatcher and Area Supervisor. The Chief Dispatcher is accountable to the supervisor of Service

Dispatching and the Area Supervisor is Accountable to the Manager of Customer Service Field Operations

7. The Chief Dispatcher will inform the supervisor of any situation that deviates from normal operations or could become a potential problem in the area.

8. Each Dispatcher should discuss any problems with the Chief Dispatcher before the supervisor becomes involved. All Chief Dispatchers arc on duty after reporting to work; however, one Chief handles floor operations and second chief handles office operation. Communications between the two is essential for overall smooth operation.

PUNCTUALITY

1. Each employee in the Service Dispatching area is expected to be at work and on time.

The clocks on the chiefs computer will be the official time clock for determining lateness.

Example: 7AM-330PM Dispatcher must be within his/her cubicle, radio and PC shall be on and telephone shall be available to receive phone calls at 7AM.

Example: 330PM-12AM Dispatcher must be within his/her cubicle, radio and PC shall be on and telephone shall be available to receive phone calls at 330PM.

2. Tardiness Report, Form 74055 will be filled out by the Chief whenever an employee is late. If the employee is late due to unforeseen circumstances (traffic, car trouble etc) the tardy may possibly be excused but Form 74055 will still be filled out for record keeping. Any tardiness excused will be at the discretion of the Chief on Duty or the Supervisor

3. The employee is responsible for notifying the Chief Dispatcher if he/she is going to be late at the earliest possible time.

4. Vacation time will not be granted to avoid being late

5. Disciplinary action will began after the third occurrence of any employee being late within a 1 year period(rolling calendar). Any time you are over 15 minutes late, it will be charged to function 904 (unpaid absence).

SICK LEAVE CALL IN/RETURNING TO WORK

1. Sick leave is to be used exclusively for absences due to the employee's own illness or accident.

2. Proof of illness shall be required after four consecutive days off, or when evidence of abuse exists. Proof of illness shall also be required when a dispatcher or chief requests vacation, and calls in sick when vacation is denied.

3. Any doctor's slip whether required or given as a courtesy must state employee was unable to work on the day(s) of the absence.

4. Illness reports are kept on an open window, therefore, the sick leave accumulates from first sick and does not begin over at the end of the fiscal year.

5. Sick leave usage will be evaluated on performance appraisals and could affect the final performance grade.

6. Service dispatching personnel who are ill shall notify the Chief or Supervisor as early as possible before assigned shift starts. Dispatchers should state when calling in if they're taking sick or FMLA.

Anyone off ill must notify the Chief or Supervisor of their return at the designated times listed below:

a. Dispatcher working 7AM-330PM must call before 9PM preceding the shift.

b. Dispatcher working 330PM-12AM must call before 9AM preceding the shift

Sick leave will be monitored by Chief's and the Supervisor.

PERSONAL USE OF TELEPHONES

1. Employee's cell phones and pagers shall be on vibrate during working hours. Cell phones should not be used at the desk for social media, text messaging, pictures etc. If an employee must accept an urgent phone call while in the workplace, the employee will request through the Chief to be relieved from their position to accept this urgent/emergency phone call. The employee shall leave the work area to complete this phone call. Personal telephone calls shall be limited to five minutes. This is a privilege that will not be abused without consequences. The Chief will monitor telephone times to determine whether the call is work related and document. Working long hours can create a need for you to communicate with others during working hours; however, extended time on the phone must be approved by the Chief.

REQUIRED OVERTIME

1. Service Dispatching personnel may be required to work overtime when the employee has the least number of cumulative overtime hours and all other available employees have passed the overtime.

2. When the Chief deems it necessary to require additional personnel to handle

heavy volumes of work and during crisis modes declared by Systems Operations.

3. If a dispatcher has been required and then states they are sick must provide a doctors notice before returning to work. Any patterns of abuse concerning this behavior when required will result in disciplinary action.

Note: See Detailed Overtime Policy.

PROFESSIONALISM WITH CUSTOMERS AND EMPLOYEES

Our work involves assisting and providing help to employees in many areas of MLGW, as well as helping customers. Most of our work is accomplished by oral communication. It is therefore necessary to reflect in our voices a willingness to assist other people. The way we conduct business exemplifies the attitudes we convey to other people.

The list of examples below are some of the ways that I expect each Service Dispatching employee to perform while conducting business with customers internal and external.

1. When answering the telephone, state the area and your name. (Service Dispatching, this is Pat). On weekends the dispatcher will follow the emergency phone line script.

2. Show a willingness to help. Abrupt, annoyed and testy communications will be documented for disciplinary action.

3. The dispatcher should express a calm, unhurried and pleasant manner when talking to another person, whether by radio, telephone or in person.

4. If you are unable to do what is requested because of MLGW policies, procedures or workload, explain in a empathetic way why you are unable to help.

5. Never allow yourself to "debate," argue or get into conflicts with another person. If you see that is about to happen, place the caller on hold or if on the radio, give standby code and consult with the Chief Dispatcher. The dispatcher WILL NOT attempt to pass irate or difficult customers to the Chief to avoid performing their duties.

6. Everyone will treat each other with dignity and respect. No one shall promote discord or conflict in the office.

7. Rude behavior, gestures or being insubordinate towards the Chiefs or Supervisor will ABSOLUTELY not be tolerated and will be cause for disciplinary action.

DISCIPLINARY ACTIONS

1. It is the policy of MLGW to initiate appropriate disciplinary action whenever an employee violates area or company rules, regulations and policies. These rules and regulations, which prescribe acceptable conduct for employees, are necessary for the effective and efficient operation of the Division and the protection of the rights and safety of all employees. When a violation occurs, supervision will consider the seriousness of the offense committed and the past record of the offending employee in determining an appropriate action.

2. Disciplinary action should always be designed to fit the offense.

3. Progressive discipline will allow the employee every opportunity to correct himself/herself for the following reasons:

a. It is administered in progressive steps.

b. The employee is told what corrective measures are necessary on his/her part in order to prevent future discipline or possible discharge.

These five (5) progressive steps will be followed under normal circumstances:

a. Oral reprimand.

b. Written reprimand.

c. Written reprimand with suspension and warning of more serious disciplinary action.

d. Written reprimand with longer suspension and warning of more serious disciplinary action, including possible discharge.

e. Discharge.

The seriousness of the offense will determine how many steps are to be followed. If a first offense is serious enough and may lead to more serious disciplinary action, supervision may bypass the oral reprimand and give a written reprimand. Under certain conditions, even discharge may be justified for a first offense (see the Discipline and Discharge Article of the Memorandum of Understanding).

MISCELLANEOUS RESPONSIBILITIES

1. Employees are responsible of ensuring they have properly setup their radio and Advantex for their area of responsibility. Failure to properly select and monitor radio talk groups, Advantex's pending orders, fleet status and e-mail will result in disciplinary

action. Area set-up shall be monitored by the Chief and Supervisor.

2. Employees upon taking their position shall log onto High-Path and report all changes in their working status during the day. At the end of their shift the employee shall log off.

3. Dispatchers working the radio jobs are expected to answer telephones. Radios and telephones are tools of work and are to be used in a professional manner. Continuous ringing phones may be an indication that too many personal projects have taken over priority (reading, crossword puzzles, internet, cell phone usage (texting or talking) personal conversations, sleeping).

4. Dispatchers WILL notify the Chief and relief person when they leave for breaks, lunches and/or any other reason.

5. Dispatchers who have been properly relieved are expected not to disrupt the work area and not to talk loudly to dispatchers who are working. No Dispatcher should be allowed to leave the work area earlier than 15 minutes prior to their shift ending, except by permission of the chief.

6. Dispatchers are to stay at their work positions unless assigned elsewhere by the duty Chief or Supervisor.

7. Dispatchers are not to be released until their vacation or sick leave actually starts. Actual time away from a scheduled shift must be charged to a function number.

8. Rough or boisterous play, hazing, bantering and loud conversations among Service Dispatching personnel are not permitted.

9. Adult, non-work related conversation among Service Dispatching personnel when the workload is light is permitted. No profanity is allowed.

10. Dispatchers are responsible for timely adherence to their 15 min breaks periods and lunch periods.

11. Complaints received from another department concerning a Dispatcher's unprofessional behavior (rude, argumentative, uncooperative) will be addressed and answered by that Dispatcher in writing.

12. Books and magazines may be read at your position, as long as they do not take priority over radios and telephones. Newspapers or major personal projects will not be allowed between the hours of 7AM TO 5PM or if workload dictates.

13. The area televisions should remain on news or weather 7a-5p. Dispatchers may occasionally watch other wholesome programs during these hours if the Chief deems the area is being productive during this time, and the workload is not heavy.

14. In order for seniority to apply, vacation must be scheduled before/on January 31st of each year. Request for vacation should be made three days in advance. Vacation requested less than 3 days in advance may be approved if the following guidelines are met: The department is not over the monthly OT budget; someone willingly accepts the overtime and if the allotted number of daily vacation slots available has not been met. No one will be required to work for requested vacation less than 3 days in advance. No more than two dispatchers may be on vacation and/or bonus day daily during the week and one dispatcher on vacation and/or bonus day daily on the week-end, unless, in emergency situations, approved by a Chief Dispatcher or Supervisor. Exception: Request of 2 hours

or less may be approved for vacation for employees in excess of two (2) during the week and one (1) on the week-ends if the workload allows for this absence. Only one Chief should be off at any given time.

15. Emergency vacation may be approved or declined depending on the workforce. Emergency vacation is defined as an unforeseen circumstance that calls for immediate attention such as court dates, accidents, or death of an immediate family member etc. Any other type of situation that is considered and emergency by a dispatcher will be left up to the discretion of the Supervisor or the Chief on Duty. You must notify supervision of the nature of the emergency. Proof of the emergency may be requested. When returning to work, Absence/FMLW request form 41144 must be filled out.

16. Swaps between regularly scheduled personnel on different shifts are permissible as long as the Memorandum of Understanding is not violated.

Swaps are allowed as a privilege, these are the restrictions:

a. No blanket swapping is allowed.

b. Swaps only granted one (1) week in advance.

c. Maximum of two (2) swaps per dispatcher.

d. No swaps allowed with a dispatcher scheduled for leave. (Vacation, bonus day, scheduled extended sick leave)

e. Swaps must be requested via Swap request form.

f. Employees may swap a regular shift for a regular shift, overtime for overtime or off days for off days.

g. No overtime swaps allowed that create double-time.

h. All requests shall be signed and dated by both parties and initiated by the Chief.

i. All swaps must be approved by Chief or Supervisor.

WORK ATTIRE

1. There is no formal dress code defined for employees of MI,GW. We should dress in a manner befitting the workplace. Business casual should be our attire in the workplace. Our clothing should be comfortable and suitable for the business environment. Some examples of what is not permitted are: Open Back Sun Dresses, mini-skirts/dresses, spandex, sweats and shorts.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JASON SMALL,

Plaintiff-Appellant,

v.

MEMPHIS LIGHT, GAS AND WATER,

Defendant-Appellee.

No. 19-5710

Appeal from the United States District Court or the Western District of Tennessee at Memphis. No. 2:17-cv-02118—Sheryl H. Lipman, District Judge.

Decided and Filed: March 12, 2020

Before: DAUGHTREY, KETHLEDGE, and THAPAR, Circuit Judges.

BRIEF OF APPELLANT JASON SMALL

ON BRIEF: Maureen T. Holland, Yvette Kirk, HOLLAND & ASSOCIATES, Memphis, Tennessee, for Appellant.

* * *

SUMMARY OF THE ARGUMENT

Small filed his Complaint against MLGW for discrimination, harassment and retaliation based on his religion in violation of Title VII, and discrimination and retaliation based on his disability in violation of the Americans with Disabilities Act. He filed his Complaint because MLGW discriminated against him based on his disability and sincerely held religious beliefs when, after Small went on disability leave and was placed in the disability reassignment program, MLGW through its HR employee Mr. Conway, bullied Mr. Small with wrongful threats of termination, and forced him into hurriedly accepting a job that was not comparable to his previous job of 17 years. Also, the position MLGW forced Small into was not within his general skill set, and MLGW knowingly interfered with Small's religious obligations. MLGW wrongfully manipulated the job reassignment process when it submitted a secondary and unofficial list of alleged "Inspector Duties", claiming them to be additional "essential functions of the job." This second list of functions and the physical demands analysis were not listed in MLGW's official job posting, were not part of the original information sent to the treating doctor for approval, and were not a list that was used for any other applicant for the Inspector Position. Further, these additional items were only sent to the treating doctor after that same doctor, Dr. Fahey, had approved Small for the Inspector Position.

Small presented an abundance of evidence that MLGW discriminated against him based on his religion when they knowingly placed him into a job with regular shift changes along with sporadic mandatory

overtime that would inevitably interfere with Small's religious obligations as a member, and Elder of the Jehovah's Witness faith. Small has established he performed his job as best he could while seeking reasonable accommodations so that he could meet his sincerely held religious beliefs and service obligations. Also, Small's accommodation request(s) would have at most caused MLGW a *de minimus* burden. As Small was not reasonably accommodated, he filed grievances and continued to make requests, including shift changes and the use of his comp/vacation time. In response, Small was continually harassed by his supervisors for having made such requests.

* * *

A. SMALL'S CLAIMS UNDER TITLE VII SHOULD NOT HAVE BEEN DISMISSED.

Title VII prohibits, in relevant part, discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C.S. § 2000e-2 (2018).

1. Religious Discrimination and Accommodation

To establish religious discrimination, an employee must show that: "(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement." *Smith v. Pyro Min. Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987). Once an employee has established a prima facie case, the burden shifts back to the employer to show that it is not possible to accommodate the employee without undue hardship. *Id.* An employee must attempt to cooperate with an employer's proposed accommodation.

Id. Because the question of "undue hardship" versus a "*de minimis* burden" will naturally shift from employer to employer, the Court looks to the specific situation in each case. *Id.* Accommodations that would interfere with union agreements, shift assignments and seniority policies have been deemed to place an undue hardship on employers. *See TWA v. Hardison*, 432 U.S. 63, 80 (1977) (Title VII does not require employers to "deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others.")

Small has established that, as a long time, active member of the Jehovah's Witness faith and the Collierville Congregation of Jehovah's Witnesses, (1) he holds a sincere religious belief (undisputed) that conflicts with the scheduling requirements of the Service Dispatch position; (2) he has informed MLGW of this conflict on numerous occasions, including prior to being placed into the Service Dispatch position; and (3) he was disciplined for failing to comply with the scheduling requirements of this position due to his religious obligations. At all points he has been treated differently from similarly situated employees. Conway disregarded Small's request not to be placed in the Service Dispatch Position due to his sincerely held religious beliefs. (Response to Statement of Facts, Ex. II-Emails, RE# 62-8, Page ID # 443-446). Conway disregarded the statement by Small's religious organization which supported Small's request for a reasonable religious accommodation. (Response to Statement of Facts, Ex. II- Emails, RE# 62-8, Page ID # 446).

The district court found that Small's claim failed because MLGW had demonstrated that it had offered accommodations where possible by allowing a "blanket

swap" and that where it had not offered accommodations, it is because accommodations would result in an undue hardship. (See Order, RE # 102, Page ID # 848). The district court's decision is erroneous on both counts for a number of reasons.

i. MLGW's "accommodations" were hollow gestures.

First, on the one occasion where MLGW granted Small's request for reasonable religious accommodation, it was done purposefully too late. MLGW agreed to offer Small an accommodation in the form of a "blanket shift swap" only when the requested accommodation was no longer needed. Additionally, these blanket shift swaps were granted months after Small had requested them, and after Small's shift had changed to one without the schedule conflict. (Depo. of Small, RE# 62-18, Page ID # 517-18).

Second, Small notified management of the conflicts that the departmental scheduling in Service Dispatch would cause because of his sincerely held religious beliefs, and made these conflicts known during the initial six (6) month training period. The policy states that during the 6 month training period "some trainees have discovered that this is not the right job for them. If that is the case, they have the right to discontinue training and be assigned somewhere else." He was denied the provision of this policy. (Grant Depo. Ex. 2, RE# 62-4, Page ID # 422-24). He was also disciplined in the form of a three (3) day suspension for attending his religious services. He informed management of an essential religious observance months in advance and his leave for that date was approved in writing. (Absence Request, RE# 62-15, Page ID # 483). He was still scheduled to work on the date of his observance and

was suspended without pay for three (3) days and lost the benefit of bidding on other available positions because of the discipline. Despite MLGW's assertion that Small missed "mandatory overtime" and despite the suspension, the overtime was not "mandatory." Other similarly-situated employees, who were not seeking religious accommodations and/or had not filed previous grievances, were approved vacation and thus allowed to take their vacation. By allowing other employees to have vacation it was apparent that the holiday overtime was not actually "mandatory." (Response to Statement of Facts, Exhibit PP, RE#62-16, Page ID # 484).

* * *

Dated:
October 21, 2019

Respectfully submitted,

/s/ MAUREEN T. HOLLAND

Maureen T. Holland
Yvette Kirk
Holland & Associates
1429 Madison Avenue
Memphis, TN 38104