No. 21-11832

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FERNANDO STAPLE,

Plaintiff-Appellant

v.

BROWARD COUNTY SCHOOL BOARD,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 to 26.1-3 and 28-1(b), counsel for *amicus curiae* United States hereby certifies that plaintiff-appellant's Certificate of Interested Persons, filed with his brief on September 13, 2021, is a complete list of the persons and entities who may have an interest in the outcome of this case except for the following individuals omitted from that list:

1. Chandler, Thomas E., U.S. Department of Justice, Counsel for *amicus curiae* United States;

2. Clarke, Kristen, U.S. Department of Justice, Counsel for *amicus curiae* United States;

3. Goldstein, Jennifer S., Equal Employment Opportunity Commission, Counsel for *amicus curiae* United States;

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5. Reams, Gwendolyn Young, Equal Employment Opportunity Commission, Counsel for *amicus curiae* United States;

6. Wang, Christopher C., U.S. Department of Justice, Counsel for *amicus curiae* United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Christopher C. Wang
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Date: September 20, 2021

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the elements of a cause of action alleging that an employer failed to reasonably accommodate an employee's religious observance in violation of Sections 703(a)(1) and 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII). The United States has a substantial interest in the proper interpretation of Title VII. The Attorney General and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility under Title VII. See 42 U.S.C. 2000e-

5(a) and (f)(1). The United States files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

Title VII prohibits an employer from discriminating against an employee with respect to his "compensation, terms, conditions, or privileges of employment" because of the employee's religious beliefs or practices unless the employer shows that it cannot reasonably accommodate the religious beliefs or practices without an undue hardship. 42 U.S.C. 2000e-2(a)(1), 2000e(j). Here, the employer denied plaintiff's request to retain an accommodation it had previously provided—an adjustment to his Friday work schedule so that he did not have to work on his Sabbath. The employer instead required the employee to use virtually all of his accrued paid leave to meet his religious obligation to observe his Sabbath. The district court granted the employer's motion to dismiss plaintiff's religious-accommodation claim, holding that he had not sufficiently alleged that he had been "discharged or disciplined" as a result of this observance.

This case presents the question of what type of employment action a plaintiff's complaint must allege to state a religious-accommodation claim under Title VII and, specifically, whether the district court erred in concluding that in this

context the employee must allege that he was "discharged or disciplined" as a result of his religious observance.[1]

STATEMENT OF THE CASE

1. Plaintiff Fernando Staple is an Afternoon Shift Supervisor for the bus operations of the Broward County School Board (School Board). Doc. 10, at 4.[2] He is a member of the Seventh-day Adventist Church. Doc. 10, at 2. Because of his religion, he must abstain from secular work on his Sabbath, which is Friday sundown through Saturday sundown. Doc. 10, at 2-3. Staple requested permission to shift his work hours on Fridays during the winter months so that he could begin work earlier than usual and leave work prior to sundown to accommodate his religious observance. Doc. 10, at 4. The School Board initially granted Staple's request, but later denied it. Doc. 10, at 4-5. As a result, Staple had to use virtually all of his accrued paid leave to cover the Fridays he wanted to leave work early because of his religious observance. Doc. 10, at 5-6.

2. Staple filed a timely Charge of Discrimination with the EEOC, which issued him a Notice of Right to Sue. Doc. 10, at 7. Staple then filed suit in the

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[1] The United States takes no position on any other issues presented in this appeal.

[2] This brief uses the abbreviation "Doc. __, at __" for the document recorded on the district court docket sheet for Case No. 0:20-cv-62313 and page number, respectively.

United States District Court for the Southern District of Florida, alleging that the School Board violated Title VII by denying his request to retain an adjustment to his work hours for his religious observance it had previously provided, and instead requiring him to use accrued paid leave if he wanted to leave work early to observe his Sabbath. Doc. 10, at 7-8. The complaint alleged that the denial of Staple's accommodation request and the requirement that he used paid leave denied him the benefits of his position by forcing him to choose between (1) not observing the dictates of his religion and working on Fridays after sundown or (2) using accrued paid leave in these circumstances so he could observe his religion, thereby losing the ability to use those hours for sick leave or vacation. Doc. 10, at 6-8.

The School Board filed a motion to dismiss for failure to state a claim. Doc. 20. The School Board argued that the complaint failed to allege an essential element of a prima facie case of discrimination—that the School Board disciplined Staple for failing to work during his Sabbath. Doc. 20, at 2-4. The School Board also asserted that its requirement that Staple use accrued paid leave to leave early on Friday evenings was a reasonable accommodation. Doc. 20, at 3-5. Staple responded that he was required to allege only that he suffered an adverse employment action as a result of the denial of his request for an accommodation. Doc. 25, at 5-7. He argued that the School Board's decision to discontinue its practice of providing him a full work schedule outside of Sabbath hours (*i.e.*, a

shift change) and its forcing him to use accrued paid leave to cover such hours constituted such adverse employment actions. Doc. 25, at 7. Staple also argued that the School Board failed to establish as a matter of law that the accommodation it afforded him was reasonable. Doc. 25, at 7-8.

3. The district court granted the School Board's motion to dismiss. Doc. 28. The court observed that this Court applies a burden-shifting framework to Title VII religious-discrimination cases based upon a failure to accommodate religious observance. Doc. 28, at 4-5. According to the court, this framework requires the employee first to establish a prima facie case of discrimination by showing that: (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he informed his employer of this belief; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. Doc. 28, at 5. If the employee establishes the prima facie case, the burden shifts to the employer to show that it provided the employee with a reasonable accommodation or that an accommodation would cause an undue hardship. Doc. 28, at 5. The court stated that there was no dispute here that the complaint adequately alleged the first two elements of his prima facie case, *i.e.*, that Staple has a bona fide belief as a Seventh-day Adventist that he should not perform secular work during the Sabbath hours that conflicted with his standard work schedule, and that he informed the School Board of this belief. Doc. 28, at 5.

The issue on appeal arises from the third element: the type of employment action a plaintiff must allege in a failure-to-accommodate-religious-observance claim (the employment-action element). The district court noted that Staple did not allege that he was discharged or disciplined for failing to work during his Sabbath or indeed that he was discharged or disciplined at all. Doc. 28, at 5.

The court rejected Staple's formulation of the employment-action element, stating that the adverse-employment-action standard applies to disparate-treatment claims, but not to religious-accommodation claims. Doc. 28, at 6-7. According to the court, "the Eleventh Circuit has made clear the third element of his prima facie case for failure to accommodate is *discharge or discipline*, not an adverse employment action." Doc. 28, at 7 (emphasis added). The court also rejected the contention that requiring Staple to use his accrued paid leave to cover his Sabbath hours may have constituted discipline. Doc. 28, at 7. Thus, the court concluded that because Staple "fails to allege that he was discharged or disciplined, he has not stated a plausible Title VII claim against [the School Board] for failure to accommodate his religious observances." Doc. 28, at 7. For that reason, the court dismissed Staple's Title VII claim. Doc. 28, at 7.

Staple filed a timely notice of appeal. Doc. 30.

SUMMARY OF ARGUMENT

The district court erred in holding that an employee pursuing a Title VII religious-accommodation claim must allege that his employer discharged or disciplined him for failing to comply with an employment requirement conflicting with his religious practices or beliefs. The Supreme Court has made clear that religious-accommodation claims may be brought as disparate-treatment claims under Section 703(a)(1), which is the statutory provision Staple invokes here. Under the plain text of the statute, an employee bringing such a claim need only allege, as relevant here, that he was subjected to some form of an employment action affecting his "compensation, terms, conditions, or privileges of employment" because of religion. 42 U.S.C. 2000e-2(a)(1). This standard is satisfied in nearly all cases in which an employer denies an employee's religious-accommodation request and instead requires an employee to accept an alternative accommodation to which the employee objects. In these cases, the employer's action will relate to the compensation, terms, conditions, or privileges of employment, almost by definition.

To be sure, in assessing ordinary disparate-treatment claims, this Court has characterized the employment-action element as requiring a plaintiff to establish an "adverse employment action," which it defined as "a *serious and material* change in the terms, conditions, or privileges of employment." *E.g.*, *Jefferson* v. *Sewon*

Am., Inc., 891 F.3d 911, 920-921 (11th Cir. 2018) (citation omitted). But, in our view, this heightened standard is mistaken and *any* employment action that affects the "compensation, terms, conditions, or privileges" of employment is covered by Section 703(a)(1). Accordingly, this standard should not be extended to religious-accommodation claims, which should instead be governed by Section 703(a)(1)'s plain language. Under either approach, however, plaintiffs pursuing religious-accommodation claims are not limited to filing suit only if they suffer discharge or discipline.

The district court's conclusion that an employee must allege discipline or discharge to state a claim of religious-accommodation discrimination thus improperly narrowed the scope of the statute. It also is at odds with Title VII's broad remedial purpose, as it forces an employee to put his job in jeopardy to vindicate his statutory right to a reasonable accommodation for his religious observance. Moreover, contrary to the district court's determination otherwise, this Court's precedents do not mandate the discharge-or-discipline standard. Although some of this Court's published decisions have stated in dictum that an employee pursuing an accommodation claim must allege that he was disciplined or discharged for failing to comply with an employment requirement that conflicts with his religious observance, they have never so held when squarely faced with the issue of whether an employment action short of discipline or discharge satisfies

the employment-action element. Indeed, this Court recently stated, also in dictum, that an "adverse employment action" satisfies this element, confirming the incorrectness of the district court's decision.

Because the district court held that Staple failed to allege discipline or discharge, it did not address whether the denial of Staple's schedule-adjustment request—or the requirement that Staple use virtually all of his accrued paid leave for his religious observances—affected the compensation, terms, conditions, or privileges of his employment. Should this Court vacate and remand, it would be appropriate for the Court to provide guidance to the district court on this issue. To state a claim for religious-accommodation discrimination, Staple's complaint need only contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Here, Staple's complaint alleged that the School Board's denial of his request for a shift change, and requirement that he use virtually all of his accrued paid leave instead to observe the Sabbath, denied him benefits of his position because it left him unable to accrue sufficient hours to both cover his Sabbath hours and cover sickness and vacation. Accepted as true, these allegations state a plausible claim that the School Board's actions constituted discrimination "with respect to his compensation, terms, conditions, or privileges of employment, because of * * * religion." 42 U.S.C. 2000e-2(a)(1).

ARGUMENT

THE EMPLOYMENT-ACTION ELEMENT OF A TITLE VII RELIGIOUS-ACCOMMODATION CLAIM IS SATISFIED BY AN EMPLOYEE'S ALLEGATION THAT THE EMPLOYER'S DISCRIMINATORY ACTION AFFECTED THE COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT

A. Title VII's Plain Language Prohibits Discrimination In Response To An Employee's Request For A Religious Accommodation

1. Requiring An Employee To Accept An Accommodation To Which He Objects Implicates The "Compensation, Terms, Conditions, Or Privileges Of Employment" Within The Meaning Of Title VII

Section 703(a)(1) of Title VII makes it an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). Title VII defines "religion" to include "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." 42 U.S.C. 2000e(j). Accordingly, "[a]n employer has a 'statutory obligation [under Section 703(a)(1)] to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship.'" *Walden* v. *Centers For Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012) (quoting *Trans World Airlines,*

Inc. v. *Hardison*, 432 U.S. 63, 75 (1977)). In *EEOC* v. *Abercrombie & Fitch Stores, Inc*., 575 U.S. 768 (2015), the Supreme Court explained that Title VII does not establish a distinct cause of action for religious-accommodation claims, and that such claims may instead be brought as so-called "disparate-treatment" claims under Section 703(a)(1), as Staple did here. *Id.* at 771-772 & n.2, 774-775.

The relevant statutory provision here is therefore Section 703(a)(1)'s prohibition on an employer discriminating against an employee with respect to the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Congress did not define the phrase "terms, conditions, or privileges of employment" in Title VII. "When a term goes undefined in a statute," courts give "the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Read according to its plain meaning, that key statutory phrase—"terms, conditions, or privileges of employment"—"is an expansive concept" with a broad sweep. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986) (citation omitted). Indeed, the Supreme Court has explained that the statutory phrase "terms, conditions, or privileges of employment" evinces Congress's intent "to strike at the entire spectrum" of disparate treatment in employment based on protected characteristics. *Id.* at 64 (citation omitted). Accordingly, for example, "the language of Title VII is not limited to 'economic' or 'tangible' discrimination." *Ibid.*; see also *Oncale* v. *Sundowner Offshore Servs.,*

Inc., 523 U.S. 75, 78 (1998) (confirming that the statutory phrase "terms, conditions, or privileges" is not limited to "the narrow contractual sense") (citation omitted).

To be sure, not every action affecting an employee qualifies as one concerning an employee's terms, conditions, or privileges of employment. But showing that an employer's action qualifies as an "employment practice" within the meaning of Title VII is not difficult. When, for example, an employer denies an employee's request for a reasonable religious accommodation and this refusal necessitates that the employee make additional burdensome arrangements so that he can both keep his job and observe his religion, the employer's actions have affected the compensation, terms, conditions, or privileges of employment "because of" the employee's religion and thus satisfy the employment-action element of a prima facie case. Indeed, in nearly all cases in which an employer denies an accommodation request and instead requires an employee to accept an alternative accommodation to which the employee objects (such as an action pertaining to the hours he works, a "term" or "condition" of employment), the employer's action will relate to the compensation, terms, conditions, or privileges of employment, almost by definition.[3]

[3] This case does not raise the closely related question whether an employer that denies *any* religious accommodation, and requires an employee to work in

(continued…)

Moreover, because the employer's actions are a response to the employee's request for a religious accommodation, they are "because of" the employee's religion and plainly constitute discrimination actionable under Section 703(a)(1). This interpretation furthers Title VII's "broad approach to the definition of equal employment opportunity" and "avoid[s] interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *County of Wash.* v. *Gunther*, 452 U.S. 161, 178 (1981) (internal quotation marks and citation omitted).

At the same time, the statutory text places meaningful limits on the scope of actionable discrimination. As mentioned, the employer's discrimination must be employment-related and "because of * * * religion." 42 U.S.C. 2000e-2(a)(1). And, in the accommodation context, employees are entitled only to a "reasonabl[e] accommodat[ion]" that would not result in "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). Accordingly, there is no reason to look beyond Section 703(a)(1)'s plain text—as relevant here, that the employer

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(…continued)
violation of his religious beliefs, necessarily alters the employee's terms, conditions, or privileges of employment within the meaning of Title VII. Because such an action by an employer makes the violation of an employee's religious beliefs a term or condition of employment, the EEOC has answered that question in the affirmative. See, *e.g.*, EEOC Compliance Manual on Religious Discrimination § 12-IV(A), text surrounding nn. 210-212 (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

discriminated because of religion with respect to the "compensation, terms, conditions, or privileges of employment"—in determining whether a plaintiff has sufficiently alleged a religious failure-to-accommodate claim. 42 U.S.C. 2000e-2(a)(1).[4]

2. This Court's Prior Decisions In Intentional-Discrimination Cases Should Not Be Read To Restrict Title VII's Plain Language With Respect To Religious-Accommodation Cases

This Court and at least some other federal courts addressing ordinary disparate-treatment claims (*i.e.*, intentional discrimination) have read Section 703(a)(1)'s "terms, conditions, or privileges of employment" language to require that a plaintiff establish, as part of his prima facie case, that he suffered an "adverse employment action." *Davis* v. *Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001) (collecting cases), abrogated on other grounds by *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006); see also *Jefferson* v. *Sewon Am., Inc.*, 891 F.3d 911, 920-921 (11th Cir. 2018). In one sense, that requirement is sensible: it is simply another way of saying that the plaintiff has suffered a cognizable injury, *i.e.*, has been subjected to an objectionable ("adverse") work-related ("employment") action by his employer.

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[4] Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a), is the provision applicable to claims against the federal government. That provision contains different statutory language than Section 703(a)(1), and the United States does not with this filing urge this Court to reconsider any of its precedent interpreting 42 U.S.C. 2000e-16(a).

The United States believes that any further gloss on Section 703(a)(1)'s plain language—requiring, for example, that the employer's action must amount to "a *serious and material* change in the terms, conditions, or privileges of employment," *Jefferson*, 891 F.3d at 921 (citation omitted); *Davis*, 245 F.3d at 1239—is mistaken.[5] To the contrary, *any* employment action that affects the "compensation, terms, conditions, or privileges" of employment is covered by

[5] This Court's contrary case law rests in part on a misreading of the Supreme Court's decision in *Burlington Industries, Inc*. v. *Ellerth*, 524 U.S. 742 (1998), which involved a claim alleging that a supervisor had created a sex-based hostile work environment—and thereby altered the "terms or conditions of employment." *Id.* at 752; see, *e.g.*, *Davis*, 245 F.3d at 1239. Significantly, the question in *Ellerth* was not the substantive standard for a discrimination claim, but rather the circumstances under which "an employer has vicarious liability" for sexual harassment by a supervisor. *Ellerth*, 524 U.S. at 754. After reviewing agency-law principles, the Supreme Court held that employers are always vicariously liable when such harassment culminates in a "tangible employment action," defined to mean a "significant change in employment status," and are vicariously liable even absent such an action if they fail to establish an "affirmative defense." *Id.* at 761-762, 764-765. *Ellerth*'s identification of the "tangible employment action[s]" that support automatic imputation of vicarious liability to an employer in cases involving supervisory harassment thus says nothing about the meaning of "terms, conditions, or privileges of employment" in Section 703(a)(1), as the Supreme Court itself subsequently made clear in *White*, 548 U.S. at 64-65. And *Ellerth*'s holding that employers may be vicariously liable for harassment even absent a tangible employment action made clear that, contrary to this Court's analysis in *Davis*, 245 F.3d at 1239, a "significant change in employment status" is not necessary for a Title VII discrimination claim. *Ellerth*, 524 U.S. at 761, 764-765.

Section 703(a)(1).[6] But even if the "serious and material" standard governs the ordinary disparate-treatment case, it should not be extended to reasonable-accommodation cases. Instead, this Court should apply the plain language of Section 703(a)(1). And it should reject the district court's requirement that a plaintiff must show discharge or discipline to make out a prima facie case of religious-accommodation discrimination.

B. The District Court Erred In Requiring That A Plaintiff Allege That He Suffered Discharge Or Discipline To State The Employment-Action Element Of A Religious-Accommodation Claim

1. The District Court's Discharge-Or-Discipline Standard Conflicts With Title VII's Text, Structure, And Broad Remedial Purpose

The district court's requirement that a plaintiff allege that he suffered "discharge or discipline" in response to his request for a religious accommodation to make a prima facie case of discrimination cannot be reconciled with Section 703(a)(1)'s plain text and statutory structure. Section 703(a)(1)'s inclusion of an expansive list of employment practices, of which "discharge" is but one covered action, necessarily encompasses much more than an employer's discharge decision

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[6] The United States has recently filed two Supreme Court briefs adopting this interpretation of the scope of Section 703(a)(1)'s "terms, conditions, or privileges of employment" language. See U.S. Br. as Amicus Curiae at 14-17, *Peterson* v. *Linear Controls, Inc.*, 2020 WL 1433451 (Mar. 20, 2020) (No. 18-1401) (dismissing certiorari petition, 140 S. Ct. 2841 (2020)); Gov't Br. in Opp. at 11-16, *Forgus* v. *Esper*, 2019 WL 2006239 (May 6, 2019) (No. 18-942) (denying certiorari petition, 141 S. Ct. 234 (2020)).

or employer actions that punish an employer for disobedience (discipline). 42 U.S.C. 2000e-2(a)(1). If Congress had meant to cover only "discharge" and "discipline" for current employees, it would not have used the phrase it did. That conclusion follows regardless of whether this Court adopts our plain-text interpretation of the statute or instead embraces the adverse-employment-action standard applicable in ordinary disparate-treatment cases. See, *e.g.*, *Gillis* v. *Georgia Dep't of Corr.*, 400 F.3d 883, 887-888 (11th Cir. 2005) (noting in applying adverse-employment-action standard in ordinary disparate-treatment context, that, *e.g.*, reductions in compensation and at least some transfers are actionable).

The district court's conclusion that an employee's "[m]ere dissatisfaction with an employer's offered accommodation is insufficient to meet [a plaintiff's] prima facie burden," *i.e.*, does not constitute "discipline" (Doc. 28, at 7), therefore misses the point that the employee must allege only that the employer's action (here, denying the employee's request for a shift change and requiring him to use virtually all of his accrued paid leave if he wanted to leave early to observe his Sabbath) affected the "compensation, terms, conditions, or privileges of employment." Thus, because the district court's discharge-or-discipline standard fails to capture *all* actionable conduct against an employee—hiring and discharge

decisions *and* actions that otherwise affect the compensation, terms, conditions, or privileges of employment—the court erred in applying it.

Moreover, the district court's standard also fails as a practical matter and puts religious employees "in an unavoidable bind." *Reed* v. *International Union*, 569 F.3d 576, 587 (6th Cir. 2009) (McKeague, J., dissenting), cert. denied, 559 U.S. 1048 (2010). As Judge McKeague explained, under such a standard, if an employee accepts an unreasonable accommodation that affects the terms or conditions of his employment, thereby avoiding discharge or discipline, "the employee has acquiesced in the discrimination and abandoned any hope of a remedy." *Ibid.* But "if an employee [instead] rejects the accommodation," then he or she "puts his or her employment in jeopardy." *Ibid.* Because that dilemma is "inconsistent with the [sic] both the text and purpose of Title VII," *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 359 (2013), it cannot be the law. As Judge Berzon of the Ninth Circuit reasoned, the view that "employees must risk financial hardship, negative employment histories, and the anxiety of waiting for a discharge or other discipline to occur before their statutory right to religious accommodation can be vindicated" is inconsistent with Title VII's "overall

structure and purpose." *Lawson* v. *Washington*, 319 F.3d 498, 501-502 (9th Cir. 2003) (Berzon, J., dissenting from denial of reh'g en banc) (citation omitted).[7]

[7] The *Lawson* majority opinion does not undermine our argument. The plaintiff in that case argued that he established the employment-action element of a prima facie case of religious-accommodation discrimination by showing that he was constructively discharged. *Lawson* v. *Washington*, 296 F.3d 799, 804-805 (9th Cir. 2002). The Ninth Circuit majority opinion held that the plaintiff did not create a genuine issue of material fact as to whether he actually had been constructively discharged. *Id.* at 805-806. The court did not address the distinct issue of whether a plaintiff could have proceeded with a religious-accommodation claim by showing another type of employment action, including one falling short of discharge or discipline. In any event, the employment-action standard recited by the majority opinion in *Lawson*—that an employer must "threaten[] [an employee] with or subject[] him to discriminatory treatment"—is broader than the discharge-or-discipline standard the district court adopted here. *Id.* at 804 (citation omitted).

By contrast, the *Reed* majority opinion is, in our view, incorrect. The court assumed *arguendo* that an "adverse employment action"—not just discharge or discipline—was sufficient to make out a religious-accommodation claim but concluded that the plaintiff there did not establish such an action even though he suffered a monetary loss as a result of the accommodation a union granted him—the option of paying a charity an amount that was 22% higher than the amount he otherwise would have had to pay the union. 569 F.3d at 578, 580-581. Significantly, *Reed* arose under Section 703(c), 42 U.S.C. 2000e-2(c), a statutory provision addressing unlawful employment discrimination by labor organizations that lacks the "terms, conditions, or privileges" language in Section 703(a)(1). To the extent that *Reed*'s reliance on decisions arising under Section 703(a)(1) suggests that the plaintiff's loss in pay would also not be actionable under Section 703(a)(1), it is at odds with the statutory text barring discrimination with respect to an employee's "compensation." 42 U.S.C. 2000e-2(a)(1).

2. This Court's Precedents Do Not Mandate Applying The Discharge-Or-Discipline Standard To This Case

The district court found that this Court's precedents have "made clear" that in a religious-accommodation case the employee must allege discharge or discipline. Doc. 28, at 7. That is not correct. The cited cases do not mandate applying that standard to this case.

The district court relied on *Dalberiste* v. *GLE Associates, Inc.*, 814 F. App'x 495, 496-497 (11th Cir. 2020), cert. denied, 141 S. Ct. 2463 (2021), and *Morrissette-Brown* v. *Mobile Infirmary Medical Center*, 506 F.3d 1317, 1320-1321 (11th Cir. 2007), to conclude that it was bound to apply the discharge-or-discipline standard. Doc. 28, at 7. But those decisions do not squarely present the question. In those cases—and many other decisions by this Court reciting this standard (or a "discharge" standard)—the plaintiffs were in fact discharged or sustained an equivalent employer action. Thus, the Court had no need to address whether a plaintiff could have made a prima facie case by showing that some other employer action fell within the scope of Section 703(a)(1). See *Dalberiste*, 814 F. App'x at 496-497 (reciting standard as requiring discharge but not examining requirement in case where employer rescinded accepted job offer); *Morrissette-Brown*, 506 F.3d at 1320-1321 (reciting standard as requiring discharge but not examining requirement in case where employer discharged employee); see also *Walden*, 669 F.3d at 1292-1293 (reciting standard as requiring discharge and assuming

requirement satisfied in case where employer discharged employee); *Dixon* v. *The Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010) (reciting standard as requiring discharge and concluding it was satisfied where employer discharged employee); *Beadle* v. *Hillsborough Cnty. Sheriff's Dep't*, 29 F.3d 589, 591, 592 n.5 (11th Cir. 1994) (reciting standard as requiring discharge and noting employer did not dispute it was satisfied where employer discharged employee), cert. denied, 514 U.S. 1128 (1995); cf. *Walker* v. *Indian River Transp. Co.*, 741 F. App'x 740, 745-746 (11th Cir. 2018) (reciting standard as requiring discipline or discharge but expressly declining to rule on whether it was satisfied there).

To our knowledge, this Court has never squarely addressed in a published decision the issue this case presents—*i.e.*, whether a plaintiff making a religious-accommodation claim must always allege an employment action constituting discharge or discipline, or whether it is also sufficient to allege that the employer's actions affected a hiring decision or the compensation, terms, conditions, or privileges of employment.[8] That this Court's law is not settled on this point is

[8] In *Dixon* v. *Palm Beach County Parks & Recreation Department*, 343 F. App'x 500 (11th Cir. 2009), cert. denied, 559 U.S. 1076 (2010), this Court defined the employment-action element as requiring the plaintiff to prove that "he was disciplined for failing to comply with the conflicting employment requirement" and concluded that the plaintiff did not satisfy this standard. *Id.* at 502. Again, we do not believe that the court applied the correct standard, and in any event the decision is not precedential. See *Ray* v. *McCullough Payne & Haan, LLC*, 838

(continued…)

made clear by a decision that was released shortly before the district court's order here (but which was not cited therein). In *Bailey* v. *Metro Ambulance Services, Inc.*, 992 F.3d 1265, 1275 (11th Cir. 2021), this Court stated in dictum that a religious-accommodation claim requires the employee to show that his "employer took adverse employment action against him because of his inability to comply with the employment requirement or because of the employer's perceived need for his reasonable accommodation." *Id.* at 1275. That characterization suggests that, at a minimum, the district court was wrong to conclude that the discharge-or-discipline standard applies in all religious-accommodation cases.

C. This Court Should Provide Guidance To The District Court On Whether Denying A Plaintiff's Request For A Shift Change Or Requiring Him To Use Accrued Paid Leave For His Religious Observance Falls Within The Scope Of Title VII

Because the district court labored under the mistaken belief that Staple was required to allege discipline or discharge, it did not address whether being denied a request for a shift change and being required to use virtually all of his accrued paid leave for his religious observance affected the compensation, terms, conditions, or privileges of his employment. Should the Court vacate and remand, it may be appropriate to provide some guidance on this issue to the district court, as follows.

(…continued)
F.3d 1107, 1109 (11th Cir. 2016) ("In this Court, unpublished decisions, with or without opinion, are not precedential and they bind no one.").

This Court "ha[s] recognized that a plaintiff's burden to establish a prima facie case [for a religious-accommodation claim] is not onerous." *Bailey*, 992 F.3d at 1275 (citations and internal quotation marks omitted). A plaintiff's burden is particularly light on a motion to dismiss, where a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" —*i.e.*, "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

Here, Staple's complaint alleged that the School Board's denial of his request for a shift change, and requirement that he use virtually all of his accrued paid leave instead to observe the Sabbath, denied him benefits of his position because it left him unable to accrue sufficient hours to both cover his Sabbath hours and cover sickness and vacation. Doc. 10, at 6-8. Accepted as true, the denial of Staple's request for a shift change to accommodate his religious observance affected the hours he works, and thus necessarily pertains to his "terms [or] conditions * * * of employment, because of * * * religion." 42 U.S.C. 2000e-2(a)(1). Likewise, the requirement that Staple use virtually all of his accrued paid leave instead to observe his Sabbath deprived Staple of a benefit or privilege of employment—namely, the ability to use his accrued leave for its intended purpose—and thus constituted discrimination "with respect to his

compensation, terms, conditions, or privileges of employment, because of * * * religion." *Ibid.*; cf., *e.g.*, *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) (recognizing that "[a]n employer who permits an employee to avoid mandatory Sabbath work only by using accrued vacation does not 'reasonably accommodate' the employee's religious beliefs [because] [s]uch an employee stands to lose a benefit, vacation time, enjoyed by all other employees who do not share the same religious conflict, and is thus discriminated against with respect to a privilege of employment").[9]

[9] Even if this Court concludes that the "adverse employment action" standard from ordinary disparate-treatment cases applies here, the forced elimination of most or all of Staple's vacation and sick leave, and the denial of his request for a modified work schedule, could plausibly satisfy that standard as well: each could qualify as "a serious and material change in the terms, conditions, or privileges of employment," and the former also could qualify as "a[] tangible consequence from [the School Board's actions] in the form of a loss of * * * benefits." *Davis*, 245 F.3d at 1239-1240 (emphasis omitted).

CONCLUSION

The Court should reverse the district court's opinion and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 5,611 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

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Date: September 20, 2021

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system and filed with the court four paper copies of the same. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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