NO. _____

In the Supreme Court of the United States

CHAREE STANLEY,

Petitioner,

v.

EXPRESSJET AIRLINES, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Railway Labor Act (RLA) requires mandatory arbitration of disputes between employers and employees in the railroad and airline industries if they require "the interpretation or application" of a collective-bargaining agreement (CBA) and "concern[] rates of pay, rules, or working conditions." 45 U.S.C. §§ 153(i), 181, 184. In *Hawaiian Airlines* v. *Norris*, the Court held that this "mandatory arbitral mechanism" preempts any "state-law claim" that is so "dependent on the interpretation of a CBA" that it can be "conclusively resolved" by that interpretation. 512 U.S. 246, 252, 260, 263 (1994) (internal quotation omitted).

The circuits conflict over whether the RLA's mandatory arbitral mechanism, and *Norris*'s rule for preemption of *state*-law claims, applies to claims brought under *federal* law. The circuits also divide over whether *Norris* extends beyond the CBA-dependent "claim[s]" *Norris* mentions, *id.* at 260, to CBA-dependent defenses. And they divide further over *Norris*'s application to the Title VII claims at issue in this case, because Respondent insists that the CBA must be interpreted to determine whether Petitioner's requested accommodation imposes "undue hardship." 42 U.S.C. § 2000e(j). But the circuits are divided over whether the "undue hardship" inquiry in a Title VII case is an affirmative defense or not.

The Questions Presented are:

1. Whether, and under what circumstances, claims arising under federal statute are subject to the RLA's mandatory arbitration requirement.

2. Whether the "undue hardship" inquiry in a Title VII case is an affirmative defense to liability.

STATEMENT OF RELATED PROCEEDINGS

Charee Stanley v. *ExpressJet Airlines, Inc.*, No. 19-1034 (CA6) (opinion issued and judgment entered Apr. 8, 2020)

Charee Stanley v. ExpressJet Airlines, Inc., No. 16-cv-12884 (E.D. Mich.) (opinion issued and judgment entered Dec. 7, 2018)

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Petitioner Charee Stanley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

This petition concerns a critically important issue of federal labor law on which the courts are expressly divided: whether workers in the railroad and airline industries governed by the RLA have the same right as other workers to have their federal civil rights claims decided in court, or whether the RLA forces those claims into arbitration.

This issue arises every day in courtrooms across the country, because the RLA mandates arbitration of certain disagreements between employers and employees in covered industries if they "aris[e] out of the interpretation and application" of a CBA. *Bhd. of R. R. Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 32 (1957) (citing 45 U.S.C. § 153(i)). And in the wake of *Hawaiian Airlines* v. *Norris*, 512 U.S. 246 (1994), which developed a test for determining whether the RLA's mandatory arbitration mechanism *preempts* state-law claims, a circuit conflict has developed over the different issue of "*preclusion*," *i.e.*, whether RLA's mandatory arbitral mechanism for "minor" disputes prevents plaintiffs from taking causes of action provided under federal statute to court.

The conflict is fully developed. The circuits are in a three-way deadlock, with three circuits saying federal claims are never precluded, three circuits saying federal claims are subject to Norris's rule for preemption, and one trying to thread its way between those camps. And the Sixth Circuit's position within that conflict is untenable. The Sixth Circuit is among those presuming that the questions of preemption of state claims and preclusion of federal claims are equivalent and should be treated the same, subjecting each to *Norris*'s standard. This cannot be squared with *Norris* itself, which explicitly limited its holding to the preemption of state claims, and explicitly preserved prior holdings that the RLA has no preclusive effect on federal claims.

The divide over the RLA's application to federal claims also feeds into other well-developed splits affecting the RLA's application to claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and similar statutes. A majority of circuits hold that even in

situations where the RLA's mandatory arbitral mandate is applicable, only "claim[s]" that depend upon CBA interpretation are barred—not CBA-impacted defenses. *Norris*, 512 U.S. at 260. And in Title VII cases, CBAs arise most often in defense. Employers frequently argue, as Respondent did in this case, that a plaintiff's requested accommodation would conflict with *other* employees' rights under a CBA—posing an "undue hardship" in violation of Section 701(j) of Title VII. 42 U.S.C. § 2000e(j).

But the Sixth Circuit applies an unusual logic for determining whether something constitutes an affirmative defense, under which it cannot be one unless a statute labels it an "affirmative defense"—by name. And so the court below applied that rule to hold that in Title VII, the "undue hardship" analysis is not an affirmative defense, contradicting the holdings of every other circuit to have considered the issue in Title VII, as well as those to have considered "undue hardship" analyses under other federal statutes.

Because of this confluence of erroneous rules, the Sixth Circuit relegates claims to arbitration that would be heard in court virtually everywhere else. And there, they will likely disappear, set before arbitration panels with no authority to hear them, and no power to provide the employee adequate relief.

This is no way to treat federal civil rights claims under Title VII. Those claims fall into no one's definition of a "minor" dispute. Under any fair preclusion inquiry, those claims are properly understood as having been carved out of the class of "disputes" governed by the RLA, and guaranteed a federal judicial forum, when Title VII was created. And this case highlights numerous conflicts that have not only rendered the RLA's interpretation into

complete chaos but have sown confusion into other areas of federal labor law as well. This is because the RLA's mandatory arbitration rules are interpreted in tandem with the preemption provisions of the Labor Management Relations Act (LMRA), which governs "[s]uits for violation of contracts between an employer and a labor organization representing employees," 29 U.S.C. § 185(a). The Sixth Circuit's divergent labor law for employees subject to CBAs in the railroad and airline industries thus becomes divergent law for every union-member in any industry. And it contributes to a confused state of federal labor law that this Court recognized to exist even before *Norris* was decided—and one that other courts and commentators have recognized as well.

This is a compelling case to address the full breadth of this widespread conflict. Petitioner's claims that the Sixth Circuit has forced into arbitration would likely succeed in a judicial forum. That is because the accommodation Stanley requested in this case—which she needed to comply with her sincerely held belief that her Muslim faith prohibits her from handling alcoholic beverages—does not require violating ExpressJet's CBA with its flight attendants, or the contractual rights of other employees, as Respondent alleges. It requires only the modification of employment policies that Respondent has reserved the right to change, and, on extremely rare occasions, voluntary shift changes Respondent had a duty to at least *try* to facilitate. The reasonableness of those accommodations should have been decided by a factfinder in federal district court.

The petition should be granted.

OPINIONS BELOW

The Sixth Circuit's opinion (App., *infra*, 1a-14a) is reproduced at 808 Fed. App'x. 351. Its order denying rehearing (*id.* 65a-66a) is unpublished. The district court's opinion (*id.* 15a-64a) is published at 356 F. Supp. 3d 667.

JURISDICTION

The Sixth Circuit issued its opinion and judgment on April 8, 2020 (App., *infra*, 1a), and denied a timely rehearing petition on May 14, 2020 (App., *infra*, 65a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the United States Code at issue in this case are reproduced in the appendix. (App., *infra*, 67a-68a)

STATEMENT

A. Background

1. Arbitration is normally "a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation omitted). And "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 648–649 (1986) (internal quotation omitted). Yet since 1926, the RLA has imposed a "mandatory arbitral mechanism," *Norris*, 512 U.S. at 252, for certain disputes that arise out of CBAs between employers and employees in particular industries—regardless of whether the parties to those agreements or the employees covered by them consented to arbitration. Congress first made the RLA applicable to workers in the railroad

industry. *Detroit & Toledo Shore Line R.R. Co.* v. *United Transp. Union*, 396 U.S. 142, 148 (1969). But Congress expanded the Act in 1936 to cover airline workers. 45 U.S.C. § 181.

For workers in these two industries, the RLA sets forth a detailed statutory "machinery to resolve disputes * * * as to wages, hours, and working conditions." *Int'l Ass'n of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). The core aspect of this machinery is arbitration, *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377–378 (1968), conducted under the auspices of the National Railroad Adjustment Board, 45 U.S.C. § 153. This arbitral mechanism applies to two classes of disputes. The first class, referred to as "major" disputes, relates to "the formation of collective [bargaining] agreements or efforts to secure them." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) (citation omitted). The second class, known as "minor" disputes, "grow[s] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). Put another way, "major disputes seek to create contractual rights, minor disputes to enforce them." *Norris*, 512 U.S. at 253. Claims falling between these "major" and "minor" extremes, or falling outside of the RLA entirely, go to court.

2. Where causes of action provided by federal statute ought to fall within this framework *seemed* to have been settled decades ago. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Buell*, 480 U.S. 557 (1987), the Court held, in considering an employee's claim brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, that the RLA cedes to any claim brought "under [a] federal

statute[]" that provides remedies for "substantive prohibitions against * * * conduct that is independent of the employer's obligations under its collective-bargaining agreement" and affords "'minimum substantive guarantees to individual workers'" that are greater than the "limited relief * * * available through the Adjustment Board." 480 U.S. at 564, 565 (quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981)). So "absent an intolerable conflict between the two statutes," the Court was "unwilling to read the RLA as repealing any part of the FELA." *Buell*, 480 U.S. at 566–567. That meant the "RLA does not deprive an employee of his opportunity to bring a FELA action for damages" even if his injury "was caused by conduct that may have been subject to arbitration under the RLA," *id.* at 564, and even when arbitration is "'exclusive,'" *id.* at 565 (quoting *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972)).

Under *Buell*, the RLA cedes to *any* statute that punishes conduct separate from employers' obligations under a CBA and provides "minimum substantive guarantees" beyond what a worker could obtain in arbitration before the RLA adjustment boards. It does not matter if those guarantees concern the right to compensation for "employees injured through an employer's or co-worker's negligence," 480 U.S. at 566, that FELA provides, or the right to be free of workplace religious discrimination that Title VII protects. Accordingly, on the question whether the RLA's mandatory arbitral mechanism would prevent a worker from advancing virtually any claim provided under federal statute, the Court answered with a resounding "No."

3. Yet what once seemed settled by *Buell* became unsettled after *Norris.* There, the Court announced a test

for determining whether the RLA "pre-empts state law," 512 U.S. at 252—one that borrowed from the "virtually identical" (512 U.S. at 247) preemption standards under § 301 of the LMRA, 29 U.S.C. § 185, that the Court had developed in cases like *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985) and *Lingle* v. *Norge Division of Magical Chef, Inc.*, 486 U.S. 399 (1988). Just as *Lingle* held "that the LMRA pre-empts state law only if a state-law claim is dependent on the interpretation of a CBA," *Norris*, 512 U.S. at 262 (citing *Lingle*, 486 U.S. at 405–408), *Norris* held that state claims are "minor" disputes, and preempted by the RLA's mandatory arbitral mechanism, only when they are so "dependent on the interpretation of a CBA" that the claim can be "conclusively resolved" by interpreting it. 512 U.S. at 262, 263.

Norris went out of its way to preserve the Court's prior decision in *Buell*. *Norris* explained that the standards it was announcing were "consistent with the holding in *Buell*," *id.* at 262. And it described how "RLA preclusion of a cause of action arising out of a *federal* statute" presented a very different question from "RLA pre-emption of a cause of action arising out of *state* law," *id.* at 259 n.6 (emphasis in original), since the latter involves "policing the line between major and minor disputes," while the former involves the "threshold question whether the dispute was subject to the RLA in the first place." *Id.* at 266, 267.

4. But the Sixth Circuit, among others, failed to heed *Norris*'s guidance and ignored *Buell*'s holding. The circuit has decided that rights granted by "federal and state law" should be subjected to the same *Norris*-based test, finding them cognizable in court only if they are not "covered" in the RLA's "minor" and "major" categories. *Int'l Bhd. of*

Teamsters, AFL-CIO, Teamsters Local Union No. 2727 v. *United Parcel Serv. Co.*, 447 F.3d 491, 495–497 (6th Cir. 2006). That means in the Sixth Circuit, a cause of action presents a "minor" controversy subject to RLA arbitration whenever it "relates either to the meaning or proper application" of the CBA, regardless of whether it arises under state or federal law. *Id.* at 496 (quoting *Elgin, Joliet & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 723 (1945)). The Sixth Circuit cited both *Buell* and *Norris* in support of this holding, *ibid.*, but the rule it announced cannot be squared with *Buell*'s holding that federal claims fall outside the RLA's major/minor framework, or *Norris*'s holding that *Buell* should be preserved.

The Sixth Circuit does, however, recognize a significant limitation on its application of *Norris*'s rule relating to "claim[s]" that depend on CBA interpretation. 512 U.S. at 260. And it is one that arises from the LMRA preemption rules that *Norris* drew upon: "[A] defendant's reliance on a CBA term purely *as a defense* * * * does not result in section 301 preemption." *Fox* v. *Parker Hannifan Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) (emphasis added) (citing *Caterpillar, Inc.* v. *Williams,* 482 U.S. 386 (1987)); see also App, *infra*, 8a. Ultimately, this is because, under LMRA preemption standards, "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly [a non-arbitral] claim, transform the action into one arising under" LMRA (and therefore RLA) standards requiring arbitration. *Caterpillar, Inc.*, 482 U.S. at 399; see also *DeCoe* v. *Gen. Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) (emphasis added) ("[T]he defendant's assertion of the [CBA] as an *affirmative defense*" will not turn "an otherwise independent claim into

a claim dependent on the labor contract.") (emphasis added).

5. Yet the Sixth Circuit stands out among the courts that properly confine the RLA's reach to claims and not defenses by improperly restricting the class of CBA-implicating "defenses" that fall outside the RLA's scope. In Title VII cases, and in cases under similar federal civil rights laws like the Americans with Disabilities Act, the CBA will most commonly be raised by the defense. It is usually interposed by employers as a roadblock against the plaintiff's requested accommodation on the basis that it would require the employer to violate *other* employees' rights under a CBA—posing an "undue hardship" in violation of Section 701(j) and similar "undue hardship" provisions in other civil rights laws. 42 U.S.C. § 2000e(j). And an accommodation that requires a party "take steps inconsistent with [an] otherwise valid" CBA constitutes an undue hardship as a matter of law. *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 79 (1977).

But the Sixth Circuit applies a peculiar logic to determine whether a matter constitutes an affirmative defense. It holds that because "[a]ffirmative defenses and exemptions generally come from the statutory text," *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 543 n.6 (6th Cir. 2014), the act creating a federal cause of action must label "undue hardship * * * an affirmative defense" for it to be one. *Ibid.* In *Hollis*, the circuit followed that rule to hold that "undue hardship" is not an affirmative defense under the Fair Housing Act, 42 U.S.C. § 12112(b)(5)(A)). And in this case, it followed that rule to decide that "undue hardship" is not an affirmative defense under Title VII. (App., *infra*, 9a)

B. Factual background

1. Petitioner Charee Stanley joined Respondent ExpressJet as a flight attendant in 2013 after having recently converted to Islam. By all accounts, ExpressJet considered her an exemplary employee—calling her "very professional and attentive, * * * with no history of customer complaints." (App., *infra*, 20a) Yet things changed about two-and-a-half years into Stanley's employment, when she learned during her religious studies that Islam prohibits adherents not only from consuming alcohol, but also from participating in its preparation and sale. (*Ibid.*)

Stanley brought this problem to her supervisor, who offered a simple accommodation: have the other flight attendant on Stanley's flights prepare and sell any alcoholic beverages. (App., *infra*, 20a-21a) Accounts diverge over whether the supervisor meant for this arrangement to be a permanent solution or simply a temporary fix for Ramadan (*id.* at 22a-23a)—but there is no dispute that it continued after Ramadan ended. After two-and-a-half months, however, ExpressJet withdrew Stanley's accommodation following complaints from a bigoted coworker who intermingled objections about having to assist with Stanley's beverage service with grumbling that Stanley had been seen "reading a small book with foreign writing" and wearing "a headdress upon her head." (*Id.* at 24a) In August 2015, ExpressJet gave Stanley an ultimatum: serve alcohol, find another position within the company, or resign. (*Id.* at 26a-27a) Soon thereafter, ExpressJet put Stanley on unpaid administrative leave while she attempted to find another position. When Stanley was unable to do so, ExpressJet terminated her employment. (Id. at 27a-28a)

After exhausting her administrative remedies, Stanley brought employment discrimination and retaliation claims against ExpressJet in federal district court under Title VII, together with claims under Title VII's Michigan counterpart, the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq*. (App., *infra*, 15a) ExpressJet moved for summary judgment on all of Stanley's claims, arguing that the RLA subjected them to arbitration. (*Id*. at 16a)

2. The district court granted ExpressJet's motion. It held, in line with Sixth Circuit precedent, *Int'l Bhd. of Teamsters*, *supra*, that the RLA's standards for "preemption" of state claims applied equally to the "preclusion" of federal claims. (App., *infra*, 41a n.2) And it noted that ExpressJet had raised its CBA with its flight attendants as part of the "undue hardship" inquiry, holding in line with this Court's precedent, but in conflict with Sixth Circuit law, *Hollis*, *supra*, that this concerned a "defense for the employer." (App., *infra*, 33a) (citing *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc*., 135 S. Ct. 2028, 2032 n.2 (2015)). Yet the district court held that because ExpressJet's "undue hardship" defense was ultimately dependent upon—and, in its view—resolved by, interpretation of the CBA, that meant Stanley's claim was precluded, in spite of Sixth Circuit precedent making such CBA-dependent defenses irrelevant to the RLA's application, *Fox*, *supra*. (App., *infra*, 41a)

The district court held that having another flight attendant assist with Stanley's drink service on a two-attendant flight could affect seniority rights under the CBA, noting that ExpressJet divided drink-service responsibilities between the first-class and regular cabins, with the senior flight attendant usually handling the first-class

cabin. (App., *infra*, 39a-55a) But the court acknowledged that turning this reassignment of responsibilities into a CBA violation would require expanding the CBA beyond its plain terms, to include certain "implied contractual terms." (*Id.* at 55a) This was because the CBA itself does not divide drink service responsibilities between the first-class and main cabins. That division was made in a separate document: the ExpressJet "Flight Attendant Manual" (*Id.* at 17a-18a), which ExpressJet reserved the right to change. (ROA Page ID 861, 940, 947-949) The CBA itself said nothing about drink-service duties other than that flight attendants were required to "work together and assist one another with completing all required service on the aircraft," including drink service. *Ibid.*

The district court also credited ExpressJet's speculative concern that accommodating Stanley's religious observance might interfere with seniority rights on *single*-attendant flights—an odd complaint, given that ExpressJet had no single-attendant flights operating from Stanley's Detroit-based crew base. RE 33-4, Page ID 925–926. The district court held that *if* a flight had to be downgraded from two attendants to one, and *if* no reserve could be found to take Stanley's place, and *if* the other flight attendant assigned to the flight was more senior, and *if* she would not voluntarily take it, that might violate the CBA, even though none of these things had happened during Stanley's years at the company. (App., *infra*, 26a, 29a)

In so holding, the district court rejected Stanley's contention that ExpressJet had a duty to at least attempt a voluntary resolution of the problem on the exceedingly rare occasions it might arise before declaring Stanley's request an undue hardship for all time. (App., *infra*, 38a)

C. The decision below

1. The court of appeals reached the same result as the district court but tried to put the decision on firmer footing under Sixth Circuit precedent. The court of appeals agreed with the district court that regardless of whether a right is created by "'state [or federal] law,'" then the claim would be "preempted" by the CBA if "interpretation of the CBA is necessary to determine the claim." (App., *infra*, 8a) (quoting *DeCoe*, 32 F.3d at 216) (alteration in original). But it disagreed with the district court that the distinction between claims and defenses was irrelevant, adding the reminder, in line with circuit precedent, that "[a]n employer cannot take an otherwise valid claim and cause it to become preempted by claiming the CBA as a defense." (*Ibid.*) But the court of appeals then departed from Supreme Court precedent, *Abercrombie*, *supra*, while ruling consistently with circuit precedent, *Hollis*, *supra*, that "undue hardship" is not "a defense raised to excuse a Title VII violation." (*Id.* at 9a) Instead, it held that it was "a part of the Title VII analysis," because although "the statutory text of Title VII clearly provides for an exception for accommodations that would be an 'undue hardship' for the employer," the text did not label that exception an affirmative defense. (*Ibid.*) And it backed this up with the inevitability of the undue hardship inquiry: "[a] court presented with a Title VII claim must always examine whether the requested accommodation presents an undue hardship," making it "part of the Title VII analysis" and not a defense. (*Ibid.*)

The court of appeals then agreed with the district court that Stanley's claims were conclusively resolved by the CBA. Like the district court, it held that assessing "undue hardship" would require "determin[ing] whether

permitting Stanley to refuse a downgraded flight with a single flight attendant violates the seniority provisions of the CBA," as would determining whether "requiring a flight attendant to accept the alcoholic beverage service" on two-attendant flights would conflict with the CBA. (CA6) And to the court below, that meant Stanley's claims were "preempted." (*Ibid.*)

2. Stanley sought en banc review, pointing out the inconsistency between the panel's holding that "undue hardship" is not an affirmative defense to Title VII liability and Supreme Court precedent and decisions from other circuits saying that it was. But the Sixth Circuit denied en banc review. (App., *infra*, 65a)

REASONS FOR GRANTING THE PETITION

The traditional criteria of certworthiness are all present here. There are acknowledged, wide-spread, and fully developed spits on both Questions Presented. And those questions are right now leading to different results in similar cases across jurisdictional lines.

This case is a compelling one for resolving these splits, as it presents an opportunity to resolve several doctrinal divergences at once and lend clarity in an area of the law that badly needs a makeover, as this Court and commentators have frequently noted. And the erroneous rule applied below, which forces plaintiffs in industries covered by the RLA to advance federal civil rights claims in an arbitral forum that is not equipped to handle them, cannot be squared with statutory text, precedent, or any rational conception of federal labor law.

A. There are acknowledged, entrenched, circuit conflicts on both Questions Presented.

Review is warranted because there are acknowledged, widespread, and entrenched conflict among the circuits on the Questions Presented.

1.a. On the first Question Presented concerning the RLA's applicability to causes of action created by federal statute, the Circuits are split 3-3-1. The Second, Eighth, and Ninth Circuits depart from the Sixth Circuit, holding claims arising from federal statute are categorically exempt from *Norris*'s framework and the RLA's mandatory arbitral scheme. In *Saridakis* v. *United Airlines*, 166 F.3d 1272 (9th Cir. 1992), the Ninth Circuit expressly followed *Norris*'s instruction that for federal claims like the ADA, it did not matter whether the plaintiff's claims "inextricably implicated" the CBA, because that question was only relevant in "policing the line between major and minor disputes," not the "'threshold question whether the dispute was subject to the RLA in the first place.'" *Id.* at 1277 (quoting 512 U.S. at 265–266. And in *Felt* v. *Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416, 1420 (9th Cir. 1995), the circuit expressly followed *Buell* in holding that "the RLA does not preclude litigation of Title VII rights" at all.

The Second Circuit has maintained a similar position. In *Bates* v. *Long Island Railway Co.*, 997 F.2d 1028 (2d Cir. 1993), it channeled *Buell* to hold that employees' federal civil rights claims are not precluded by the RLA, so as to make arbitration the plaintiffs' "exclusive remedy," even if resolution of their claims would "require interpretation of the applicable collective bargaining agreement." *Id.* at 1034. "When an employee's statutory civil rights have been violated," the court held, "arbitration should not

be the sole avenue of protection, unless Congress has so specified." *Ibid.* (holding that the RLA did not bar a claim under the Rehabilitation Act). And the Second Circuit has adhered to the same position since *Norris* was decided in 1994. *Goss* v. *Long Island R. Co.*, 159 F.3d 1346 (2d Cir. 1998) (Table opinion) (distinguishing *Bates* and holding that because the employee's "RLA claim is grounded in the collective bargaining agreement and is not a matter of statutory civil rights," it was precluded).

Similarly, the Eighth Circuit held both before and after *Norris* that because an employee "bringing a claim" under a federal statute "seeks to enforce a federal statutory right, not a contractual right embodied by the" CBA, her claim is not precluded by the RLA so long as the federal law "'provides a more extensive and broader ground for relief'" than arbitration. *Benson* v. *Nw. Airlines*, 62 F.3d 1108, 1115 (8th Cir. 1995) (holding that the RLA does not preclude claims under the ADA) (quoting *Norman* v. *Missouri Pac. R.R.*, 414 F.2d 73, 83 (8th Cir. 1969)) (holding that the RLA does not preclude Title VII claims).

Every circuit in this camp has adhered to pre-*Norris* precedent keeping federal claims separate from the RLA's arbitral machinery, and heeded *Norris*'s instruction that this precedent should be preserved.

b. By contrast, the Sixth Circuit joins the Seventh and Tenth Circuits in jettisoning precedent and subjecting both state and federal claims to the RLA and *Norris*'s test. The Seventh Circuit's decision in *Brown* v. *Illinois Central Railroad Co.*, 254 F.3d 654 (7th Cir. 2001) exemplifies this camp's thinking. *Brown* recognized, in considering whether the RLA precludes an ADA claim, that "preclusion" of federal claims requires a different inquiry than "preemption," as "the two types of cases implicate

some different concerns." *Id.* at 662. Yet the Seventh Circuit deemed the inquiries "sufficiently similar" that *Norris*'s test for "RLA preemption cases" could be applied in preclusion cases. *Ibid.* And it held that even federal claims cannot survive the RLA's arbitration mechanism "if the claim's resolution requires the court to interpret the CBA's terms as a potentially dispositive matter." *Id.* at 664.

Brown also recognized that this interpretation of the RLA departed from that of the Second Circuit. See 254 F.3d at 667 n.12 (acknowledging but rejecting *Bates*'s holding that "the RLA did not preclude the plaintiff's claim under the Rehabilitation Act even though it implicated portions of the CBA"). *Brown* likewise recognized that its position departed from that of the EEOC, which urged the court as amicus to hold that the RLA's jurisdiction-stripping power over "*state* law" claims should not "as a matter of course preclude similar claims brought under a *federal* statute." *Id.* at 661 (emphasis in original).

The Tenth Circuit joined this camp in *Fry* v. *Airline Pilots International Association*, 88 F.3d 831 (10th Cir. 1996). It interpreted *Norris*'s and *Lingle*'s *state* preemption standards as making "the threshold question" for *both* "federal and state law claims" whether the claim "requires interpretation or application of the CBAs." *Id.* at 836.

c. Like in *Brown*, the Fifth Circuit has also noted the conflict, expressly recognizing the two camps' differing standards while crafting its own unique standard in *Carmona* v. *Sw. Airlines Co.*, 536 F.3d 344 (5th Cir. 2008). There the Court contrasted the Seventh Circuit's holding in *Brown* that "'a federal claim'" that "'depends for its resolution on the interpretation of a CBA'" is precluded, *id.* at 350 n.25 (quoting 254 F.3d at 667–668 & n.24–25), with the

rule in "[o]ther circuits" that "claims grounded in federal statutory rights are generally *not* precluded by the RLA," *id.* at 350 (emphasis added) (citing the Ninth Circuit's decisions in *Saridakis* and *Felt,* along with the Eighth Circuit's decision in *Benson*). And it expressly rejected the latter camp's approach making "the source of the rights" determinative in deciding whether the RLA required arbitration. 536 F.3d at 350–351. But the Fifth Circuit still did find a claims' federal origins relevant in determining whether the RLA was preclusive, holding that they "further evidence[ed] that the instant suit" was independent of the RLA. *Id.* at 351. Yet the circuit still considered the determinative issue whether the suit "require[d] CBA interpretation." *Ibid.*

2. That conflict gives rise to another implicated by the Questions Presented, because—quite apart from disagreeing about whether the standards for preclusion and preemption should be unified—the circuits differ on what that unified standard ought to be. Here, at least, the Sixth Circuit is in the majority, joining the Seventh Circuit in holding that *Norris*'s rule extends only to "claims," and not defenses, while the Third Circuit disagrees. Compare *Brown*, 254 F.3d at 668 ("An employer cannot ensure the preclusion of a plaintiff's claim merely by asserting certain CBA-based defenses to what is essentially a non-CBA-based claim.") with *Capraro* v. *United Parcel Service, Co.*, 993 F.2d 328, 332 (3d Cir. 1993) (holding that the RLA precludes any claim requiring "interpretation of" the

CBA, whether it concern "the employee's claim or the employer's defense relies on the agreement").[1]

3. But the Sixth Circuit stands out from all other circuits as the most extreme in denying a judicial forum for federal civil rights claims in RLA-covered industries—especially in application to claims under statutes, like Title VII and the ADA, that require reasonable accommodations. This is because the Sixth Circuit departs from every other circuit to have considered the issue on the second Question Presented, because every other circuit considers the Title VII "undue burden" inquiry to constitute an affirmative defense. *E.E.O.C.* v. *GEO Grp., Inc.*, 616 F.3d 265, 270 (3d Cir. 2010) (calling "undue hardship" an "affirmative defense" under Title VII); *Antoine* v. *First Student, Inc.*, 713 F.3d 824, 833 (5th Cir. 2013) (calling "undue hardship" part of the Title VII "affirmative defense of reasonable accommodation"); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (calling undue hardship an "explicit affirmative defense" under Title VII); *E.E.O.C.* v. *Sw. Bell Tel., L.P.*, 550 F.3d 704, 710 (8th Cir. 2008) (agreeing with defendant that "undue hardship" is an "affirmative defense" under Title VII); *Tabura* v.

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[1] This split extends beyond the RLA to the similar question of preemption under § 301 of the LMRA. Here, as the Eleventh Circuit has noted, "[c]ircuits are split over whether a defense, as opposed to a claim, that is substantially dependent on the terms of a CBA compels § 301 preemption." *Atwater* v. *Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1181 n.14 (11th Cir. 2010) (noting that *Fry*, *Smith* v. *Colgate–Palmolive Co.*, 943 F.2d 764, 770–71 (7th Cir. 1991), and *Hanks* v. *Gen. Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988) hold that even where CBA interpretation is initiated by a defense, claims are preempted, while *Ward* v. *Circus Casinos, Inc.*, 473 F.3d 994, 996–98 (9th Cir. 2007) holds that defenses are not relevant to § 301 preemption).

Kellogg USA, 880 F.3d 544, 557 (10th Cir. 2018) (calling "undue hardship" an "affirmative defense" under Title VII). And several other circuits have held "undue hardship" to be an affirmative defense under statutes applying a similar framework to Title VII.[2]

The comparative unfairness of the Sixth Circuit's rules extends further, as other circuits recognize that the RLA's arbitral mechanism should extend no further than its reason for being: ensuring uniform interpretation of CBAs. In the Seventh Circuit, for example, if CBA interpretation is necessary to resolve a claim, the litigation is not dismissed, but only "stayed" until the interpretive problem is resolved, whereupon "the suit can resume." *Tice* v. *Am. Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002). But in the Sixth Circuit, the need for CBA interpretation does not produce a stay for arbitration, but a dismissal with prejudice—closing the courthouse doors completely and leaving arbitration as the only forum where these claims could be addressed. (App., *infra*, 14a, 64a)

* * *

Employees in industries regulated by the RLA who seek to bring Title VII claims in the Sixth Circuit therefore face a two-fold disadvantage when compared to

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[2] *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 217, 223 (2d Cir. 2001) (holding that "undue hardship" is an affirmative defense under the ADA, which applies the same "framework" as Title VII); *E.E.O.C.* v. *St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1341 (11th Cir. 2016) (holding that "undue hardship" is an affirmative defense under the ADA); *Woodruff* v. *Peters*, 482 F.3d 521, 527 (D.C. Cir. 2007) (citing 29 C.F.R. § 1630.15(d) as "confirming that 'undue hardship' is an affirmative defense" under the Rehabilitation Act).

similar employees in every other circuit. The first is that their federal claims are subject to a risk of preclusion that does not exist elsewhere. The second is that the Sixth Circuit's rules for RLA preclusion are uniquely slanted toward arbitration. The upshot is that for plaintiffs like Stanley, claims are subject to arbitration that would have been heard in court virtually anywhere else. This Court's intervention is necessary to end the multifaceted conflicts that have allowed such jurisdictional unfairness to develop.

B. The decision below is incorrect.

1. This Court's review is also essential because the Sixth Circuit's standards for preclusion of federal claims under the RLA are wrong and cannot be squared with this Court's precedent—for the very reasons the Court explained out in *Norris* and *Buell*: The RLA is not meant to preclude federal civil rights claims.

That much is evident from the tests the Court has utilized to determine the scope of the RLA's mandatory arbitral mechanism. *Norris*'s test for determining which disputes fit within the RLA's category of "minor" disagreements is designed for "pre-empt[ion]" of "state law" claims, 512 U.S. at 262. And the standard it "adopts" is likewise a "preemption" standard—*Lingle*'s framework for applying LMRA § 301, in hopes of harmonizing the two "virtually identical" preemption standards. *Norris*, 512 U.S. at 260. Neither concerns the determination whether the RLA precludes federal claims. And the reason why is ultimately rooted in "the Supremacy Clause." *Coker* v. *Trans World Airlines, Inc.*, 165 F.3d 579, 584 (7th Cir. 1999). The question in preclusion is whether the RLA means to displace a co-equal federal law, and thus involves

asking whether the RLA has any application to claims created by federal statute. And that question cannot be answered by examining *Norris*'s test, which presumes the RLA's applicability, and aims to help courts decide how much law the RLA displaces—by "policing the line between major and minor disputes." 512 U.S. at 265. The inquiries are not "sufficiently similar" that they can be treated as equivalents. *Brown*, 254 F.3d at 662.

Preclusion therefore requires a different toolkit—one meant to help courts determine how to read the RLA together with other federal statutes. That toolkit is supplied by *Buell*, which is why the Court took such pains to leave *Buell*'s holding intact. Under *Buell*, the RLA cedes to any statute that provides "minimum substantive guarantees" to particular workers beyond what they could obtain before RLA adjustment boards. 480 U.S. at 565. The Court's reasons for this rule is obvious: The RLA claims no specific power over claims created by other federal claims, and federal statutes like Title VII give no indication that they meant to cede to *any* arbitral mechanism in *any* other statute. Accordingly, when Congress added Title VII after the RLA and granted a class of employees a substantive protection against discrimination, that carved out these matters from the "disputes" that might have fallen within the RLA and gave them entirely separate treatment. And if there were any doubt on this score, Title VII ought to control, as the act enacted later in time. *United States* v. *Estate of Romani*, 523 U.S. 517, 530–531 (1998) (holding that the "a later federal statute should control").

It is also obvious that Title VII provides the "minimum substantive guarantees" to particular workers necessary to reflect Congress's intent to displace the RLA arbitral mechanism. Title VII "is a comprehensive statute

designed to end * * * discrimination in the workplace in all industries, and it does not exempt the railroad and airline industries from its reach." *Brown*, 254 F.3d at 659 (emphasis added). "The enactment of Title VII provides a more extensive and broader ground for relief" than available through the RLA arbitral process. *Norman*, 414 F.2d at 83. It is also "specifically oriented towards the elimination of discriminatory employment practices," *ibid.*, and it provides a broader set of remedies—including damages and injunctive relief, 42 U.S.C. §§ 1981a(a)(1), 2000e–5(g)—than the "back pay" and "reinstatement" remedies available in RLA arbitration. *Lewy* v. *Southern Pacific Transportation Co.*, 799 F.2d 1281, 1295, 1297 (9th Cir. 1986). And the substantive rights Title VII provides are specifically "enforceable by individuals in the District Courts." *Norman*, 414 F.2d at 83. That is plainly greater than what a worker can get in RLA arbitration.

There is also a deeper incompatibility between the RLA arbitral forum and substantive Title VII rights that indicates the former did not mean to preclude the latter. The only matters that the RLA delegates to arbitrators and the RLA Adjustment Board are "disputes invoking contract-based rights." 512 U.S. at 254. Accordingly, such contract disputes over the meaning of a CBA are the only matters that the RLA empowers them to decide. That means arbitrators are not empowered to make the legal decisions necessary to decide federal civil rights claims. They are simply not part of the delegation of authority provided by the RLA. And that comports with the Board's understanding of the limits of its own authority. See NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award

No. 19790 (1973) ("[T]his Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreements"); *Northwest Airlines/Airline Pilots Ass'n., Int'l System Bd. of Adjustment*, Decision of June 28, 1972, p. 13 ("[B]oth the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]"); *United Airlines, Inc.*, 48 LA 727, 733 (BNA) (1967) ("The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act"). Accordingly, forcing federal civil rights claims into RLA arbitration would lead to a truly "radical" result: The claimant would not be able to "assert *in any forum*" the rights conveyed to her by federal statute. *Carlson* v. *CSX Transp., Inc.*, 758 F.3d 819, 834 (7th Cir. 2014) (emphasis in original). That cannot be the correct reading of the RLA, a statute that "reflects a strong congressional interest in seeing that employees are not left remediless." *Pyles* v. *United Air Lines*, 79 F.3d 1046, 1052 (11th Cir. 1996). This is strong evidence that the RLA leaves Title VII claims intact, even when they might require interpretation of a CBA for their resolution.

2. This carving out of Title VII claims from the RLA's mandatory arbitral mechanism does nothing to undermine the uniformity the RLA provides. The RLA's arbitral mechanism displaces state law for the same reason section 301 of the LMRA preempts state law: "[T]he application of state law" to a CBA "might lead to inconsistent results since there could be as many state-law principles as there are States." *Lingle*, 486 U.S. at 406. But the chances for fractured CBA-interpretation are drastically reduced for federal claims. These can be heard in federal court, with a

single set of CBA construction and interpretive principles. And this Court sits to ensure those rules are kept uniform. Accordingly, allowing federal claims to proceed in court creates far less concern of interpretive incoherence than allowing state claims. In any event, if the RLA's need for uniform treatment of CBAs necessitates that arbitral bodies—and only arbitral bodies—be entrusted with interpretation of those agreements, then the answer is not to subject federal claims to dismissal, as the Sixth Circuit does. It is instead to afford parties a stay while the contract is interpreted in the arbitral forum, as the Seventh Circuit does, and then allow the federal claim to go forward when interpretation is complete. *Tice*, 288 F.3d at 318. That better balances Congress's desire to allow workers to have their federal civil rights claims heard in court with its concern for uniform interpretation of CBAs. The Sixth Circuit erred in concluding otherwise.

3. The Sixth Circuit does get one thing right, however. If, as *Norris* suggests, courts should employ the § 301 standard under the LMRA to determine the RLA's preclusive effect, they should at least apply the entire standard. And that means holding that only CBA-based claims, not CBA-based defenses, should be able to trigger a mandatory arbitral forum under *Caterpillar*, 482 U.S. at 399. Just as a worker cannot avoid RLA arbitration by repackaging claims for breach of a CBA as claims arising under state law, so too should an employer be prohibited from manufacturing a right to an RLA arbitral forum by asserting CBA-based defenses.

4. Yet as right as the Sixth Circuit might be it treating CBA-based claims differently from CBA-based defenses, it gets the contents of the category of "defenses" entirely wrong. This is because the Sixth Circuit erred in

determining that the "undue hardship" analysis in a Title VII case is not an affirmative defense.

There are two basic, universally recognized markers of an affirmative defense: *first*, whether the matter defeats the defendant's liability "even if all the allegations in the complaint are true," and *second*, whether it is a matter on which the "defendant bears the burden of pro[of]." *Black's Law Dictionary* (11th ed. 2019). The "undue hardship" analysis exhibits both markers. It is clear, for example, that the undue hardship inquiry allows a defendant to succeed regardless of the strength of the plaintiff's case. As Justice Alito's concurrence in *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) explained, the allocation of burdens in a Title VII failure-to-accommodate case can be summarized like this:

> An employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice *unless* the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.

Id. at 2034 (Alito, J., concurring) (emphasis added). Everything coming after the italicized "unless" constitutes an affirmative defense, creating a defense for the employer, *id.* at 2032 n.2. That includes "undue hardship," because it means the employer triumphs regardless of what the plaintiff can prove on the other side of that "unless," which encompasses the plaintiff's Title VII *prima facie* burden. *Abercrombie* also makes clear that the employer defendant bears "the burden of establishing" this "'undue

hardship' defense." *Ibid.* And that is exactly why *Abercrombie* calls "undue hardship" a "defense."

By contrast, the Sixth Circuit's quixotic approach to identifying affirmative defenses improperly places the focus on labels and irrelevant details. It should make no difference whether the act creating a federal cause of action labels something an affirmative defense, *Hollis*, 760 F.3d at 543, if it does not operate as a defense. Nor for that matter does the "inevitability" of an issue make it anything less than affirmative defense. (App., *infra*, 9a) Many defenses are routinely asserted, but their popularity does not change their character. Accordingly, the Court was wrong to conclude the Title VII "undue hardship" inquiry was a part of Stanley's claim, and to hold that the RLA precluded courts from considering those claims for that reason.

C. The Questions Presented are of obvious national importance, and this is the appropriate vehicle to address them.

1. Certiorari is also warranted because the question presented in this case is a recurring one of national significance. The conflicts implicated by this case incorporate all but two of the regional circuits. That widespread conflict has been recognized by the lower courts, see *Carmona*, *supra*, and *Brown*, *supra*, and it has persisted since 1995, less than two years after *Norris* was decided. Compare, e.g., *Benson*, *supra*, with *Fry*, *supra*. And these conflicts are not confined to the RLA itself, but extend to the LMRA too, when they ought to be producing harmony.

2. These conflicts are right now leading to different case outcomes and different treatment of CBAs, in different circuits. That makes for bad treatment of CBAs—

which "'peculiarly * * * call [] for uniform law,'" since they often operate across jurisdictional lines. *Local 174, Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (quoting *Pa. Ry. Co.* v. *Pub. Serv. Comm'n*, 250 U.S. 566, 569 (1919)). Allowing these jurisdictional differences to persist therefore deprives parties to CBAs of certainty when they apply and enforce the agreement, and could make negotiating a CBA more difficult "because neither party could be certain of the rights which it had obtained or conceded." *Ibid.* And the resulting uncertainty "would inevitably exert a disruptive influence" on the bargaining and administration processes. *Ibid.*

These festering conflicts are also bad for labor law writ large, contributing to a confusion that this Court recognized in *Lividas* v. *Bradshaw*, 512 U.S. 107 (1994). There it recognized that "the courts of appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and *Lueck*." *Id.* at 124 n.18. Lower courts agree: "[S]ection 301 has been the precipitate of a series of often contradictory decisions, so much so that federal preemption of state labor law has been one of the most confused areas of federal court litigation." *Galvez* v. *Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991) (internal quotation marks omitted). And numerous commentators have noted the widespread confusion as well. E.g., Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. Rev. 687, 702 (1997) ("The section 301 preemption doctrine is an awful mess."); Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17

Berkeley J. Emp. & Lab. L. 1, 6–17 (1996) (noting that the Court's decisions "did not clearly define the test for preemption" and identifying at least three tests for preemption in the Court's jurisprudence). And as this case illustrates, the conflicts have only grown worse since these articles and decisions were written. The Court's intervention could fix all these conflicts—within the RLA, within the LMRA, and between the two—and give the entire area of the law a course-correct.

3. The issues encapsulated in the Questions Presented are also obviously important. Not only do they affect each of the millions of employees in the railroad and airline industries affected by the RLA who might experience discrimination in the workplace, but they could reach many more—because of the ties between the RLA and LMRA. And that means the issues in this case could control worker relations in every industry in which companies are subject to CBAs negotiated by labor unions. Accordingly, left unchecked, the Sixth Circuit's erroneous approach to RLA preclusion could spread to harm virtually all union members and anyone subject to a CBA. It will deny all employees subject to the RLA or the LMRA of any federal judicial forum for Title VII claims—under a logic that will shunt many other types of federal civil rights claims into arbitration as well, before arbitral boards that lack the power to consider federal civil rights claims. And that will lead to a disappearance-through-arbitration of claims that other circuits reserve for a judicial forum. The end result will be that employees in the Sixth Circuit will have fewer civil rights than those virtually everywhere else—the price workers must pay to collectively bargain or join a union.

4. This case is an excellent vehicle to overturn the Sixth Circuit's erroneous precedent and resolve the festering conflicts in federal labor law. It highlights several conflicts in a way that allows them all to be resolved at once—fostering the inter-statutory harmony this Court has long sought to develop. And this is a good case to resolve these splits because the standard is outcome determinative under Sixth Circuit precedents that have stood for years and that the Court refused to fix in this case to bring them in line with Supreme Court precedent.

This case also provides an opportunity to resolve these issues on sympathetic facts, because leaving the lower court's judgment standing will force the death-by-arbitration of claims that ought to succeed in district court. The lower court may have been correct that issues of CBA interpretation might have been implicated by Stanley's claims if ExpressJet's position were adopted. But the better reading of the CBA is that it has no impact on Stanley's claims or ExpressJet's "undue burden" defense. Indeed, Stanley's request to have the division of cabin responsibilities be adjusted to relieve her of responsibility for assisting with drink service on two-attendant flights does not involve the CBA at all, and therefore does not involve other employees' contractual rights. It instead involves a manual that has not been incorporated into the CBA and that ExpressJet reserved the right to change at its pleasure.

The only accommodation that might implicate the CBA itself would be Stanley's request to be relieved of staffing one-attendant flights—because it at least implicates other flight attendants' rights to pick their assignments. But Charee offered her own accommodation that would not require violating anyone's contractual rights.

She said would be willing to take an "unexcused" absence for any single-attendant flight that might arise, and ExpressJet could call up a reserve. The only way that might require forcing a flight attendant to take an assignment against her will would require a chain of hypotheticals that is unlikely to ever happen. It would arise only if (1) a flight had to be downgraded from two attendants to one, (2) a reserve was unavailable, (3) another senior flight attendant objected to taking the spot. And in any event, ExpressJet had the obligation under Title VII to at least ask for voluntary waivers from other affected employees before denying Stanley's request outright. "The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps." 29 C.F.R. §1605.2 (d)(1)(i); see also Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 605 (2000) (citing cases).

Accordingly, the concern for CBA interpretation and application so often raised in Title VII cases—that accommodating would require violating the contractual rights of other workers—are simply not implicated in this case. This is the paradigm case where ExpressJet is employing "a collective bargaining contract" and a "seniority system" as an excuse to "violate [a] statute"—rather than being required "take steps inconsistent with the otherwise valid agreement." *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 79 (1977).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 12, 2020

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 8, 2020]

No. 19-1034

CHAREE STANLEY,

Plaintiff-Appellant,

v.

EXPRESSJET AIRLINES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

BEFORE: BOGGS, BATCHELDER, and DONALD, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Recognizing the critical role the transportation sector serves in the country's security and prosperity, Congress amended the Railway Labor Act ("RLA") in 1934 to require that all minor labor disputes in these vital industries be resolved by arbitration. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 72-73 (2009). Rather than having every issue that would invariably arise in the workplace litigated through the court system, Congress instead sought to facilitate the "peaceful and efficient resolution" of employees' grievances through

arbitration whenever the governing collective bargaining agreement ("CBA") addressed those issues, including pay or working conditions. *Id.* at 72; 45 U.S.C. § 151 *et seq.* As the Supreme Court and this circuit have repeatedly held, when a claim can be resolved conclusively by the CBA, the claim is preempted[1] and must be brought before an arbitrator, not a court. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 792 (6th Cir. 2012).

In the case before us, Charee Stanley, a practicing Muslim and formerly employed flight attendant at Defendant ExpressJet Airlines, Inc. ("ExpressJet"), brought a federal religious discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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[1] Federal claims are said to be "precluded," while state claims are said to be "preempted." For the purposes of the RLA, this is a distinction without a difference, as the same standard applies for both preclusion and preemption, i.e., whether the claim could be conclusively resolved by the CBA. *See e.g. Brown v. Illinois Central R.R. Co.*, 254 F.3d 654, 662 (7th Cir. 2001) ("[W]e find the preemption question sufficiently similar to the preclusion question to make the analysis employed in the RLA preemption cases applicable here."); *Parker v. American Airlines, Inc.*, 516 F. Supp. 2d 632, 637-38 (N.D. Tex. 2007) ("Arbitral boards established under the RLA enjoy exclusive jurisdiction to resolve all disputes requiring the construction or application of a CBA regardless of whether the dispute involves a state-law claim or a federal claim. When applied to a state-law claim, the RLA is said to preempt. But when applied to a federal claim, the RLA is said to preclude.") (citation omitted); *VanSlyck v. GoJet Airlines, LLC*, 323 F.R.D. 266, 269 (N.D. Ill. 2018) ("It is well settled that the RLA requires mandatory arbitration of so-called 'minor disputes,' which are those requiring 'interpretation or application' of a CBA. Such disputes are thus 'preempted' (if raised in a state claim) or 'precluded' (if raised in a federal claim)." (citation omitted)). While recognizing the difference between preclusion and preemption, we will refer to both Stanley's federal and state claims as "preempted" for the sake of brevity and clarity.

§ 2000e, *et seq.* ("Title VII"), and a state religious discrimination claim under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq.* ("ELCRA"), as well as a retaliation claim. Stanley requested and was denied an accommodation that would excuse her from her duties of preparing and serving alcohol during flights, which Stanley says her religion forbids. The question we must answer, however, is not whether Stanley's claims have any merit, but whether we may hear her claims in the first place. If Stanley's claims can be conclusively resolved by the CBA, then they are preempted by the RLA. The district court granted ExpressJet's motion for summary judgment, holding that Stanley's religious-discrimination claims were preempted under the RLA and that she failed to create a genuine issue of material fact for her retaliation claim, which also would have been preempted. For the reasons below, we AFFIRM the district court as to all claims.[2]

I.

In January 2013, just a few weeks after converting to Islam, Charee Stanley began working for ExpressJet as a flight attendant. As part of her duty as a flight attendant, Stanley was required to prepare and serve alcoholic drinks to passengers. From January 2013 through June 2015, Stanley prepared and served alcohol to passengers and was by all accounts a professional and attentive flight

[2] On June 7, 2019, ExpressJet filed a motion for leave to file a sur-reply. The motion was referred to the merits panel for consideration along with the briefs as filed. Because new arguments first raised in a reply brief are generally not considered and given the final disposition of this case, we DENY ExpressJet's motion. *See United States v. Jenkins*, 871 F.2d 598, 602, n. 3 (6th Cir. 1989) ("[C]ourt decisions have made it clear that the appellant cannot raise new issues in a reply brief.").

attendant. However, in June 2015, Stanley had a conversation with her imam who informed her that not only were Muslims forbidden from consuming alcohol, but also from preparing or serving it. Upon being advised of this, Stanley spoke to Inflight Operations Manager Melanie Brown the following day. Because Stanley's next assigned flight was "within minutes" of departing, Brown suggested Stanley ask the other flight attendant to handle all of the alcoholic beverages prepared and served during the flight. At this point, the parties' accounts diverge. Stanley claimed she understood this would be a permanent solution going forward, while Brown thought this was a temporary accommodation for "that specific flight" because Stanley "was beginning to observe Ramadan."

Regardless, this arrangement was unlikely to succeed in the long-term as it violated several provisions of the CBA. As an ExpressJet flight attendant, Stanley was a member of the International Association of Machinists and Aerospace Workers ("the Union"). The CBA was negotiated between the Union and ExpressJet and governed Stanley's relationship with ExpressJet as her employer.

There are three provisions of the CBA pertinent to this dispute. First, flight schedules, as well as bidding rights, filling of vacancies, vacation preferences, and domicile assignments, are all based on a flight attendant's seniority. Second, on a flight with two flight attendants, "[t]he senior Flight Attendant may choose the 'A' or the 'B' position on the aircraft." Flight Attendant A is primarily responsible for the First Class passengers, while Flight Attendant B is primarily responsible for the main cabin. The Flight Attendant Handbook ("FAM") specifies in more precise detail the actual duties of each flight attendant. For example, Flight Attendant B (usually the junior flight

attendant) is expected to "prepare beverages" and assist Flight Attendant A with preparing and serving beverages to the First Class cabin, "including alcoholic beverages." Third, if a scheduled flight with two flight attendants is downgraded to a flight with only one flight attendant, the senior flight attendant has the right to accept or decline the downgrade. If the senior flight attendant declines the downgrade, the junior flight attendant must accept the assignment.

Stanley's requested accommodation of having the other flight attendant (who likely would have seniority given Stanley's relatively short tenure at ExpressJet) serve all of the alcoholic beverages on a flight conflicts with the CBA's seniority provisions in at least four ways. First, requiring the senior flight attendant to serve alcoholic drinks for both the First Class cabin and the main cabin violates the CBA provision that permits the senior flight attendant to choose whether he or she would prefer position A or position B. While the flight attendants are expected to help one another, it would violate the CBA if ExpressJet were to mandate that the senior flight attendant accept the alcoholic beverage service duties for both positions. Second, under Stanley's requested accommodation, she could refuse a senior flight attendant's request for assistance with the alcoholic beverage service to the First Class cabin. Both flight attendants are expected to help one another, and the FAM specifically mentions that "[Flight Attendant] B should assist with preparing" alcoholic beverages for first class passengers "while [Flight Attendant] A delivers."

Third, if a flight with two flight attendants is downgraded to a flight with one flight attendant and the senior flight attendant declined the assignment (as is his or her right under the CBA), Stanley, as the junior flight attendant on that flight, would be required to

accept the assignment. However, if Stanley's requested accommodation were granted, she could not accept the assignment as there would be no one on the aircraft who could serve alcoholic beverages to passengers were she the only flight attendant. If no reserve flight attendants were available, ExpressJet would be forced to require the senior flight attendant to serve as the single flight attendant, despite the senior flight attendant's initially declining the assignment, thus clearly violating the CBA. Fourth and finally, this reality would mean in effect that Stanley could never be assigned to a single-flight-attendant flight. However, the preference of flights is determined by seniority and Stanley's religious accommodation and corresponding mandatory flight preference would put her preferences ahead of those of flight attendants with greater seniority in violation of the CBA. The Union agrees that Stanley's requested accommodation violates the CBA's seniority provisions.

Less than a week after Stanley's initial meeting with Brown, ExpressJet received its first complaint from one of Stanley's coworkers, who complained about having to serve all of the alcoholic drinks on a flight. Just a week later, Stanley took time off without pay for the month of Ramadan, which delayed any conflicts at least temporarily. Upon returning later that summer, Stanley again began asking the other flight attendant to prepare and serve all alcoholic drinks on each flight she worked. On August 2nd, just two weeks after Stanley returned to work, ExpressJet received a complaint from another flight attendant who expressed frustration with having to do "both [flight attendant] A and [flight attendant] B duties."

On August 18, 2015, Stanley met with Brown, a Union representative, and an ExpressJet human resources representative to discuss Stanley's situation. Stanley was presented with three options: (1) take personal leave and

seek another position at the airline, (2) agree to serve and sell alcohol, or (3) voluntarily resign. Before Stanley decided, ExpressJet placed her on 90-day non-disciplinary, unpaid administrative leave, which was soon extended to a year. Stanley rejected the options ExpressJet presented and instead submitted a formal request for her preferred accommodation.

ExpressJet rejected Stanley's request on August 25th. Stanley did not apply for another position at the airline during her leave and filed suit in federal court a year later in August of 2016. ExpressJet's motion to dismiss was denied, but after discovery, ExpressJet filed a motion for summary judgment that the district court granted. The district court found that Stanley's religious discrimination claims were preempted, and that she had failed to make a retaliation claim, which also would have been preempted if made successfully. Stanley now appeals.

II.

"This court reviews the district court's grant of summary judgment de novo." *CSXTransp., Inc. v. United Transp. Union*, 395 F.3d 365, 368 (6th Cir. 2005). "Summary judgment is appropriate where there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Emswiler*, 691 F.3d at 788 (citing Fed. R. Civ. P. 56(a)).

Before we may address whether Stanley has a viable Title VII claim or its counterpart state-law claim, we must first decide whether we can reach the merits of either claim. The RLA, which was extended to cover airlines in 1936, requires minor disputes to be resolved by arbitration. *Hawaiian Airlines*, 512 U.S. at 248. If an issue qualifies as a minor dispute, then an Article III court cannot reach the merits of the dispute, but rather can only enforce the arbitrator's decision. *See Dotson v. Norfolk*

Southern R.R. Co., 52 F. App'x 655, 658 (6th Cir. 2002). In this case, Stanley did not pursue arbitration, but rather went directly to federal court. The question before us is whether this issue is preempted by the RLA and therefore must be decided by an arbitrator.

For a claim to be preempted, the CBA must conclusively resolve the dispute. *Emswiler*, 691 F.3d at 792. An employer cannot take an otherwise valid claim and cause it to become preempted by claiming the CBA as a defense. *Brown v. Illinois Central R.R. Co*., 254 F.3d 654, 668 (7th Cir. 2001). ExpressJet claims that Stanley's requested accommodation would require it to violate the CBA and an accommodation that violates the CBA would constitute an undue hardship. Stanley argues that her *prima facie* Title VII claim does not require interpretation of the CBA and the CBA is only implicated, if at all, by ExpressJet's raising it as a defense. However, Stanley misstates the extent to which her initial claim implicates the CBA and misunderstands what constitutes a preempted claim under Sixth Circuit precedent.

In this circuit, we employ a two-step test to determine whether a CBA preempts a claim: "First, the [] court must examine whether proof of the [] claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state [or federal] law." *DeCoe v. General Motors Corp*., 32 F.3d 212, 216 (6th Cir. 1994). If the right is created by the CBA *or* if the interpretation of the CBA is necessary to determine the proof of the claim, then the claim is preempted. *Id.*

In this case we must answer three questions: (1) Does a Title VII claim require a court to assess whether there is undue hardship? (2) Would violating the seniority provisions of the CBA constitute undue

hardship? (3) Would examining the CBA conclusively resolve the question of undue hardship and therefore the merits of Stanley's Title VII claim? We answer "yes" to each question and hold that because the CBA can conclusively resolve Stanley's religious-discrimination claims, her claims are preempted under the RLA.

A.

Title VII requires a plaintiff first to establish a *prima facie* case. *Virts v. Consolidated Freightways Corp. of Delaware*, 285 F.3d 508, 516 (6th Cir. 2002). There are three elements the plaintiff must show: (1) that the employee holds a sincere religious belief that conflicts with an employment requirement, (2) that the employee informed the employer about the conflict, and (3) that the employee was discharged or disciplined for failing to comply with the requirement. *Id.* Once a plaintiff has established a *prima facie* case, the burden shifts to the defendant. *Id.* In order to escape liability, the employer must show that the accommodation would create an "undue hardship." *Id.* "To require an employer to bear more than a *de minimis* cost in order to accommodate an employee's religious beliefs is an undue hardship." *Id.* (quoting *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994)). Given that the statutory text of Title VII clearly provides for an exception for accommodations that would be an "undue hardship" for the employer, a court presented with a Title VII claim must always examine whether the requested accommodation presents an undue hardship. 42 U.S.C. § 2000e(j). Contrary to Stanley's claims, undue hardship is not a defense raised to excuse a Title VII violation; rather, undue hardship is a part of the Title VII analysis, and a Title VII claim cannot be decided unless a court determines whether the accommodation would in fact impose an undue hardship.

B.

For the purposes of its summary judgment motion, ExpressJet concedes that Stanley has met the *prima facie* requirement. It argues that Stanley's accommodation would force it to violate the CBA and that constitutes an undue hardship. As we have previously held, a Title VII accommodation that would force the employer to violate the seniority provisions of the CBA constitutes an undue hardship. *Virts*, 285 F.3d at 517-18. It cannot be the case that the law would put the employer in an impossible situation where it either faces liability for refusing a religious accommodation (and respecting the CBA's seniority provisions) or faces liability for violating the CBA if it grants the accommodation. This court has reconciled this conflict by holding that when the accommodation would violate the CBA's seniority provisions, the accommodation constitutes an undue hardship and the employer may refuse to grant it. *Id.*

C.

The third and most important question is not whether the accommodation would be an undue hardship, but whether the CBA can conclusively resolve Stanley's Title VII claim. Any court seeking to address Stanley's religious-discrimination claims must interpret the CBA. Because a court hearing a Title VII claim must assess undue hardship and because an accommodation that violates a CBA's seniority provisions constitutes undue hardship, we would need to interpret the CBA to resolve Stanley's Title VII claim on the merits. For instance, we would need to determine whether permitting Stanley to refuse a downgraded flight with a single flight attendant violates the seniority provisions of the CBA. Or whether forcing a senior flight attendant to serve on a downgraded flight or requiring a flight attendant to accept the alcoholic beverage service duties of both positions violate those

provisions. The answer to these questions lies in the CBA and only the CBA can resolve them conclusively. Regardless of the outcome, the CBA resolves the issue; therefore, under the RLA, Stanley's claims are preempted.

III.

Stanley also brought a retaliation claim against ExpressJet. In order "to prevail on a claim for retaliatory discharge under Title VII, a plaintiff must first establish a *prima facie* case by demonstrating that 1) the plaintiff engaged in an activity protected by Title VII; 2) the exercise of the plaintiff's civil rights was known to the defendant; 3) the defendant thereafter undertook an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action." *Virts*, 285 F.3d at 521. Once the plaintiff successfully establishes a *prima facie* case, the burden shifts to the defendant who must "articulate a legitimate, nondiscriminatory reason for its actions." *Id.* If the defendant can provide a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff, who must "demonstrate that the proffered reason was a mere pretext for discrimination." *Id.* A plaintiff can successfully demonstrate that the defendant's reason was a mere pretext by showing that: "1) the stated reason had no basis in fact; 2) the stated reason was not the actual reason; or 3) the stated reason was insufficient to explain the defendant's actions." *Id.* In other words, a plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993) (emphasis in original)).

The district court held that Stanley failed to create a genuine issue of material fact as to the first element of her *prima facie* case, i.e., that she engaged in an activity protected by Title VII, because Stanley never identified

what exactly was her "protected activity." In both her corrected brief and reply brief on appeal, Stanley still fails to identify what protected activity she engaged in for which ExpressJet allegedly retaliated against her. Under Title VII, protected activity "can fall into two categories: participation and opposition." *Perkins v. International Paper Company*, 936 F.3d 196, 213 (4th Cir. 2019). More specifically, protected activity means the employee either (1) opposed an employer's discriminatory activity or practice made unlawful by Title VII, or (2) testified, assisted, or participated in an investigation or proceeding under Title VII. 42 U.S.C. § 2000(e)-3(a); *see* 45A Am. J. 2d Job Discrimination § 244. Regardless of which category the protected activity falls under, for a retaliation claim, "the key question is whether the complaint concerns conduct between an employer and its employee." David C. Singer and Joshua Colangelo-Bryan, *Protected Activity Under Title VII Retaliation Claims*, 231 N.Y. L. J. 2 (Feb. 6, 2004).

Even when we construe the facts in Stanley's favor, we are at a loss to discern what Stanley's protected activity could be. It cannot be the case that Stanley was terminated or put on leave because of her participation in an investigation as Stanley did not participate in any investigation, nor was ExpressJet the subject of any investigation or proceeding under Title VII before Stanley's termination. It also cannot be the case that Stanley faced retaliation for calling attention to an allegedly discriminatory activity by ExpressJet. Nothing in Stanley's allegations accuses ExpressJet of any discriminatory activity. Stanley's only accusation of animus was against a fellow flight attendant who questioned Stanley's choice to read "foreign writings," while the other flight attendant was forced to prepare and serve all alcoholic drinks to both cabins. Notwithstanding the fact that there

were likely non-discriminatory reasons for the flight attendant's complaint, the accusation is irrelevant to a retaliation claim because the alleged behavior was not that of the employer, but rather of another employee. Nowhere in Stanley's recounting of the facts does she mention discriminatory behavior by ExpressJet, Stanley's opposing discriminatory behavior of ExpressJet, or Stanley's then facing retaliation for opposing any alleged discriminatory behavior of ExpressJet.

ExpressJet suggested that perhaps Stanley meant that her request for an accommodation constituted protected activity. A request for an accommodation does not constitute protected activity under Title VII, which clearly delineates two options: opposition to discriminatory practice or participation in an investigation. 42 U.S.C. § 2000e-3(a). On appeal, Stanley has again failed to identify a protected activity she engaged in, and it is not the responsibility of this court to fill in the blanks for her. Because Stanley failed to establish the first element of a retaliatory discharge claim, she cannot establish a *prima facie* case and, consequently, her retaliation claim fails.

The district court was thorough in analyzing why each of Stanley's arguments related to her retaliation claim lacked either a legal or factual basis. The district court concluded that Stanley's novel "retaliation by ratification" legal theory[3] was not backed by any case law, that discovery did not reveal any factual support for Stanley's claims of alleged animus toward her faith (and if anything, there was actually evidence to the contrary, such as

[3] Stanley appears to have argued that ExpressJet ratified her coworker's comments about Stanley's reading "books with foreign writings" and about Stanley's hijab by reacting to the complaint that contained them, that these comments constituted animus, and that the supposed ratification constituted retaliation.

ExpressJet's approving her request to wear a hijab), and that her retaliation claim, even if correctly made, would also be preempted under the RLA. However, because Stanley's failure to create a genuine issue of material fact as to whether she had engaged in protected activity is dispositive, we do not need to consider those other arguments on appeal.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court on all counts.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 7, 2018]

Case No. 16-cv-12884

CHAREE STANLEY,

Plaintiff,

v.

EXPRESSJET AIRLINES, INC.,

Defendant.

Paul D. Borman
United States District Judge

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 33)

In this religious discrimination action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, ("Title VII") and its Michigan counterpart the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq*., ("the ELCRA"), Plaintiff, a Muslim woman who was employed as a flight attendant for Defendant ExpressJet Airlines, Inc. ("ExpressJet"), alleges that she was discriminated against on the basis of her religion when Defendant refused to accommodate her religiously held belief that prevents her from ever serving alcohol to passengers. Plaintiff further alleges that Defendant

retaliated against her by rescinding a previously-granted accommodation and placing Plaintiff on administrative leave pending termination.

In an Opinion and Order issued on June 7, 2017, this Court denied ExpressJet's motion to dismiss because the motion relied on matters outside the pleadings. *Stanley v. ExpressJet Airlines, Inc.*, No. 16-cv-12884, 2017 WL 2462487 (E.D. Mich. June 7, 2017). Now before the Court is ExpressJet's Motion for Summary Judgment (ECF No. 33). Plaintiff has filed a Response (ECF No. 36) and ExpressJet has filed a Reply (ECF No.37). The Court held a hearing on November 6, 2018. For the reasons that follow, ExpressJet's motion is GRANTED.

I. FACTUAL BACKGROUND

A. Plaintiff's Employment and Termination From Express Jet

Plaintiff began working as a flight attendant for Express Jet on January 31, 2013. (ECF No. 33, Def.'s Mot. Summ. J. Ex. C, January 29, 2018 Deposition of Charee Stanley 56:8-12; Def.'s Mot. Ex. B, May 30, 2018 Declaration of Daniel J. Curtin ¶ 4.) As an Express Jet Flight Attendant, Plaintiff was a member of the International Association of Machinists and Aerospace Workers ("the JAM" or "the Union"), and a Collective Bargaining Agreement ("CBA") governed the relationship between Express Jet and its Flight Attendants. (Def.'s Mot. Summ. J. Ex. A, ASA-AFA 2008 CBA.) Plaintiff was a practicing Christian when she began the interview process for the job with Express Jet, but during the interview process in mid-December, 2012, she met "a young gentleman who talked about Emirates" and expressed the view that if he was to live abroad, he would work for Emirates. (Stanley Dep. 24:9-21, 51:5.) Plaintiff became curious about the possibility of living abroad and

working for Emirates and "went home and looked it up." (Stanley Dep. 24:20-24.) She learned that she could "live in Dubai, and [] work overseas, and [] make tax-free money, and [] could travel the world." (Stanley Dep. 24:23-25:1.) Plaintiff researched Emirates and applied for a job with them and "knew that Dubai was a Muslim country but didn't know what that meant." (Stanley Dep. 25:1-4.) Plaintiff began to research the Muslim faith and "fell in love with it" and took her "shahada," or "confession of faith," on January 2 (or 3), 2013. (Stanley Dep. 25:4-7, 51:4.) So Plaintiff was not a practicing Muslim when she interviewed for the job with Express Jet but once she started her training on January 21, 2013, she had converted to the Muslim faith. (Stanley Dep. 25:11-14, 51:3-5.)

During her training, Plaintiff made a request of one of her trainers to be permitted to wear her hijab (head scarf). (Stanley Dep. 65:14-22,67:6.) That verbal request was initially declined but Plaintiff submitted a written a request shortly thereafter, on or about August 26, 2013, which was granted by Express Jet. (Stanley Dep. 66:3-20, 70:8-71:6, 75:1-16; ECF No. 33-6, Stanley Dep. Attach. 9, PgID 1153.)

Plaintiff understood that serving beverages was part of her job responsibilities and she understood that alcohol was one of the beverages that was available to passengers to request as part of that beverage service on Express Jet flights. (Stanley Dep. 87:11-23.) Plaintiff testified that the Flight Attendant Manual ("FAM") was a flight attendant's "bible" and was required to be carried at all times and updated as necessary. (Stanley Dep. 89:4-8. 92:13-24; Stanley Dep. Attachment 11, Flight Attendant Manual Excerpts.) The FAM outlines an Express Jet Flight Attendant's job responsibilities, obligates a Flight Attendant to "perform[] all duties as outlined in the

Express Jet Flight Attendant Manual, Company Policy Manuals, and duties as assigned by the Captain," and specifically references the responsibility of a Flight Attendant to "attend to all passenger requests, including beverages, alcohol and/or other snacks." (FAM Service Policy, PgID 1158, 1170.) Plaintiff understood that she was responsible for performing all of the duties as outlined in the FAM. (Stanley Dep. 93:17-23.) The FAM also outlines the "normal chain of command" on an Express Jet aircraft as follows: "1. Captain, 2. First Officer, 3. Flight Attendant "A", 4. Flight Attendant "B"." (FAM Chain of Command, PgID 1166.) The Chain of Command further provides that "[t]he most senior Flight Attendant at duty-in shall either assume the A position or assign the A position to the other assigned Flight Attendant." (*Id.*) Ms. Stanley understood this hierarchy and also understood that the more senior Flight Attendant could choose whether he or she wanted position "A" or position "B" and that Flight Attendant "A" would be positioned in First Class and Flight Attendant "B" would be positioned in the main cabin. (Stanley Dep. 95:8-24.) Ms. Stanley specifically testified to her understanding that seniority "gave you better choices," and that as the senior Flight Attendant "[y]ou have the pick of what position you want on an aircraft." (Stanley Dep. 117:4-118:19.) Ms. Stanley understood that there was this division of responsibilities and that the Flight Attendants were expected to "work as a team," and perform the other Flight Attendant's duties when necessary to get the job done. (Stanley Dep. 96:9-97:8.)

The FAM contains specific detail regarding the duties of a Flight Attendant assigned as the Flight Attendant on a one-Flight Attendant aircraft and the duties assigned to the "A" and "B" Flight Attendants when two Flight Attendants are on board an aircraft. (FAM Phases of Flight Overview PgID 1160-64.)

Ms. Stanley also recalled having received, or been given access online to, the Flight Attendant Handbook. (Stanley Dep. 100:9-11; Stanley Dep. Attach. 12, 4/24/15 ExpressJet Flight Attendant Handbook.) The Flight Attendant Handbook ("FAH") outlines many employment related guidelines, including general serving guidelines and parameters, and specifically guidelines regarding the service of alcohol. (FAM § 3-6.1, PgID 1206-11.) The FAM also outlines the general guidelines for service in Delta First Class cabins. Specifically, the FAM provides, among other guidelines, that: "FA "A" is responsible for conducting a pre-departure beverage service to all First Class customers, to include a full selection including alcoholic beverages." (FAM § 3-4.1, PgID 1196.) The FAM further provides that: "FA 'B" should assist with First Class pre-departure service. For example, FA "A" may take orders, hang coats and serve beverages, while FA 'B" remains in the galley to greet boarding customers, prepare beverages and control boarding traffic to allow FA "A" to move about the First Class cabin." (*Id.*) The FAM provides that Flight Attendants are primarily responsible for their "A" or 'B" duties but are "encouraged to work together and assist each other with completing all required service on the aircraft." (*Id.*) As far as the serving of alcohol, Ms. Stanley testified that "[t]here are flights that no one asks for it, and there are flights when everybody seemingly asks for it," and "everything in between." (Stanley Dep. 123:13-15.) The job posting for the Flight Attendant position that was in effect when Plaintiff applied for a job and to which Plaintiff would have responded in applying for a position as an Express Jet Flight Attendant, expressly stated that the job duties of Flight Attendant required the selling of "food and alcoholic beverages to passengers . . . ." (Stanley Dep. 76:10-77:6; Attachment 3, Job Posting for Flight Attendant.) Ms. Stanley recalled reading the job posting

online for the Flight Attendant position, although she could not remember the specific details of the posting. (Stanley Dep. 80:21-81:1.)

And Ms. Stanley performed all of her job responsibilities, and did serve alcohol, through the first year and a half of her service as an Express Jet Flight Attendant, and was considered very professional and attentive and a good employee, with no history of customer complaints. (Def.'s Mot. Summ. J. Ex. F, April 10, 2018 Deposition of Melanie Brown 39:13-41:1. 36:23-37:11.) However, sometime in early June, 2015, Plaintiff learned that she was prohibited not only from consuming alcohol, but also from preparing and/or serving alcohol. (Stanley Dep. 119:7-120:12.) Plaintiff testified that she learned of this prohibition during a conversation with an Imam with whom she discussed questions that would arise as she studied Islam and read the Quran. Plaintiff explained to the Imam that she was required to serve and sell alcohol at work and he told her that she was not supposed to drink or serve/sell alcohol, but told her "don't quit your job . . . you can't quit your job . . . you just pray to Allah to give you something better." (Stanley Dep. 119:22-120:5.)

Following this discussion with her Imam, on or about June 2, 2015, which was the next time she went to work and had an opportunity to speak to Melanie Brown, the chief flight attendant at the Detroit Express Jet base, she explained to Ms. Brown that she had learned from her Imam that she was not supposed to serve or sell alcohol. (Stanley Dep. 118:24-119:6, 121:21-122:2.) Plaintiff explained to Ms. Brown what she had learned from the Imam and according to Plaintiff, Ms. Brown told her that it shouldn't be a problem for Plaintiff to "just make an arrangement with the other flight attendant," to serve any alcoholic beverages that customers requested from the Plaintiff. According to Ms. Stanley, Ms. Brown implied

that it was "an easy fix." (Stanley Dep. 122:9-23.) Plaintiff did testify that Ms. Brown told her that Ms. Brown would "have to look into it" but that Plaintiff should go ahead and "make an arrangement" with the other flight attendant. (*Id.*) During this conversation with Ms. Brown, Plaintiff mentioned that the month of Ramadan was about to start and she did not want to go into that holy month doing something that she now knew she was not supposed to do. Ms. Brown also mentioned to Plaintiff, who wanted to take time off for Ramadan, that Plaintiff could take Time Off Without Pay ("TOWOP") for the month of Ramadan, which Plaintiff decided to do. (Stanley Dep. 124:12- 125:14.)

Ms. Brown memorialized this conversation with Plaintiff in a "daily note" log for entry in the "crew resource management system." Ms. Brown would have made this entry in her daily log and asked Ms. Holland, identified as the "creator" on the entry, to enter it into the crew resource management system so that it could be placed in Plaintiff's profile. (Stanley Dep. 64:22-68:15, 98:8-99:22.) Ms. Holland would have copied and pasted Ms. Brown's daily note memorializing the June 2, 2015 meeting with the Plaintiff, which states as follows:

> M. Brown DN 6-2-15 as we enter the season of Ramadan, FA raised concerns about not being able to serve alcohol as a tenant [sic] of her faith. We discussed the options she has and ultimately the decision regarding her continued employment rests with her. I explained TOWOP for the month of July, which if awarded will assist, however it is not a permanent solution. I suggested she work with her fellow FAs on board to assist during service, suggested she work the main cabin where alcohol is purchased thus potentially limiting her

> interaction. Recommended she look at our Careers tab to see if there was another position within the company she may be able to apply for. I also sought guidance from Kaylee Davis.

(Brown Dep. Attachment 6.) Ms. Davis was an individual from Express Jet's Human Resource Department and Ms. Brown could not recall if she called Ms. Davis or emailed her but she did recall that she also spoke with Mr. Curtin, Director of In Flight Operations, who directed her to Ms. Davis to see about any special accommodation form that might be available to Plaintiff and what to do if Plaintiff submitted such a request. (Brown Dep. 103:10-107:11.)

Ms. Brown understood Plaintiff to be asking about how to handle her inability to serve and sell alcohol on a particular upcoming flight due to the observance of the Ramadan holiday. Ms. Brown stated that Plaintiff explained in the June 2, 2015 meeting that she had just learned "she could not serve alcohol because she was going into Ramadan and she did not feel comfortable on" the flight she was about to board and Plaintiff "didn't speak beyond that flight." (Brown Dep. 91:2-21.) "It was regarding that specific flight, and [Plaintiff] was beginning to observe Ramadan. . . . Ramadan was the catalyst for that." (Brown Dep. 92:3-8.) Ms. Brown testified: "My advice to her because we were within minutes of that flight departing was to speak to her fellow flight attendant, express her concern and ask if he would assist her on that flight." (Brown Dep. 94:22-25.) Ms. Brown did not interpret that Plaintiff was making a formal accommodation request when she came to speak with Ms. Brown on June 2, 2015, about how to handle her problem with serving alcohol on a flight that was about to depart. (Brown Dep. 164:3-165:12.)

Plaintiff left the June 2, 2015 meeting with Ms. Brown with a different impression: Plaintiff thought that the

arrangement whereby she would ask fellow Flight Attendants to perform Plaintiff's alcohol service duties was a permanent arrangement and that going forward, after Plaintiff returned from her TOWOP for the month of Ramadan, she would "just pick up and do the same," and just "work with the other flight attendants," and she did not walk away from the June 2, 2015 meeting with Ms. Brown thinking it was a temporary arrangement. (Stanley Dep. 127:13- 130:18.) Plaintiff never thought the arrangement suggested by Ms. Brown, whereby Plaintiff would ask the other Flight Attendant with whom she was assigned to fly that day whether they would serve alcohol for the Plaintiff, was "temporary." (Stanley Dep. 182:16-22.)

On Friday, June 7, 2015, Ms. Brown received an email from Chief Flight Attendant Amy Cain, who reported a call she received from Flight Attendant Abdel Aafifi, complaining about Plaintiff's refusal to help him assist with the beverage service in First Class due to her inability "to pour or serve alcohol during this time due to her religion." (Brown Dep. 115:16-116:15; Brown Dep. Attachment 7.) Ms. Cain reported that "as the senior FA, he is requesting assistance with first class but she is refusing." (Brown Dep. Attachment 7.) Ms. Brown forwarded this email to Mr. Rick Berry, employee relations manager, and subsequently met with Mr. Aafifi regarding this complaint. Mr. Aafifi he explained that there was "a lot of extra work" that he was required to do when he was flying with Ms. Stanley and he felt it was "unfair." Mr. Aafifi never filed a formal complaint regarding Ms. Stanley. (Brown Dep. 116:19-119:16.)

Ms. Stanley was then away on TOWOP for the remainder of Ramadan and Express Jet received no further complaints about Ms. Stanley until Express Jet

received an Irregular Operations Report ("IOR") from Flight Attendant Katie Hice on August 2, 2015, after Plaintiff had returned from her TOWOP for Ramadan. Ms. Hice's IOR read in full as follows:

> I worked with flight attendant Charee Stanley who refused to do her flight attendant duties and failed to follow ExpressJet policies. I was asked by FA Charee Stanley to serve ALL alcoholic beverages on flights DL5319 dtw/orf, DL5319 orf/dtw, DL5237 dtw/yul, DL 5025 yul/dtw because she said she had since being hired converted to a different religion which is now Muslim and she isn't allowed to serve alcohol now. She said she knows she is supposed to serve alcohol but she can't/won't serve alcoholic beverages. Several times Charee Stanley was in the galley reading a small book with foreign writing in it. It was extremely hard to do both FA A and FA B duties. I served the alcoholic beverages to first class on the ground, completed FA B duties, served first class alcoholic beverages once in the air, served economy comfort and economy and then when bringing the cart back to the galley first class needed to be attended to again. I don't know what she was doing while I was busy with passengers and serving. When I would get to the galley she had out her food, her phone, her book with foreign writings or taking things in and out of her bags. Once when the captain said to close the main cabin door she hesitated because she was having a conversation with a ramper about where she should move to in Detroit (good area) and didn't close the door until her conversation was complete. The captain had even got me to tell her to close the door and I did but she did what she

> wanted and finished her conversation first. Charee also wore a headress upon her head. Twice Charee came to switch with me so I could serve alcoholic beverages to first class while I was serving in the back. First class needed more than just alcoholic beverages as I ended up giving other drinks as well and tidying up as they handed me things they wished to discard.

(Stanley Dep. Attachment 15.)

Plaintiff testified that indeed Ms. Hice did perform all of Plaintiff's alcohol serving duties on four different flights and Plaintiff explained that she and Ms. Hice would "swap" positions, like this:

> Q: So you would swap positions?
>
> A: Correct.
>
> Q: You would go to first class. She would come to the main cabin?
>
> A: And then once she serves, I would go back to main cabin so she can go back to first class.
>
> Q: So she would come to you, she would make the drinks. In the meantime you'd go up to the first class passengers?
>
> A: Yes.
>
> Q: And you were just, at that point, I assume walking through the first-class cabin and making sure everyone's okay, seeing if they need anything.
>
> A: Yes.
>
> Q: Did it ever – did you ever have first-class passengers ask you for alcohol when you swapped places and went up to first class?

> A: Maybe they did, and I took the order and I left it for her when she came back. Because it doesn't take long to make a drink, so once she makes it . . . we were swapping back out. And I would – if there was a request, I would put 1A would like this [alcoholic drink] . . . [s]o that she would know when she came back.

(Stanley Dep. 151:4-152:9.) Plaintiff testified that she gave Ms. Hice "the same spiel [she] gave every flight attendant [she] worked with: As a Muslim, I'm not permitted to do so. Do you mind serving on my behalf . . . ." (Stanley Dep. 153:16-19.) Plaintiff testified that she was never required to work a single Flight Attendant plane so she had never considered what would have occurred had she been the sole Flight Attendant and refused to serve alcohol. After initially not responding to further questions about this issue, Plaintiff eventually responded that Express Jet would have to pull someone from the reserves to take over that flight for the Plaintiff. (Stanley Dep. 174:11-182:4.)

On August 18, 2015, a meeting was held with Plaintiff, Ms. Brown, a Union representative (Nate Wysong), and a human resources representative (Tracy Hassell), to discuss Ms. Hice's IOR and to get "Plaintiff's side of the story." (Brown Dep. 150:15-160:21; Brown Dep. Attachments 9, 10.) The focus of the concern at the meeting was Plaintiff's refusal to serve alcohol and her request to fellow Flight Attendants to additionally perform her alcohol service duties for her. (Brown Dep. 162:21-163:5, Brown Dep. Attachment 10, Melanie Brown 8/18/15 Meeting Notes.) Tracee Hassell explained to Plaintiff at the August 18, 2015 meeting that serving alcohol was a job requirement for a Flight Attendant and that Express Jet could not guarantee Plaintiff that she will always fly with another Flight Attendant who will be willing to perform Plaintiff's

alcohol service duties. (Brown 8/18/15 Meeting Notes.) Ms. Brown's meeting notes reflect that Ms. Brown explained to Plaintiff that she had three options: (1) take a personal leave for a period of time to seek another position in the company; (2) make the decision to serve and sell alcohol; or (3) voluntarily resign. (*Id.*) Plaintiff similarly recalled that she was given these options. (Brown Dep. Attachment 13, Plaintiff's 8/18/15 Personal Statement, PgID 2025.)

At the close of the August 18, 2015 meeting, Plaintiff presented Express Jet with a formal request for a religious accommodation not to serve alcohol. (Brown Dep. Attachment 11, Stanley Religious Accommodation Request Form.) Plaintiff also presented a letter from her attorney, Ms. Lena Masri, explaining that Express Jet's refusal to accommodate Plaintiff's sincerely-held religious belief that prohibited her from serving alcohol was a violation of Title VII of the Civil Rights Act of 1964. (Brown Dep. Attachment 12, 8/18/15 Masri Letter.)

On August 19, 2015, before Plaintiff had the opportunity to elect one of the three options presented to her at the August 18, 2015 meeting, Express Jet informed Plaintiff that she had been placed on a 90-day non-disciplinary, unpaid administrative leave of absence, which was later extended to a year, to allow her to seek another position with Express Jet. (Curtin Decl. ¶ 38.) Express Jet placed Plaintiff on this 90-day leave before she had an opportunity to select one of the three options presented to her at the August 18, 2015 meeting because she was scheduled to work the day after the meeting and "ExpressJet needed to categorize her status in its scheduling and payroll systems." (*Id.*) Also on August 19, 2015, Plaintiff received a call from ExpressJet informing her that the leave had been extended to a 12-month leave. (Stanley Dep. 184:6-14; Brown Dep. Attachment 15, PgID 2040.)

On August 25, 2018, Express Jet sent Plaintiff a letter informing her that serving alcoholic beverages to customers on their request was "an essential function of the Flight Attendant position," and that it would be "unrealistic and operationally difficult for the Company to require Flight Attendants, with whom [Plaintiff] might be flying [], to assume this duty on [her] behalf, while still performing their duties as outlined in the Flight Attendant Manual." Furthermore, ExpressJet noted that it could not guarantee that Plaintiff would always be assigned to a two (2) flight attendant aircraft. Therefore, ExpressJet found Plaintiff's request for an accommodation "to be unreasonable and [not able to be] honored." (Brown Dep. Attachment 15, 8/25/15 Denial Letter.) The 8/25/15 Letter encouraged Plaintiff to take advantage of her one-year administrative leave to find another position with ExpressJet. (*Id.*)

Plaintiff testified that there was "no discretion" within the Islamic faith for her to serve alcohol under any circumstance and she stated that she was not willing to violate that proscription. (Stanley Dep. 187:21-188:3.) But in Plaintiff's opinion, Express Jet had already granted her an accommodation that was "their idea" – that being Ms. Brown's verbal suggestion to Plaintiff on June 2, 2015, as to how she should handle the impending situation with her upcoming flight – and as a result of her doing what they told her to do, they unjustifiably took her job away. (Stanley Dep. 240:19-241:15.)

B. The Provisions of the Governing Collective Bargaining Agreement

As noted *supra*, as a member of the JAM Union, Plaintiff's employment with Express Jet was governed by a CBA. (Def.'s Mot. Summ. J. Ex. A, ASA-AFA 2008 CBA.) Pursuant to that CBA, a Flight Attendant's monthly

work schedule is arranged through a Preferential Bidding System ("PBS") set forth in the CBA. (CBA § 7.C, PgID 766.) Flight schedules are "constructed preferentially, in order of seniority . . . ." (CBA § 7.C.3.) The CBA expressly provides: "The senior Flight Attendant may choose the "A" or 'B" position on the aircraft." (Def.'s Mot. Summ. J. Ex. A, ASA-AFA 2008 CBA § 7.W.1., PgID 779.) The CBA further provides: "Seniority shall govern all Flight Attendants in the case of bidding rights, filling of vacancies . . . vacation preferences, and domicile assignments." (*Id.* § 11.E.1., PgID 798.) If a 2 (two) Flight Attendant aircraft is downgraded to a 1 (one) Flight Attendant aircraft, the senior Flight Attendant has the right to accept or decline the downgrade: "If more Flight Attendants than needed are scheduled for and report for the same trip (as a result of scheduling error, downgrade, etc.) the choice to remain on the trip from amongst the reporting regular lineholders shall be on a seniority basis." (CBA § 7.W.2.) If the senior Flight Attendant declined the downgrade, the junior Flight Attendant would be required to accept the trip. (Curtin Decl. ¶ 15.) If the junior Flight Attendant refused to accept the downgrade, and no reserves were available to fill the spot, the senior Flight Attendant would be recalled, which would violate Section 7.W.2 of the CBA. (*Id.*) Express Jet has never granted a Flight Attendant a permanent accommodation that violated the seniority provisions of the CBA. (Curtin Decl. ¶ 27.) If the senior Flight Attendant refused to voluntarily perform Plaintiff's alcohol service responsibilities for her, or refused to accept a downgrade, and Express Jet forced the senior Flight Attendant to perform those duties, Express Jet would be subject to a grievance by the Union claiming that Express Jet violated the seniority provisions of the CBA, as evidenced by Mr. Aafifi's complaint that as the "senior" Flight Attendant, he had the right to request Plaintiff's

assistance with serving alcoholic beverages to First Class. (Curtin Decl. ¶ 33.) The Union concedes that providing Plaintiff with an accommodation not to be placed on a single flight attendant aircraft could violate seniority and a grievance could be filed for violation of the CBA seniority provisions. (Def.'s Mot. Summ. J. Ex. D, March 28, 2018 Deposition of Yvette Marche Cooper 12:5-23.)

II. LEGAL STANDARD[1]

Summary judgment is appropriate where the mov-ing party demonstrates that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(a). "A fact is 'material' for purposes of a motion for summary judgment where proof of that fact 'would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.'" *Dekarske v. Fed. Exp. Corp*., 294 F.R.D. 68, 77 (E.D. Mich. 2013) (Borman, J.) (quoting *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving

[1] As this Court noted in its Opinion and Order denying Defendant's motion to dismiss, while some courts analyze RLA preemption arguments under Fed. R. Civ. P. 12(b)(1) as implicating the court's subject matter jurisdiction to hear the claim, the Sixth Circuit has held that "completion of the RLA-mandated arbitral process does not affect a district court's subject matter jurisdiction over a claim but instead goes to the court's ability to reach the merits of a dispute and grant relief. . . ." *Emswiler v. CSX Transp., Inc*., 691 F.3d 782, 790 (6th Cir. 2012). *See also Upperman v. Southwest Airlines Co*., No. 17-cv-00348, 2018 WL 527376, at *2-3 (S.D. Ohio Jan. 24, 2018) (denying a motion to dismiss on RLA preemption grounds for lack of subject matter jurisdiction, citing *Emswiler* and observing that "[t]he Sixth Circuit has squarely held that exhaustion of the RLA's arbitration procedures, while necessary for a court to reach the merits of an RLA minor dispute, is not jurisdictional in nature").

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

"In deciding a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party." *Perry v. Jaguar of Troy*, 353 F.3d 510, 513 (6th Cir. 2003) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). At the same time, the non-movant must produce enough evidence to allow a reasonable jury to find in his or her favor by a preponderance of the evidence, *Anderson*, 477 U.S. at 252, and "[t]he 'mere possibility' of a factual dispute does not suffice to create a triable case." *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 576 (6th Cir. 2004) (quoting *Gregg v. Allen–Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). Instead, "the non-moving party must be able to show sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy."*Arendale v. City of Memphis*, 519 F.3d 587, 601 (6th Cir. 2008) (quoting *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir. 2004)). "The test is whether the party bearing the burden of proof has presented a jury question as to each element in the case. The plaintiff must present more than a mere scintilla of the evidence. To support his or her position, he or she must present evidence on which the trier of fact could find for the plaintiff." *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000) (internal quotation marks and citations omitted). That evidence must be capable of presentation in a form that would be admissible at trial. *See Alexander v. CareSource*, 576 F.3d 551, 558-59 (6th Cir. 2009).

III. ANALYSIS

A. "Undue Hardship" in The Context of a Title VII Claim of Religious Discrimination Implicating the Collectively Bargained Rights of Co-Workers

"The analysis of any religious accommodation case begins with the question of whether the employee has established a *prima facie* case of religious discrimination." *Virts v. Consolidated Freightways Corp. of Delaware*, 285 F.3d 508, 516 (6th Cir. 2002) (internal quotation marks and citation omitted). "To establish a *prima facie* case, a plaintiff must demonstrate that 1) [s]he holds a sincere religious belief that conflicts with an employment requirement; 2) [s]he has informed the employer about the conflicts; and 3) [s]he was discharged or disciplined for failing to comply with the conflicting employment requirement." *Id.* "Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant employer to show that it could not reasonably accommodate the employee without undue hardship." *Id.* Here, ExpressJet assumes for purposes of its motion for summary judgment, "that Stanley has established a *prima facie* case of failure to accommodate her religious beliefs." (Def.'s Mot. 10n. 13, PgID 580). Thus, we need only address here the issue of undue hardship:

> This case requires us to interpret a provision of Title VII of the Civil Rights Act of 1964 that prohibits an employer from taking an adverse employment action (refusal to hire, discharge, etc.) "against any individual . . . because of' such individual's . . . religion." 42 U.S.C. § 2000e-2(a). Another provision states that the term "religion" "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 2000e(j). When these two provisions are put together, the following rule (expressed in somewhat simplified terms) results:

> An employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.
>
> [1] Under 42 U.S.C. § 2000e-2(m), an employer takes an action "because of" religion if religion is a "motivating factor" in the decision.

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015) (Alito, J., concurring). The phrase "unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship," creates a defense for the employer and "place[s] upon the employer the burden of establishing an 'undue hardship' defense." *Id.* at 2032 n. 2 (Scalia, J.).

In *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), analogizing to the standards for analyzing Title VII religious discrimination claims, the Seventh Circuit Court of Appeals held "that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees." *Id.* at 1051. "A 'bona fide' seniority system is one that was created for legitimate purposes, rather than for the purpose of discrimination." *Id.* at 1046 n. 7. In so holding, the Seventh Circuit directly analogized the ADA claim it was called upon to review to claims for religious accommodations under Title VII:

> Title VII of the Civil Rights Act of 1964 also contains a duty of "reasonable accommodation," in this case to the religions of employees. Initially

> it emerged within 1966 EEOC guidelines interpreting Title VII, see 29 C.F.R. § 1605.2(b) (1968), and in 1972 it was incorporated into Title VII itself. 42 U.S.C. § 2000e(j). Under Title VII an employer must "reasonably accommodate" the religious observances and practices of its employees, up to the point of "undue hardship on the conduct of the employer's business." *Id.* In *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), the Supreme Court considered a conflict between a demand for a particular "reasonable accommodation" under Title VII (being relieved from Saturday work duties, as required by the plaintiffs religion) and the seniority rights of other employees under a collective bargaining agreement (since more senior employees would be required to work in the plaintiffs stead). The Supreme Court decisively rejected the position of Hardison and the EEOC that the statutory requirement to accommodate necessarily superseded the collectively-bargained seniority rights of the other employees: "We agree that neither a collective bargaining contract nor a seniority system may be employed to violate a statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." *Id.* at 79, 97 S.Ct. at 2274.

94 F.3d at 1048. As the Seventh Circuit noted in *Eckles*, the case for drawing the line under Title VII for accommodating religious beliefs at the interference with bona fide seniority rights finds support in the provision within Title VII expressly limiting an

employer's obligation to provide accommodation in the case of a "bona fide" seniority system:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h).

The Sixth Circuit has expressly held that any accommodation that "will result in a violation of the seniority provisions of the collective bargaining agreement, and affect the shift and job preferences and contractual rights of other employees," constitutes an undue hardship. *Virts*, 285 F .3d at 517. *Virts* is relevant here and merits further discussion. In *Virts*, the plaintiff, a "born again Christian," was an "over-the-road" truck driver for defendant. 285 F.3d at 511. Under the defendant's system for assigning "runs," the more seniority a driver has, the more choices he has in selecting a run. *Id.* Drivers can request certain runs and will be dispatched on runs in the order requested based upon their seniority. *Id.* If the dispatcher exhausts the list and fails to dispatch all of the runs, he drafts drivers "from the bottom of the call board and go[es] up, in order of least seniority to highest, and place[s] drivers in runs they did not request." *Id.* "If a driver is called by the dispatcher, a driver cannot decline to accept the run." *Id.* Plaintiff was dispatched and refused to accept a "sleeper run" – "a run

where two drivers are dispatched in a sleeper truck" – with
a female co-driver, based upon his sincerely held religious belief that being in the company of a woman under those circumstances violated the tenets of his faith. *Id.* at 512. Due to time factors and the fact that another sleeper run was leaving at the same time, the defendant and a Union representative "made arrangements to switch loads," relieving plaintiff of the obligation to do a run with a female, and told the individuals involved to get with the Union and dispatcher on their return to "review work rules and contract procedures." *Id.* The defendant contended "that by allowing such a swap, the seniority provisions of the [governing collective bargaining agreement] were violated." *Id.* "Upon Plaintiffs return from his run, he was informed that the next time that he was paired with a female on a sleeper run dispatch, he must accept it." Subsequently, plaintiff declined a second run citing the same religious objection and was deemed to have voluntarily quit based on his failure to report for the run. *Id.* at 513. Plaintiff filed a grievance with the union and the union and defendant denied the grievance, explaining that "there was not any accommodation that could be made for Plaintiff which would not violate the seniority provisions of the collective bargaining agreement ("CBA" or "collective bargaining agreement") and the rights of other bargaining unit members." *Id.* Although defendant ultimately was reinstated to his position, Plaintiff filed a Title VII Religious Discrimination Complaint with the EEOC and received a Right to Sue Letter on January 30, 1998, and filed his complaint in the United States District Court for the Middle District of Tennessee on April 29, 1998. *Id.* at 514.

The district court assumed that plaintiff had established a *prima facie* case of discrimination, but granted summary judgment to the defendant, finding that defendant could

not reasonably accommodate the plaintiff without undue hardship and the Sixth Circuit affirmed. *Id.* at 516-17. In reaching its decision in *Virts*, the Sixth Circuit relied, as the district court had done, on *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977):

> In *Hardison*, the Supreme Court looked at seniority systems as they relate to an employer's attempt to reasonably accommodate an employee's sincere religious beliefs. *See Hardison*, 432 U.S. at 81, 97 S.Ct. 2264. In the course of doing so, the Court noted that to accommodate the plaintiffs claim-that the employer discriminated against the plaintiff on the basis of his religion in failing to provide the plaintiff with Saturdays off-the employer would have had to violate its seniority system. *Id.* The Court then opined that it "would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *Id.*

Virts, 285 F.3d at 517. *See also Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994) (relying on *Hardison* to deny a requested religious accommodation and observing that "it 'would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others[.]") (quoting *Hardison*, 432 U.S. at 81); *Crider v. University of Tennessee, Knoxville*, 492 F. App'x 609, at *5 (6th Cir. 2012) (table case) (discussing *Hardison*

and acknowledging that requiring an employer "to breach the contractual rights of its employees by abandoning the seniority system established by a collective bargaining agreement," creates an undue hardship). *See also Prach v. Hollywood Supermarket, Inc.*, No. 09-cv-13756, 2010 WL 3419461, at *5 (E.D. Mich. Aug. 27, 2010) ("employers are not required to engage in proposed accommodations that have the ability to violate a CBA by interfering with a valid seniority system") (citing *Virts*, 285 F.3d at 519 and *Hardison*, 432 U.S. at 79).

Nor is an employer required to wait for this eventuality to occur before denying Plaintiff's requested accommodation. *Virts*, 285 F.3d at 519 (observing that "an employer does not have to actually experience the hardship in order for the hardship to be recognized as too great to be reasonable") (citing *Hardison*, 432 U.S. at 81). As *Virts* established, "[t]he mere possibility of an adverse impact on co-workers as a result of [swapping positions] is sufficient to constitute an undue hardship." *Virts*, 285 F.3d at 520 (internal quotation marks and citation omitted) (second alteration added).

Plaintiff argues that "the Sixth Circuit has held that it is incumbent on an employer to at least 'explore a voluntary waiver of seniority rights' from others before taking adverse action against a religious employee." (Pl.'s Resp. 18, PgID 2434) (quoting *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991)). But this is both a misstatement of Sixth Circuit law and a misrepresentation of the requested accommodation here. As discussed *supra*, Plaintiff is not seeking an accommodation that would give co-workers an option to "voluntarily" waive their seniority rights to accommodate her. She has testified that she will not prepare or serve alcohol under any circumstance, i.e. even if they refuse. Thus, her requested accommodation necessarily demands

that they agree to do so. But more importantly, the Sixth Circuit in *Virts* expressly distinguished *Arlington Transit*, noting that "*Arlington* . . . did not involve a collective bargaining agreement and a seniority system, nor the concerns associated therewith." *Virts*, 285 F.3d at 519. "In other words," the Sixth Circuit continued, "the array of concerns spoken of by the Supreme Court in relation to a collective bargaining agreement and the role it plays in determining whether a proposed accommodation rises to the level of an undue hardship were not present in *Arlington*." *Id.* At the hearing on the motion for summary judgment, Plaintiff's counsel continued to insist (misguidedly) that *Arlington* involved a CBA. It *did not* involve a CBA and *Arlington Transit* is inapt. *See Prach v. Hollywood Supermarket, Inc.*, No. 09-cv-13756, 2010 WL 4608782, at *1 (E.D. Mich. Nov. 5, 2010) (Duggan, J.) (denying plaintiff's motion for reconsideration and distinguishing *Arlington* as not involving a CBA and observing that the Sixth Circuit's decision in *Virts* established that "employers are not required to accommodate where the proposed accommodations would violate a collective bargaining agreement").

Undue hardship, if established by a defendant in response to a plaintiff's failure to accommodate claim, will be dispositive of the plaintiff's claim. *Virts* instructs that a proposed accommodation that would violate a collective bargaining agreement necessarily constitutes an undue hardship. ExpressJet argues that Plaintiff's requested accommodation to never be required to prepare/serve/sell alcohol violates the CBA's seniority provisions in numerous ways. Plaintiff disagrees that the seniority provisions of the CBA are implicated by her requested accommodation. The Court concludes, as discussed *infra*, that the answer to the question whether or not ExpressJet can establish undue hardship requires an interpretation of the governing CBA, and thus

Plaintiff's failure to accommodate claim is preempted (or precluded) by the RLA.

B. Preemption/Preclusion of Plaintiffs Failure to Accommodate Claim Under the RLA

"The RLA, which was extended in 1936 to cover the airline industry, sets up a mandatory arbitral mechanism to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994) (internal quotation marks and citations omitted). "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Id.* at 252. The RLA's "mandatory arbitral mechanism" addresses two classes of disputes. *Id.* at 252. "The first class, those concerning rates of pay, rules or working conditions, are deemed "major" disputes. Major disputes relate to the formation of collective [bargaining] agreements or efforts to secure them." *Id.* (internal citations and quotation marks omitted) (alteration in original). "The second class of disputes, known as "minor" disputes, gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. Minor disputes involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation. Thus, major disputes seek to create contractual rights, minor disputes to enforce them." *Id.* at 252-53 (internal citations and quotation marks omitted) (alteration in original). Minor disputes "must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions." *Id.* at 253 (internal citations and quotation marks omitted). "Thus, a determination that

[Plaintiff's] complaints constitute a minor dispute would pre-empt [her] state law actions."[2] *Id. See also Smith v. Northwest Airlines, Inc.*, 141 F. Supp. 2d 936, 940 (W.D. Tenn. 2001) ("The RLA provides that minor disputes initially be settled through grievance procedures established in the CBA. [45 U.S.C.] § 152 First. If such efforts are unsuccessful, parties are required to submit to binding arbitration by the NRAB [National Railroad Adjustment Board] or a privately established arbitration panel. [45 U.S.C.] § 153 First (i). The NRAB has primary and exclusive jurisdiction over minor disputes.") (citing *Glover v. St. Louis—San Francisco Ry. Co.*, 393 U.S. 324,

[2] As several courts have recognized, when the plaintiff claims that defendant violated a federal statute, rather than a state law, the issue is one of preclusion, not preemption. *See, e.g. Brown v. Illinois Central R.R. Co.*, 254 F.3d 654, 662 (7th Cir. 2001) (Noting that cases holding that the RLA's mandatory arbitration provisions preempt state law claims whose resolution depends upon the interpretation of a CBA, do not necessarily preclude similar claims brought under federal statutes which require an analysis of competing federal statutes to determine whether they can be harmonized, but finding "the preemption question sufficiently similar to the preclusion question to make the analysis employed in the RLA preemption cases applicable" in the preclusion context) (collecting cases applying the RLA preemption standard to cases involving a federal statute). *See also Parker v. American Airlines, Inc.*, 516 F. Supp. 2d 632, 637-38 (N.D. Tex. 2007) ("Arbitral boards established under the RLA enjoy exclusive jurisdiction to resolve all disputes requiring the construction or application of a CBA regardless of whether the dispute involves a state-law claim or a federal claim. When applied to a state-law claim, the RLA is said to preempt. But when applied to a federal claim, the RLA is said to "preclude.") (internal quotation marks and citation omitted); *VanSlyckv. GoJetAirlines, LLC*, 323 F.R.D. 266, 269 (N.D. Ill. 2018) (observing that it is "well settled that the RLA requires mandatory arbitration" of minor disputes, and noting that "[s]uch disputes are thus 'preempted' (if raised in a state claim) or 'precluded' (if raised in a federal claim)"). The Court will generally use the term "preemption" in its analysis of both Plaintiff's federal and state law claims understanding this distinction.

328 (1969)"). *See Dotson v. Norfolk Southern R.R. Co.*, 52 F. App'x 655, 658 (6th Cir. 2002) ("If the parties cannot resolve minor disputes on their own, they are submitted to the National Railroad Adjustment Board ["NRAB"] for final resolution. 45 U.S.C. § 153, First (i) & (m). The Board has exclusive jurisdiction over minor disputes, and a party cannot bypass the Board and take the dispute into federal court, except to enforce the Board's award.") (quoting *CSX Transp., Inc. v. Marquar*, 980 F.2d 359, 361 (6th Cir. 1992) and *Airline Professionals Ass 'n of Intern. Broth. of Teamsters, Local Union No. 1224, AFL-CIO v. ABX Air, Inc.*, 274 F.3d 1023, 1028 (6th Cir. 2001) ("[t]he adjustment board exercises exclusive jurisdiction over minor disputes")).[3] "In determining appropriate preemption standards under the RLA, cases decided under the Labor Management Relations Act ("LMRA") provide useful guidance. *Hawaiian Airlines*, 512 U.S. at 263 (citing *Lingle v. Norge Div. of Magic Chef Inc.*, 486 U.S. 399 (1988) (a case involving preemption under section 301 of the LMRA).

Defendant contends that Plaintiff's failure to accommodate claim is a "minor dispute" that is subject to mandatory arbitration and thus preempted by the RLA. For the Plaintiff's claim to be preempted (or precluded)

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[3] The RLA requires air carriers to establish "internal dispute-resolution processes and an adjustment board established by the employer and the unions." *Hawaiian Airlines*, 512 U.S. at 253 (citing 45 U.S.C. § 184.). *See Jenisio v. Ozark Airlines, Inc. Retirement Plan for Agent and Clerical Employees*, 187 F.3d 970, 972-73 (8th Cir. 1999) ("The RLA requires air carriers and unions to establish a system board of adjustment (the Board) to resolve all "disputes . . . growing out of . . . the interpretation or application of agreements concerning rates of pay, rules, or working conditions.") (quoting 45 U.S.C. § 184). Thus, in the context of an air carrier, the arbitral body is often referred to as a "system board," or "adjustment board." The terms are used interchangeably in this Opinion and Order.

under the RLA, its resolution must "depend[] on an interpretation of the CBA." *Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 792 (6th Cir. 2012). The Sixth Circuit has enunciated a two-step test for determining whether a claim is preempted under the RLA: (1) does proof of the plaintiff's claim require interpretation of the CBA; and (2) is the right claimed by plaintiff created by the CBA or by state or federal law. *Id.* If the "claim is not a purely factual question about . . . an employer's conduct and motives and cannot be decided without interpretation of the CBA," it is preempted. *Id.* at 793 (internal quotation marks and citation omitted). Even if an employer's defense, *e.g.* that it had a non-discriminatory or non-retaliatory reason for discharge, "may involve attention to the same factual consideration as the employee's [] claim" the claim will not be preempted unless the claimed right "*depend[s]*" upon an interpretation of the CBA. *Smith*, 141 F. Supp. 2d at 941 (citing *Lingle*, 486 U.S. at 407-08) (emphasis in original). Even if a claim "is grounded upon rights which stem from some source other than the CBA (such as state law), the claim will be preempted if it cannot be adjudicated without interpreting the CBA, or if it can be 'conclusively resolved' by interpreting the CBA." *Brown v. Illinois Central R.R. Co.*, 254 F.3d 654, 658 (7th Cir. 2001).[4]

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[4] If "preemption arises in the context of a motion for summary judgment, then the court extends the inquiry to all stages of the analysis that it would reach when deciding the case on its merits." *Douglass v. Carlex Glass Co., LLC*, No. 14-cv-468, 2015 WL 12532115, at *4 (E.D. Tenn. Sept. 30, 2015) (addressing preemption in the context of the LMRA) (internal quotation marks and citations omitted). *See also Howard v. Cumberland River Coal Co.*, 838 F. Supp. 2d 577, 583 (E.D. Ky. 2011) ("Because this case raises LMRA preemption in the summary judgment context, this Court must determine whether Howard's prima facie case, Cumberland's legitimate, non-retaliatory reason, or Howard's proof of pretext requires interpreting the CBA. "). As the Supreme Court

A closer examination of a few significant cases best illustrates what type of dispute will fall into the "preempted/precluded" category and what type of dispute will be considered "independent" of the CBA and not "preempted/precluded."

In *Hawaiian Airlines*, *supra*, the plaintiff was terminated for refusing to sign a maintenance record attesting that the repair he had been ordered to make rendered the airplane fit to fly. 512 U.S. at 249. The employer argued that the plaintiff's wrongful discharge and whistleblower claims were preempted because the discharge was justified under the "just cause" provision of the CBA and that therefore resolving the claim required interpreting the CBA. 512 U.S. at 251. The Supreme Court rejected this argument, holding that although the just cause analysis might involve consideration of many of the same facts as the plaintiff's whistleblower and wrongful discharge claims, the state law claims could be resolved without interpreting the CBA itself, and therefore the claim was "independent" for preemption purposes. *Id.* at 262. Preemption will occur only where the state law claim is dependent on an interpretation the CBA. In the case of the airplane mechanic in *Hawaiian Airlines*, resolution of "purely factual questions about an employee's conduct or an employer's conduct and motives d[id] not require [the] court to interpret any term of a collective-bargaining agreement." *Id.* at 261 (internal quotation marks and citation omitted) (alterations added).

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noted in *Hawaiian Airlines*, LMRA preemption law guides the analysis in the RLA preemption context because the preemption standards are "virtually identical." 512 U.S. at 260. There can be no objection by Plaintiff that the issues requiring the Court to examine and interpret the CBA arise in the context of ExpressJet's burden to establish undue hardship at this summary judgment stage.

In *Brown, supra*, the plaintiff claimed that defendant violated the Americans With Disabilities Act ("ADA") by medically disqualifying him from his position and refusing to accommodate his inability to be available for work seven days a week. 254 F.3d at 656-57. Plaintiff suffered from schizoaffective disorder but claimed that he was qualified to work his desired position as a trainman with the reasonable accommodation of being allowed to be unavailable two days per week. *Id.* The defendant argued that granting the plaintiff this accommodation would require the creation of a new position, i.e. one that required availability fewer than 7 days a week, and that offering such a new position to plaintiff without first offering the new position to employees with greater seniority would flout the general seniority provisions established under the CBA. *Id.* at 660. The Seventh Circuit held that the plaintiff's claim under the ADA did require an interpretation of the CBA because it seemed "quite possible" that the accommodation plaintiff sought would create a new position that would be required to be subject to bidding under the CBA and that offering the position to plaintiff without first offering the position to more senior trainmen "might very well violate the seniority system established by the CBA." *Id.* at 661. Additionally, the Seventh Circuit noted, a determination of whether plaintiff's requested accommodation would violate his employer's seniority system was potentially dispositive of his ADA claim as a matter of law because "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees." *See also Eckles*, 94 F.3d at 1051 (finding "that collectively bargained seniority rights have a pre-existing special status in the law and that Congress to date has shown no intent to alter this status by the duties created under the ADA").

"[T]he RLA does not automatically preclude all claims brought under independent federal statutes merely because the same conduct could be characterized as a violation of the CBA and grieved pursuant to the RLA." *Brown*, 254 F.3d at 666. But "claims brought under federal or state statutes which can be 'conclusively resolved' by an interpretation of a CBA are not truly 'independent' from the CBA, and are therefore precluded by the RLA." *Id.* at 667 (citing *Hawaiian Airlines*, 512 U.S. at 257-63). The Seventh Circuit summarized:

> It remains true as a *general rule* that the RLA will not bar a plaintiff from bringing a claim under an independent federal statute in court (because such claims are generally independent of the CBA and will be adjudicated under non-CBA standards). However, this rule no longer applies if the federal claim asserted by the plaintiff depends for its resolution on the interpretation of a CBA. Such claims are not "independent" of the CBA regardless of their source, and are therefore precluded by the RLA.
>
> We close by stressing the limited scope of our holding. A claim brought under an independent federal statute is precluded by the RLA only if it can be dispositively resolved through an interpretation of a CBA. This occurs "only when a provision of the collective bargaining agreement is the subject of the dispute or the dispute is substantially dependent upon an analysis of the terms of a collective bargaining agreement." Therefore, an employer cannot ensure the preclusion of a plaintiffs claim merely by asserting certain CBA-based defenses to what is essentially a non-CBA-based claim, or by arguing that the action challenged by the

> plaintiff is "arguably justified" by the terms of a CBA. Nor will a claim be precluded merely because certain provisions of the CBA must be examined and weighed as a relevant but non-dispositive factor in deciding a claim or a defense. Therefore, Brown's claim would not have been precluded if either the parties did not dispute the interpretation of the relevant CBA provisions (and Brown had merely argued that he was entitled to a certain reasonable accommodation under
> the ADA notwithstanding anything to the contrary in the CBA), or if the disputed provisions of the CBA were relevant but not dispositive of Brown's claim (as the CBA's provisions describing job functions are in relation to the ADA "essential function" determination). However, because in this case the interpretation of the CBA's seniority provisions could dispose of Brown's entire ADA claim as a matter of law, his claim is not truly "independent" of the CBA and is precluded by the RLA.

254 F.3d at 667-68 (emphasis in original).

In *Carlson v. CSX Transp., Inc.*, 758 F.3d 819 (7th Cir. 2014), by contrast, the Seventh Circuit reversed the district court's dismissal of plaintiff's Title VII sex discrimination and retaliation claims, rejecting defendant's assertion that the RLA precluded plaintiff's claims because it acted pursuant to the terms of the CBA rather than for discriminatory reasons in denying her certain positions that she claimed were given to less qualified individuals. Plaintiff claimed that she was not asserting any right under the CBA which in any event did not preclude sex discrimination

or retaliation. *Id.* at 832. Distinguishing *Brown*, the Seventh Circuit rejected defendant's argument that, like the plaintiff in *Brown*, an arbitral ruling that plaintiff was not qualified for the positions under the terms of the CBA would conclusively resolve her claims: "The argument [relying on *Brown*] is based on a misunderstanding of the nature of [plaintiff's] claims. Even if Carlson did not have the qualifications specified in the collective bargaining agreement, she would still have viable Title VII claims if, as she alleges, the same potentially disqualifying attributes have been overlooked for men or for others who have not complained about discrimination." *Id.* at 833. The Seventh Circuit concluded:

> As we were careful to clarify in *Brown*, *a claim* is not barred simply because "the action challenged by the plaintiff is 'arguably justified' by the terms of the CBA." 254 F.3d at 668, quoting *Hawaiian Airlines*, 512 U.S. at 265-66, 114 S.Ct. 2239. An "employer cannot ensure the preclusion of a plaintiffs claim merely by asserting certain CBA-based defenses to what is essentially a non-CBA-based claim." *Id.* at 668. And the fact that a collective bargaining agreement might be consulted in resolving a plaintiff's claims is insufficient to trigger RLA preclusion. Claims are not precluded just "because certain provisions of the CBA must be examined and weighed as a relevant but non-dispositive factor in deciding a claim or a defense." *Id.*
>
> All this is to say that RLA preclusion, properly applied, does nothing more than keep disputes actually arising under a collective bargaining agreement out of court.

758 F.3d at 833.

In *Carlson*, the Seventh Circuit discussed a number of cases that further highlight the crux of the preemption inquiry, including *Rabé v. United Air Lines, Inc.*, 636 F.3d 866, 873 (7th Cir. 2011). In *Rabé*, the plaintiff (a lesbian) claimed that her supervisor made comments to her that he believed it is "not right to be gay" and suggesting that he suspected she was a lesbian. *Id.* at 868. That supervisor initiated an investigation, which ultimately led to plaintiff's termination, into plaintiff's misuse of travel vouchers, which plaintiff claimed was a pretext for firing her for discriminatory reasons. *Id.* The "principal focus" of plaintiff's claims, which alleged that she was treated differently than other employees who were similarly situated with respect to their use of company travel vouchers, was "on United managers' subjective reasons for terminating Rabé's employment." *Id.* at 873. The Seventh Circuit again distinguished *Brown*, concluding:

> The collective bargaining agreement is relevant to Rabé's claims because she alleged that the travel-voucher policy was enforced against her in a discriminatory manner, but her claims do not call the policy itself into dispute. *See Carmona v. Southwest Airlines, Co.*, 536 F.3d 344, 349-50 (5th Cir. 2008) (reversing dismissal of flight attendant's claims of sex and disability discrimination; claims were not preempted where plaintiff did not challenge collective bargaining agreements or procedures, but alleged their discriminatory application); cf. *Brown*, 254 F.2d at 660-64. Accordingly, we conclude that Rabé's claims are not preempted or precluded by the RLA.

636 F.3d at 873.

Several Sixth Circuit cases address the preemption issue under this same framework. In *Emswiler*, the court

concluded that plaintiff's disability discrimination claim turned on the meaning of the CBA phrase "at his earliest opportunity," and concluded that resolving the parties' competing interpretations of that provision would conclusively determine the plaintiff's claim. 691 F.3d at 793. The court concluded that plaintiff's claims were preempted and plaintiff "was required to exhaust the RLA-mandated arbitral processes before coming to court." *Id.*

In *Dotson, supra*, the court concluded that plaintiff's claims of disparate treatment required interpretation of the seniority provisions of the CBA regarding who was eligible to "fill in" when needed and also required interpretation of the requirements for the job of a clerk stenographer. 52 F. App'x at 658. Thus, to dispose of plaintiff's claims, the court would be required to look at and interpret terms of the CBA, and not just evaluate defendant's motives. *Id.* The court concluded that plaintiff's claims were preempted.

Similarly, in *Wellons v. Northwest Airlines, Inc.*, 25 F. App'x 214 (6th Cir. 2001), the court concluded that plaintiff's fraud claim required plaintiff to establish that defendant made a false and material misrepresentation regarding the company's leave policy, which would necessitate the court interpreting the CBA to determine the policies for obtaining leaves of absence. *Id.* at 218. The court concluded that plaintiff's fraud claim was preempted.

Finally, *Schirrick v. Butler Aviation*, 25 F.3d 1050 (6th Cir. 1994) (table case), also involved interpretation of a CBA's seniority provisions. Plaintiff in *Schirrick* worked for defendant fueling and servicing aircraft. When she became pregnant, she provided a note from her physician indicating that she should avoid all contact with noxious fumes. *Id.* at *1. After receiving this note, defendant

placed plaintiff on disability leave. Plaintiff had hoped to be switched to a dispatcher position during her pregnancy and sought her union representative's help in getting another employee to switch with her, but the other dispatchers had more seniority than plaintiff and the union could not force them to accommodate plaintiff. *Id.* at *1. Plaintiff filed suit against defendant claiming violations of the ELCRA and the state's Handicappers Civil Rights Act for the failure to accommodate plaintiff by moving her to the dispatch position during her pregnancy. *Id.* at *2. The Sixth Circuit found plaintiff's claims preempted by the RLA:

> The resolution of this dispute then comes under the terms of the CBA, because in order to switch positions, seniority of other persons must be taken into consideration. Plaintiff was requesting to be switched to a dispatch position, which has a seniority requirement, which is governed by the CBA. This claim places the terms of the CBA in issue. Plaintiff also claims that defendant violated the contract by placing her on a leave of absence. This claim also requires additional examination of the CBA provisions relating to job classifications and to medical and pregnancy leave. Unlike *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir.) (en banc), *cert. denied*, 493 U.S. 992 (1989), plaintiff's claim requires extensive interpretation of the language of the CBA. It is, therefore, preempted by federal law, *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294 (6th Cir.), *cent. denied*, 488 U.S. 879 (1988); *Brown v. American Airlines, Inc.*, 593 F.2d 652, 655 (5th Cir. 1979), which indicates that the claim must be submitted to arbitration according to the RLA, 45 U.S.C. § 184..

25 F.3d at *4.

Plaintiff relies on *Nguyen v. United Air Lines, Inc.*, No. 09-cv-733, 2010 WL 2901878 (W.D. Mich. July 23, 2010), in which the district court held that plaintiff's race, national origin and sex discrimination claims asserted under Title VII were not preempted by the RLA. Noting that "[n]o requirement exists that the collective bargaining agreement be totally irrelevant to the dispute" the court observed that "Plaintiff's claims cannot be conclusively resolved looking at the collective bargaining agreement, but instead require a factual determination of Defendant's acts and motivations." *Id.* at *4. The court distinguished *Dotson, supra*, concluding that "[n]one of Plaintiff's claims require the court to determine his qualifications or the seniority provisions of the CBA." *Id.*

Plaintiff also relies on *Smith, supra*, but *Smith* simply applies the undisputed propositions that: (1) just because a court must refer to the CBA in adjudicating a claim does not make a claim a minor dispute, and (2) "whether or not an employee has a Title VII discrimination claim is not necessarily answered by looking at the [CBA]." 141 F. Supp. 2d at 944. *Smith* is unhelpful. The district court in *Smith* glosses over the facts of the case to such a degree that it is impossible to glean from the case anything other than general well-established (and undisputed) notions, such as "when a cause of action ultimately concerns an issue unrelated to the CBA, then the RLA does not pre-empt the plaintiff's statutory claim." *Id.* at 942. Providing no discussion of the factual circumstances of the plaintiff's claims, the court in *Smith* simply concluded that "[i]n determining the validity of Plaintiff's sexual harassment claim, parties will find it unnecessary to consult, even in the most cursory manner, terms in the CBA." *Id.* Without factual context, *Smith* tells this Court nothing about

whether or not in this case, on these facts, the Plaintiff's claims concern an issue related to the CBA.

In this case, an examination of the CBA *will* potentially dispose of Plaintiff's claims because under established Sixth Circuit precedent, any accommodation that "will result in a violation of the seniority provisions of the collective bargaining agreement, and affect the shift and job preferences and contractual rights of other employees," constitutes an undue hardship. *Virts*, 285 F.3d at 517. As a threshold matter, the Court clarifies the Plaintiff's requested accommodation: despite what Plaintiff may now suggest about her flexibility to consider "other accommodations," she testified in her deposition that under no circumstances would she be willing to violate the tenet of her faith that precludes her from preparing/serving/selling alcohol. (Stanley Dep. 187:21-188:3.) Thus, Plaintiff requests an accommodation that would: (1) guarantee Plaintiff that every senior Flight Attendant would agree on every flight to perform her alcohol service duties, thus foregoing that Flight Attendant's seniority rights under the CBA to only perform the duties of Flight Attendant "A" or "B" at his or her election (which ExpressJet argues would violate the governing CBA seniority provisions), (2) guarantee Plaintiff the right to refuse to assist a more senior Flight Attendant with alcohol service duties, despite the requirements of the CBA and FAM that require such cooperation (which ExpressJet argues would violate the governing CBA seniority provisions), (3) guarantee Plaintiff that if a multi-attendant flight to which Plaintiff was assigned was downgraded to a single Flight Attendant flight, the senior Flight Attendant would be required to forego his or her right under the CBA to decline the downgrade, or at the last minute ExpressJet would have to call up a reserve to immediately work the flight (which ExpressJet argues would violate the

governing CBA seniority provisions); and (4) guarantee that Plaintiff would never be assigned to a single Flight Attendant aircraft (which ExpressJet argues would violate the governing CBA seniority provisions).

Plaintiff *does not* seek an accommodation that would be observed only insofar as it does not interfere with ExpressJet's seniority system or only insofar as fellow Flight Attendants are agreeable to her request. In fact Plaintiff testified that if a Flight Attendant refused her request at the outset of a flight, Plaintiff could take an unexcused "no show" and the departure could be put on hold while ExpressJet endeavored to call up a reserve (who may or may not be on-site at that time and who may or may not agree to perform Plaintiff's job duties for her). Plaintiff sought an "upfront" guarantee from ExpressJet that she would *never* be required to prepare or serve alcohol, and expected that other more senior Flight Attendants would surrender their bargained-for rights and agree to perform that duty for her or that ExpressJet would alter operations, delay flight departures, call up reserves, or otherwise figure out a way to accommodate a last minute operational roadblock caused by her refusal to perform her alcohol service duties. While Plaintiff suggests now that ExpressJet could somehow determine in advance a fellow Flight Attendant's agreement to perform Plaintiff's job duties for her, ExpressJet rightly responds that it could never be certain that an "agreeable" Flight Attendant would be available in the event of an unplanned operational event such as a downgrade of equipment or in the event of an "agreeable" Flight Attendant's unplanned unavailability. An "employer [is] not required to make an effort to accommodate the plaintiff, where any attempt at doing so would be fruitless inasmuch as the rights of other employees would be violated, and providing the accommodation would therefore pose an undue burden." *Virts*, 285 F.3d at 508.

See also Tepper v. Potter, 505 F.3d 508, 514 (6th Cir. 2007) ("For the purpose of religious accommodations, "[t]o require an employer to bear more than a *de minimis* cost in order to accommodate an employee's religious beliefs is an undue hardship.'" *Id.* (quoting *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994)).

Given the nature of Plaintiff's requested accommodation, the Court concludes that Plaintiff's Title VII and ELCRA claims are dependent upon interpretation of the CBA. "[B]ecause a CBA, unlike a private contract, is a "'generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate,' [*Consolidated Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299], at 311-12 [(1989)] (internal citation omitted), the major-minor dichotomy treats interpretation or application of express and implied contractual terms indistinguishably." *Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co.*, 879 F.3d 754, 758 (7th Cir. 2017). "Thus, the relevant terms of an agreement are not only those that are written down; they also include the parties' practice, usage, and custom as they carry out their agreement." *Id. See also VanSlyckv. GoJetAirlines, LLC*, 323 F.R.D. 266, 271 (N.D. Ill. 2018) (observing that a "disputed past practice under [a] CBA g[ives] rise to [a] minor dispute requiring interpretation of CBA in light of disputed past practice," and acknowledging that in deciding the preemption issue, "the court may look beyond the explicit terms of the written agreement . . . [and] must interpret the agreement to include recognized past practices"). Thus, when determining whether a dispute requires interpretation of the CBA, and whether preemption is required, past practice and other written materials related to those practices also must be examined to resolve the issue.

The CBA dictates, and the Plaintiff agrees, that the more senior Flight Attendant gets to choose whether he or she wants the "A" or 'B" position. While there are instances of voluntary collaboration and cooperation in performing the duties of both the "A" and "B" positions, Plaintiff's requested accommodation mandates her control over the two positions. Both the FAM and FAH, as discussed *supra*, contain specific detail regarding the duties of a Flight Attendant to serve alcohol, including an express directive that Flight Attendant "B" should assist Flight Attendant "A" with the pre-departure service of beverages, including alcoholic beverage preparation and service, which Plaintiff refused to do – prompting Mr. Aafifi's complaint. (FAM § 3-4.1, PgID 1196.) ExpressJet argues that the job duty of Flight Attendants to participate in the service of alcoholic beverages is an established past practice. In fact, Flight Attendant Aafifi's complaint regarding Plaintiff was based upon her refusal to help him (the senior Flight Attendant) service First Class alcoholic beverages preflight. Interpretation of the CBA in light of past practices is inherently a task for the system board. *VanSlyck*, 323 F.R.D. at 271 ("it is for the System Board to evaluate this past practice in the context of CBA interpretation; not the Court") (internal quotation marks and citation omitted).

In this case, the CBA provides that the more senior Flight Attendant may choose whether to assume the "A" or "B" position on a flight, and the FAM and the FAH contained express instruction that all Flight Attendants are to help with the preparation and serving of alcoholic beverages. ExpressJet argues that if Plaintiff is granted an accommodation by ExpressJet relieving her of her duties to prepare and serve alcohol, and guaranteeing that she will never be called upon to prepare and serve alcohol, the seniority provisions of the CBA are necessarily implicated (and according to ExpressJet violated) because

the more senior Flight Attendant will be forced to fully perform (not just "help out" occasionally with hot water or tea or extra peanuts, Cooper Dep. 92:5-19) the alcohol service duties of both the "A" and "B" Flight Attendants, in violation of the more senior Flight Attendant's rights under the CBA to elect either the "A" or "B" positions for the flight. Plaintiff's Union representative, Ms. Cooper, conceded that Plaintiff's requested accommodation could violate the seniority provisions of the CBA and could result in the filing of a grievance against ExpressJet under the CBA's seniority provisions.

Plaintiff disagrees that her requested accommodation has any effect on the seniority rights of other Flight Attendants because "everyone has been happy to accommodate her." But the undisputed evidence demonstrates that in the short period of time (approximately three weeks) that she operated under the "duty swapping" arrangement, at least two Flight Attendants verbalized to their supervisors that they were not at all happy to assume Plaintiff's alcohol service duties for her and Mr. Aafifi expressly complained that "as the Senior FA, he is requesting assistance with first class, but [Plaintiff] is refusing." (Brown Dep. Attach. 7, PgID 2014.) And importantly Plaintiff's Union representative, Ms. Cooper, conceded that she had received comments from "a few"
Flight Attendants regarding Plaintiff's refusal to serve alcohol, some of whom were concerned that it would violate seniority rights and others who indicated they would be willing to work with Plaintiff and serve alcohol for her. (Cooper Dep. 194:19-195:10.) It is clear to the Court that the resolution of Plaintiff's religious accommodation claim will require an interpretation of the seniority provisions of the CBA. This is a determination committed to the RLA arbitral mechanism and the appropriate system board. *See Brotherhood of Locomotive*

Engineers v. Union Pacific Railroad Co., 876 F.3d 261, 268 (7th Cir. 2017), *amended on petition for rehearing* 879 F.3d 754 (7th Cir. 2017) ("Wading through the competing declarations to determine the actual authority the Railroad had to modify the disciplinary policies, based on past practices, is a job for the arbitrator.").

To the extent that Plaintiff's requested accommodation results in a violation of the seniority provisions of the CBA, or adversely affects the seniority rights of other Flight Attendants, the "undue hardship" issue, which is a central and dispositive issue on Plaintiff's Title VII failure to accommodate claim, will be conclusively resolved by interpretation of the CBA. Thus, the claim is a minor dispute subject to adjudication through the RLA arbitration provisions and is therefore preempted/precluded.

C. Plaintiff Has Failed to Create a Genuine Issue of Material Fact on her Claim of Retaliatory Discharge and Such a Claim In Any Event Also Would Be Preempted/ Precluded Under the RLA

"[T]o prevail on a claim for retaliatory discharge under Title VII, a plaintiff must first establish a *prima facie* case by demonstrating that 1) the plaintiff engaged in an activity protected by Title VII; 2) the exercise of the plaintiffs civil rights was known to the defendant; 3) the defendant thereafter undertook an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action." *Virts*, 285 F.3d at 521. "If the plaintiff demonstrates a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Once the defendant articulates its reason, the plaintiff, who bears the burden of persuasion throughout the entire process,

must demonstrate that the proffered reason was a mere pretext for discrimination." *Id.* (Internal quotation marks and citation omitted). "The plaintiff may establish that the proffered reason was a mere pretext by showing that 1) the stated reason had no basis in fact; 2) the stated reason was not the actual reason; or 3) the stated reason was insufficient to explain the defendant's action." *Id.* "'[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.'" *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)).

Plaintiff's retaliation claim is difficult to understand but she reasons as follows: ExpressJet initially accommodated the Plaintiff's request not to serve alcohol through Ms. Brown's advice to Plaintiff shortly before Plaintiff's flight was about to depart on June 2, 2015, to ask her fellow Flight Attendant to perform her alcohol serving duties for her. After taking TOWOP for the holy month of Ramadan, Plaintiff returned to work and apparently operated under that procedure for a period of a few weeks and considered that she had been granted a permanent accommodation not to serve alcohol in her role as an ExpressJet Flight Attendant. ExpressJet disagrees that this was a permanent accommodation, and submits that it was a temporary solution to Plaintiff's then-immediate problem of having to serve alcohol on her upcoming flight and to address Plaintiff's concerns about serving alcohol during the approaching holy month of Ramadan. But this factual dispute is not material because it is undisputed, and ExpressJet does not deny, that ExpressJet did permit Plaintiff to proceed with the swap requests until it received two separate complaints from fellow Flight Attendants who complained that they were being required to perform Plaintiff's alcohol service duties. One of those complaints, the IOR from Ms. Katie Hice, objected to having to

perform Plaintiff's alcohol service duties for her but also contained remarks regarding "books with foreign writings" that Plaintiff was reading and comments on Plaintiff's hijab, that were interpreted by Plaintiff to be bigoted and charged with racial animus toward Plaintiff's Muslim religion. Plaintiff's counsel explained at the hearing on ExpressJet's motion to dismiss the Plaintiff's "theory" of retaliation:

> [T]he revocation of the religious accommodation in response to a colleague's complaints is the factual basis for plaintiff's retaliation claims. The colleague's complaints indicate[s] a level of animus that if ratified by the defendant becomes the basis of the employment action. And here, paragraph 31 of the complaint makes it clear that plaintiff's allegations are that the withdrawl of the religious accommodation was motivated by animus against Miss Stanley because of her faith.

(ECF No. 31, Transcript of May 17, 2017 Hearing 25:22-26:5.) Paragraph 31 of Plaintiff's Complaint alleges: "This revocation of her religious accommodation was purportedly in response to complaints by a flight attendant about the fact that Ms. Stanley wore her hijab; possessed religious books in Arabic ("foreign writings"); and because she did not want to personally serve alcohol." (Compl. ¶ 31.) Plaintiff's counsel stated further at the hearing on the motion to dismiss: "[W]e believe that when we get ahold of their internal records regarding how this religious accommodation was revoked, that will indicate the level of animus that makes the revocation of the religious accommodation independently actionable regardless of whether the accommodation should have been given in the first place." (5/17/17 Hr'g Tr. 32:5-10.)

Plaintiff's retaliation claim fails for several reasons. First, Plaintiff's retaliation claim is premised on

comments made by a fellow Flight Attendant. In constructing her retaliation theory, however, Plaintiff has not identified *her* "protected activity," leaving the Court and ExpressJet to fill in this blank for her. Therefore, Plaintiff fails to create a genuine issue of material fact as to the first element of her *prima facie* case. Second, discovery has simply failed to bear out the factual premise for this claim as Plaintiff has failed to unearth even a scintilla evidence to support the contention that ExpressJet denied Plaintiff's request in response to Ms. Hice's allegedly bigoted remarks, rather than in response to the issues raised by Ms. Hice's and Mr. Aafifi's (the more senior Flight Attendants) complaints about being forced to perform Plaintiff's duties to serve alcohol. The evidence reveals that ExpressJet received two complaints from Flight Attendants in the relatively short period of time (a few weeks) that Plaintiff was operating under the swapping of duties procedure, prompting ExpressJet to investigate the legal and operational implications of granting Plaintiff a permanent guarantee that would relieve her of her alcohol service duties on each of her ExpressJet flights. There is not one piece of evidence from which a reasonable juror could conclude that ExpressJet "ratified" (whatever that might mean in this context – Plaintiff certainly cites no case law explaining such "retaliation by ratification" theory) Ms. Hice's comments or in any way acted on or even considered Ms. Hice's allegedly bigoted remarks in denying Plaintiff's request that she be relieved of her duties to serve alcohol. In fact, ExpressJet granted Plaintiff's request to wear her hijab in November, 2013, long before Plaintiff sought an accommodation that would permit her to refuse to serve alcohol to passengers.

And Plaintiff ignores the undisputed fact that ExpressJet had also received and was responding to Mr. Aafifi's complaint, which specifically referenced Plaintiff's

refusal to comply with his request, as the senior Flight Attendant in the "A" position, that she assist him with serving alcohol to first class passengers in the pre-departure phase of the flight. In addition, as discussed *supra*, Plaintiff's Union representative, Ms. Cooper, testified that she received comments from "a few" Flight Attendants regarding Plaintiff's refusal to serve alcohol, some of whom viewed it as violating seniority rights. (Cooper Dep. 194:19-195:10.) Thus, the complaints appear to have been more widespread than just those formally reported to ExpressJet. There is simply nothing in this summary judgment record, beyond pure speculation, on which a jury could conclude that ExpressJet made the decision to deny Plaintiff's requested accommodation because of Ms. Hice's unsolicited remarks regarding Plaintiff's "foreign reading materials" and her hijab. Even assuming there is a legal theory that would allow such a "retaliation by ratification" theory to proceed, there is simply no factual basis for imputing Ms. Hice's allegedly discriminatory remarks to ExpressJet.

Plaintiff has devoted little effort to developing a retaliation argument, and indeed doesn't even endeavor to address the basic elements of the claim. Issues "adverted to . . . in a perfunctory manner, unaccompanied by some effort at developed argumentation," are deemed waived. *Clemente v. Vaslo*, 679 F.3d 482, 497 (6th Cir. 2012). "It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." *Bishop v. Gosiger, Inc.*, 692 F. Supp. 2d 762, 774 (E.D. Mich. 2010) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997)). Plaintiff "offers no substantive arguments as to the continued viability of a retaliation claim and fails to link any protected activity to any discriminatory conduct." *Dotson*, 52 F. App'x at 660. Plaintiff has failed to create a genuine issue of material

fact on her retaliation claim and ExpressJet is entitled to summary judgment on this claim.

ExpressJet reads Plaintiff's retaliation claim more generously, and assumes for sake of argument that the "protected activity" was Plaintiff's request for an accommodation. ExpressJet submits, and the Court agrees, that such a claim also would also be preempted by the RLA because it would require interpretation of the CBA's seniority provisions in analyzing ExpressJet's proffered legitimate, nondiscriminatory reason for refusing to grant Plaintiff's accommodation and placing her on leave. If the system board were to determine that Plaintiff's requested accommodation would violate the seniority provisions of the CBA, this would be dispositive of any retaliation claim because a "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Virts*, 285 F.3d at 521. A determination pursuant to the RLA arbitral process that the requested accommodation would in fact violate the CBA would preclude a find-ing that ExpressJet's proffered reason was false. Accordingly, the retaliation claim could not be decided without interpreting the CBA and an interpretation of the CBA could be dispositive of Plaintiff's retaliation claim, regardless of any evidence of ExpressJet's motive. *See Emswiler*, 691 F.3d at 793. *See also Monroe v. Missouri Pacific R. Co*., 115 F .3d 514, 518 (7th Cir. 1997) (analyzing the "*Hawaiian Airlines-Lingle* preemption standard," and concluding that plaintiff's retaliatory discharge claims were minor disputes involving interpretation of the CBA and required adjudication under the RLA procedures where analysis of those claims "necessarily requires interpretation of the CBA in order to determine the validity of his arguments regarding the Railroad's retaliatory intent").

IV. CONCLUSION

Because Plaintiff's failure to accommodate claims are preempted/precluded by the RLA and because Plaintiff fails to create a genuine issue of material fact on her retaliation claim, which also would be preempted/precluded by the RLA, the Court GRANTS ExpressJet's Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: December 7, 2018

s/Paul D. Borman
Paul D. Borman
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 14, 2020]

No. 19-1034

CHAREE STANLEY,

Plaintiff-Appellant,

v.

EXPRESSJET AIRLINES, INC.,

Defendant-Appellee.

ORDER

BEFORE: BOGGS, BATCHELDER, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Deborah S. Hunt Clerk

Filed: May 14, 2020

Ms. Lena F Masri
Council on American-Islamic Relations
453 New Jersey Avenue, S.E.
Washington, DC 20003

Re: Case No. 19-1034,
Charee Stanley v. ExpressJet Airlines, Inc.
Originating Case No.: 2:16-cv-12884

Dear Ms. Masri,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Jessica Lynn Asbridge
Ms. Carolyn M. Homer
Mr. Justin Mark Sadowsky
Ms. Sarah P. Wimberly

Enclosure

APPENDIX D

42 U.S.C. § 2000e(j)

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

* * *

45 U.S.C. § 151a

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * *

45 U.S.C. § 153

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working

conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

45 U.S.C. § 181

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

* * *

45 U.S.C. § 184

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the

parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

* * *