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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PETERSEN; et al, Plaintiffs-Appellants, v. SNOHOMISH REGIONAL FIRE AND RESCUE and KEVIN O'BRIEN, Chief, Defendants-Appellees.	No. 24-1044 D.C. No. 2:22-cv-01674-TSZ Western District of Washington, Seattle ORDER

Before: BYBEE and FORREST, Circuit Judges, and RODRIGUEZ, District Judge.[*]

The panel judges have voted to deny Appellants' petition for rehearing. Judge Forrest voted to deny the petition for rehearing en banc, and Judges Bybee and Rodriguez recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. Appellants' petition for rehearing and petition for rehearing en banc, filed September 30, 2025, are DENIED.

[*] The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PETERSEN; JAY STICKNEY; BEAU WATSON; EVAN MERRITT; NORM ALAN PETERSON II; RILEY KORF; RYAN STUPEY; KEVIN GLEASON, *Plaintiffs - Appellants*, v. SNOHOMISH REGIONAL FIRE AND RESCUE AND KEVIN O'BRIEN, Chief, *Defendants - Appellees*.	No. 24-1044 D.C. No. 2:22-cv-01674-TSZ OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted April 3, 2025
Portland, Oregon

Filed September 2, 2025

Before: Jay S. Bybee and Danielle J. Forrest, Circuit Judges, and Xavier Rodriguez, District Judge.[*]

Opinion by Judge Bybee

[*] The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas, sitting by designation.

SUMMARY**

Employment Discrimination

The panel affirmed the district court's summary judgment in favor of Snohomish Regional Fire and Rescue (SRFR) in an action brought by eight firefighters alleging that, in violation of Title VII and Washington state law, SRFR failed to accommodate their religious beliefs when it denied their requests for exemptions from the governor of Washington's August 2021 proclamation requiring all healthcare providers to be vaccinated against COVID-19.

SRFR ultimately denied the firefighters' requests because it was unable to identify a reasonable accommodation that would allow the firefighters to remain in their roles without imposing an undue hardship on SRFR.

The panel held that to establish a failure-to-accommodate claim for religious discrimination under Title VII, a plaintiff must first set forth a prima facie case that he had a bona fide religious belief, the practice of which conflicted with an employment duty; he informed his employer of the belief and conflict; and the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement. The burden then shifts to the employer to show that it initiated good faith efforts to reasonably accommodate the employee's religious practices or that it could not reasonably accommodate the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

employee without undue hardship.

Declining to scrutinize the firefighters' religious beliefs, the panel assumed that they set forth a prima facie case. The panel held that the district court did not err in concluding that SRFR could not reasonably accommodate the firefighters' vaccine exemption requests without undue hardship. Following *Groff v. DeJoy*, 600 U.S. 447 (2023), the panel held that undue hardship is shown when, taking into account all relevant factors in the case at hand, a burden is substantial in the overall context of an employer's business. SRFR showed that it faced several substantial costs of accommodating the firefighters' requested vaccine exemption, including the health and safety of its own firefighters and the public, the large number of firefighters seeking accommodations, the risk to its operations and the costs of widespread absences, the potential loss of a lucrative contract, and the risk of additional liability. In addition, SRFR provided unrebutted medical evidence that showed the inadequacy of the firefighters' proposed accommodation. The panel concluded that SRFR thus showed that it could not reasonably have accommodated the firefighters without undue hardship in October 2021.

COUNSEL

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Shannon E. Phillips (argued) and Molly J. Gibbons, Summit Law Group PLLC, Seattle, Washington, for Defendants-Appellees.

OPINION

BYBEE, Circuit Judge:

In August 2021, Washington's governor issued a proclamation requiring all healthcare providers to be vaccinated against COVID-19. In response, Defendant Snohomish Regional Fire and Rescue (SRFR) issued a vaccine mandate to its firefighters but allowed them to request accommodations based on their sincerely held religious beliefs. Plaintiffs, eight SRFR firefighters, did just that. SRFR ultimately denied these requests because it was unable to identify a reasonable accommodation that would allow firefighters to remain in their roles without imposing an undue hardship on SRFR. Plaintiffs sued under both federal and Washington law, arguing that SRFR failed to accommodate their religious beliefs. The district court granted summary judgment for SRFR, and Plaintiffs appealed. For the reasons that follow, we affirm.

I. BACKGROUND

SRFR "provides fire suppression and emergency medical services" in Snohomish County, Washington. Its service area covers some 135 square miles and 175,000 persons, including 2,500 inmates housed in the Monroe Correctional Complex, a men's prison. In 2021, SRFR responded to 18,000 emergency calls, 85% of which were for emergency medical services. SRFR maintains eleven fire stations for its nearly two hundred career firefighters. The fire stations serve "as a workplace, home, and gym during a firefighter['s] . . . 24-hour shift."

On August 9, 2021, Washington Governor Jay Inslee

issued Proclamation 21-14 (the Proclamation), which required healthcare workers to be vaccinated against COVID-19 by October 2021.[1] The Proclamation stated that employers should comply with Title VII and the Washington Law Against Discrimination (WLAD), among other laws. Specifically, the Proclamation provided that healthcare workers were "not required to get vaccinated against COVID-19 if they are entitled . . . [to] a sincerely held religious belief accommodation." The Proclamation acknowledged that, consistent with Title VII, "such accommodations" need not be provided by employers "if they would cause undue hardship."

SRFR provided its firefighters with information about the vaccination requirement and the process for requesting exemptions. Forty-six of SRFR's 192 firefighters requested exemptions, including the eight Plaintiffs. All the firefighters served in various firefighting and emergency medical technician (EMT) positions, and all held EMT or paramedic certifications.

SRFR's Human Resources staff met with each employee who requested an exemption to discuss their request and any possible accommodation. SRFR simultaneously negotiated with the International Association of Fire Fighters, Local 2781 (the Union) regarding the vaccination requirement, and eventually "approved a Memorandum of Understanding ('MOU') that modified the collective bargaining agreement to provide accommodation options for firefighters if [SRFR] determined they could not be accommodated in their

[1] By the time of the Proclamation, emergency use authorizations had been approved for the Moderna and Johnson & Johnson vaccines, and full approval had recently been granted for the Pfizer vaccine.

healthcare roles."

In these circumstances, the MOU explained that unvaccinated firefighters could use their accrued paid leave while remaining employed. After exhausting that leave, firefighters could take a one-year leave of absence without pay. The MOU also provided that if any firefighters chose to leave SRFR, they could be added to the disability rehire list, which gave them "priority"—meaning that they would not lose their rank, seniority, or benefit accrual status if they returned to SRFR within two years. Additionally, the MOU "specified that the unvaccinated frontline employees could return to work during their period of absence if [the] Proclamation . . . was updated and amended to that effect."

In October 2021, SRFR determined that it could not accommodate unvaccinated firefighters in their firefighting roles without imposing an undue hardship on its operations. SRFR explained that because a firefighter's work requires interfacing with the public, it did not have alternative positions for those seeking exemptions, nor could it facilitate their requested accommodation—masking, testing, and social distancing. SRFR encouraged all forty-six employees to use their accumulated leave days first and then apply for a one-year leave of absence. SRFR approved all such requests.

SRFR continued to monitor information from public health authorities regarding COVID-19 conditions and the risks to its operations, its employees, and the community in 2021 and into 2022. In May 2022, after the Omicron wave of COVID-19 had subsided, SRFR notified unvaccinated employees that they could either remain on leave or "return to their patient-care roles, following all applicable . . . guidelines." Four Plaintiffs returned to

work shortly after; others returned later.

Six months later, in November 2022, Plaintiffs filed suit against SRFR, Fire Chief Kevin O'Brien,[2] and unnamed defendants, and asserted two causes of action: (1) a failure to accommodate their religious beliefs in violation of 42 U.S.C. § 2000(e) (Title VII); and (2) a violation of WLAD. Plaintiffs sought a "declaration that, under these circumstances, a leave of absence falls short of lawful reasonable accommodation" under either Title VII or WLAD. They also asked for damages and other relief.

SRFR moved for summary judgment. It argued that Plaintiffs' Title VII and WLAD claims should be dismissed because Plaintiffs' exemptions could not be accommodated without undue hardship to SRFR. Plaintiffs moved for partial summary judgment and argued that SRFR failed to accommodate their exemption requests. The district court granted summary judgment for SRFR. The court assumed that Plaintiffs had established a bona fide religious objection to the vaccination. It then found that accommodating Plaintiffs' objections would impose an undue hardship on SRFR's operations. The court ruled that the undisputed evidence showed that "allowing unvaccinated firefighters to work would increase the risk of spreading COVID-19 even with the use of masks and [personal protective equipment (PPE)] because masks and PPE are effective only when worn and firefighters could not always wear masks and PPE." The court further found that "the uncontroverted evidence in this case demonstrates that unvaccinated firefighters were at a higher risk of contracting and

[2] The parties later stipulated to Chief O'Brien's dismissal.

transmitting COVID-19 even with the use of masks, PPE, testing, and social distancing." "Moreover, the fact that 46 out of 192 Snohomish Fire firefighters requested an exemption and accommodation increased Snohomish Fire's hardship and the risks associated with accommodating Plaintiffs in their patient-care roles while living and working in fire stations."

The court entered final judgment for SRFR, and Plaintiffs timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's summary judgment decision "de novo, viewing the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party." *Edwards v. Wells Fargo & Co.*, 606 F.3d 555, 557 (9th Cir. 2010).

III. ANALYSIS

We begin by setting out the legal framework and then discuss its application in this case.

A. *Religious Discrimination Under Title VII*

1. Title VII's burden-shifting framework

Title VII makes it "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a). For purposes of Title VII, "[t]he term 'religion' includes all aspects of religious observance and practice . . . unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship

on the conduct of the employer's business." *Id.* § 2000e(j). Accordingly, "[a] claim for religious discrimination under Title VII can be asserted under several different theories, including . . . failure to accommodate." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004). To do so:

> [A plaintiff] must first set forth a prima facie case that (1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement.

Id. at 606. Once a plaintiff "makes out a prima facie failure-to-accommodate case, the burden then shifts to [the employer] to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." *Id.* (internal quotation marks and citations omitted).

Here, the district court "decline[d] to scrutinize Plaintiffs' religious beliefs" and "assume[d] that Plaintiffs have established a bona fide religious belief and have set forth their prima facie case." On appeal, SRFR does not take issue with this assumption. We, too, decline to scrutinize Plaintiffs' religious beliefs and assume they have set forth a prima facie case. On appeal of summary judgment, that leaves us with one straightforward question: Whether the district court erred in concluding that SRFR could not reasonably accommodate Plaintiffs'

vaccine exemption requests without undue hardship.[3]

2. "Undue hardship" after *Groff v. DeJoy*

As we discussed above, Title VII "requires employers to accommodate the religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'" *Groff v. DeJoy*, 600 U.S. 447, 453–54 (2023) (quoting 42 U.S.C. § 2000e(j)); *see also Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1224 (9th Cir. 2023) ("Undue hardship is an affirmative defense . . . ."). In *Groff*, the Supreme Court clarified how lower courts should conduct the undue hardship analysis. Nearly fifty years ago, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court suggested that an employer need not demonstrate "more than a de minimis cost" to show "undue hardship." *Id.* at 84. In *Groff*, the Court observed that "*Hardison*'s reference to '*de minimis*' . . . was fleeting" and, when divorced from the context of *Hardison*, unfortunate. 600 U.S. at 465. The Court clarified that "showing 'more than a *de minimis* cost' . . . does not suffice to establish 'undue hardship' under Title VII." *Id.* at 468. The Court held that

[3] We consider the Title VII and WLAD claims simultaneously because the Washington standard mirrors the federal one. At the time of the district court's decision, a defendant in Washington could show undue hardship so long as accommodating a plaintiff's request imposed "more than a *de minimis* cost" on its business. *Kumar v. Gate Gourmet Inc.*, 325 P.3d 193, 203 (Wash. 2014) (en banc) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)). Nonetheless, the district court evaluated the WLAD claim under the more difficult federal standard, which requires "substantial increased costs." Last year, Washington adopted the substantial cost test. *See Suarez v. State*, 552 P.3d 786, 798–99 (Wash. 2024) (en banc). Washington courts "look to federal case law" to guide their interpretation of WLAD. *Kumar*, 325 P.3d at 197.

"'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." *Id.* The Court continued:

> [A] hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. . . . [W]e are pointed toward something closer to . . . "substantial additional costs" or "substantial expenditures."

Id. at 469 (citations omitted).

The Court counseled us to "apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of [an] employer," to see if "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Id.* at 470–71 (alteration in original) (quotation marks and citations omitted). In the end, "'undue hardship' in Title VII means what it says," *id.* at 471, and proof of hardship to the employer is not sufficient—the hardship must be *undue*, *see id.* at 471–72. By way of example, the Court offered that "forcing other employees to work overtime would [not] constitute an undue hardship," *id.* at 473, without considering other options

such as "temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs," *id.* at 471 (citing EEOC Guidelines, 29 C.F.R. § 1605.2(d)).

We have not had occasion to grapple with how exactly we should "take[] into account all relevant factors." *Id.* at 470. To date, we have cited *Groff* just four times in published cases. None of our citations are precedential here. *See Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1155 (9th Cir. 2025) (citing *Groff* once to establish that "[d]iscrimination on the basis of religious beliefs is discrimination on the basis of religion for purposes of Title VII"); *Apache Stronghold v. United States*, 95 F.4th 608, 656 n.20 (9th Cir. 2024) (en banc) (Bea, J., concurring in part), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036, 1085 n.20 (9th Cir. 2024) (Bea, J., concurring in part); *Hittle v. City of Stockton, Cal.*, 101 F.4th 1000, 1028, 1032 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc). For this reason, the parties spend much of their briefing citing district court cases.[4]

It is sufficient for us to state at this point that *Groff* raised the bar that defendants must clear to show undue hardship but left us to consider a range of factors that we

[4] Plaintiffs have directed us to *Bacon v. Woodward*, 104 F.4th 744 (9th Cir. 2024). We do not think that case aids our analysis here. In *Bacon*, Spokane firefighters brought an as-applied Free Exercise Clause challenge to the city's implementation of the Proclamation. *Id.* at 754. We concluded that those plaintiff-firefighters had adequately pleaded that the city's policy was "fatally underinclusive" and, therefore, not narrowly tailored. *Id.* at 753. The plaintiffs in that case did not bring a Title VII claim, and the case does not even cite *Groff*. *See id.* at 747 (indicating that the district court's reference to Title VII was the wrong standard for a First Amendment claim).

might deem relevant.

B. *Undue Hardship and Reasonable Accommodation in This Case*

With *Groff* in mind, we consider whether SRFR would have faced an undue hardship by accommodating Plaintiffs' request for vaccine exemption. *See* 600 U.S. at 468. SRFR identifies several different kinds of costs it would have faced had it allowed firefighters to work unvaccinated. For our purposes, we will group them into three categories: (1) health and safety costs, (2) operational burdens, and (3) financial burdens.

1. Health and safety costs

SRFR argues that it faced increased health and safety costs by allowing firefighters to work unvaccinated. Plaintiffs think these health and safety costs are overstated. SRFR was concerned with the health of two distinct populations: its own employees and the public, including vulnerable patients, that it serves. The declaration of Fire Chief O'Brien provided some context for SRFR's concerns. Chief O'Brien stated that, as of 2021 when the vaccine mandate went into effect, SRFR employed 248 persons, of which 192 were firefighters. All the Plaintiffs were firefighters or paramedics of some kind, and all were required to maintain a current Washington State certification as an EMT or paramedic. Chief O'Brien stated that in 2021, SRFR responded to 18,000 emergency calls, 85% of which were calls for emergency *medical* services. During that year, SRFR transported 6,866 persons to area hospitals.

At summary judgment, SRFR relied on the extensive declaration of Dr. John Lynch to explain its concerns for its employees and the public it served. Dr. Lynch is a

board-certified physician in infectious disease, Professor of Medicine at the University of Washington School of Medicine, and Associate Medical Director at Harborview Medical Center. Among other things, Dr. Lynch led the University's COVID response, including the medical school's decision to require COVID-19 vaccinations for its clinical employees. His testimony is unrebutted by Plaintiffs.[5]

Dr. Lynch opined that COVID vaccination is the best way to slow the spread of COVID and prevent serious illness or death. He explained that "being fully vaccinated provides better protection [from reinfection] as compared to having recovered from COVID." Further, he opined that "[p]eople who would rather contract COVID-19 to get infection-mediated immunity rather than simply get vaccinated are taking a significant risk of severe illness, longer-term serious health problems . . ., and death, even if they have recovered" from COVID, and "also risk infecting others . . . with whom they come in contact." Dr. Lynch added context for the timing of the Proclamation's vaccination mandate in the latter part of 2021: During that time, "cases were spiking due to the Delta variant despite other strategies in place. This was followed by the Omicron waves, which continued . . . into 2022."

Dr. Lynch reviewed "the risks of COVID-19 spreading throughout fire stations." He wrote that "[o]utbreaks among firefighting teams would lead to potentially severe limits on EMS and firefighting responses in the community." He concluded that "[b]ased

[5] The district Court concluded that "Dr. Lynch is qualified as an expert on infectious diseases generally and COVID-19 specifically." Plaintiffs do not contest Dr. Lynch's qualifications; on appeal, they refer to Dr. Lynch as an "infectious disease[] expert."

on [his] experience with the layouts of fire stations and the research literature relevant to this environment, none of [the suggested mitigation measures] could have been effective non-pharmaceutical interventions to prevent the spread of COVID-19."

Similarly, Dr. Lynch discussed how unvaccinated firefighters might endanger the public when they "have to enter public buildings or private residences" and when they "transport injured or sick persons in their vehicles." He observed that Plaintiffs' proposed mitigation techniques—"assigning unvaccinated firefighters to the same . . . shifts, assigning individual bedrooms such that they are only used by other unvaccinated firefighters . . . , [and] designating restrooms such that unvaccinated employees use one restroom"—were "aimed only at transmission in the fire station and not in work vehicles or as personnel are . . . interacting with members of the public. . . . None of these suggestions would have reduced the changes of bringing an infected firefighter into proximity to an often higher-risk patient population."

Dr. Lynch explained in some detail why Plaintiffs' proposed accommodation—testing, masking, and social distancing in lieu of vaccination—was inadequate. Regular COVID-19 testing was "not sufficient" because tests are not always accurate and unvaccinated people subject to testing were "among positive cases that . . . caused outbreaks in" Washington. Dr. Lynch described PPE, like masks, as "complements, not substitutes, for getting vaccinated," since "[m]asks shore up protection on the outside," and vaccines do so on the "inside." According to Dr. Lynch, vaccines are "effective around the clock," and masks are not because "a work-based masking requirement applies only while employees are at work."

He cited various studies that supported these conclusions. Dr. Lynch disagreed with Plaintiffs' contention that social distancing served as an adequate alternative to vaccination because even if firefighters could socially distance in the fire station, they could not do so in work vehicles or in public. For Dr. Lynch, "vaccination was and is the single best tool available for stemming the spread of COVID-19 . . . , especially when used in combination with other mitigations."

Even if Plaintiffs' proposed alternatives would have been sufficient, the evidence submitted by Plaintiffs and SRFR showed that Plaintiffs did not always wear masks or social distance. Although Plaintiffs submitted affidavits that stated that firefighters were always masked when in fire engines and always social distanced in the fire station, such evidence was anecdotal and contradicted by other evidence in the record. One Plaintiff, for example, admitted that firefighters did not wear masks when sleeping, eating, and drinking at the firehouse, and another admitted that firefighters did not wear masks at all times. Chief O'Brien also stated in his deposition that there were "a lot" of times he saw firefighters without masks.

Plaintiffs fail to provide any evidence that their proposed accommodation would have been a reasonable alternative to vaccination. Although Plaintiffs' declarations state they were "able to safely perform [their] job" and "never transmitted [COVID] to another employee, co-worker, or patient, or member of the public," these general assertions are unsupported by any medical evidence and would be impossible to prove at trial.

Groff tells us that we may look to EEOC guidance to help determine if these health and safety costs would have

imposed an undue hardship on SRFR. *See* 600 U.S. at 471 ("[A] good deal of the EEOC's guidance in this area is sensible . . . ."). The EEOC has said that when considering undue hardship in the context of COVID, employers should consider if the employee "works in a solitary or group work setting," "has close contact with other employees or members of the public," and "works outdoors or indoors." *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (published Mar. 1, 2022), https://www.eeoc.gov/wysk/whatyou-should-know-about-covid-19-and-ada-rehabilitationact-and-other-eeo-laws [https://perma.cc/CQ9C-JPNY]. Each of these considerations weighs in favor of finding undue hardship here—firefighters work in group settings, interfacing constantly with coworkers and the public, both inside and outdoors.

Allowing unvaccinated firefighters to keep working in October 2021 would have come at a substantial cost to SRFR. The objective, unrebutted medical evidence shows that SRFR would have faced significant health and safety costs by allowing unvaccinated firefighters to continue working, even with accommodations. Those costs would have affected SRFR's own workforce and persons in the public needing emergency, even life-saving, services. Because firefighters did not (and likely could not) always mask and social distance, SRFR needed a way to ensure employee and public safety. Dr. Lynch's opinion explains that the vaccine offered the safest, easiest, and most effective way of doing so.

2. Operational burdens

SRFR also argues that it faced a serious operational burden because forty-six of its 192 firefighters—almost

one quarter of its force—requested an exemption and accommodation. Plaintiffs argue that because only eleven firefighters ended up needing accommodation, SRFR overstates this cost.

SRFR provided essential EMT and firefighting services during the pandemic. The cost of accommodating nearly twenty-five percent of its firefighters is substantial. The fact that forty-six requests were "initially received" is the critical data point because after receiving those requests, SRFR had to make a decision regarding accommodation. And given the circumstances, there can be no doubt that granting that many exemptions would have hamstrung SRFR's operations. *See Groff*, 600 U.S. at 476 (Sotomayor, J., concurring) ("[F]or many businesses, labor is more important to the conduct of the business than any other factor.").

There is an additional operational cost to Plaintiffs' requested accommodation. As we discussed in the prior section, allowing unvaccinated firefighters to work—even if they were masked, tested regularly, and maintained social distancing—put other firefighters at risk. SRFR could not afford to have substantial numbers of its firefighters on sick leave. And given the community-critical nature of SRFR's mission, this is not a risk that SRFR could assume lightly. As Dr. Lynch pointed out, any "[o]utbreaks among firefighting teams would lead to potentially severe limits on EMS and firefighting responses in the community."

3. Financial costs

Finally, SRFR directs us to the financial costs of accommodating unvaccinated firefighters, three of which merit discussion.

First, SRFR worried about the "increased risk" of employee absences and the scheduling issues that would result from those absences. Although *Groff* mentioned that temporary labor costs alone do not constitute an undue hardship, 600 U.S. at 473, firefighter absences or a fire station COVID outbreak could hamper operations for weeks at a time. Absenteeism among firefighters not only imposed real and substantial costs to SRFR, it also threatened real costs on the community.

Second, SRFR risked losing a contract to provide emergency medical services to the Department of Corrections (DOC) at its Monroe Correctional Complex. The contract provided almost $400,000 in annual revenue to SRFR. In September 2021, a month after the Proclamation, DOC advised SRFR that it would require proof of vaccination for all on-site contractors and said that "[f]ailure to provide proof of full vaccination . . . may result in DOC denying entry." DOC acknowledged that this policy might particularly impact "personnel who seek an exemption for a disability or sincerely held religious belief." Therefore, while DOC was willing to consider accommodations, it "ha[d] not identified any reasonable accommodations available for [contractors] whose work must be performed on-site."

Plaintiffs argue that DOC never objected to SRFR's unvaccinated firefighters working in its facilities once SRFR allowed unvaccinated firefighters to return to work in May 2022. Even if this is true, DOC's policy is not within SRFR's control, and at the time SRFR imposed its vaccine mandate, SRFR had a reasonable concern that it would lose a lucrative contract. This is a textbook economic hardship. *See Lavelle-Hayden v. Legacy Health*, 744 F. Supp. 3d 1135, 1151 (D. Or. 2024) ("Before

Groff, federal courts regularly considered . . . economic . . . costs when conducting the undue hardship analysis. . . . Following *Groff*, district courts have continued to consider . . . economic . . . costs when conducting the undue hardship analysis." (collecting cases)). The potential loss of a contract with DOC was a cost that SRFR was entitled to consider.

Third, SRFR argues that it faced potential liability for claims brought against it "regarding COVID-19 transmission." SRFR's insurance policy excludes "any liability, defense cost or any other amount incurred by or accruing directly or indirectly . . . from . . . a Communicable Disease or the fear or threat . . . of a Communicable Disease." In accordance with the policy, the insurer informed SRFR that "if any patient sued SRFR and alleged that an unvaccinated employee gave them COVID-19, the insurance pool would not defend or indemnify SRFR . . . ."

Plaintiffs argue that this fear is hypothetical and explain that one Plaintiff spoke to a representative of SRFR's insurer who confirmed that it had never faced such a lawsuit. In general, we consider only actual hardships, not hypothetical ones when assessing undue hardship. *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988) ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of actual imposition on coworkers or disruption of the work routine." (quotation marks and citation omitted)). That said, we do not understand "undue hardship" to mean "realized hardships." An undue hardship may include an evaluation of the risk of hardship, not just an accounting of damages actually suffered. The

risk of undue hardship, however, must be realistic and not "merely conceivable or hypothetical." *See id.* (citation omitted). When SRFR's insurer issued a warning about what would or would not be covered by its "Communicable Disease" exclusion, SRFR was justified in seriously considering whether it was prepared to assume the risk of liability.

* * *

SRFR has pointed to several substantial costs of accommodating Plaintiff's requested vaccine exemption—the health and safety of its own firefighters and the public, the large number of firefighters seeking accommodations, the risk to its operations and the cost of widespread absences, the potential loss of a lucrative contract with DOC, and the risk of additional liability. SRFR also provided unrebutted medical evidence that showed the inadequacy of Plaintiffs' proposed accommodation. All of this amounts to a showing that SRFR could not reasonably have accommodated Plaintiffs without undue hardship in October 2021. *See Groff*, 600 U.S. at 469; *Peterson*, 358 F.3d at 606.

Plaintiffs, both in their briefing and at oral argument, urge us to look at this case with the benefit of hindsight. They thus express their puzzlement as to why SRFR mandated the vaccine for a seven-month period (October 2021 to May 2022) after managing the pandemic without one at other times. Plaintiffs point out that other fire departments in the area allowed unvaccinated firefighters to continue working. In one instance, a neighboring fire department hired Plaintiff David Petersen while he was on leave from SRFR. He then fought fires alongside his SRFR peers because of a mutual-aid agreement between the departments.

We cannot judge SRFR by the responses taken by other fire departments. The reasonableness of others' decisions is not before us. Nor can we judge SRFR with the clarity of hindsight or the benefit of post-pandemic debates over what measured responses frontline employers should have taken. We must consider the costs faced by SRFR in October 2021, not today. As Dr. Lynch explained, at the time the Governor issued the Proclamation, "COVID-19 cases were spiking due to the Delta variant despite other strategies in place. This was followed by the Omicron waves, which continued in this area into 2022." The pandemic forced the State of Washington to make decisions quickly and with limited information. In so doing, SRFR relied on the scientific evidence and COVID data then available and acted in the best interests of the community.

Both sides have cited district court cases involving Title VII in support of their arguments. Each of these cases involves a claim of religious exemption from COVID-related restrictions. Plaintiffs identify three decisions that they believe support their position here. But each case is distinguishable because the employers failed to establish that they could not accommodate their employees without undue hardship in ways that SRFR did not. *See Malone v. Legacy Health*, No. 3:22-cv-1343, 2024 WL 3316167, at *4 (D. Or. July 5, 2024) (denying summary judgment because the record lacked "any evidence that Defendant made an individualized inquiry into whether Plaintiff could be accommodated"); *Floyd v. Trinity Cent. Home Health, LLC*, No. 6:22-cv-6117, 2024 WL 3653055, at *7 (W.D. Ark. Aug. 5, 2024) (denying summary judgment because "the record [was] devoid of *evidence* showing that granting an accommodation would result in

substantial increased costs in relation to Defendant's business"); *Hayslett v. Tyson Foods, Inc.*, No. 1:22-cv-1123, 2023 WL 11897503, at *13 (W.D. Tenn. Sept. 20, 2023) (denying summary judgment because defendants failed to show how accommodating plaintiffs would come at a substantial cost and because "the undue burden test is fact-bound and therefore ill-suited for determination as a matter of law at summary judgment"). Unlike in those cases, SRFR thoroughly explained the medical evidence that supported its decision, why Plaintiffs' proposed accommodation would not be sufficient, and the other costs it would face if it did not institute a vaccine mandate. The costs were substantial.

For its part, SRFR has cited several cases that came to the same conclusion as we do here. *See*, *e.g.*, *Lavelle-Hayden*, 744 F. Supp. 3d at 1155–59 (finding employer-healthcare provider would face undue hardship by accommodating employee-respiratory therapists because allowing approximately four percent of its employees to remain unvaccinated would "compromise[] both employee and patient safety"); *Bordeaux v. Lions Gate Ent., Inc.*, 703 F. Supp. 3d 1117, 1123–25 (C.D. Cal. 2023) (finding employer-television production company would face undue hardship by accommodating an actor's vaccine exemption request because the actor's increased risk of contracting COVID would pose "logistical problems" that would shut down the television set and cost the employer at least $150,000 per day).

We also note two recent decisions in the First Circuit that found undue hardship in cases similar to this one. In *Melino v. Boston Medical Center*, 127 F.4th 391 (1st Cir. 2025), a nurse brought a Title VII claim against her employer-hospital for denying her request to work

unvaccinated in the Cardiac Intensive Care Unit. *Id.* at 394. The First Circuit had little difficulty concluding that "permitting Melino to work unvaccinated would pose an undue hardship by increasing the risk of COVID-19 transmission amongst staff and patients," noting that it was "uncontroverted that [the hospital] implemented its vaccine requirement based on the CDC's recommendations." *Id.* at 397 (quotation marks omitted). Similarly, in *Rodrique v. Hearst Communications, Inc.*, 126 F.4th 85 (1st Cir. 2025), the court found that a television station would have faced undue hardship by accommodating an employee's COVID vaccination exemption request in part because the employer "relied on the objective, scientific information available," and "no medical evidence in the summary judgment record contradict[ed] [the television station's] conclusion that vaccinated people are less likely to infect others." *Id.* at 91, 93 (citations and quotation marks omitted); *cf. Smith v. City of Atlantic City*, 138 F.4th 759, 775 (3d Cir. 2025) (finding that the employer-fire department would not face unreasonable hardship in accommodating a single, nonfirefighting employee's request for exemption from a regulation requiring he not have a beard in order to properly wear a breathing mask because there was only "a vanishingly small risk that [he would] be called in to engage in the sort of firefighting activities for which [a breathing mask] is required").

For reasons explained, we conclude that SRFR could not "reasonably accommodate" Plaintiffs' proposed accommodation "without undue hardship on the conduct of" its business. 42 U.S.C. § 2000e(j). The district court did not err in granting SRFR's summary judgment motion and denying Plaintiffs' motion.

IV. CONCLUSION

We **AFFIRM** the district court's grant of SRFR's motion for summary judgment and its denial of Plaintiffs' motion for summary judgment.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID PETERSEN et al. Plaintiffs, v. SNOHOMISH REGIONAL FIRE AND RESCUE et al., Defendants.	C22-1674 TSZ ORDER

THIS MATTER comes before the Court on Defendant Snohomish Regional Fire & Rescue's motion for summary judgment, docket no. 23, and Plaintiffs David Petersen,[1] Beau Watson, Jay Stickney, Evan Merritt, Norm Alan Peterson II, Riley Korf, Ryan Stupey, and Kevin Gleason's motion for partial summary judgment, docket no. 27. Having reviewed all papers filed in support of, and in opposition to, the motions, the Court enters the following Order.

Background

A. The Parties

Plaintiffs Petersen, Watson, Stickney, Merritt, Peterson, Korf, Stupey, and Gleason are employed by Defendant Snohomish Regional Fire & Rescue ("Snohomish Fire") in the positions of

[1] It appears that the Complaint incorrectly spells David Petersen's name as David "Peterson." Compare Compl. (docket no. 1), with Pls.' Exemption Requests (docket no. 1-4).

Firefighter/Emergency Medical Technician ("EMT"), Firefighter/Paramedic, Driver/Operator/EMT, Driver/Operator/Paramedic, Fire Lieutenant/EMT, or Fire Lieutenant/Paramedic (collectively, "firefighters"). O'Brien. Decl. at ¶ 4 (docket no. 25).[2] Plaintiffs each held either a Washington State EMT certification or paramedic certification. Id.

Snohomish Fire provides fire suppression and emergency medical services to roughly 175,000 people across approximately 135 square miles of Snohomish County, Washington. Id. at ¶ 3. Snohomish Fire's mission is to "[s]ave lives, protect property, safeguard the environment, and take care of people." Id. At all times relevant to this case, Snohomish Fire operated eleven fire stations.[3] Id. In 2021, Snohomish Fire employed 192 career firefighters and 85% of its emergency calls were for emergency medical services. Id. at ¶¶ 4, 8. When responding to calls, firefighters may enter private homes, adult care facilities, retirement homes, schools, businesses, and the Monroe Correctional Complex, and are expected to provide medical assistance as needed. Id. at ¶ 8. In most vehicles used to respond to calls, firefighters sit in a cab with two to three other firefighters. Id. When transporting a patient, one or more firefighters rides in the vehicle compartment with the patient. Id.

Certain career firefighters are represented by the International Association of Fire Fighters, Local 2781 (the "Union"). O'Brien Decl. at ¶ 5; Ex. B to O'Brien Decl.

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[2] Plaintiffs do not dispute the material facts related to their work duties as outlined in the O'Brien Declaration. Pls.' Mot. at 2–4 (docket no. 27); Pls.' Resp. at 2 (docket no. 40).

[3] As of January 2023, Snohomish Fire operates ten fire stations. O'Brien Decl. at ¶ 3 n.2.

(docket no. 25-1 at 11–60). Firefighters choose their home station assignments by seniority, per the collective bargaining agreement between Snohomish Fire and the Union. O'Brien Decl. at ¶ 6. Although each firefighter has a home station, they may work at other stations when working overtime to cover for absences, to create space when training a probationary firefighter, or because their skills are needed at another station. Id.

Firefighters work 24-hour shifts, working and living in fire stations when they are not responding to calls. Id. at ¶¶ 6–7. They have beds available in single rooms or rooms divided by screens, access to toilets and showers in shared bathrooms, access to workout equipment, and access to communal areas to cook, eat, use computers, watch television, and meet for briefings. Id.

B. The COVID-19 Pandemic, the Development of Vaccines, and Washington's Vaccine Mandate

Snohomish Fire's leadership relied on guidance from public health authorities at the local, state, and federal levels to determine its COVID-19 policies and procedures. O'Brien Decl. at ¶ 9; O'Brien 30(b)(6) Dep. at 14:23–15:5, 100:24–101:3, Ex. J to Phillips Decl. (docket no. 24-1 at 94–116). In determining its COVID-19 policies, Snohomish Fire balanced protecting employees and the public from COVID-19, while still providing vital emergency medical and fire suppression services. O'Brien Decl. at ¶ 9; O'Brien 30(b)(6) Dep. at 12:23–15:5, 46:18–47:3, 84:24–85:21, 139:15–141:15, Ex. J to Phillips Decl. (docket no. 24-1 at 94–116). Snohomish Fire worked with a multi-agency "Force Protection" group to develop a "COVID Playbook" (the "Playbook") containing protection protocols to be followed by firefighters. O'Brien Decl. at ¶ 9; O'Brien 30(b)(6) Dep. at 27:13–18, 46:18–47:3, Ex. J to Phillips

Decl. (docket no. 24-1 at 94–116); McConnell Dep. at 9:24–10:8, 15:19–17:25, 18:12–16, 21:9–15, Ex. I to Phillips Decl. (docket no. 24-1 at 70–93). The Playbook included protection protocols such as masking, social distancing, and testing. Ex. A to Tribbett Decl. (docket no. 28 at 4–40).

On February 29, 2020, Washington Governor Jay Inslee proclaimed a State of Emergency because of COVID-19. Def.'s Mot. at 3 (docket no. 23) (citation omitted); Pls.' Resp. at 2–3 (docket no. 40). Between December 2020 and February 2021, the United States Food and Drug Administration ("FDA") issued Emergency Use Authorizations for three COVID-19 vaccines developed by Pfizer, Moderna, and Johnson & Johnson. Lynch Decl. at ¶¶ 6–8, 16 (docket no. 26). The FDA gave full approval to Pfizer's vaccine for people 16 and older in August 2021, and to Moderna's vaccine for people 18 and older in January 2022. Id. at ¶¶ 17–18. During the initial vaccine roll-out in late 2020, firefighters were among the first groups of people to have access to the vaccines. O'Brien Decl. at ¶ 10.

In August 2021, Governor Inslee issued Proclamation 21-14 (the "Proclamation"), which prohibited healthcare providers such as firefighters from working after October 18, 2021, if not fully vaccinated against COVID-19. O'Brien Decl. at ¶¶ 11–12; Ex. F to O'Brien Decl. (docket no. 25-2 at 13–14). The Proclamation stated that an employee could request an exemption from the vaccine requirement based on "a sincerely held religious belief" and noted that employers were not required to accommodate employees if doing so "would cause undue hardship." O'Brien Decl. at ¶¶ 11–12; Ex. F to O'Brien Decl. (docket no. 25-2 at 13–14).

C. Snohomish Fire's Response to Washington's Vaccine Mandate

Following the Proclamation, Snohomish Fire provided its firefighters with information about the vaccination requirement, as well as the process for requesting religious exemptions. O'Brien Decl. at ¶ 12; Ex. G to O'Brien Decl. (docket no. 25-2 at 60–62). Out of Snohomish Fire's 192 firefighters, 46 requested an exemption and accommodation from the vaccination requirement. O'Brien Decl. at ¶ 14. Plaintiffs, who were assigned to seven different fire stations, requested exemptions based on their religious beliefs.[4] Id. at ¶¶ 6,

[4] Specifically, Plaintiff Petersen noted that his faith guides him through life and he could not get vaccinated because doing so would put his connection with God at risk. Pls.' Exemption Requests (docket no. 1-4 at 2); Petersen Dep. at 28:12–18, 28:23–29:8, Ex. V to Tribbett Decl. (docket no. 41 at 265–77). Plaintiff Gleason stated that he held sincere religious beliefs that prevented him from getting vaccinated. Pls.' Exemption Requests (docket no. 1-4 at 3); Gleason Dep. at 23:7–25:14, Ex. S to Tribbett Decl. (docket no. 41 at 252–56). Plaintiff Korf stated that he could not get vaccinated in good conscience because the Holy Spirit lives inside him and he treats his body as a temple. Pls.' Exemption Requests (docket no. 1-4 at 6); Korf Dep. at 27:2–19, Ex. T to Tribbet Decl. (docket no. 41 at 257–61). Plaintiff Stupey requested an exemption because the vaccines were manufactured or tested using cell lines from abortion procedures and it would be a sin against God for him to get vaccinated. Pls.' Exemption Requests (docket no. 1-4 at 7–8). Plaintiff Watson noted that he could not get vaccinated because his faith allows him to make his own medical decisions based on his free will, the vaccines were derived from aborted fetal cells, and he had already been vaccinated by God and recovered from a natural COVID-19 infection. Pls.' Exemption Requests (docket no. 1-4 at 9). Plaintiff Stickney stated that getting vaccinated would be wrong for him because he is a follower of Jesus Christ and believes that his body is the holy temple of the living God. Pls.' Exemption Requests (docket no. 1-4 at 10); Stickney Dep. at 20:14–23:11, Ex. X to Tribbett Decl. (docket no. 41 at 284–91).

14.

Snohomish Fire's Human Resources staff met with each employee that requested an exemption to seek information about their exemption request and any accommodations suggestions the employee had. Id. at ¶ 14. While Snohomish Fire was collecting and evaluating information about the risks and other costs associated with potential accommodations, it negotiated with the Union regarding the impacts of the vaccination requirement. Id. at ¶ 16. On October 14, 2021, Snohomish Fire and the Union approved a Memorandum of Understanding ("MOU") that modified the collective bargaining agreement to provide accommodation options for firefighters if Snohomish Fire determined they could not be accommodated in their healthcare roles. Id.; Ex. K to O'Brien Decl. (docket no. 25-2 at 113–17). The MOU modified requirements for using accrued leave time so that a firefighter could continue pay and benefit accrual during leave as an accommodation. O'Brien Decl. at ¶ 16. Upon exhaustion of paid leave, Snohomish Fire communicated that it would approve requests from firefighters for a personal leave of absence of up to a year. Id. at ¶¶ 16, 18. After that, or if a firefighter chose to leave employment, the MOU allowed that firefighter to be placed on a disability list, which gave them priority rehire rights with no loss of rank, seniority, or benefit accrual status for two years. Id.

Snohomish Fire granted all of the Plaintiffs' requests for an exemption based on religious grounds but

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Plaintiff Peterson stated that getting vaccinated would be a violation of his moral conviction and a sin against the most Holy God. Pls.' Exemption Requests (docket no. 1-4 at 12); Peterson Dep. at 19:17–22:4, Ex. W to Tribbett Decl. (docket no. 41 at 278–83).

determined that it could not accommodate unvaccinated firefighters in their healthcare roles without imposing an undue hardship on its operations.[5] Id. at ¶ 15. In letters dated October 21, 2021, Snohomish Fire notified employees who had requested exemptions, including Plaintiffs, that it had been unable to identify a reasonable accommodation that would enable them to perform the essential functions of their positions without imposing an undue hardship on Snohomish Fire, and that it did not currently have alternative positions. Id. at ¶ 17, Ex. L to O'Brien Decl. (docket no. 25-2 at 118–34); Letters Denying

[5] Snohomish Fire maintains it determined accommodating Plaintiffs' vaccine exemption requests would have been an undue hardship because (1) unvaccinated frontline employees had a greater risk of contracting and transmitting "the COVID-19 virus to patients, members of the public, and other employees;" (2) unvaccinated frontline employees cannot always socially distance because of their job duties and testing is not always accurate; (3) it had "a strong interest in maintaining the public's confidence in [its] ability to provide reasonably safe emergency fire and medical services" and wanted "to assure the public that it can call 911 without fear of greater risk of infection;" (4) "[a]t the time, PPE and testing kits were scarce and costly;" (5) "[o]n September 23, 2021, the Washington State Department of Corrections ("DOC") informed [Snohomish Fire] that unvaccinated staff could not perform on-site work at any DOC facility and no reasonable accommodation was available for on-site work. [Snohomish Fire] is contracted with the DOC to provide emergency fire and medical services to the Monroe Correctional Complex. Logistically, [Snohomish Fire] could not serve the Complex if a quarter of its frontline staff was unvaccinated and would have lost $376,933.93 annually in revenue if it stopped serving the Complex;" and (6) "[o]n October 14, 2021, [Snohomish Fire]'s insurance pool, Washington Cities Insurance Authority ("WCIA"), informed [Snohomish Fire] that if any patient sued [Snohomish Fire] and alleged that an unvaccinated employee gave them COVID-19, the insurance pool would not defend or indemnify [Snohomish Fire] against the lawsuit because of a policy exclusion for 'communicable diseases.'" O'Brien Decl. at ¶ 15 (docket no. 25).

Pls.' Exemption Requests, Ex. 6 to Compl. (docket no. 1-6). The letters highlighted how Plaintiffs' positions require performance of emergency medical services and "must be done in the physical presence of patients, coworkers, and the public." Id. In addition, the letters informed Plaintiffs that performing the essential functions of their positions, "without being fully vaccinated against COVID-19, poses a threat to the health and safety of yourself, others in the workplace, and the public that we serve." Id. Snohomish Fire did not have vacant non-patient care, day-shift positions to which it could reassign firefighters to decrease the risk of COVID-19 transmission to or from patients and among employees. O'Brien Decl. at ¶ 18. After Snohomish Fire determined it could not accommodate the 46 employees who requested exemptions in their healthcare roles and that it lacked adequate reassignment options, the employees were allowed to remain in paid status using leave benefits. Id. When their benefits approached depletion, Snohomish Fire encouraged them to apply for a one-year leave of absence. Id.; Ex. M to O'Brien Decl. (docket no. 25-2 at 135–37). All such requests were approved. O'Brien Decl. at ¶ 18.

Beginning in late 2021, Snohomish Fire monitored information from public health authorities regarding COVID-19 conditions and the risk posed by and to Snohomish Fire's unvaccinated employees. Id. at ¶¶ 19–20; McConnell Dep. 66:17–67:14, 101:20–102:1, 102:12–103:1, Ex. I to Phillips Decl. (docket no. 24-1 at 70–93); O'Brien 30(b)(6) Dep. 98:19–99:2, 139:15–141:15, Ex. J to Phillips Decl. (docket no. 24-1 at 94–116). In April 2022, Fire Chief Kevin O'Brien directed staff to evaluate whether Snohomish Fire could modify the

accommodations offered to unvaccinated firefighters. O'Brien Decl. at ¶ 20; Ex. N to O'Brien Decl. (docket no. 25-2 at 138–43). At a meeting on April 28, 2022, Snohomish Fire's Board of Commissioners approved a motion directing Fire Chief O'Brien and Snohomish Fire staff to reevaluate what accommodations Snohomish Fire could provide so unvaccinated employees would be able to return to operational duty. O'Brien Decl. at ¶ 21; Ex. O to O'Brien Decl. (docket no. 25-2 at 144–48). In letters dated May 9, 2022, Snohomish Fire informed unvaccinated employees that they now had two new accommodation options: (1) remain on leave, or (2) return to their firefighter positions, following applicable Playbook safety guidelines, including those specific to unvaccinated employees. O'Brien Decl. at ¶ 22; Ex. P to O'Brien Decl. (docket no. 25-2 at 149–227). Plaintiffs Gleason, Merritt, Petersen, and Watson elected to return to their firefighter positions as soon as possible under the conditions offered by Snohomish Fire and returned from leave effective June 6, 2022. O'Brien Decl. at ¶ 23. Plaintiffs Korf, Peterson, and Stupey elected to remain on leave and returned to their firefighter positions at later dates.[6] Id.

D. Plaintiffs' Lawsuit

In November 2022, Plaintiffs initiated this lawsuit against Defendants Snohomish Fire, Fire Chief Kevin

[6] It is unclear when Plaintiff Stickney returned to work. The O'Brien Declaration states that Plaintiff Stickney elected to return both on June 6, 2022, and at a later date. O'Brien Decl. at ¶ 23. The Stickney Affidavit does not specify when Plaintiff Stickney returned to work. Stickney Affidavit (docket no. 34). Nevertheless, when Plaintiff Stickney returned to work is not material to resolution of the instant motions.

O'Brien,[7] and Does 1–10.[8] Compl. (docket no. 1). Plaintiffs assert two causes of action: (1) failure to accommodate their religious beliefs in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), and (2) failure to accommodate their religious beliefs under Washington's Law Against Discrimination ("WLAD"). Id. at ¶¶ 23–32. Snohomish Fire moves for summary judgment, asking the Court to dismiss Plaintiffs' Title VII and WLAD claims because Snohomish Fire "could not provide [Plaintiffs] with a reasonable accommodation in their healthcare roles without imposing an undue hardship on [Snohomish Fire]'s operations, and no reasonable accommodation apart from leave was available." Def.'s Mot. at 1 (docket no. 23). Plaintiffs move for partial summary judgment, seeking a finding that, as a matter of law, Snohomish Fire failed to accommodate their exemption requests from the COVID-19 vaccine requirement. Pls.' Mot. at 1 (docket no. 27).

Discussion

A. Summary Judgment Standard

The Court shall grant summary judgment if no genuine issue of material fact exists and the moving party

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[7] The parties subsequently stipulated to the dismissal of Defendant Fire Chief O'Brien. See Order (docket no. 15).

[8] "District courts in the Ninth Circuit consistently hold that the opportunity to name Doe defendants ends with the close of discovery." Bratcher v. Polk Cnty., No. 3:20-cv-02056, 2022 WL 17184419 at *5 (D. Or. Sept. 1, 2022), report and recommendation adopted, 2022 WL 17178266 (D. Or. Nov. 23, 2022) (citations omitted). The discovery deadline in this case has expired, and Plaintiffs have not named the Doe Defendants. Moreover, Plaintiff do not argue that their claims against the Doe Defendants should not be dismissed. Pls.' Mot. (docket no. 27); Pls.' Resp. (docket no. 40); Pls.' Reply (docket no. 53). Thus, Plaintiffs' claims against the Doe Defendants are DISMISSED.

is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the record, taken as a whole, could not, however, lead a rational trier of fact to find for the non-moving party on matters which such party will bear the burden of proof at trial, summary judgment is warranted. See Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see also Celotex, 477 U.S. at 322.

B. Snohomish Fire's Motion to Strike

In its reply and response, Snohomish Fire filed a motion to strike. Def.'s Reply at 1–3 (docket no. 49); Def.'s Resp. at 1–3 (docket no. 51). Snohomish Fire seeks to strike certain "statements and evidence in Plaintiffs' supporting declarations," such as "Plaintiffs' assertions that they were 'able to safely perform [their] job' and 'never transmitted CV-19 to another employee, co-worker, or patient, or member of the public.'" Def.'s Reply at 1 (citation omitted). The Court declines to individually address each statement Snohomish Fire seeks to strike but has considered only admissible evidence in reaching its decision.

C. Plaintiffs' Title VII and WLAD Claims

Snohomish Fire argues that it is entitled to summary

judgment on Plaintiffs' claims because (1) six of the Plaintiffs' objections to the vaccination requirement were not based on bona fide religious beliefs; (2) providing Plaintiffs with their preferred accommodation of continuing to work while unvaccinated would have imposed an undue hardship on Snohomish Fire; "and (3) there were no other reasonable accommodations that would have enabled them to remain in the workplace from October 2021 until they were returned to duty in spring 2022." Def.'s Mot. at 11. Under Title VII, employers are prohibited from discriminating against any individual with respect to the terms, conditions, or privileges of employment, because of the individual's religion. 42 U.S.C. § 2000e-2(a). An employer must "reasonably accommodate" an employee's religious practices unless such an accommodation would impose "undue hardship" on the conduct of the employer's business. Id. at § 2000e(j). Similarly, under the WLAD, employers may not refuse to hire, discharge, bar from employment, or discriminate in compensation or other terms of employment against any person because of their religion. RCW § 49.60.180; Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 489, 325 P.3d 193 (2014).

The parties agree that Plaintiffs' Title VII claim and WLAD claim can be analyzed together. Pls.' Mot. at 8–9; see Def.'s Mot. at 10–11. To analyze failure to accommodate religious belief claims, courts use a burden-shifting framework. Bolden-Hardge v. Office of Cal. State Controller, 63 F.4th 1215, 1222 (9th Cir. 2023) (Title VII); Kumar, 180 Wn.2d at 481, 501–02, 325 P.3d 193 (WLAD). First, the employee must plead a prima facie failure to accommodate religious belief case. Id. Second, if the employee can plead a prima facie case, the burden shifts

to the employer to show either that it initiated good faith efforts to accommodate the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship. Peterson, 358 F.3d at 606; Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681–82 (9th Cir. 1998). The Court addresses whether Plaintiffs have set forth a prima facie case and, if so, whether Snohomish Fire proved that it could not reasonably accommodate Plaintiffs without undue hardship.

1. Prima Facie Case

To set forth a prima facie case of discrimination, Plaintiffs must show that (1) they "had a bona fide religious belief, the practice of which conflicts with an employment duty;" (2) they "informed [their] employer of the belief and conflict;" and "(3) the employer discharged, threatened, or otherwise subjected [them] to an adverse employment action because of [their] inability to fulfill the job requirement." Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606 (9th Cir. 2004). Plaintiffs maintain that they "can establish a prima facie case of discrimination" because (1) they "hold sincere beliefs," (2) they "informed the employer of [their] beliefs and the conflict with the [COVID-19] vaccine requirement," and (3) Snohomish Fire "discharged them and/or took adverse action." Pls.' Mot. at 9 (citations omitted). Snohomish Fire does not dispute that Plaintiffs can establish the second and third elements of their prima facie case. Instead, Snohomish Fire now argues that six plaintiffs, "Plaintiffs Peterson, Gleason, Merritt, Petersen, Stickney, and Korf cannot establish a prima facie case because their objections to the COVID-19 vaccination requirement were not based on

bona fide religious beliefs."[9] Def.'s Mot. at 11; Def.'s Resp. at 12 (docket no. 51). Because "the burden to allege a conflict with religious beliefs is fairly minimal[,]" Beuca v. Wash. State Univ., No. 2:23-CV-0069, 2023 WL 3575503, at *2 (E.D. Wash. May 19, 2023) (citation omitted),[10] and precedent cautions "against questioning the sincerity of a Title VII plaintiff's alleged religious beliefs[,]" Bordeaux v. Lions Gate Entm't, Inc., No. 222CV04244SCWPLA, 2023 WL 8108655, at *12 (C.D. Cal. Nov. 21, 2023) (citations omitted), the Court declines to scrutinize Plaintiffs' religious beliefs.[11] Instead, for purposes of the instant motions, the Court assumes that Plaintiffs have established a bona fide religious belief and have set forth their prima facie case, and that the burden shifts to Snohomish Fire to show that it could not reasonably accommodate Plaintiffs' beliefs without undue hardship. See Bordeaux, 2023 WL 8108655, at *11–12.

2. Undue Hardship

Snohomish Fire contends that it "was not required by Title VII and WLAD to accommodate Plaintiffs in their

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[9] Snohomish Fire does not challenge Plaintiffs Watson's and Stupey's prima facie case for purposes of summary judgment. Def.'s Mot. at 11 n.3 (docket no. 23). Snohomish Fire also does not challenge the second and third elements of Plaintiffs' prima facie case. See Def.'s Mot. (docket no. 23); Def.'s Reply (docket no. 49); Def.'s Resp. (docket no. 51).

[10] Beuca is on appeal in the Ninth Circuit.

[11] The Court notes that Snohomish Fire's position in its motion is contrary to its position in its letters to Plaintiffs. On October 21, 2021, Snohomish Fire notified each Plaintiff by letter that their requests "for a religious exemption [was] based on a sincerely held religious belief" and that their requests for a religious exemption from the vaccination requirement were approved. Ex. L to O'Brien Decl. (docket no. 25-2 at 118–34).

firefighter roles because doing so would have imposed an undue hardship." Def.'s Mot. at 14. Title VII "requires employers to accommodate the religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'" Groff v. DeJoy, 600 U.S. 447, 453–54 (2023) (quoting 42 U.S.C. § 2000e(j)); Kumar, 180 Wn.2d at 496, 325 P.3d 193 (noting that Washington courts look to Title VII cases for help interpreting the WLAD). To establish an undue hardship, the employer must prove "that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[12] Groff, 600 U.S. at 470 (citation omitted). "[C]ourts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'" Id. at 470–71. The "undue hardship" defense is a complete defense to WLAD and Title VII failure-to-accommodate claims. See 42 U.S.C. § 2000e(j); Kumar, 180 Wn.2d at 501–02, 325 P.3d 193.

Plaintiffs argue that masking, PPE, testing, and social distancing are accommodations that would have allowed them to continue working from October 18, 2021, to the end of April 2022, without imposing an undue hardship on

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[12] Under the WLAD, "an 'undue hardship' results whenever an accommodation 'require[s an employer] to bear more than a *de minimis* cost.'" Kumar, 180 Wn.2d at 502, 325 P.3d 193 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (alterations in original)). Undue hardship was clarified in Groff after the relevant timeframe in this case to mean "substantial increased costs." See Pls.' Mot. At 14 (docket no. 27); Pls.' Resp. at 13 (docket no. 40). Evidence in this case also satisfies the "substantial increased costs" standard for undue hardship articulated in Groff.

Snohomish Fire. Pls.' Mot. at 16–22 (docket no. 27); Pls.' Resp. at 12–13 (docket no. 40). Snohomish Fire counters that allowing Plaintiffs to work while unvaccinated would have been an undue hardship even with masking, testing, PPE, and social distancing measures in place. Def.'s Resp. at 15–20 (docket no. 51). In support of its argument, Snohomish Fire cites to the expert opinion of Dr. John Lynch. Id. As an initial matter, the Court agrees with Snohomish Fire that Dr. Lynch is an expert on this subject.[13] See Phillips Decl. at ¶ 12 (docket no. 24). Dr. Lynch explains why masking, PPE, testing, and social distancing are less effective than vaccines with respect to reducing the spread of COVID-19. Lynch Decl. (docket no. 26).

With respect to masking and PPE, Plaintiffs note that Snohomish Fire required vaccinated employees to wear masks and contend that masks and PPE prevent the spread of COVID-19 regardless of vaccination status. Pls.' Mot. at 19–20 (docket no. 27); Pls.' Resp. at 18 (docket no. 40). Dr. Lynch notes that masks and PPE work only when worn and are complements to, rather than substitutes for, getting vaccinated. Lynch Decl. at ¶ 28;

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[13] Plaintiffs did not file a motion to strike Dr. Lynch's opinion. Instead, Plaintiffs argue that "Dr. Lynch has no experience in para-military operations, he is not a medical advisor to any emergency service district, nor is he someone whom [Snohomish Fire] consulted at the time their decisions were made." Pls.' Resp. at 15 (docket no. 40). The Court concludes that Dr. Lynch is qualified as an expert on infectious diseases generally and COVID-19 specifically. See Lynch Decl. at ¶¶ 1–2. Dr. Lynch reviewed information about Plaintiffs' job duties, work environment, and proposed accommodations, and Snohomish Fire's assessment of the risks, and provided opinions relevant to the undue hardship analysis. See id. at ¶¶ 26–28, 34, 37–38, 42–44.

Ex. B to Lynch Decl. (docket no. 26-1 at 27–31). Even when wearing a mask, an unvaccinated firefighter has a greater risk of contracting and transmitting COVID-19 compared to a vaccinated firefighter. Id. at ¶ 44. Furthermore, firefighters did not wear masks at all times during their 24-hour shifts. Merritt Dep. at 33:12–21, Ex. C to Phillips Decl. (docket no. 24-1 at 24–29); O'Brien 30(b)(6) Dep. 29:1–15. Thus, contrary to Plaintiffs' argument, allowing unvaccinated firefighters to work would increase the risk of spreading COVID-19 even with the use of masks and PPE because masks and PPE are effective only when worn and firefighters could not always wear masks and PPE.

With respect to social distancing, Plaintiffs concede that they could not always social distance while at work. Pls.' Mot. at 3, 22 (docket no. 27); Watson Dep. at 100:14–23, Ex. A to Phillips Decl. (docket no. 24-1 at 1–12); Gleason Dep. at 17:19–18:15, Ex. E to Phillips Decl. (docket no. 24-1 at 38–45). Nevertheless, Plaintiffs contend that social distancing was effective at preventing the spread of COVID-19 because Snohomish Fire "had no known firefighter to firefighter transmissions despite intimate" living and working conditions. Pls.' Mot. at 3, 22. As Dr. Lynch explains, however, social distancing does not eliminate the risk of spreading COVID-19 because it is an airborne virus, meaning it can remain in and circulate between rooms. Lynch Decl. at ¶ 46. Dr. Lynch further explains that social distancing is less effective for firefighters because they regularly interact with patients and coworkers and thus cannot always social distance. Id. at ¶ 43. Although Plaintiffs assert that there were no known COVID-19 transmissions between firefighters, the fact that someone has never tested positive for COVID-19

does not mean that person is not at risk of infection or transmitting COVID-19 to others, as tests may not be accurate, or someone might be asymptomatic and not test. Id. at ¶ 35. Thus, because social distancing measures are not completely effective and Plaintiffs could not always social distance at work, unvaccinated firefighters were at a higher risk of transmitting COVID-19.

With respect to testing, Plaintiffs point out that Snohomish Fire implemented mandatory testing for its vaccinated staff and argue that "the unvaccinated could have been tested safely and effectively" because tests work on unvaccinated and vaccinated individuals. Pls.' Mot. at 20–21. Again, however, Dr. Lynch explains that testing does not eliminate the risk of spreading COVID-19 at work. Tests are not 100% accurate and an individual could take a test, become infected while waiting for the results, and be contagious while at work even after a negative test result. Lynch Decl. at ¶¶ 27, 35. Furthermore, there was a nationwide shortage of tests in late 2021. O'Brien 30(b)(6) Dep. at 14:1–4; McConnell Dep. at 34:20–35:11, Ex. I to Phillips Decl. (docket no. 24-1 at 70–93). Because testing does not eliminate the risk of spreading COVID-19 and there was a lack of available tests in late 2021, unvaccinated firefighters were at a higher risk of spreading COVID-19 even with testing.

In sum, the uncontroverted evidence in this case demonstrates that unvaccinated firefighters were at a higher risk of contracting and transmitting COVID-19 even with the use of masks, PPE, testing, and social distancing. See Lynch Decl. at ¶¶ 41, 44. Snohomish Fire informed Plaintiffs it could not accommodate their vaccination exemption requests because of the increased health risks of working as unvaccinated firefighters.

Other courts have found undue hardship on employers because of an increased risk of contracting and spreading COVID-19. See Bordeaux, 2023 WL 8108655, at *12–14 (noting, on a motion for summary judgment, that the nature of the plaintiff's work as an actress required close, unmasked contact with other performers and members of the crew and determining that granting the plaintiff's vaccine accommodation request would have been an undue hardship in part because of the risk of endangering the plaintiff's coworkers); Beuca, 2023 WL 3575503, at *3 (dismissing the plaintiff's claim without leave to amend because "unvaccinated healthcare workers impose an undue hardship on employers due to the increased risk of infection" (citations omitted)); Bushra v. Main Line Health Inc., No. 23-CV-1090, 2023 WL 9005584, at *8 (E.D. Pa. Dec. 28, 2023) (granting summary judgment and finding undue hardship if the defendant had been required to accommodate the plaintiff's religious beliefs because the unvaccinated plaintiff would have been a greater health risk to coworkers and vulnerable patients).[14] Moreover, the fact that 46 out of 192 Snohomish Fire firefighters requested an exemption and accommodation increased Snohomish Fire's hardship and the risks associated with accommodating Plaintiffs in their patient-care roles while living and working in fire stations. See O'Haplin v. Hawaiian Airlines, Inc., 583 F. Supp. 3d 1294, 1309 (D. Haw. 2022) ("Employers 'may take into account the cumulative cost or burden of granting accommodations to other employees.'" (citation omitted)). Because unvaccinated firefighters are at a greater risk of contracting and spreading COVID-19, regardless of masking, PPE, testing, and social distancing, the Court

[14] Bushra is on appeal in the Third Circuit.

concludes that Snohomish Fire could not reasonably accommodate Plaintiffs' vaccine exemption requests without undue hardship.[15]

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) Defendant Snohomish Fire's motion for summary judgment, docket no. 23, is GRANTED. Plaintiffs' Title VII and WLAD claims are dismissed.

(2) Plaintiffs' motion for partial summary judgment, docket no. 27, is DENIED.

(3) The Court having previously dismissed Defendant O'Brien, see Order (docket no. 15), and all claims against all parties having now been resolved, the Court DIRECTS the Clerk to enter Judgment consistent with the Court's ruling in this matter.

(4) The Clerk is directed to send a copy of this Order and the Judgment to all counsel of record.

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[15] Plaintiffs also argue that (1) unpaid leave is not a reasonable accommodation, and (2) Snohomish Fire used an erroneous standard when analyzing undue hardship prior to this litigation. Pls.' Mot. at 12–16. Because the Court concludes that accommodating Plaintiffs' exemption requests and allowing them to work in their firefighter roles while unvaccinated would have resulted in an undue hardship on Snohomish Fire, and Plaintiffs could not be reassigned to non-healthcare positions, O'Brien Decl. at ¶ 18, the Court concludes that Snohomish Fire's decision to place Plaintiffs on leave instead of allowing them to continue to work while unvaccinated did not violate Title VII or the WLAD. In addition, although Snohomish Fire may have used an incorrect standard to analyze undue hardship prior to this litigation, the Supreme Court did not clarify the undue hardship standard until the Groff opinion published in June 2023. See Def.'s Resp. at 13–14 (docket no. 51). Thus, the Court concludes that Plaintiffs' remaining arguments lack merit.

IT IS SO ORDERED.

Dated this 25th day of January, 2024.

Thomas S. Zilly
Thomas S. Zilly
United States District Judge

APPENDIX D

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 50l(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor

organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or

employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or

communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(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.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons

not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(*l*) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

APPENDIX E

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment

practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a

Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National Security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

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, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment

to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as

described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to

discriminate because of race, color, religion, sex, or national origin.

(*l*) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal

civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent

judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.