IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. NEW YORK CITY TRANSIT AUTHORITY, Defendant.	Civil Action No. 04-CV-4237 (SLT) (MDG)

MEMORANDUM OF PLAINTIFF UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff United States submits this Memorandum in Opposition to defendant New York City Transit Authority's Motion for Summary Judgment, along with a responsive statement of material facts supported by deposition testimony, declarations and documentary evidence, pursuant to Local Rule 56.1.

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I. SUMMARY OF ARGUMENT

The United States filed suit against the New York City Transit Authority ("TA"), alleging that the TA has unlawfully engaged in a pattern or practice of employment discrimination against Muslim, Sikh and similarly situated employees on the basis of their religion. Compl. ¶ 16. Specifically, the United States alleges that the TA violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), by (1) selectively enforcing its uniform policies to target Muslim, Sikh and similarly situated employees whose sincerely held beliefs and practices require that they wear religious head coverings (*e.g.*, khimars (or headscarves) and turbans) and (2) failing or refusing to reasonably accommodate the sincerely held religious beliefs and practices of those employees in wearing their religious head coverings. Compl. ¶¶ 8-9, 15-16.

The TA has moved for summary judgment, arguing – without support in the record – that there is "no evidence" of selective enforcement of its uniform policies against Muslim and Sikh employees. TA Memorandum of Law in support of its motion for summary judgment ("TA Mem.") at 35-36. The TA further argues that the purported accommodations it provided were reasonable as a matter of law, and, even if they were unreasonable, no other accommodations would be reasonable without imposing an undue hardship on the TA. *Id.* at 22-30.

Summary judgment is improper in this case because there are genuine disputes with respect to material facts, and because the TA is not entitled to judgment as a matter of law. As set forth below, and in the affidavits and documentary evidence supporting this response, in making its motion, the TA ignores material facts in the record, including the testimony of all of the Muslim and Sikh employees involved in this case, and the testimony of many of the TA's own supervisors. The record is replete with evidence that the TA engaged in a pattern or practice of religious discrimination against Muslims, Sikhs and other similarly situated employees who wear religious head coverings by selectively enforcing its uniform policies against them and by denying them reasonable accommodations for their religious beliefs, even though reasonable accommodations existed that would have resolved the religious conflict without imposing an undue burden on the TA.

II. BACKGROUND

A. Procedural Background

When the United States filed this action on September 30, 2004, three lawsuits making similar and related allegations – brought by four Muslim bus operators identified as putative victims in the United States' Complaint, *see* Compl. ¶¶ 10-13 – were already pending against the TA in this Court.[1] Two more lawsuits making similar allegations were filed later – including one brought by a Sikh train operator identified as a putative victim in the United States' Complaint and another brought by five Sikh station agents who, though not identified by name in the United States' Complaint, were "similarly situated" turban-wearing Sikh employees who the TA had subjected to the same practice of selective enforcement and failure to accommodate.[2] The Court consolidated all of these cases for discovery and pretrial purposes, designating the United States' action as the lead case. Discovery closed in April 2007.

B. Factual Background[3]

1. The TA's Uniform Policies and the Enforcement of Those Policies

For years prior to 2002, Muslims and Sikhs employed by the TA wore their religious head coverings – *e.g.,* khimars (headscarves) and turbans – openly to work every day, uncovered by any TA hat, unmarked by any TA logo, while working in passenger service jobs as bus operators, train operators and station agents. RSOF at ¶¶ 16, 20, 28. For instance, Muslim bus operator Stephanie Lewis openly wore her unadorned khimar every day for more than 13 years while working as a bus operator in passenger service; Sikh train

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[1] *See* Ex. 125, *Small & Alkebulan v. N.Y. City Transit Auth.*, 03-CV-2139 (May 2, 2003); *Muhammad v. N.Y. City Transit Auth.*, 04-CV-2294 (June 3, 2004; Am. Compl. June 21, 2004); Ex. 106, *Lewis v. N.Y. City Transit Auth., et al.*, 04-CV-2331 (June 7, 2004; Am. Compl. Mar. 23, 2006).

[2] *See Harrington v. Reuter, et al.*, No. 05-CV-3341 (July 15, 2005; Am. Compl. Sept. 14, 2005); *Singh, et al. v. N.Y. Transit Auth., et al.*, 05-CV-5477 (Nov. 17, 2005).

[3] For reasons of length and readability, the United States does not set forth every factual dispute here, but rather provides the factual background of this case. The United States has set forth the numerous factual disputes raised by the evidence in the accompanying Responsive Statement of Facts ("RSOF") and the exhibits thereto. Additional facts regarding the TA's treatment of individual employees referenced herein are set forth in the RSOF and the declarations from those individuals.

operator Kevin Harrington openly wore his turban (without any TA logo) every day for more than 20 years while working in passenger service; and Sikh station agent Jatinder Attari openly wore his plain turban every day for more than 13 years while serving passengers in the TA subway system. *Id.* at ¶¶ 16, 20, 28. These employees wore their turbans and khimars along with the rest of their TA-issued uniforms, including uniform shirts with large TA logos on the sleeves, visible to TA passengers. *Id.* at ¶¶ 16, 20, 28.[4] The TA's written uniform policies applicable to these employees did not address (or prohibit) religious head coverings; and these employees interacted with supervisors daily for many years and were never told that their turbans and khimars violated any TA uniform policy or otherwise interfered with their ability to perform their duties or their identifiability as TA employees, or posed any kind of safety risk. *Id.* at ¶¶ 13, 16, 19-20, 28. In other words, for years, there was no apparent conflict between the TA's interpretation and application of its uniform policies and the religious practices of its Muslim and Sikh employees.

Even though the TA's written uniform policies had not changed, beginning in early 2002 and continuing thereafter, the TA began re-interpreting (and later re-writing) those policies to make the wearing of khimars and turbans a violation and to impose new requirements on employees who wear khimars and turbans (*i.e.,* requiring them to wear a TA hat over or affix a TA logo patch to their head coverings) that were not imposed on other employees (*i.e.,* other employees were permitted to wear no hats or hats without any identifying TA logos). *Id.* at ¶¶ 3, 14, 16(a), 16(f), 19-20, 24, 31. The TA claims it was "expanding" those policies to accommodate its employees even though many of the Muslim and Sikh employees actually affected by those policy changes told the TA that these new requirements conflicted with their religious beliefs. *Id.* at ¶¶ 16(a), 32, 33, 43. Those employees view their religious head coverings as sacred, and believe that affixing a TA logo to them desecrates their turbans and khimars and violates their religious

[4] Photographs of two of these employees (Sikh station agents I. Singh and S. Arora) in their TA uniforms are attached as Exhibits 34 and 30, respectively, to the RSOF.

beliefs. *Id.* at ¶¶ 16(e), 20, 27, 32-33, 43.[5] In other words, the TA's purported "expansion" of its policies was not an accommodation at all; this "expansion" actually created – rather than eliminated – the religious conflicts at issue in this case, leaving Muslim and Sikh employees in worse positions than before the so-called accommodations.

The TA then began strictly enforcing these new uniform requirements against its Muslim and Sikh employees, first bus operators, and later train operators and station agents. Indeed, TA supervisors testified that they were specifically instructed to monitor the Muslim and Sikh employees involved in this case for compliance with these new uniform requirements and, if they refused to comply, to write them up; something the supervisors had never been asked to do with other employees. *Id.* at ¶¶ 14, 32, 34. When the Muslim and Sikh employees failed to comply – because doing so would violate their religious beliefs – TA supervisors responded by repeatedly reprimanding them verbally, writing them up for uniform violations, threatening them with further disciplinary action, and in two cases terminating their employment. *Id.* at ¶¶16(a) and (c), 20, 34, 42.

The TA – pursuant to its "expanded" uniform policies – ultimately involuntarily transferred several Muslim and Sikh bus and train operators out of jobs they had exercised their seniority to pick and held for years into jobs working in the bus or train depots where they are not visible to TA passengers. *Id.* at ¶¶ 9, 16(b), 16(d), 16(h)-(j), 17, 20. According to the TA, these "re-assignments" were reasonable accommodations as a matter of law; but, in reality, they adversely affected the terms and conditions of employment for Muslim and Sikh employees, and were viewed as disciplinary because, among other things, they deprived those employees of the primary benefit of seniority – the ability to "pick." Once or more each year, bus operators (as well as train operators and station agents) have the opportunity to put in for – or

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[5] For instance, the Muslim bus operators in this case believe that their khimars are sacred, and that they reflect modesty and are a core part of their religious identity. They believe that they cannot desecrate their khimars by covering them with a TA baseball hat or affixing a TA logo to them (at the forehead). In addition, because they place their foreheads on the floor when they pray, they believe that placing a TA logo on their forehead would interfere with their prayer. RSOF at ¶ 16(e).

"pick" – their job location, schedule and duties, including whether to work a straight 8-hour route or a route with built-in overtime, and whether to work in passenger or non-passenger service; who gets what during each pick is based entirely on seniority. According to TA supervisors' testimony, under the TA's unionized seniority system, the ability to pick a particular job is the "number one perk" of the seniority system; "there's really no other perk." *Id.* at ¶¶ 20 (*quoting* Ex. 200 (Dep. of John Morro ("Morro Dep."), May 5, 2005 at 175). As the TA's Director of Labor Relations put it: "Seniority is very powerful in choosing where they are going to work on any given day, the days that they have off, the tours of duty that they work. And someone with 10 to 15 years' seniority has a tremendous amount of power in their daily life. And people pick – they have a right to pick, if they have the seniority, passenger service or non-passenger service." RSOF at ¶ 20 n. 131 (*quoting* Ex. 192 (Dep. of David Hyland ("Hyland Dep."), Mar. 29, 2006 at 173-174). The TA's policy of involuntarily transferring Muslim and Sikh employees who cannot comply (for religious reasons) with the newly imposed logo requirement effectively eliminates the primary benefit of seniority. As explained in more detail below, that policy also substantially and negatively altered their duties (*i.e.*, required some of them to perform janitorial duties, and eliminated all interactions with the public and passengers), deprived them of overtime opportunities, exposed them to unpleasant and hazardous working conditions, and resulted in ongoing harassment by co-workers and supervisors. RSOF at ¶¶ 16(d), 16(i)-(j), 20, 22, 34.

For the station agents who could not comply with the TA's newly imposed logo requirement for religious head coverings, the TA offered no accommodation that would resolve the religious conflict or allow those employees to stay in their station agent jobs in any capacity. *Id.* at ¶¶ 31, 35. According to the TA, there are no non-passenger service station agent jobs. Thus, the TA's purportedly "expanded" uniform policy for station agents requires that those employees violate their religious beliefs by affixing TA logos to their turbans or face disciplinary action, including termination, for non-compliance. *Id.* at 31. The policy provides no other alternatives. The TA's only effort to resolve the religious conflict created by the revised uniform policy for station agents was a suggestion by TA counsel that the Sikh station agents give up their

station agent jobs altogether and "apply" through the regular civil service process (a process that often takes years) for other jobs within the TA that do not require uniforms. *Id.* at ¶ 35.

Some of the affected employees continue to work in the depots pending the outcome of this litigation. *Id.* at ¶ 16(g). Others, namely the Sikh train operator and station agents, agreed – under protest – to affix TA logos to their turbans to avoid further harassment, discipline and termination pending the outcome of this litigation. *Id.* at ¶¶ 20, 27, 34, 36.

The discriminatory nature of the TA's policies with respect to its Muslim and Sikh employees is evident when compared to its treatment of other employees. For instance, after the TA changed its uniform policy to require Muslims and Sikhs to affix TA logos to their turbans (despite their religious objections to doing so), the TA continued to issue and allow employees working in passenger service to wear hats without any TA identifying logos. *Id.* at ¶¶ 13, 19, 28, 31. Indeed, the TA issued hats that were not obviously part of a uniform and bore no TA identifying logo, including a Russian-style faux fur hat and baseball hats with eagle and star logos. *Id.* at ¶¶ 13, 19. Some of the TA's own supervisors were shown photographs of these hats and did not know that the hats were part of the TA uniform. *Id.* at ¶ 13. In other words, under this "expanded" policy, the only employees actually required to wear TA logos on their heads were those who could not do so for religious reasons.

Moreover, in contrast to the TA's practice of rigidly enforcing the newly imposed uniform requirement against Muslims and Sikhs, the TA continued to allow other TA employees to regularly violate TA uniform policies without consequence. *Id.* at ¶¶ 12, 14. For instance, the TA concedes that it allowed employees to wear FDNY and NYPD hats for months after the September 11, 2001 terrorist attacks. TA Mem. at 9. And, the record is replete with evidence (including testimony from TA supervisors and the ruling of a TA arbitrator) that the TA did not consistently enforce its uniform policies against other employees, and that employees regularly wore Mets, Yankees and other non-compliant secular head wear. *Id.* at ¶¶ 12, 14, 16(e). Despite the above, according to the TA, its ongoing treatment of its Muslim and Sikh employees (including its strict enforcement of the new logo requirement) is not discriminatory, but

rather merely part of a broader effort to enforce a neutral uniform policy that is necessary to ensure that individuals are identifiable as TA employees. TA Mem. at 4, 24-25, 36. The undisputed facts demonstrate that Muslim and Sikh employees wore their turbans and khimars (without TA logos) for many years and were identifiable as TA employees, and there is no evidence that the wearing of turbans or khimars without TA logos interferes with identifiability. RSOF at ¶ 4. Nevertheless, in an effort to satisfy the TA's concern (asserted for the first time in this litigation) about ensuring that employees who wear religious head coverings are identifiable as TA employees, the Muslim and Sikh employees identified to date in this case proposed that they wear khimars and turbans in the same blue color as the TA uniform, and affix a TA logo patch or pin to the front pocket or collar of the uniform shirts (which have TA logos on the sleeves only), or to prominently display their TA photo identification cards. The TA rejected those proposed accommodations out of hand significantly undermining, if not destroying, its claim that identifiability is its paramount concern. *Id.* at ¶ 35.

2. Application of Uniform Policies to Bus Operators

The TA began this pattern of discriminatory and selective enforcement of its uniform policies in early 2002, when TA supervisors began instructing Muslim bus operators that their khimars violated the TA's uniform policies and that they had to either remove their khimars or cover them with a TA-issued depot logo hat. *Id.* at ¶¶ 13, 14, 16, 16(a). The TA's written uniform policy applicable to bus operators at that time did not address (or prohibit) religious head coverings; bus operators were not required to wear any employer-identifying hats; and bus operators were issued and permitted to wear baseball caps with other logos that were not marked with "TA" or "NYCTA" anywhere.[6] The Muslim bus operators believe that they cannot, consistent with their religious beliefs, comply with the TA's new interpretation of its uniform

[6] The TA's written uniform policy applicable to bus operators at that time provided that: "Depot logo caps are optional. Depot logo caps may only be worn with the bill of the cap facing forward." That policy did not state, as asserted by the TA, that "other forms of headwear" could be worn provided a TA depot logo hat was worn over such headgear, and that policy did not make a distinction between bus operators performing passenger service duties and those performing non-passenger service duties. RSOF at ¶ 13.

policies, and requested accommodations that would allow them to wear their khimars (in blue to match their uniforms) without covering them with TA hats. *Id.* at ¶¶ 16(a)-(c). Rather than accommodating these employees, TA supervisors demanded that they comply with this new requirement, monitored them closely, wrote them up repeatedly for uniform violations, threatened them with disciplinary action, and in two cases terminated their employment. *Id.* at ¶ 16(c).

For example, Muslim bus operator Malikah Alkebulan was told during her initial classroom training in March 2002 that she could not wear "that thing" on her head, referring to her khimar, and she was instructed to remove it. *Id.* at ¶ 16(b). At that time, she had not yet been issued a TA uniform and the training did not involve interaction with passengers. *Id.* Alkebulan told her supervisor that she wore her khimar for religious reasons, but nevertheless complied with the instruction to remove it because she was a probationary employee and feared losing her job. After the training ended (and she consulted with the union), Alkebulan resumed wearing her khimar. The TA, through its supervisors, began closely monitoring and harassing Alkebulan, repeatedly instructing her that she had to remove her khimar or wear a TA hat over it. For instance, between February 8 and 15, 2003, Alkebulan was written up for uniform violations five times – including three times on the same day. *Id.* Notably, the hat the TA ordered Alkebulan to wear over her khimar had a logo reading "Flatbush Depot"; that logo did not say TA or NYCTA anywhere. The TA also terminated Alkebulan's employment – twice – for not wearing a TA hat over her khimar; she was reinstated only after the union challenged her terminations.[7] *Id.* Although Alkebulan repeatedly objected on religious grounds to wearing the hat over her khimar, to protect her job and on the advice of the union, she agreed to do so under protest during the remainder of her probationary period. After her probationary period ended, Alkebulan refused – for religious reasons – to wear the TA hat over her khimar, and provided a letter from her local Imam supporting her religious objection. *Id.* Nevertheless, TA supervisors resumed

[7] Alkebulan was not paid for the three days she was held out of service following her termination in July 2002 until much later, after she successfully challenged that removal through the TA's grievance process. RSOF at ¶ 16(b).

monitoring her closely and writing her up repeatedly for uniform violations. This harassment continued for more than a year, until June 2003, when the TA purported to accommodate Alkebulan by involuntarily transferring her to a bus depot to perform janitorial and "shifting" (*e.g.,* moving empty buses) work. *Id.*

Shortly after the TA began enforcing this new uniform requirement against Alkebulan, TA supervisors also targeted several other Muslim bus operators who wore khimars to work, including Stephanie Lewis, Deirdre Small and Gladys Muhammad, for strict application of its new interpretation of its uniform policy. RSOF at ¶ 16(c). Each of these employees had been wearing their khimars (without TA hats over them) for years and had never been told that they were violating TA uniform policies. *Id.* TA supervisors began to monitor them closely, ordered them to wear TA hats over their khimars and, when they refused, initiated the progressive disciplinary process, including repeatedly reprimanding them verbally, writing them up and threatening them with further disciplinary action. *Id.* One supervisor told bus operator Lewis that she should work at Wendy's because "they wouldn't mind that rag on her head." *Id.* These employees objected to removing or covering their khimars, explained that they wore khimars for religious reasons, provided letters from their Imams supporting their religious objections, (Ex. 1 (Decl. of Malikah Alkebulan ("Alkebulan Decl.") at ¶ 30); Ex. 12 (Decl. of Deirdre Small ("Small Decl.") at ¶ 17); Ex. 9 (Decl. of Stephanie Lewis ("Lewis Decl. at ¶ 9) and requested that they be permitted to wear their khimars as they had done for years.[8]

Eventually, the TA removed all four of these Muslim bus operators from passenger service and involuntarily transferred them to "shifter" positions in the bus depots where they would have no interaction with TA passengers. RSOF at ¶ 16(d). After being transferred to the depot, the Muslim bus operators lost the ability to exercise their seniority to pick jobs of their choice, including routes with built-in overtime. They also were assigned to perform janitorial tasks, including washing windows and cleaning buses (which

[8] At least one of the Muslim bus operators offered to wear a khimar out of the fabric used to make TA uniform ties, which is burgundy with small stripes. RSOF at ¶ 16. The TA rejected that proposed accommodation.

was not part of their job and is typically performed by cleaners at a lower pay grade). *Id.* at ¶¶ 16(b), 16(d), 16(h), 16(j). They also were assigned as "extras" – a status typically held by employees who lack sufficient seniority to pick a regular job – which meant that they no longer had set or regular duties and did not know what they would be doing day-to-day. *Id.* at ¶ 16(d). They were subjected to harassment by co-workers and supervisors. For example, the Muslim bus operators were forced to sign-in and sign-out on special sheets when they arrived at work, took a meal break or left work. These sign-in sheets included only the names of the Muslim bus operators at issue in this case (*i.e.*, Malikah Alkebulan, Deirdre Small and Stephanie Lewis); other employees in the depot were not subjected to this requirement. *Id.* at ¶¶ 16(d).

The Muslim bus operators filed a grievance challenging the TA's treatment of them, including its interpretation of the uniform policy as requiring them to cover their khimars with TA hats. *Id.* at ¶ 16(e). On September 22, 2003, an arbitrator issued a decision concluding that the bus operators had been allowed to wear their khimars (without any TA hat over them) while operating buses in passenger service for years, and that the applicable uniform policy did not prohibit them from doing so. The arbitrator also found that, at the time the TA enforced the uniform policy against these Muslim bus operators, the TA's enforcement of those policies was "lax" and other employees had been allowed to wear non-TA issued secular hats (such as Mets hats) for years and that the TA allowed bus operators to wear FDNY or NYPD hats for more than six months after the terrorist attacks of September 11, 2001. *Id.*

In November 2003, after the arbitrator's ruling and after the Muslim bus operators filed EEOC charges and a lawsuit, the TA changed its written uniform policy to institutionalize the new requirement that employees either remove their khimars and turbans, cover them with TA-issued hats or be involuntarily removed from their seniority-chosen positions and compulsorily reassigned to jobs out of public view. *Id.* at ¶¶ 16(f), 17. In October 2004, after the United States brought this enforcement action, the TA again changed its written uniform policy for bus operators. Under the new (and current) policy, bus operators working in passenger service are required to affix a TA-issued logo patch to the front of their religious head coverings or be involuntary transferred to positions in the depots. *Id.* at 16(f).

Because the Muslim bus operators cannot – consistent with their religious beliefs – affix TA logos to their khimars, they remained relegated to working in the bus depots. *Id.* at ¶ 16(g). Two of the Muslim bus operators highlighted here (Alkebulan and Muhammad) are no longer employed by the TA. Bus operator Small continues to work as a bus operator and is working (involuntarily) in the bus depot pending resolution of this case. *Id.* at ¶¶ 16(g)-(h).

Bus operator Lewis was injured while working in the bus depot in 2003 and became medically unable to drive buses. In 2004, in an effort to return to work, she sought reclassification to a station agent position and completed the requisite training. *Id.* at ¶ 42. As discussed in more detail below, in late 2004, the TA revised its uniform policy applicable to station agents to impose the same requirement it imposed on bus operators – namely, that they must affix TA logos to any religious head coverings. That policy did not provide an alternative of working in a non-passenger service capacity because, according to the TA, there are no non-passenger service station agent positions. When Lewis began working as a station agent, TA supervisors immediately started monitoring her and instructed her that she was required to affix a TA logo to her khimar. *Id.* at ¶ 42. Although Lewis notified the TA that she could not comply with that requirement because it conflicts with her religious beliefs, the TA failed to offer Lewis any accommodation. Instead, the TA rescinded her reclassification, returned her to her previous position as a bus operator (a job she was medically unable to perform), and then terminated her employment. Lewis remains out of work. *Id.*

3. Application of Uniform Policies to Train Operators

Next, in mid-2004, the TA continued targeting its Muslim and Sikh employees, and turned its attention to long-time Sikh train operator, Kevin Harrington. Harrington had been wearing his turban (without any TA logo) while working in passenger service for more than 20 years, had interacted with supervisors daily, and had never been told that his turban conflicted with any TA uniform policy. Indeed, in his written evaluations, supervisors repeatedly indicated that Harrington was in full compliance with TA uniform policies. RSOF at ¶¶ 19, 20. In June 2004, even though the TA's uniform policies applicable to train operators had not changed and did not address, let alone prohibit, Harrington's turban, the TA, through

its supervisors, instructed Harrington that his turban violated those policies and must be removed. *Id.* at 20. Harrington explained that he wore a turban because of his religious beliefs, refused to violate those beliefs by removing it, and asked that he be permitted to continue (as he had done for 20 years) wearing his turban while operating trains in passenger service. Despite his religious objection, that same day, Harrington was taken out of passenger service and involuntarily transferred to a non-passenger service job in the train yard. *Id.* Harrington's removal garnered some media attention, and he was returned to his train operator position shortly thereafter. Nevertheless, he was warned that, if he wanted to continue wearing his turban to work, Harrington should use his seniority to "pick" non-passenger service yard jobs going forward. *Id.*

As it did with bus operators, in November 2004, the TA changed the written uniform policy for train operators and conductors to make the wearing of religious head coverings a violation. Under that revised policy (which remains in effect today), train operators working in passenger service are now required to affix a TA-issued logo patch to the front (forehead) of their religious head coverings or be involuntary transferred to positions in the train yards. *Id.* Harrington has more than 20 years' seniority, entitling him to pick almost any job within his classification, including jobs with built-in overtime. The TA's so-called "expansion" of its policy effectively eliminates that benefit, and forces Harrington to either violate his religious beliefs by affixing a TA logo to his turban or give up the benefits of his seniority. It not only eliminates his ability to participate in the pick process, but it also forces Harrington to give up the opportunity to earn overtime pay. Over the years, he routinely exercised his considerable seniority to pick routes with built-in overtime (*i.e.,* 9 or 10 hour shifts) and earned substantial overtime pay. The shifting jobs in the yard are 8-hour shifts without an opportunity for overtime. *Id.*

Upon learning of the November 2004 uniform policy change, Harrington notified the TA that he could not, consistent with his religious beliefs, affix a TA logo to his turban, and requested an accommodation. The TA failed to offer any accommodation that would resolve the religious conflict without adversely affecting Harrington's employment. Instead, TA supervisors began monitoring Harrington closely, ordering him to affix the TA logo to his turban, and threatening him with discipline,

including termination. In order to remain in his picked train operator position and retain the benefits of his seniority, Harrington agreed – under protest – to affix a TA logo to his turban pending the outcome of this litigation. *Id.*

4. Application of Uniform Policies to Station Agents

Between 1994 and April 2005 – a period of more than 10 years – Sikh station agent Inderjit Singh wore a blue turban (to match his uniform) every day (without any TA logo on it) while working in passenger service. Singh interacted with dozens of supervisors who checked his compliance with TA uniform policies and was never told that he was violating any TA uniform policies by wearing a turban. Indeed, his written evaluations indicated that he was in full compliance with TA uniform policies. Singh has a stellar performance record and has never been written up or disciplined prior to April 2005. RSOF at ¶¶ 28, 32.

In November 2004, the TA changed its written uniform policy for station agents to make wearing a turban a violation. Under that revised policy (which remains in effect today), station agents are now required to affix a TA-issued logo to the front of their religious head coverings. Because there are no non-passenger service station agent jobs, unlike the policies for bus and train operators, the station agent policy does not provide any alternative whatsoever to the new logo requirement for employees who cannot comply with that requirement for religious reasons. *See* Defs.' Local Civ. R. 56.1 Statement ¶ 35; *see also* RSOF at ¶ 31. Instead, those employees are subject to discipline, including termination, for non-compliance.

After changing its policy in November 2004, the TA began instructing supervisors to strictly enforce this new requirement against station agents who wear religious head coverings. For instance, in April 2005, Inderjit Singh was instructed – for the first time – that his turban violated TA uniform policies and that, in order to continue wearing it, he must affix a TA logo to it. Singh objected and notified the TA that its new logo requirement conflicts with his religious beliefs. *Id.* at ¶¶ 14, 32. TA supervisors also sought out four other Sikh station agents (Jatinder Attari, Satinder Arora, Trilock Arora and Brijinder Gill) and instructed them that they must now comply with this new logo requirement. As with Singh, they objected and requested that they be provided an accommodation that would meet the TA's business needs without

requiring them to desecrate their turbans with TA logos. *Id.* at ¶ 32. The Sikh station agents requested that they be permitted to wear their turbans in the TA uniform color provided they add TA logo patches to the fronts and/or collars of their uniform shirts, or prominently display their TA photo identification cards. *Id.* at ¶ 35.

Despite their religious objections and several letters from their attorney reiterating their request for an accommodation, over the next few months, TA supervisors harassed the Sikh station agents and monitored them closely, sometimes daily, to see if they were wearing the TA logo on their turbans. Supervisors questioned the Sikh station agents repeatedly about why they would not affix the logo to their turbans (even though they had already explained why in writing), and initiated the progressive disciplinary process, including repeatedly reprimanding them verbally, writing them up and threatening them with further disciplinary action, including removal for non-compliance. *See id.* at ¶ 34.

As a result, all but one of the Sikh station agents agreed – under duress – to affix TA logos to their turbans to avoid further discipline and harassment and to keep their jobs pending resolution of this litigation. One Sikh station agent, Brijinder Gill, refused to violate his religious beliefs by affixing the TA logo to his turban. Gill was 70 years old at the time and in poor health; he left his employment to avoid further harassment and discrimination following an incident in which a TA supervisor took the TA logo from Gill and affixed it to Gill's turban himself, an action Gill viewed as highly offensive. *Id.*

Despite repeated requests for accommodation, the TA offered no accommodation that would resolve the religious conflict or allow the station agents to stay in their jobs in any capacity. *Id.* at ¶ 35. Instead, the TA proposed (during settlement discussions) only that the Sikh station agents who could not affix TA logos to their turban, give up their station agent jobs altogether and find other jobs within the TA that do not require uniforms, through the regular civil service process (a process that often takes years). *Id.* at ¶ 35.[9]

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[9] For instance, Sikh station agent Inderjit Singh initially applied for employment with the TA in or about 1989, took the civil service test in 1990 or 1991 (and scored 100%), and then waited approximately three years before being hired in June 1994. RSOF at ¶ 35.

III. STANDARD FOR SUMMARY JUDGMENT

The TA may prevail on its motion for summary judgment only where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Both the Supreme Court and the Second Circuit have emphasized the heavy burden that a movant must carry in order to prevail on its summary judgment motion. Indeed, specifically in the Title VII context, decisions have noted that a "motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried[,] and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (citing Fed. R. Civ. P. 56(c) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). This is because it "is not the trial court's function to weigh the evidence and resolve the factual issues" on a motion for summary judgment, "rather, its role . . . is to determine as a threshold matter whether there are genuine unresolved issues of material fact to be tried." *Gibson v. Am. Broad. Cos.*, 892 F.2d 1128, 1132 (2d Cir. 1989).

Further, the "burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, and in assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." *Chambers*, 43 F.3d at 36 ("inferences to be drawn from the underlying facts revealed in materials such as affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion."); *Gibson*, 892 F.2d at 1132 ("[u]ncertainty as to the true state of any material fact defeats the motion.") (citation omitted). In the Title VII context, the Second Circuit has specifically instructed that "if, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *LaFond v. Gen. Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995).

IV. ARGUMENT

A. The Record Demonstrates that the TA Has Engaged in a Pattern or Practice of Religious Discrimination

In its Complaint, the United States alleges that the TA has engaged in a pattern or practice of unlawful religious discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by selectively enforcing its uniform policies against Muslim, Sikh and similarly situated employees who wear religious head coverings, and by failing to accommodate the religious practices of those employees. Compl. at ¶¶ 7-17.

To establish a *prima facie* case of "pattern or practice" discrimination under 42 U.S.C. § 2000e-6(a), the United States "must demonstrate that unlawful discrimination has been a regular procedure or policy" followed by the TA. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). This may be accomplished by proving that "discrimination was the [employer's] standard operating procedure – the regular rather than the unusual practice," and not the result of isolated, accidental or sporadic discriminatory acts. *Teamsters*, 431 U.S. at 336. At the *prima facie* stage in a "pattern or practice" case, the United States "is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* at 360. Rather, its burden is to establish that a discriminatory policy or practice exists. *Id.* This may be accomplished through evidence of overall disparities in an employer's treatment of members of the protected group, such as employment statistics,[10] as well as through the testimony of affected employees and anecdotal evidence of specific instances of discrimination. *Id.* at 337-38; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001). Once the United States establishes a *prima facie* pattern or practice of discrimination, the burden shifts to the TA to demonstrate

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[10] Statistics are not required to show that a discriminatory policy or practice exists, particularly when the situation does not lend itself readily to statistical analysis because of the number of victims or the nature of the discrimination. *See, e.g., Pitre v. Western Elec. Co*, 843 F.2d 1262, 1267 (10th Cir. 1988) ("[S]tatistics . . . are clearly not required, especially when the sample size is too small to produce meaningful results.") (*citing Teamsters*, 431 U.S. at 339-40); *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1074 (C.D. Ill. 1998) (holding that "the sum of the individual testimony by the class" may suffice to show a pattern or practice of sexual harassment).

that the United States' proof is "either inaccurate or insignificant." *Teamsters,* 431 U.S. at 360; *Robinson,* 267 F.3d at 159. The trier of fact then considers the evidence introduced by both parties to determine whether the United States has established by a preponderance of the evidence that the TA engaged in a pattern or practice of discrimination. *Robinson,* 267 F.3d at 159.[11]

The evidence in the record in this case is sufficient to satisfy the United States' *prima facie* burden, and the TA cannot demonstrate that the United States' showing is either inaccurate or insignificant. This is not a case where one employee was denied an accommodation or singled out for more stringent enforcement of a workplace policy. In this case, the TA adopted uniform requirements for Muslim and Sikh employees that were not imposed on other employees, and every Muslim and Sikh employee who requested an accommodation with respect to those new requirements was denied that accommodation and singled out for strict enforcement of uniform requirements that other employees were not required to adhere to and/or routinely violated.

1. The United States' Claims Are Properly Framed as a Pattern or Practice of Religious Discrimination

In its motion, the TA argues at the outset that neither of the United States' claims can be maintained as pattern or practice claims because the United States has identified by name only ten (10) TA employees who are "victims" of the TA's "efforts to maintain or enforce its [uniform] policy." TA Mem. at 18-19. According to the TA, because thousands of TA employees are subject to its uniform policies, the number of employees identified by the United States is too small (less than 1% of its workforce by the TA's

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[11] Pattern or practice cases are typically bifurcated into two phases: the liability phase and the remedial phase. *See Teamsters*, 431 U.S. at 360-62; *accord Robinson*, 267 F.3d at 158. If the United States succeeds in the liability phase, notice will be sent to all TA employees governed by the policies and practices at issue to determine the identity of additional victims. Those victims, along with the ten Muslim and Sikh employees identified to date, would enter the remedial phase with a presumption in their favor "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy," *Robinson*, 267 F.3d at 159 (quoting *Teamsters,* 431 U.S. at 362), and would then present evidence of the individual harm each of them suffered. At the conclusion of briefing on the TA's motion for summary judgment, the United States will move to bifurcate the trial in this case.

calculations) to evidence the type of "widespread" discrimination necessary to establish a pattern or practice claim. *Id.*

Contrary to the TA's assertion, pattern or practice claims do not require a minimum number of affected employees or percentage of an employer's workforce and are not subject to the numerosity requirements for class actions; the crux of the claim is the discriminatory policy or practice itself, not the treatment of a particular individual employee. *See, e.g., Davoll v. Webb, et al.,* 194 F.3d 1116, 1147-48 (10th Cir. 1999) (affirming summary judgment for United States in pattern or practice case challenging a policy of failing to accommodate disabled employees; record contained evidence regarding three employees subjected to the policy); *Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 406 (2d Cir. 1981) ("If there were evidence that a policy of discrimination had been adopted, perhaps two or even one confirmatory act [against an individual employee] would be enough [to establish a discriminatory pattern or practice]"). For instance, if an employer has a practice of not hiring women, that practice is unlawful whether the employer denied employment to ten women or to 1000 women, and whether its workforce is 20 employees or 20,000 employees. Moreover, the TA's comparison of the number of employees within the protected category (*i.e.,* those whose religious beliefs conflict with the TA's uniform policies) and its thousands of other employees (*i.e.,* those who did not need or request religious accommodations) is irrelevant.[12] Here, every employee – *i.e.,* 100% – who is unable to comply for religious reasons with the TA's uniform policies has been subjected to disparate treatment and denied a reasonable accommodation.[13]

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[12] Moreover, given that the TA's workforce of 45,000 is – according to the TA – "of extraordinary racial, ethnic, and religious diversity," TA Mem. at 3, it is likely that additional employees will be identified (during the remedial phase of this case) who have been adversely affected by the TA's practices and/or will benefit from the relief sought by the United States in this case.

[13] The cases cited by the TA are inapposite. *See* TA Mem. at 19 n.70-71. In each of these cases, the court held that the plaintiff had not established the existence of a discriminatory policy or practice because the plaintiff had not shown that even a "substantial minority" of the protected class had been adversely affected by the alleged discriminatory policy. *See, e.g., EEOC v. Carrols Corp.*, No. 5:98 CV 1772, 2005 WL 928634 at *4-5, 2003 U.S. Dist. LEXIS 6157 (N.D.N.Y. Apr. 20, 2005) (holding that evidence that 333 women, out of 90,835 women employed by the defendant, had been harassed by different supervisors or co-workers at different stores did not show a pattern or practice of sexual

The TA also argues that the United States cannot bring a claim for a pattern or practice of failure to accommodate because pattern or practice claims are limited to disparate treatment – namely, "intentional" discrimination – claims. TA Mem. at 18. Denying a reasonable accommodation is a form of intentional religious discrimination under Title VII. Moreover, the statutory definition of "religion" in Title VII creates the religious accommodation duty, 42 U.S.C. § 2000e(j), and an employer is prohibited from breaching that duty. Most notable is Title VII's language making it "an unlawful employment practice for an employer . . . 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). As the Supreme Court explained in *Trans World Airlines, Inc. v. Hardison*: "the intent and effect of th[e] definition [of "religion"] was to make it an unlawful employment practice under § 703(a)(1)" of Title VII, 42 U.S.C. § 2000e-2(a)(1), "for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of [its] employees and prospective employees." 432 U.S. 63, 74 (1977); *see also Baker v. The Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006). In other words, an employer's refusal to reasonably accommodate an employee's sincerely held religious beliefs or practices is prohibited, and imposes liability under Title VII, because it constitutes intentional discrimination just the same as if the employer refused to hire or promote an employee based on his or her religious beliefs or practices. *See, e.g.*, 42 U.S.C. § 2000e-2(a).

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harassment); *Ste. Marie*, 650 F.2d at 406-07 (pattern or practice of discrimination against women in promotions not shown based on a few isolated promotion decisions where the evidence also showed that women were, on the whole, treated equally). These cases merely reaffirm *Teamsters'* holding that a discriminatory policy cannot be shown by "mere occurrence of isolated or 'accidental' or sporadic disciplinary acts." 431 U.S. at 336. Indeed, the court in *Ste. Marie* noted that "if there were evidence that a policy of discrimination had been adopted, perhaps two or even one confirmatory action would be enough." 650 F.2d at 406. Here, in contrast, there is ample evidence that the TA adopted a practice – later reflected in its written uniform policies – that adversely affected every identified member of the protected class (Sikhs, Muslims and similarly situated employees who wore religious head coverings).

Thus, the United States may properly bring its selective enforcement and religious accommodation claims as pattern or practice claims under Title VII.[14]

2. The TA Engaged in a Pattern or Practice of Religious Discrimination through Selective Enforcement of its Uniform Policies

The United States has presented evidence that the TA engaged in a pattern or practice of discrimination – later reflected in its written uniform policies – of singling out Muslim and Sikh employees for enforcement of uniform policies that other employees were not required to adhere to and/or routinely violated.

The TA has not presented sufficient evidence – supported by undisputed material facts in the record – to meet its burden of demonstrating that the evidence presented by the United States is "either inaccurate or insignificant." *Teamsters,* 431 U.S. at 360; *Robinson,* 267 F.3d at 159. Instead, the TA argues – without support in the record – that there is "no evidence" of selective enforcement of its uniform policies against the Muslim and Sikh employees at issue in this suit, and that these employees were not subject to adverse actions and there is "no evidence" of discriminatory motive on the part of the TA. TA Mem. at 35-36. In making these arguments, the TA ignores the applicable legal standard in pattern or practice cases, and relies on material facts that are disputed or simply ignores the facts altogether, including the testimony of the

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[14] The fact that the Muslim and Sikh employees identified to date as part of the United States case have filed their own suits against the TA has no bearing on the merits of the United States' pattern or practice claims. The Department of Justice brought this suit in its official enforcement capacity under Section 707 of Title VII, 42 U.S.C. § 2000e-6, and has an independent obligation and independent authority to pursue such claims regardless of whether the individual employees affected pursue those claims. The Department is charged with enforcing the provisions of Title VII for the benefit of individual aggrieved employees, as well as similarly situated employees who have not yet been identified, and to vindicate a broader public interest in preventing and remedying employment discrimination. 42 U.S.C. §2000e-6; Exec. Order No. 12,068, 43 Fed. Reg. 28971 (June 30, 1978). That interest and authority exist regardless of whether the individual employees affected have filed EEOC charges or their own lawsuits and, if so, regardless of defects in those charges or private actions. *See, e.g., EEOC v. Cont'l Oil Co.*, 548 F.2d 884, 887 (10th Cir. 1977) ("It was unquestionably the design of Congress in enactment of [section 707] to provide the government with a swift and effective weapon to vindicate the broad public interest, at a level which may or may not address the grievances of particular individuals.").

Muslim and Sikh employees subjected to the TA's discriminatory practices and the testimony of many of the TA's own managers.

As a threshold matter, the *McDonnell Douglas* burden shifting framework applicable to individual claims of disparate treatment does not apply to pattern or practice claims. In other words, the United States is not required to show that the TA's treatment of its Muslim and Sikh employees rises to the level of actionable adverse actions or that its purported reasons for that treatment are pretextual in order to establish a pattern or practice claim or to defeat the TA's motion for summary judgment. *Teamsters*, 431 U.S. at 360; *Robinson,* 267 F.3d at 158; *Morgan v. UPS*, 380 F.3d 459, 464 (8th Cir. 2004); *Davoll,* 194 F.3d at 1147-48.[15] Nevertheless, the TA's treatment of the individual Muslim and Sikh employees and the fact that its purported reasons for that treatment are not supported by the record are relevant anecdotal evidence of a pattern or practice of discrimination.

a. The record evidence shows that the TA has selectively enforced its uniform policies against Muslims and Sikhs

The record is replete with evidence that the TA systematically discriminated against Muslim and Sikh employees by imposing uniform requirements on them (*i.e.,* requiring them to affix TA logos to their religious head coverings) that were not imposed on other employees (*i.e.,* they were permitted to wear hats without any identifying TA logos), and strictly enforcing those policies against them while allowing rampant violations of the same policies by other employees. *Robinson*, 267 F.3d at 158 (citing *Teamsters*, 431 U.S. at 336); *see, e.g., Annis v. County of Westchester*, 136 F.3d 239, 247-48 (2d Cir. 1998) (a fact finder may infer the presence of unlawful discrimination from evidence that an employer's rules were selectively enforced); *Chescheir v. Liberty Mut. Ins. Co.*, 713 F.2d 1142, 1148 (5th Cir. 1983) (plaintiff may establish a *prima facie* case that a pattern or practice of selective enforcement exists by showing that, as a matter of

[15] Moreover, even if the evidence did not show that the individual Muslim and Sikh employees were harmed by the TA's discriminatory practices, summary judgment would be improper. If the TA fails to rebut the inference that arises from the United States' *prima facie* case, the United States may obtain injunctive relief regardless of the individual employees' entitlement to damages. *Teamsters*, 431 U.S. at 361.

regular policy, employees outside the protected class "were given the benefit of a lenient company practice or were not held to compliance with a strict company policy; and . . . [employees in the protected class were] disciplined either without the application of a lenient policy, or in conformity with a strict one."); *see also Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989).

Evidence in the record shows that – after the TA changed its uniform policy to require Muslim and Sikhs to affix TA logos to their turbans and khimars and at the same time TA managers went out of their way to ensure that Muslims and Sikhs complied with that requirement – the TA continued to issue and allow other employees working in passenger service to wear hats without any TA identifying logos. RSOF at ¶¶ 3, 13, 19, 31. Indeed, the TA issued hats that were not obviously part of a uniform and bore no TA identifying logo, including a Russian-style faux fur hat and baseball hats with eagle and star logos. *Id.* at ¶ 13. Some of the TA's own managers were shown photographs of these hats and did not know that the hats were part of the TA uniform. *Id.* In short, the only employees actually required to wear TA logos on their heads were those who could not do so for religious reasons. *See, e.g., Kalsi v. New York Transit Auth.*, 62 F. Supp. 2d 745, 754-755 (E.D.N.Y. 1998) (an inference of discrimination may result from evidence that rules were enforced selectively).

The TA's claim that the Muslim and Sikh employees had "got[ten] away with" violating its uniform policies for years by wearing their turbans and khimars, and were simply caught up in the TA's effort, in mid-2002, to have "across-the-board, neutral enforcement" of those policies for all of its uniformed employees[16] is simply not supported by the record. The evidence in the record shows that – prior to 2002 – it was not a violation of TA uniform policies for Muslim and Sikh employees to wear khimars and turbans: Muslim bus operator Lewis, Sikh train operator Harrington and Sikh station agent Singh wore their khimars and turbans (without TA logos) to work every day for more than 10 years. TA supervisors checked these employees for compliance with TA uniform policies – in some cases daily for years – and never told them

[16] TA Mem. at 4, 9, 10, 13.

that their head coverings violated any TA policies. RSOF at ¶¶ 14, 16, 16(c), 20, 28, 31. And, many of the TA's own supervisors conceded that the wearing of religious head coverings without TA logos did not violate any uniform policy prior to 2003 (for buses) and 2004 (for trains and stations), when the TA changed those policies – after the fact – to make the wearing of those garments a violation. *Id.* at ¶¶ 16, 20, 28.

These Muslim and Sikh employees were not merely caught up in a broader effort by the TA to enforce its uniform policies "across-the-board." Instead, the evidence shows that the TA began enforcing its uniform policies stringently and selectively against Muslim bus operators who wore khimars beginning in March 2002, and many TA supervisors testified that they were not aware of any broad effort on the part of the TA to strengthen or otherwise beef up enforcement of the uniform policies after the events of September 11, 2001.[17] In fact, several TA managers conceded that they had been specifically instructed to monitor whether the Muslim and Sikh employees were complying with the TA's new logo requirement for religious head wear, but that they had never been asked to monitor any other individual employees that way. *Id.* at ¶¶ 14, 32.

Finally, in contrast to the rigid enforcement of the newly imposed uniform requirement against Muslims and Sikhs, other TA employees had been violating and continued to regularly violate TA uniform policies (for instance, by wearing secular hats) without consequence. *Id.* at ¶¶ 12, 16, 16(e). Evidence in the record shows that – at the time it began enforcing its new uniform requirements against Muslims and Sikhs – the TA allowed employees to wear FDNY and NYPD hats. *Id.* at ¶ 12; TA SOF at ¶ 14. The Muslim and Sikh employees at issue in this case testified that they regularly observed co-workers wearing non-TA-issued

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[17] To the extent the TA made any effort to enforce its uniform policies more consistently, that effort came well after it began enforcing those policies against Muslim bus operators. For instance, the first documentary evidence in the record regarding the TA's alleged efforts to beef up enforcement of its uniform policies for bus operators after September 11, 2001 is a Permanent Bulletin – issued November 17, 2003 – which indicates that it was issued in response to the grievance filed by the Muslim bus operators. That bulletin states that the arbitrator determined in ruling on that grievance that there was "lax enforcement" by the TA of its uniform policies, and reminds supervisors they need to "pay attention to what employees in passenger service are wearing to ensure that everyone is complying" with the uniform policies. RSOF at ¶ 14.

head coverings without being instructed to remove them by supervisors or disciplined in any way; and many of the TA's own supervisors conceded that they frequently saw employees working in passenger service wearing non-compliant headwear, including Yankees and Mets caps. RSOF at ¶ 12. In addition, the United States conducted a field study in which several Department of Justice employees observed TA bus and subway employees at work during two periods totaling approximately eleven hours over three days in early 2005. During that short time at a small fraction of the TA's worksites, they observed more than 200 instances of TA employees violating uniform policies, including approximately 100 employees working in passenger service wearing non-TA-issued head coverings with no visible TA logos, including knit hats (plain and with brand logos, such as North Face and Columbia Sportswear), NY Yankees/Mets hats, a variety of baseball hats, headbands, berets, kufis and a fur hat. *Id.* The sheer volume of open and obvious violations by so many employees confirms that the TA was not in the midst of an "across-the-board" effort to enforce its uniform policies.

b. The record evidence shows that TA's selective enforcement of its uniform policy adversely affected Muslims and Sikhs

The TA claims that it did not subject Muslim and Sikh employees to any adverse employment action because it never "disciplined [them] for violating employment rules for religious reasons." TA Mem. at 21-22. According to the TA, even if the employees "feared" termination, because they were not issued formal "disciplinary action notices" or actually fired, the TA's treatment of them did not constitute adverse action. TA Mem. at 7-9, 21-22, 29-30. Although the United States is not required to show that the TA's treatment of its Muslim and Sikh employees rose to the level of actionable adverse actions in order to establish a pattern or practice claim or to defeat the TA's motion for summary judgment, *Teamsters*, 431 U.S. at 360, the TA's position is simply not supported by the record. The record contains ample evidence to show that the TA's treatment of its Muslim and Sikh employees – taken as a whole – did rise to the level of adverse employment action.

As an initial matter, the record is clear that issuance of a formal disciplinary action notice (or "DAN") is not a prerequisite for adverse action by the TA. RSOF at ¶¶ 9, 11. For instance, the TA terminated the employment of Muslim bus operator Alkebulan (twice) for her inability to comply with portions of its uniform policies for religious reasons, and failed to pay her for three days when she was held out of service following her termination, without ever issuing her a formal DAN. *Id.* at ¶ 16(b) (which includes testimony from one TA supervisor, Jennifer Sinclair, that removing Alkebulan from service was "an attempt to discipline her" that was reversed by upper management when "some of the executive-level staff . . . got on notice that the discipline had been issued."). Similarly, the TA removed Muslim Stephanie Lewis from her position as a station agent (the only job she was medically able to perform due to a work-related injury), and subsequently terminated her employment because she refused to violate her religious beliefs by affixing a TA logo to her khimar. *Id.* at ¶ 42. Such actions plainly rise to the level of actionable adverse actions, even where the employer (as the TA did with Alkebulan) reverses the action after a challenge by the employee. *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004); *Crawford v. Carroll*, 529 F.3d 961, 972 (11th Cir. 2008) ("To conclude otherwise would permit employers to escape Title VII liability by correcting their discriminatory and retaliatory acts after the fact."); *Phelan v. Cook County*, 463 F.3d 773, 780 (7th Cir. 2006).[18]

Regardless of the TA's narrow definition of what constitutes "discipline," evidence in the record demonstrates that Muslim and Sikh employees were subjected to actions that affected the terms and conditions of their employment. *Khan v. Fed. Reserve Bank of N.Y.*, No. 02-Civ-8893, 2005 WL 273027 at *5, 2005 U.S. Dist. LEXIS 1543 at *17 (S.D.N.Y. Feb. 2, 2005) (in analyzing whether an employee was subjected to adverse action, the analysis is "not limited to what is conventionally understood to be 'discipline.'"). These employees were singled out for strict application of uniform policies that other

[18] In addition, Muslim bus operator Deirdre Small was held out of service – without pay – for a day because she refused (for religious reasons) to wear a TA hat over her khimar. She was never paid those lost wages. RSOF at ¶ 16(h).

employees freely violated, subjected to logo requirements to which others were not required to adhere, harassed by supervisors, verbally reprimanded and written up repeatedly, threatened with discipline if they did not comply (including removal from service and termination) and, in some cases, terminated and/or involuntarily transferred out of their jobs and stripped of the benefits of their seniority. RSOF at ¶¶ 16(a)-(d), 16(f), 16(h), 16(j), 17-22, 25-26, 34, 42.[19] That treatment was punitive and – considered collectively – adversely affected the day-to-day work of Muslim and Sikh employees who failed to comply with the conflicting uniform requirement. *See Bass v. Bd of County Comm'rs, Orange County, Florida*, 256 F.3d 1095, 1117-18 (11th Cir. 2001) (depriving employee of opportunity to earn overtime pay, forcing him to perform custodial and clerical duties under supervision of less senior personnel, and requiring him to take tests – considered collectively – constituted adverse action); *Fowler v. New York City Transit Auth.*, No. 96 CV 796, 2001 WL 83228 at *6, 2001 U.S. Dist. LEXIS 762 at *17-21 (S.D.N.Y. Jan. 31, 2001) (series of actions by employee's supervisors, including canceling previously approved training, altering job duties, taking away the employee's desk, and humiliating the employee – when viewed in the aggregate – may constitute adverse action).[20]

Moreover, the TA's heightened monitoring of its Muslim and Sikh employees and constant threats of further disciplinary action (including removal from service and termination) constituted adverse actions

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[19] For instance, the Sikh station agents were repeatedly questioned by TA supervisors about why they would not affix the logos to their turbans even after they provided that information in writing several times. RSOF at ¶ 34.

[20] Evidence in the record shows that the verbal and written reprimands and citations received by the Sikh station agents were one step in the disciplinary process and that reprimands and citations are used by the TA to justify further disciplinary action, including termination. RSOF at ¶¶ 9, 11; *see also id.* at ¶ 34 (citing testimony from a TA manager that "if [Sikh train operator Harrington] continued not to wear the logo, then he would continue to be disciplined for other instances . . . [including] dismissal."). Such verbal and written reprimands contribute to the adverse nature of the TA's treatment, particularly where, as here, they increase the individual's risk of termination. *See Sanders v. N.Y. City Human Res. Admin*, 261 F.3d 749, 756 (2d Cir. 2004); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (holding plaintiff had submitted sufficient evidence that warnings were adverse action because "the record indicates that the more warnings an employee received, the more likely he or she was to be terminated for a further infraction.").

even if the TA did not follow through on all of those threats. The Sikh station agents (and Sikh train operator Harrington) understood that, if they did not comply with the TA's new logo requirement (even for religious reasons), they would be subject to further disciplinary action, including termination. RSOF at ¶¶20, 27, 34, 36. The fact that they agreed – under protest and to avoid termination – to violate their religious beliefs by affixing TA logos to their turbans pending the outcome of this litigation does not make the TA's treatment of them any less adverse. When faced with the threat of adverse action, "an employee ... is not required to violate employment rules and suffer the consequences before she is able to bring suit." *Khan,* 2005 WL 273027 at *5 (threats of discipline or other adverse action are sufficient where the threat is causally related to the conflict between employer's policy and employee's religion); *Rodriguez v. City of Chicago,* No. 95 CV 5371, 1996 WL 22964 at *3, 1996 U.S. Dist. LEXIS 533 at *8 (N.D. Ill. Jan. 12, 1996) ("It is nonsensical to suggest that an employee who, when forced by his employer to choose between his job and his faith, elects to avoid potential financial and/or professional damage by acceding to his employer's religiously objectionable demands has not been the victim of religious discrimination.").[21]

Finally, the TA's involuntary transfers – which it characterizes as lateral "reassignment" to "extremely desirable" positions – also adversely affected Muslim and Sikh employees. TA Mem. at 22-23,

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[21] Although courts have stated that unfulfilled threats that are not conditioned on a plaintiff acquiescing to discrimination are not adverse actions under Title VII, *see, e.g., Brightman v. Prison Health Serv., Inc.*, No. 05 CV 3820 (SLT), 2007 WL 1029031 at *7 n.4, 2007 U.S. Dist. LEXIS 23724 at *20, n.4 (E.D.N.Y. March 30, 2007); *Presley v. Pepperidge Farm, Inc.*, 356 F. Supp. 2d 109, 125 (D. Conn. 2005) (holding supervisor's "action of threatening to suspend [employee] . . . is not a tangible employment action because the threat was not conditioned upon [employee] submitting to further sexual harassment"), when an employer's threat is unfulfilled only because an employee submitted to an employer's discriminatory demands, that employee has suffered an adverse action. *See, e.g., M'on Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 97-98 (2d Cir. 2002) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) for the proposition that "a submission case is inherently different from a typical unfulfilled threat case" and holding that a plaintiff may suffer a tangible employment action if she submits to threats to avoid other harm); *Siddiqi v. N.Y. City Health & Hosps. Corp.*, 572 F. Supp. 2d 353, 370 (S.D.N.Y. 2008) (holding the "threat of an adverse action may be sufficient"); *Pozo v. J & J Hotel Co.,* 2007 WL 1376403 at *18, 2007 U.S. Dist. LEXIS 34143 at *67 (S.D.N.Y. May 10, 2007) (same); *Khan*, 2005 WL 273027 at *5 (same).

34. "A lateral transfer that does not result in a reduction in pay or benefits may be an adverse action so long as the transfer alters the terms and conditions of the plaintiff's employment in a materially negative way." *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 310 F.3d 43, 51 (2d Cir. 2002) (internal citation omitted). Such a materially negative effect may be indicated by "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.*[22]

The evidence in the record shows that these involuntary transfers altered the terms and conditions of the Muslims' and Sikhs' employment, limited their ability to earn overtime pay and essentially abrogated their seniority rights. The undisputed evidence shows that the primary benefit of seniority is the ability to pick particular jobs, which includes choosing whether to work in passenger or non-passenger service, whether to work routes or shifts with built-in overtime, as well as choosing routes or shifts with set duties (as opposed to the "extra" duties that vary from day-to-day). RSOF at ¶¶ 16(d), 16(h)-(i), 20. The TA's purported accommodation (*i.e.*, involuntarily transfer) effectively eliminates that benefit and forces employees to choose between their religious practices and exercising their seniority rights. Moreover, the Muslim and Sikh employees at issue in this case did not view these yard and depot jobs as "extremely desirable." In fact, they viewed those jobs as less desirable because, among other things, they did not involve any customer contact; the working conditions were less desirable (a bus depot filled with fuel fumes); they were required to perform janitorial duties; and they were harassed by supervisors and co-workers. *Id.* at ¶ 16(d).

Overall, the TA's treatment of its Muslim and Sikh employees must be viewed as a whole. Taken as a whole, the record contains an abundance of evidence that the TA's treatment of its Muslim and Sikh

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[22] *See also Cruz v. New York City Human Res. Admin. Dep't of Soc. Serv.*, 82 F.3d 16, 21 (2d Cir. 1996) (holding that employee's transfer to a unit with less opportunity for advancement was sufficient evidence of adverse action to survive summary judgment); *Fowler v. N.Y. Transit Auth.*, 2001 WL 83228 at *6, 2001 U.S. Dist. LEXIS 762 at *19 (S.D.N.Y. Jan. 31, 2001) (holding that sufficient evidence supported the jury's finding that the loss of a desk was an adverse action).

employees adversely affected the terms and conditions of their employment, and that the TA engaged in a pattern or practice of discrimination.

c. The TA's stated non-discriminatory rationale for its treatment of its Muslim and Sikh employees is not supported by the record

In a pattern or practice case such as this, the United States is not required to demonstrate that the TA's asserted rationale for its treatment of Muslim and Sikh employees is merely a pretext for discrimination under the *McDonnell Douglas* burden shifting framework. *Robinson,* 267 F.3d at 159. Nonetheless, the fact that the TA's purported rationale for its treatment of these employees is not supported by (and, in many instances, is directly contradicted by) the testimony of the TA's own supervisors is further anecdotal evidence of a pattern or practice of discrimination.[23]

For instance, the TA has asserted that its treatment of its Muslim and Sikh employees (including its strict enforcement of the new logo requirement) was not discriminatory, but rather merely part of a broader effort to enforce a neutral uniform policy that is necessary to ensure that individuals are identifiable as TA employees and to present a uniform professional appearance to the public. TA Mem. at 4, 24-25, 36. However, as discussed in part IV.A.2.b above, the undisputed facts demonstrate that Muslim and Sikh employees wore their turbans and khimars (without TA logos) for many years and were identifiable as TA employees. There is no evidence that the wearing of turbans or khimars without TA logos interferes with identifiability or creates an unprofessional appearance. RSOF at ¶ 4. In fact, Sikh train operator Kevin Harrington safely evacuated scores of passengers from the subway on September 11, 2001; there is no evidence that any passengers were unable to identify him as a TA employee. *Id.* Many TA managers (including those involved in the implementation of the new logo requirement and/or responsible for

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[23] In challenging the factual bases for the TA's purported rationale for its treatment of these Muslim and Sikh employees, the United States never argued that the TA's policies were "silly" or "unwise," or questioned the TA's ability to impose uniform requirements on its employees. TA Mem. at 36. To the contrary, the United States questioned the TA's reasoning for adopting its policies because that reasoning appears to be post-hoc rationalization following legal challenges to those policies, and is not supported by the record.

enforcing TA uniform policies) testified that the wearing of turbans and khimars – even without TA logos affixed to them – did not result in a less professional appearance or interfere with a passenger's ability to identify that person as a TA employee. *Id.* Indeed, the issue of identifiability was not raised with any of the Sikh employees when they were being harassed about complying with the newly imposed logo requirement, and the TA managers who created the logo requirement conceded that the issue of identifiability was not even discussed at the meetings in which that requirement was adopted. *Id.* at ¶¶ 4, 24.

As the Supreme Court made clear in *Reeves v. Sanderson Plumb. Prods., Inc.*, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." 530 U.S. 133, 147 (2000); *Kalsi v. New York Transit Authority*, 62 F. Supp. 2d at 755 (an inference of discrimination may result from evidence that a Sikh employee was disciplined for violating a policy while other non-Sikh employees were not disciplined for engaging in similar conduct) citing *Shumway v. United Parcel Serv.*, 118 F.3d 60, 63 (2d Cir. 1997); *Feingold*, 366 F.3d at 153 (evidence that similarly situated non-Jewish employees were not disciplined for similar rule infractions gives rise to an inference of religious discrimination).

Overall, the record contains ample evidence demonstrating that (1) the TA has engaged in a pattern or practice of selectively enforcing its uniform policies against its Muslim and Sikh employees, (2) that selective enforcement adversely affected the terms and conditions of employment for Muslims and Sikhs, and (3) the TA's purported non-discriminatory rationale for such treatment is unsupported by the record.

3. The TA Has Engaged in a Pattern or Practice of Religious Discrimination by Failing to Accommodate the Religious Practices of its Muslim and Sikh Employees

The evidence in the record also demonstrates that the TA has failed to accommodate the religious beliefs and practices of Muslims and Sikhs as required by Title VII. The evidence demonstrates that the TA's standard operating procedure is to deny Muslim and Sikh employees reasonable accommodations for their religious practices under the guise of enforcing a uniform policy, even though reasonable accommodations exist that would resolve the religious conflict without imposing an undue burden on the

TA. *Teamsters*, 431 U.S. at 336. The TA has not put forth sufficient evidence – supported by undisputed material facts in the record – to meet its burden of demonstrating that the evidence presented by the United States is "either inaccurate or insignificant." *Teamsters,* 431 U.S. at 360; *Robinson,* 267 F.3d at 159; *Davoll,* 194 F.3d at 1147-48.

The TA argues that this claim should be dismissed because it never "disciplined" these employees for their non-compliance with its uniform requirements; its repeated "expansions" of its uniform policies were reasonable accommodations as a matter of law; and, even if they were unreasonable, no other accommodation would be reasonable without imposing an undue hardship on the TA. TA Mem. at 22-30. In making these arguments, the TA ignores its burden to demonstrate – with admissible evidence – that there is "no genuine issue as to any material facts." FED. R. CIV. P. 56. As discussed in Part IV.A.2.b, above, evidence in the record shows that the TA took adverse action against its Muslim and Sikh employees for violating its uniform policies. The record further shows that the TA's purported accommodations were not reasonable, and that reasonable accommodations were available that would not have imposed an undue hardship on the TA. At a minimum, factual disputes underlying these issues preclude summary judgment.

a. The TA's purported accommodations did not resolve the religious conflicts and were not reasonable

A religious accommodation is reasonable only where it "eliminates the conflict between employment requirements and religious practices." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986). Moreover, the analysis of the reasonableness of an accommodation is highly fact specific and "ordinarily, questions of [an accommodation's] reasonableness are best left to the fact finder." *Baker*, 445 F.3d at 548 (internal quotation omitted). That issue cannot be determined at the summary judgment stage, where, as here, many of the material facts regarding the reasonableness of the TA's purported accommodation are in dispute, and must be construed in favor of the United States.

For instance, the TA's representations to the Court regarding the context in which its purported accommodations arose are disputed and not supported by the record. The Muslim and Sikh train and bus

operators at issue in this case (other than 2002 new hire Alkebulan) had been wearing their khimars and turbans (without TA logos) for years while working in passenger service. RSOF at ¶¶ 16, 20, 28. According to the TA, however, these employees had in fact been "violating" TA uniform policies every day for years by doing so, and their requests for accommodation arose only after the TA attempted to enforce existing uniform policies against them. To the contrary, the evidence in the record demonstrates that these employees were not violating any TA policies by wearing their turbans and khimars, and the TA changed its uniform policies – after the fact – to make the wearing of those garments a violation. *Id.* at ¶¶ 13, 16, 16(f), 19-20, 28. The record is replete with evidence that prior to 2002, supervisors checked these employees for compliance with TA uniform policies – in some cases daily for years – and never told them that their head coverings violated any TA policies. *Id.* at ¶ 28. Further, several TA managers testified that wearing turbans and khimars without TA logos was not a violation of the TA's uniform policy prior to 2003 (when the TA changed the policy to make it a violation). *Id.* at ¶¶ 16, 19, 20, 28.

Similarly, as explained above, the TA's claim that it repeatedly "expanded" its uniform policies to accommodate these employees is not supported by the record. To the contrary, the evidence in the record shows that the TA's so-called "expansions" of its uniform policies actually imposed new requirements on Muslim and Sikh employees that were not imposed on other employees and created – rather than eliminated – the religious conflicts at issue in this case. *See infra* at pp. 3-6, 12.

It is also notable that the TA did not discuss the new logo requirement with the Muslim and Sikh employees who would be affected by this policy change (including the Muslims and Sikhs at issue in this case, several of whom had already requested accommodations regarding their religious head coverings) before it decided to adopt the change in mid-2004. Ordinarily, employers engage in the interactive process with the affected employee(s) to resolve religious conflicts, at least in part because the religious beliefs and practices – and, hence, the conflict – may vary from employee to employee. *Ansonia*, 479 U.S. at 69 (recognizing that the search for a reasonable accommodation requires "bilateral cooperation" between the employer and the employee). Instead, the TA adopted these requirements – apparently based on its

understanding that some Muslims and Sikhs may not object to affixing logos to their khimars and turbans – and then demanded that all of its Muslim and Sikh employees adhere to them, regardless of whether that requirement conflicts with the beliefs of those employees.[24]

i. TA's purported accommodation for bus operators and train operators is not reasonable

The TA cannot establish *as a matter of law* that it reasonably accommodated its Sikh and Muslim bus and train operators by "reassigning" or offering to reassign them to jobs where they would be allowed to wear their turbans or khimars without TA logos. "An offer of accommodation may be unreasonable if it causes an employee to suffer an inexplicable diminution in his employee status or benefits," *i.e.*, "if it imposes a significant work-related burden on the employee without justification." *Baker*, 445 F.3d at 548 (quoting *Cosme v. Henderson*, 287 F.3d 159, 160 (2d Cir. 2002)). As noted above, the nature of these "reassignments" is disputed. The evidence in the record shows that they were involuntary transfers that altered the terms and conditions of the charging parties' employment and essentially abrogated their seniority rights, placing them in a work environment they viewed as less desirable, subjecting some of them

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[24] The TA asserts that it had "a discussion" with four Muslim and Sikh "representatives" from other government agencies "whose employees may wear uniforms" and those Muslims and Sikhs felt that affixing a TA logo to khimar or turban "would be acceptable." TA Mem. at 5. As set forth in the RSOF at ¶ 24, the TA description of that discussion is incomplete and not entirely accurate. The TA also asserts that it has a newspaper article about and some photographs of Sikhs who do not wear turbans or who wear logos on their turbans (typically high-ranking military officials) or jewelry (during wedding ceremonies) on their turbans. TA Mem. at 11; Decl. of Richard Schoolman attached thereto at ¶ 9. Those points, however, are not relevant to the analysis on this motion. First, the Muslims and Sikhs at issue in this case did object to the logo requirement and the TA (at least for purposes of this motion) has not challenged the sincerity of that objection. Second, the fact that some Muslims and Sikhs might agree to affix corporate logos to their khimars and turbans does not make it a reasonable accommodation for the TA to impose that requirement on all Muslims and Sikhs. For instance, the fact that a few Jewish employees may not object to working on their Sabbath does not mean that all other Jewish employees would not object to being required to work on their Sabbath and, as such, it is reasonable for an employer to require those employees to work those days. *See Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 715 (1981) (that other members of the religion had no religious conflict should not be given significant weight and "it is not within the judicial function to inquire whether the petitioner or his fellow worker more correctly perceived the commands on their common faith); *Baker*, 445 F.3d at 547 ("the question of the sincerity of an individual's religious beliefs is inherently within that individual's unique purview").

to a bus depot full of fumes, depriving them of customer contact, subjecting them to harassment, and limiting their opportunities for overtime pay – all as the price for maintaining their religious beliefs and practices. RSOF at ¶¶ 5, 17, 22. Accordingly, the United States has presented evidence that these transfers amounted to "an inexplicable diminution in employee status or benefits" and thus were not reasonable accommodations.[25]

For instance, in *Brown v. F.L. Roberts & Co.*, a Rastafarian automobile technician was unable to comply with Jiffy Lube's new no-facial-hair policy due to his religion and requested an accommodation. 419 F. Supp. 2d 7 (D. Mass. 2006). Jiffy Lube purported to accommodate the employee by having him perform essentially the same duties in a lower bay area away from customers, with no reduction in pay. The employee viewed the accommodation as unreasonable, arguing that it adversely affected the terms and conditions of his employment by depriving him of customer interaction duties, and forcing him to work in a less desirable environment (the lower bay was apparently cold and isolated). The court agreed, concluding that a jury may find that such a lateral transfer constitutes adverse action, rather than an accommodation, noting that: "it would be distasteful to suggest that employers can legally single out employees who assert inconvenient but bona fide religious beliefs and isolate them in unappealing work environments without 'adversely' affecting the condition of their employment." *Id.* at *13.[26] As in *Brown*, the TA's unilateral

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[25] In recounting its accommodation efforts to the Court, the TA points almost entirely to the purported accommodations it made (*e.g.*, the logo or involuntary transfer) well after it took adverse actions against these employees (*e.g.*, after it fired Alkebulan, twice) and after some of those employees filed discrimination charges and/or lawsuits. The TA's earlier treatment of these employees violated Title VII; and its later accommodations, even if found to be reasonable, do not negate the illegality of its earlier actions. *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993) (cited by the First Circuit in *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004) for the proposition that "an accommodation offered after an adverse employment action does not shield an employer from liability under Title VII").

[26] In a parallel under Massachusetts state law, *Brown v. F.L. Roberts & Co.*, __ N.E.2d __, 452 Mass. 674, 2008 WL 5050172, 2008 Mass. LEXIS 793 (Mass. Dec. 2, 2008), the Supreme Judicial Court of Massachusetts issued a decision echoing that of the federal court.

relegation of employees whose religious beliefs preclude them from complying with the new logo requirement to jobs without customer contact is not a reasonable accommodation.[27]

The TA further argues that its purported accommodation was reasonable because some of the Sikh employees "agreed" to affix TA logos to their turbans, thereby resolving the religious conflict. TA Mem. at 12, 14, 21, 28, 34. The record, however, negates – or is at best disputed with respect to – that issue. Evidence in the record shows that these employees objected repeatedly to affixing TA logos to their turbans and khimars and that some of them did so – under protest and under the threat of discipline or termination – only to keep their jobs pending the outcome of this litigation. For example, the TA asserts that Sikh train operator Kevin Harrington cannot challenge the reasonableness of the TA's purported accommodation requiring him to affix a TA logo to his turban because he "accepted without religious objection" that accommodation, only to "change his mind" later. TA Mem. at 28. Harrington did not, as the TA asserts, agree "without reservation" to affix a TA logo to the turban; to the contrary, he adamantly opposed affixing a corporate logo to the turban he had been wearing without a TA logo while operating TA trains for more than 20 years, and ultimately filed a lawsuit against the TA over that requirement. RSOF at ¶¶ 20, 25.

ii. TA's purported accommodation for station agents is not reasonable

The TA failed to offer any reasonable accommodation to the station agents who could not comply with the TA's newly imposed logo requirement for religious head coverings. Under that purportedly "expanded" uniform policy, station agents are required to affix TA logos to their turbans and khimars; the policy provides for no other alternatives, even if that requirement creates a religious conflict. RSOF at ¶¶31, 35.

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[27] *Birdi v. United Airlines Corp.*, No. 99 C 5576, 2002 WL 471999 (N.D. Ill. Mar. 26, 2002) is not, as the TA claims, "precisely on point." TA Mem. at 22-23. Unlike the plaintiff in *Birdi*, the United States is not arguing that the offered accommodations are unreasonable solely because they eliminate the opportunity to interact with customers. Rather, the loss of customer contact is one of several aspects of the "reassignments," which, taken together, imposed a significant work-related burden on Sikh and Muslim employees.

The unreasonableness of that policy is evidenced by the TA's application of it to Muslim Stephanie Lewis. Lewis worked as a TA bus operator for more than 13 years. In 2004, due to a work-related injury, she no longer was able to operate buses and sought re-classification to a less physically demanding job. She was reclassified as a station agent in 2005. *Id.* at ¶ 42. As soon as she began working as a station agent, TA supervisors demanded that she affix a TA logo patch to her turban pursuant to the TA's "expanded" uniform policy. Lewis refused because doing so would violate her religious beliefs. *Id.* The TA claims that it "accommodated" Lewis by allowing her to work as a station agent provided she affixed a TA logo to her khimar – even though that purported accommodation did not resolve the religious conflict. TA Mem. at ¶¶30-33.[28] The TA offered Lewis no accommodation that would resolve that conflict. Instead, the TA rescinded the re-classification, removed Lewis from the station agent job altogether and, because Lewis was medically unable to perform any other job, terminated her employment. In short, Lewis was fired because she would not violate her religious beliefs by affixing a TA logo to her khimar. RSOF at ¶¶ 42, 44.[29]

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[28] The TA claims that this accommodation is nonetheless reasonable because Lewis initially agreed to affix a TA logo to her khimar and only later changed her mind. TA Mem. at 32. Again, the TA's position is simply not supported by the record. At both of Lewis's depositions, she testified that her reference in her June 7, 2004 Compl. (at ¶ 34) to wearing a khimar with a TA "logo on top" referred to her suggestion – long before there were any discussions of affixing TA logo patches to religious head coverings – that she could fashion a khimar out of the TA tie fabric that has small NYCTA letters printed on the fabric. Ex. 197 (Dep. of Stephanie Lewis ("Lewis Dep."), Jan. 27, 2005, at 223-224); Ex. 198 (Lewis Dep., Nov. 16, 2005, at 323-324); *see also* Ex. 105 (TA letter to Judge Go, Feb. 27, 2006 (TA attorney Schoolman stating that the "khimar-with-a-logo-on-it alternative . . . did not come into existence at the Transit Authority until October 2004)). It was the TA, not Lewis, that rejected that proposal, *id.*; and there is no evidence in the record that Lewis ever agreed to affix the TA logo patch to her khimar as required under the TA's current uniform policy.

[29] The Second Circuit's decision in *Baker*, 445 F.3d at 541, is informative. In that case, a Home Depot employee requested that he not be scheduled to work on Sundays because, pursuant to his religion, he views Sunday as a day of rest. Home Depot allowed him to not work Sundays for a while, but later told him that he would have to work Sundays. The employee requested an accommodation that would not require him to work Sundays; Home Depot rejected that request and instead offered to schedule him to work Sunday afternoons and evenings, but not Sunday mornings (so he could attend church). The Second Circuit reversed the district court's order granting summary judgment for Home Depot, reasoning that Home Depot's purported accommodation was unreasonable because it did not resolve the religious conflict. *Id.* at 548.

The TA failed to offer any reasonable accommodation to the Sikh station agents. According to the TA, it accommodated the Sikh station agents *as a matter of law* because it "made an unconditional offer to discuss with them their getting other positions" that did not have the logo requirement for religious head wear, and the station agents rejected that offer. TA Mem. at 30. However, both that purported "unconditional offer" (which was made by TA counsel) and the Sikh station agents' response (through their attorney) occurred in the context of settlement discussions and, as such, are not admissible for purposes of determining liability. FED. RULE CIV. P. 408; RSOF at ¶ 35 (including letter from TA counsel, Aug. 5, 2005, referring to his meeting with the attorney for the Sikh station agents as "a settlement discussion.").

Nevertheless, because the TA has introduced those discussions as evidence of the reasonableness of its purported accommodations, to the extent they are considered by the Court, the alternative accommodations proposed by the Sikh station agents should also be considered. The week before the Sikh station agents rejected the TA's purported "offer," the parties in all of the consolidated cases had a settlement conference with the Magistrate Judge during which they discussed other accommodation options that would not require the affected employees to violate their religious beliefs by affixing TA logos to their religious head coverings. RSOF at ¶ 35. The plaintiffs (the United States and the Muslim and Sikh employees identified to date in this consolidated litigation) proposed alternatives that would address the TA's concerns about identifiability, including allowing the employees turbans and khimars (without TA logos) in the TA uniform color provided they add TA logo patches to the fronts and/or collars of their uniform shirts, or prominently display their TA photo identification cards. *Id.*[30] The TA rejected those proposed alternative accommodations.

Even if the TA's purported "unconditional offer" were to be considered by the Court, the evidence in the record shows – or is, at a minimum, disputed – as to the reasonableness of that "offer." The record is clear that: the Sikh station agents objected to affixing TA logos to their turbans and requested an

[30] The Sikh station agents had previously proposed these same alternative accommodations to the TA, which the TA rejected. RSOF at ¶ 35.

accommodation (RSOF at ¶¶ 33, 35); there were no station agent positions available that did not involve passenger interaction (TA SOF at ¶ 44; RSOF at ¶ 35); and the TA did not actually offer these employees any positions that did not have similar uniform requirements or would otherwise resolve the religious conflict. RSOF at ¶ 35. Instead, the TA's "unconditional offer" was a suggestion by TA counsel that the Sikh station agents give up their station agent jobs altogether and "apply" through the regular civil service process for other jobs within the TA that do not require uniforms. *Id.* The Sikh station agents viewed the TA's purported accommodation offer as unreasonable and, in effect, meaningless because, among other things, the civil service hiring process takes years. For example, Sikh station agent Satinder Arora initially applied for employment with the TA in or about 1997, took and passed the civil service test in 1997, and then waited approximately seven years before being hired in early 2004. Under that same process, Arora (who has a bachelor's degree in electronic engineering and a two-year degree in mechanical engineering), applied for more than 20 other jobs within the TA between 2004 and 2007, primarily electrical engineer jobs. Despite his credentials, he was not hired for one of those other jobs until October 2007, and once hired into that new title, had to start at the bottom of the seniority list for picking purposes. *Id.* In short, not only would the process of "applying" and being hired for other jobs take years, but the Sikh station agents also believed that, even if they could eventually obtain other non-uniformed jobs with the TA, that they would be forced to start over in their careers, including losing the seniority in terms of picking their schedules, work locations, *etc.* they had accumulated in their station agent positions over the years. *Id.*

In *EEOC v. United Parcel Service*, the Court of Appeals for the Seventh Circuit found a similar accommodation unreasonable. In that case, a Muslim employee could not, for religious reasons, comply with UPS' policy prohibiting employees working in customer contact positions from wearing a beard. 94 F.3d 314, 315 (7th Cir. 1996). UPS moved for summary judgment, arguing that it had accommodated the employee by offering him a comparable non-public-contact job, and the district court granted that motion. The Court of Appeals reversed, reasoning that there was evidence in the record that the employee was told that, under UPS' seniority and transfer system, he would have had to wait as much as two years to actually

obtain a comparable non-public-contact position. As such, the Court concluded, the employee was not offered a reasonable accommodation. *Id.* at 319-321.[31]

b. Other accommodations exist that would eliminate the religious conflict without imposing an undue burden on the TA

The TA argues that, even if the accommodations it offered are not reasonable, summary judgment is warranted because "there would be no 'reasonable accommodation" that would not cause the TA 'undue hardship.'" TA Mem. at 24. The TA fails to include a single citation to any undisputed material fact supporting this argument. Instead, the TA rests its argument on non-existent legal rights and a conclusory list of hypothetical burdens that might result from "exempting" these employees from the "rules." *Id.* at 24-25. In reality, the TA's version of events is not only disputed, but directly contradicted by the evidence in the record. That evidence shows that the burdens identified by the TA are purely speculative, and that alternative accommodations were available to resolve the religious conflict without interfering with the TA's purported business purposes for its new logo requirement or imposing anything close to an undue hardship on the TA.

An employer seeking not to accommodate an employee's religious belief bears the burden of showing that "any accommodation would impose undue hardship." *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993). "[T]he determination whether a particular accommodation works an undue hardship on . . . an employer . . . must be made by considering the particular factual context of each case." *Protos v. Volkswagen of Amer.*, 797 F.2d 129, 134 (3d Cir. 1986) (internal quotation omitted). "The *magnitude* as

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[31] The cases cited by the TA are inapposite. TA Mem. at 30 n.113. For instance, in *Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001), the religious conflict prevented Bruff from performing some of her duties as a counselor, and evidence in the record showed that accommodating her in her current position would have shifted some of her duties to her co-workers, imposing on them a disproportionate workload, and increased the travel costs for the employer. In an effort to accommodate Bruff, the employer specifically identified other vacant and available counselor positions into which she could transfer, and assigned an employment counselor to help her find another job. *Id.* at 500-502. In contrast, the religious conflicts at issue in this case do not prevent the Sikh station agents from doing their jobs and the TA did not identify any station agent or comparable positions that were vacant and readily available.

well as the *fact* of hardship must be determined by the examination of the facts of each case." *Id.* The cost of any accommodation should be assessed "in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *EEOC v. Aldi, Inc.*, Civ. No. 06-01210, 2008 WL 859249 at *16, 2008 U.S. Dist. LEXIS 43794 at *52 (W.D. Pa. Mar. 28, 2008) (*quoting* 29 C.F.R. § 1605.2(e)(1)); *see also Trans World Airlines v. Hardison,* 432 U.S. 63, 84 n.15 (1977). Perhaps most importantly, "[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 co-workers or disruption of the work routine." *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (internal quotation omitted). *Accord Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085-86 (6th Cir. 1987); *Gordon v. MCI Telecomms. Corp.*, 791 F. Supp. 431, 436 (S.D.N.Y. 1992).

The accommodation requested by Muslim and Sikh employees was not – as the TA claims – that they be "exempted" from TA uniform policies, but rather that they be permitted to continue doing what the TA had allowed them to do for years – namely, wearing their khimars and turbans without TA logos, along with the rest of their TA uniform – while working in passenger service jobs. To address the TA's concerns about identifiability, these employees agreed to wear turbans and khimars in the TA uniform color, and also proposed adding TA logo patches to the fronts and/or collars of their uniform shirts, or to prominently display their TA photo identification cards. RSOF at ¶ 35. The TA rejected these proposed accommodations, *id.*, even though there is no evidence in the record that they would result in any burden on the TA. Indeed, the TA has not alleged that it would incur any monetary costs by providing such an accommodation; and, according to the TA's own estimates, the impact of such an accommodation on uniform standards would be minimal, given that as few as 0.05% of the 20,000 employees subject to its uniform standards would be affected by this policy change. TA Mem. at 18.

In arguing that any accommodation (short of a TA logo on the religious head coverings themselves) would impose an undue hardship, the TA also claims that allowing Muslim and Sikh employees to wear

their turbans and khimars without TA logos would interfere with the TA's "right as an employer to present *its* chosen image to the public." TA Mem. at 24-25, 36, citing *Cloutier*, 390 F.3d 126, and *Brown*, 419 F. Supp. 2d 7. Although *Cloutier* and *Brown* recognized that employers have an interest in preserving religiously neutral policies that prevent their employees from dressing in a way that "would adversely affect the employer's public image," *Cloutier*, 390 F.3d at 136; *Brown*, 419 F. Supp. 2d at 15, those courts did not rule that any accommodation related to a uniform requirement *per se* unduly burdens an employer's public image.[32]

In addition, the TA has provided no explanation as to how allowing Muslim and Sikh employees to wear turbans or khimars without TA logos would adversely affect its chosen public image or detract from the perceived professionalism of its work force. There is no evidence in the record that the TA's public image was harmed in any way during the more than ten years that these employees wore their turbans and khimars without TA logos. To the contrary, TA supervisors testified that the wearing of turbans and khimars – even without TA logos affixed to them – did not result in a less professional appearance. RSOF at ¶ 4. Unsupported speculation of such harm is insufficient to show undue hardship. *See EEOC v. Alamo Rent-A-Car*, 432 F. Supp. 2d 1006, 1016-17 (D. Ariz. 2006) (granting summary judgment for EEOC and rejecting employer's argument that any deviation from uniform policies constitutes an undue burden where there was no evidence in the record that Muslim employee's wearing of her khimar would have actually imposed any cost on Alamo, impacted customer impressions, or hindered her ability to do her job).[33]

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[32] *Cloutier* is also factually distinguishable. The Muslims' and Sikhs' request to wear their turbans and khimars without TA logos, consistent with their longstanding religious practices and absent any factual evidence that doing so would harm the TA's public image or result in a less professional appearance, is not comparable to a cashier requesting, pursuant to her newly adopted beliefs as a member of the Church of Body Modification, that she be permitted to wear facial piercings. 390 F.3d at 128-129.

[33] The TA also cites several cases involving accommodation requests by police officers or FBI agents, including *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998); *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991); and *Webb v. City of Philadelphia*, Civ. No. 05-5238, 2007 WL 1866763, 2007 U.S. Dist. LEXIS 46872 (E.D. Pa. June 27, 2007). The TA is not a para-military organization and TA bus operators, train operators and station agents do not hold jobs akin to the law enforcement or para-military jobs at issue in those cases. As such, the TA is not entitled to the same type

Similarly, the TA argues that forcing Sikhs and Muslims to wear hats or logos was justified by the need to "help in the quick and sure identification of safety-related personnel." TA Mem. at 4. However, the TA conceded that it was not aware of any customers who had experienced difficulty identifying Sikhs and Muslims who wear turbans and khimars as TA employees; and numerous TA supervisors testified in deposition that the Muslim and Sikh employees wore their turbans and khimars – without TA logos – for years and were identifiable as TA employees, and that the wearing of those turbans and khimars did not interfere with the ability of these employee to do their jobs or create any kind of safety risk. RSOF at ¶ 4. Indeed, TA supervisors conceded at deposition that allowing employees who wear religious head coverings to put a TA logo patch on their collar (as proposed by the Muslim and Sikh employees in this case), rather than on their forehead, would not interfere with their identifiability as TA employees. *Id.* at ¶ 35.[34]

Moreover, as discussed above, the TA does not consistently enforce its policy regarding head garments among its non-Sikh and non-Muslim employees, strongly suggesting that allowing Muslim and Sikh employees to wear their turbans and khimars without TA logos would not impose an undue burden on the TA. *See* RSOF at ¶¶ 3, 12; *Dodd v. SEPTA*, Civ. No. 06-4213, 2008 WL 2902618 at *9, 2008 U.S. Dist. LEXIS 56301 at *18 (E.D. Pa. July 24, 2008) (evidence that female officers wore their hair in ponytails showed that allowing officers to wear ponytails did not cause the employer hardship); *see also Mohamed-Sheik v. Golden Foods/Golden Brands,* 2006 WL 709573 at *5, 2006 U.S. Dist. LEXIS 11248 at *12-15 (W.D. Ky. Mar. 22, 2006) (denying employer's motion for summary judgment and rejecting its argument that accommodating Muslim employees' request to wear their shirts untucked would create a safety risk and,

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of deference some courts have afforded to police departments or other para-military employers with respect to uniform and/or grooming rules.

[34] *See also* the citations in RSOF ¶ 35, including: Ex. 193 (Hyland Dep., Apr. 20, 2006 at 292-293, 296-298 (allowing employees who wear religious head coverings to put a TA logo on their collar, rather than on their forehead, would not interfere with their identifiability as TA employees, or impose additional costs on the TA)); Ex. 202 (O'Connell Dep. at 45-48 (an employee wearing a turban without a TA logo on it is identifiable: If people can see the patch from his arm or his shoulder or his breast, whatever, I'm sure he's identifiable. You don't need, you know, six different types of patches.")).

thus, impose an undue burden, where there was evidence that the employer had allowed the employees to wear their shirts untucked prior to September 11, 2001 but then began enforcing its uniform policy only after that date).

The TA also claims that "exempting" a handful of Muslim and Sikh employees from "rules to which all others are subject" would "likely lead to loss of employee morale and thus the loss of productivity and good work performance." TA Mem. at 25-26.[35] As discussed above, the Muslim and Sikh employees are seeking an accommodation, not an "exemption;" and the evidence in the record demonstrates that these uniform requirements – particularly the new logo requirement for headwear – has not been imposed on or enforced against other TA employees. RSOF at ¶¶ 3, 19, 31-32. In addition, TA managers testified that they were not aware of any morale problems arising during the many years that its Muslim and Sikh employees wore their turbans and khimars without TA logos. *Id.* at ¶ 4. More fundamentally, "morale" is always a questionable ground on which to deny a religious accommodation: as the Supreme Court has stated, "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act

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[35] The TA claims that this argument is supported by "the teachings of Industrial Psychology," as set forth in the TA's expert report by an industrial psychologist named Thomas Hollmann. TA Mem. at 26 n.96; Def.'s Ex. 19(a). Although Dr. Hollmann's report contains sweeping conclusions that exceptions to standard rules may lead to "questions of unfairness" and "anarchy," the report does not contain any substantive expert support for the TA's argument. At deposition, Dr. Hollmann conceded that, in preparing his report, he never reviewed the TA's uniform policies, never spoke with any TA employees about whether they felt that the wearing of religious head garments created morale problems, and never determined how religious accommodations in particular affect employee morale. Hollmann Dep. 15:9-25, 26:22-25, 105:19-23, 107:4-13, Apr. 20, 2007. As such, he acknowledged that his report "doesn't speak to the specifics of this case." *Id.* at 27:24-25. Dr. Hollmann's report does not comply with the reliability and admissibility requirements for expert reports, and the United States will file a motion to exclude it. FED. R. EVID. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591-92 (1993) (Rule 702 "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000) (affirming the exclusion of expert testimony where expert had no knowledge of the specific facts at issue in the case); *Wurtzel v. Starbucks Coffee Co.*, 257 F. Supp. 2d 520, 525-526 (E.D.N.Y. 2003) (same).

is directed." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976) (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)).[36]

Likewise, there is no evidence in the record to support the TA's claim that allowing Muslims and Sikhs to wear their religious head coverings without TA logos would somehow force the TA to allow secular head garments to be worn or spark a wave of illegitimate religious accommodation claims. TA Mem. at 25; Hyland Decl. at ¶25. The TA's concerns are the type of pure speculation rejected by the court in *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1016. In *Alamo,* the court expressly rejected the employer's claim that allowing a Muslim employee to wear a khimar during religious holidays would require it to allow other employees to deviate from its uniform policies. Under such "faulty reasoning," the court explained, "virtually no accommodation could overcome the undue hardship test." *Id.* Moreover, TA managers conceded that they were not aware of any instances in which an employee attempted to use the wearing of religious head coverings (with or without TA logos) by some employees to justify his or her own secular deviations from TA uniform policies. RSOF at ¶ 4.

Finally, the TA claims that accommodating the religious beliefs of its Sikh and Muslim employees would impose an undue hardship because it potentially would violate Title VII or the Establishment Clause by "send[ing] the message that the TA accords preference for *certain* religions." TA Mem. at 25. The TA, however, does not explain how requiring it to obey Title VII by accommodating the beliefs of Sikhs and Muslims would simultaneously violate Title VII. Nor does the TA identify the protected group that supposedly would suffer unlawful discrimination if turbans and khimars were worn, or provide any factual or legal support for its pure speculation that accommodating its Muslim and Sikh employees would

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[36] The one case the TA cites in which the court recognized concerns regarding other employees' morale, *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008), is factually inapposite. In that case, granting the employee's requested accommodation would have forced his coworkers to cover his shifts and allow him to take more unpaid leave than other employees. *Id.* at 318. The court concluded that the employer had reasonably rejected this accommodation because of "the magnitude of the accommodation sought, and the sheer number of hours a small group of coworkers would have been forced to cover [for the accommodated employee]." *Id.* at 318-19. The accommodation requested by the Muslim and Sikh employees at issue in this case would not impose such burdens on their co-workers.

somehow run afoul of the Establishment Clause. Courts have uniformly rejected the argument that granting a religious accommodation under Title VII violates the Establishment Clause by giving preference to religion or to a particular religion. *See, e.g., Protos*, 797 F.2d at 137; *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988); *Tooley*, 648 F.2d at 1244-46; *McDaniel v. Essex Int'l Inc.*, 696 F.2d 34, 37 (6th Cir. 1982). There is no evidence in the record that any of the TA's thousands of employees has ever raised an Establishment Clause or Title VII challenge related to the wearing of turbans or khimars (with or without TA logos) by Muslim and Sikh TA employees.[37]

C. The Sikh Station Agents Are Properly Part of this Suit

According to the TA, the five Sikh station agents are not properly part of the United States' suit because they were not identified *by name* in the United States' Complaint and are not similarly situated to the bus and train operators who were identified by name in that Complaint. TA Mem. at 1, 28-29. In support of that argument, the TA argues that the station agents have different responsibilities, different uniforms, have a uniform policy that is overseen by a different subdivision than those which oversee uniform policies for bus and train operators, and report to a different management hierarchy. *Id.* at 29.

The Complaint itself, however, makes clear that the United States' suit is a pattern or practice suit challenging the TA's policies and practices with respect to "Muslim, Sikh and similarly situated employees" whose religious beliefs conflict with TA uniform policies. Complaint at ¶¶ 9, 10, 16, 17, 19; *see also Erickson v. Pardus*, __ U.S. __, 127 S. Ct. 2197, 2200 (2007) (Fed. R. Civ. P. 8(a) only requires "fair notice" of what the claim is and the grounds upon which it rests). The TA's application of those policies to

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[37] The few cases cited by the TA are simply not on point. TA Mem. at 25, n.94. For instance, *Berry v. Dep't of Social Servs.*, 447 F.3d 642, 655 (9th Cir. 2006), does not stand for the proposition that religious accommodations automatically implicate the Establishment Clause. The unique facts in that case involved a government employee seeking an accommodation that would allow him to evangelize to clients. *Id.* In contrast the Sikhs and Muslims employed by the TA are not seeking to evangelize to TA passengers or co-workers, but rather to wear their turbans and khimars without TA logos as they did for many years without prompting any complaints that doing so reflected TA sponsorship of their religion.

Sikh station agents is merely a continuation of the discriminatory policies and practices challenged in the Complaint.[38]

Further, the undisputed facts in the record demonstrate that the Sikh station agents are similarly situated to the Muslim and Sikh bus and train operators identified by name in the United States' Complaint. These station agents were subject to the same uniform policies with respect to their religious head coverings as bus and train operators; indeed, according to the testimony of TA managers and the TA's own documents, TA managers created the logo requirement for religious head coverings in 2004 and that requirement applied to bus operators, train operators, conductors and station agents. *See* TA Mem. at 6; RSOF at ¶ 31. The enforcement process for station agents is similar or identical to that for train operators and conductors; they work in the same work area (*i.e.,* subway stations); and the records of uniform infractions by station agents are kept in the same computer database as those for train operators, conductors and bus operators. *See id.* at ¶¶ 31, 32; *see also McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001) (under Title VII, "similarly situated" means similarly situated in all material respects, not identical); *Downes v. Potter*, No. 04-CV-3976, 2006 WL 2092479 at *11, 2006 U.S. Dist. LEXIS 51132 at *31-32 (E.D.N.Y. July 26, 2006) (same).

Moreover, the TA has been on notice for years that this suit encompassed Sikh station agents. The United States sought discovery from the TA regarding its treatment of station agents and train conductors; the TA objected, arguing that they were not similarly situated; and both Magistrate Judge Chrien (in 2004) and Magistrate Judge Go (in 2005) rejected that argument and ordered the TA to provide the requested information. *See, e.g.,*United States' Motion to Compel, April 6, 2005 (Docket Entry #11); Trans. of April 12, 2005 Motions Conf., at 9-17. In or about May 2005, the United States learned the identity of five Sikh station agents against whom the TA had begun enforcing its new logo requirement. The United States

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[38] Indeed, in many pattern or practice cases, the identity of similarly situated employees may not be known until after the plaintiff has prevailed in the liability phase and notice is sent out to all of the defendant's employees to identify additional persons affected by the unlawful policy or practice.

subsequently propounded written discovery about those employees, deposed their supervisors, and the TA deposed the station agents. In short, the TA has been on notice that the station agents were part of the United States' case for years, and under the notice pleading standards embodied in the Federal Rules, the United States was not required to amend its complaint to identify each of the similarly situated employees by name. FED. R. CIV. P. 8(a).

In sum, the TA's argument that the Sikh station agents are not similarly situated or properly part of the United States' case is unsupported by the record or applicable case law.[39]

D. The TA's Ongoing Application of its Discriminatory Policies to Bus Operator Stephanie Lewis is Properly Part of This Suit

The TA argues that this Court cannot consider its treatment of Lewis after she was re-classified as a station agent in 2005 because the United States did not amend its Complaint to add what the TA views as a "separate" claim. TA Mem. at 30-31. The United States' Complaint did, however, identify Lewis as a victim of the TA's discriminatory practices, which included its practice of failing to accommodate employees who wear religious head coverings, including (as discussed in part C, above) station agents. Compl. at ¶¶ 13, 15-17. As with the Sikh station agents, the TA's application of the new uniform policy for station agents to Lewis is merely a continuation of the discriminatory policies and practices challenged in the Complaint. The United States is not required to amend its Complaint each time the TA applies those discriminatory policies, particularly where, as here, the TA was on notice that the United States viewed those facts as part of this action and responded (without substantive objections) to discovery requests by the United States (in late 2005) regarding the TA's rescission of Lewis' classification to a station agent position.[40]

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[39] In addition to station agents, as indicated in the United States' Complaint, this suit also encompasses other employees who are similarly situated, including subway conductors who are subject to the same uniform policy as train operators.

[40] The TA also claims judicial estoppel prohibits Lewis – and "the DOJ on her behalf" from considering its treatment of her after she was reclassified as a station agent in 2005. According to the TA, any "station-agent-related claim" for Lewis depends on her being "medically capable" of working as

E. Conclusion

For the reasons set forth herein, the TA's motion for summary judgment should be denied.

BY:

December 15, 2008

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a station agent in 2005 and, she cannot establish that she was medically capable because, the argument goes, she submitted paperwork for Social Security Disability (SSDI) benefits stating that she was "unable to continue work" due to a work-related injury in 2003. TA Mem. at 31. In support of its argument, the TA cites several cases, including cases that were overturned by the Supreme Court in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797-98 (1999), in which the Court held that a claimant for SSDI benefits is not *per se* precluded from making a showing of qualification for purposes of making a *prima facie* case of discrimination. Instead, an employee must explain the apparent inconsistency between the term "qualified" for employment and "disabled" for SSDI benefits. *Id.* at 807. This is a pattern or practice case challenging the TA's discriminatory policies and practices; whether Lewis was "medically capable" of working as a station agent is not relevant to the merits of those claims. Morever, the forms referenced by the TA stated that Lewis was physically unable to perform her job as a bus operator. TA Mem. at ¶¶31-32. That information may be relevant, if at all, in the remedial phase of this litigation for determining the actual injury suffered by Lewis. In any event, the record is clear that, even if Lewis could not work as a bus operator, the TA's own physician found that Lewis was medically able to work in the less physically demanding job as a station agent in 2005, and that the TA did not rescind Lewis' reclassification as a station agent because she was medically unable to perform the job. The TA removed her from that position because she would not affix a TA logo to her khimar.