No. 17-380

# In the Supreme Court of the United States

CONSOL ENERGY INC., ET AL., PETITIONERS

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**


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## QUESTIONS PRESENTED

1. Whether workplace conditions can ever be so intolerable that a reasonable person would feel compelled to resign, and thus constitute a discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), if the employee's union has a grievance procedure for challenging adverse employment actions.

2. Whether the court of appeals correctly sustained the district court's decision that the back and front pay award should not be reduced by the amount of pension benefits the employee received, where those benefits were paid by a third-party union out of a multi-employer commingled fund as deferred compensation for his past work and the employee was entitled to those benefits regardless of the Title VII violation.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 860 F.3d 131. The district court opinion ordering monetary and injunctive relief, and denying the motion to exclude evidence of lost pension benefits, is reported at 151 F. Supp. 3d 699. The district court's opinion denying petitioners' renewed motion for judgment as a matter of law and denying petitioners' motions for a new trial and to amend the district court's findings and conclusions is not published in the Federal Supplement but is available at 2016 WL 538478.

## JURISDICTION

The judgment of the court of appeals was entered on June 12, 2017. The petition for a writ of certiorari was filed on September 11, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to "discharge any individual * * * because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's * * * religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). These provisions "make it an unlawful employment practice * * * for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977). If an employee is unlawfully discharged in violation of Title VII, the victim is presumptively entitled to full back pay, offset by "[i]nterim earnings or amounts earnable with reasonable diligence." 42 U.S.C. 2000e-5(g); see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975).

This Court has recognized that an employer can effectively discharge an employee without actually firing him, by instead making his working conditions "so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Green* v. *Brennan*, 136 S. Ct. 1769, 1776 (2016) (quoting *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141 (2004)). "When the employee resigns in the face of such circumstances, Title VII treats that resignation as tantamount to an actual discharge." *Id.* at 1776-1777. This is known as a "constructive discharge." *Id.* at 1777.

2. This case involves Beverly R. Butcher, Jr., a coal miner who worked for 37 years at the Robinson Run

Mine in West Virginia. Pet. App. 2a, 4a. During the relevant time, petitioners were Butcher's employers. *Ibid.* Butcher is an evangelical Christian and an ordained minister who "by all accounts was a satisfactory employee, with no record of poor performance or disciplinary problems." *Id.* at 4a.

In 2012, petitioners changed the timekeeping system at Robinson Run from manual tracking by shift foremen to biometric hand scanning. Pet. App. 4a. "The scanner system required each employee checking in or out of a shift to scan his or her right hand; the shape of the right hand was then linked to the worker's unique personnel number." *Ibid.* For Butcher, "participating in the hand-scanner system would have presented a threat to core religious commitments." *Ibid.* "Butcher's understanding of the biblical Book of Revelation is that the Mark of the Beast brands followers of the Antichrist, allowing the Antichrist to manipulate them." *Id.* at 5a. Using this hand-scanning system "with his right hand or his left," Butcher believed, "would result in being so 'marked'" and in turn "condemned to everlasting punishment." *Ibid.* It is undisputed that Butcher's beliefs were sincere. *Ibid.*

Butcher met with Mike Smith, Robinson Run's superintendent, and Chris Fazio, a human resources supervisor, to discuss his religious objection to the hand scanner. Pet. App. 6a. Butcher stated his objection, explaining that the hand-scanning system was not one that he "could or would want to participate in" for religious reasons. *Ibid.* (citation omitted). Butcher also made clear in that meeting with Smith and Fazio that his objection was not limited to use of his right hand, and he offered to check in with his shift supervisor or to punch in on a time clock, as he had in the past. *Ibid.*

In response, Fazio presented Butcher with a letter written by the hand-scanner's manufacturer, which offered assurances that the scanner cannot detect or place any mark on a person's body, and saying—based on the manufacturer's own interpretation of the Bible—that the Mark of the Beast is associated only with the right hand and forehead, so scanning the left hand presented no religious concerns. Pet. App. 6a. Fazio and Smith asked Butcher to review this information with his pastor to consider using his left hand instead and, if he continued to object, to provide a letter explaining his church's opposition. *Ibid.*

Unbeknownst to Butcher, petitioners were at the same time allowing employees without religious objections to bypass the hand-scan system. Specifically, petitioners had determined that two employees who could not be enrolled in the system because of hand injuries could instead enter their personnel numbers on a keypad attached to the system. Pet. App. 6a-7a. "According to [petitioners'] own trial witness, this accommodation imposed no additional cost or burden on the company, and allowing Butcher to use the keypad procedure would have been similarly cost-free." *Id.* at 7a. Petitioners nevertheless decided not to extend the same accommodation to Butcher. See *ibid.* (email from senior human-resources official stating, "let's make our religious objector use his left hand").

Smith and Fazio met with Butcher and notified him of the decision to force him to use the hand scanner. Pet. App. 7a. For four days, Butcher considered the option of scanning his left hand. *Ibid.* Butcher used that time to go "back to the scriptures again" and to "pray[] very hard" about his religious dilemma. *Ibid.* (citation

omitted) (brackets in original). At the end of that process, Butcher told Smith and Fazio that "in good conscience [he] could not go along with this system of scanning [his] hand in and out." *Ibid.* (citation omitted) (brackets in original). In response, "Smith promptly handed Butcher a copy of [petitioners'] disciplinary procedures regarding the scanner, with the promise that it would be enforced against him if he refused to scan his left hand." *Ibid.* The policy provided that first and second missed scans would result in a written warning; a third would result in suspension; and a fourth would result in suspension with intent to discharge. *Id.* at 7a-8a.

Butcher testified that he understood petitioners' message as a threat: "If I didn't go along with the hand scan system, their intent . . . was to fire me." Pet. App. 8a (citation omitted). Presented with this ultimatum, Butcher told Smith and Fazio that he did not want to retire, saying he "didn't have any hobbies, [he] wasn't ready to retire," and "reiterat[ing] again" that he "really believed and tried to live by the scriptures and, well, almost practically just begged them to find a way to keep my job." *Ibid.* (citation omitted). Smith and Fazio "remained unsympathetic," and "Butcher felt he had no choice but to retire under protest." *Ibid.* He tendered his retirement. *Ibid.*

A few days later, Butcher learned from his union (the United Mine Workers of America) that petitioners had offered the keypad accommodation to employees with hand injuries. Pet. App. 8a; see *id.* at 6a-7a. The union then filed a grievance on behalf of Butcher pursuant to its collective bargaining agreement with petitioners, on the theory that petitioners violated the agreement when they refused to accommodate Butcher's religious beliefs. *Id.* at 8a. The union subsequently withdrew the

grievance, however, after determining that the agreement's grievance process did not cover religious-discrimination claims and thus provided no recourse for petitioners' refusal to accommodate Butcher. *Ibid.*

3. a. Butcher filed an administrative charge with the Equal Employment Opportunity Commission (EEOC). The EEOC sued in district court on Butcher's behalf, contending that petitioners had violated Title VII by refusing to accommodate Butcher's religious beliefs and by constructively discharging him. Pet. App. 9a. The case was tried before a jury, which rendered a verdict in favor of the EEOC. The jury found that Butcher had a sincere religious belief that conflicted with petitioners' mandate that he use the hand scanner; that Butcher had informed petitioners of this conflict; and that petitioners had constructively discharged Butcher. *Ibid.* The district court entered judgment against petitioners, awarding back pay and front pay and refusing to set off vested retirement benefits that Butcher obtained via his pension plan following his discharge. *Id.* at 9a-10a.

b. Petitioners filed a post-verdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) and a motion under Fed. R. Civ. P. 59 to amend the judgment that Butcher was entitled to full back and front pay with no offset for his pension benefits. Pet. App. 11a. The district court denied petitioners' post-trial motions. 2016 WL 538478, at *1-*15.

First, the district court rejected petitioners' contention that "there was insufficient evidence to support the jury's finding that Butcher was constructively discharged." 2016 WL 538478, at *3. The court explained that "[t]he evidence showed that Butcher requested an

accommodation to the hand scanner policy"; that petitioners had developed a cost-free accommodation "to bypass the hand scanner for miners that were physically incapable of scanning their hands"; but that petitioners "did not offer that bypass method as an accommodation for Butcher." *Id.* at *5. Further, the court explained, "Butcher met with [petitioners'] human resources personnel several times regarding his request for an accommodation, but was repeatedly denied an exception to the hand scanner policy." *Ibid.*

Second, the district court denied petitioners' motion for a new trial on the ground that evidence of Butcher's union grievance process was excluded from trial as irrelevant and because it was more prejudicial than probative. 2016 WL 538478, at *3-*6. The court explained that the existence of the union grievance process for a wrongful discharge was immaterial to the determination of whether Butcher had been discharged in the first place. Petitioners had conclusively "refused to grant Butcher an accommodation before he could be discharged," the court reasoned, and thus "Butcher's constructive discharge was complete before the grievance process would have applied to an attempt to discharge Butcher." *Id.* at *5. Moreover, the court explained, it was undisputed that Butcher's "collective bargaining agreement did not require arbitration of Title VII claims." *Ibid.* Indeed, when the union actually filed a grievance on Butcher's behalf, it withdrew the grievance because "the collective bargaining agreement did not cover religious discrimination claims." *Ibid.* "Thus," the court concluded, "the grievance process could not have resulted in Butcher getting an accommodation." *Ibid.*

Third, the district court rejected petitioners' argument that a new trial was warranted because of the jury instructions on whether working conditions were objectively intolerable. The court had instructed the jury:

> Intolerability of the working conditions is assessed by the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign. An employee is not guaranteed a working environment free from stress. It is the obligation of an employee not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.

2016 WL 538478, at *9 (citation omitted). The district court concluded that this instruction "correctly stated the standard for determining whether working conditions were intolerable," "[t]he substance of [petitioners'] proposed instruction that is supported by case law was covered by this Court's proper instruction," and petitioners "were not unfairly prejudiced." *Ibid.*

Fourth, the district court rejected petitioners' argument that it should have offset Butcher's pension benefits. The court explained that "[a] defendant may offset damages with compensation received by the plaintiff for [his] injury," but "compensation a plaintiff receives from a collateral source may not offset damages." 2016 WL 538478, at *13 (citing *Sloas* v. *CSX Transp., Inc.*, 616 F.3d 380, 389 (4th Cir. 2010)). The court then observed that a benefit is "from a collateral source unless it results from payments made by the employer in order to indemnify itself against liability." *Ibid.* (quoting *Sloas*, 616 F.3d at 390). The court concluded that Butcher's pension benefits were from a collateral

source because the right to obtain such vested retirement benefits was "a term of employment rather than an attempt by [petitioner] to indemnify itself against liability." *Ibid.* (citation omitted).

4. The court of appeals affirmed. Pet. App. 1a-34a. First, the court held "that there exists substantial evidence that Butcher was put in an intolerable position when [petitioners] refused to accommodate his religious objection, requiring him to use a scanner system that Butcher sincerely believed would render him a follower of the Antichrist." *Id.* at 19a. "This goes well beyond the kind of run-of-the-mill 'dissatisfaction with work assignments, [] feeling of being unfairly criticized, or difficult or unpleasant working conditions' that we have viewed as falling short of objective intolerability," the court explained. *Ibid.* (citation omitted). "And like the district court," the court of appeals added, "we do not think that the future prospect of a successful grievance under a collective bargaining agreement * * * would do anything to alleviate the immediate intolerability of Butcher's circumstances." *Ibid.*

Second, the court of appeals affirmed the district court's decision to exclude evidence of the grievance process. The court of appeals explained that the district court had not abused its discretion because "'Title VII requires an employer to provide a reasonable accommodation when *requested* by the employee,' not only after—and if—a successful grievance process leads to an order by an arbitrator." Pet. App. 22a (quoting C.A. J.A. 1686). Further, the court of appeals explained, "'a claimant is not required to endure an intolerable work environment' until a grievance process can be utilized and completed." *Ibid.* (quoting C.A. J.A. 1686). "That is particularly so here," the court stated, where "the

grievance process would have been unlikely to provide Butcher even with after-the-fact relief." *Ibid.* The court also noted that petitioners did not dispute that the district court had properly excluded the grievance procedures under Federal Rule of Evidence 403 because their probative value was substantially outweighed by the risk of prejudice. *Id.* at 22a n.5. "That determination alone," the court concluded, "is sufficient to sustain the district court's ruling on this point." *Ibid.*

Third, the court of appeals affirmed the district court's refusal to grant a new trial due to the jury instructions on constructive discharge. The court of appeals stated that the district court had found "that the substance of [petitioners'] instruction was included in the instructions given the jury, at least to the extent it was consistent with governing law," and petitioners "had failed to show any prejudice arising from any of the instructions at issue." Pet. App. 25a.

Fourth, the court of appeals affirmed the district court's decision not to subtract Butcher's pension benefits from his back and front pay award. "[A] defendant may offset damages with payments already received by a plaintiff as compensation for the injury in question," the court of appeals stated. Pet. App. 28a. "But benefits that are not provided as compensation, or to 'indemnify . . . against liability' for the injury, are treated as coming from a 'collateral source,' and are not offset against a damages award." *Ibid.* (quoting *Sloas*, 616 F.3d at 389-390). And in this case, the court continued, petitioners did not "make pension payments to indemnify [themselves] against the liability at issue"; rather, petitioners contributed to a commingled pension

fund "along with other coal mine employers" as a contractual retirement benefit that was "a standard term of Butcher's employment." *Id.* at 29a.

**ARGUMENT**

Petitioners contend (Pet. 4-5, 12-22) that this Court should "intervene to set a uniform standard that employees" alleging constructive discharge "cannot quit when they have not worked in violation of their religious principles" and "any potential discipline would be subject to a collective bargaining agreement." Pet. 21-22. But the court of appeals here correctly rejected that per se rule, and no other court of appeals has reached a contrary conclusion. Petitioners do not dispute that they had made a final decision to deny an accommodation to Butcher, and thus to force him to work in violation of his religious beliefs or to face a discipline process culminating in termination. The union grievance process here was not relevant to whether, at that point, Butcher was constructively discharged when he resigned. At most, the grievance process could have potentially provided an after-the-fact remedy for a violation that was already complete. Further review is not warranted.

Petitioners also contend (Pet. 22-31) that the district court committed reversible error in treating the pension benefits Butcher received after his forced retirement as coming from a "collateral source." The court of appeals correctly rejected that contention. Butcher received those benefits not as compensation from petitioners for being discharged in violation of Title VII, but as deferred compensation from his union for service that he had already performed working as a coal miner at petitioners' mine for 37 years. See Pet. App. 4a. Petitioners did not make those payments; Butcher's union's pension fund did. Nor did petitioners exclusively

fund them; the union's pension fund included contributions from multiple coal mine operators. The lower courts' denial of a setoff is correct, limited to the circumstances of this case, and does not conflict with any decision of this Court or another court of appeals.

1. a. The court of appeals correctly held that sufficient evidence supported the jury's verdict that petitioners constructively discharged Butcher by imposing working conditions so intolerable that "a reasonable person in [his] position would have felt compelled to resign." 2016 WL 538478, at *9 (citation omitted). The evidence established that Butcher was resolute and sincere in his belief that participating in the hand-scanning system would subject him to being rendered "a follower of the Antichrist, 'tormented with fire and brimstone.'" Pet. App. 19a (citation omitted). The evidence further showed that, notwithstanding that petitioners provided a cost-free accommodation to other employees who were unable to use the hand-scanner system for non-religious reasons, they refused to provide him the same accommodation. *Id.* at 7a (internal email from senior human-resources official denying Butcher's request: "let's make our religious objector use his left hand") (citation omitted).

When petitioners notified Butcher of their final decision to deny him an accommodation, he responded by stating to Smith and Fazio that he "could not go along with this system of scanning [his] hand in and out." Pet. App. 7a (citation omitted) (brackets in original). Smith responded by "promptly hand[ing] Butcher a copy of [petitioners'] disciplinary procedures regarding the scanner, with the promise that it would be enforced against him if he refused to scan his left hand." *Ibid.* And Butcher testified that he understood petitioners'

threat: "If I didn't go along with the hand scan system, their intent . . . was to fire me." *Id.* at 8a (citation omitted). Finally, Butcher testified that he told Smith and Fazio that he did not want to retire and "almost practically just begged them to find a way to keep my job." *Ibid.* (citation omitted). Smith and Fazio "remained unsympathetic," and "Butcher felt he had no choice but to retire under protest." *Ibid.* The jury did not err in determining that a reasonable person in Butcher's position would have felt compelled to retire.

Petitioners assert (Pet. 13) that "[t]his simply was not a workplace so 'intolerable' that an objectively reasonable person would see no other option but to quit" and that (Pet. 15-16) the court of appeals "read out of Title VII" the "requirement that working conditions be objectively intolerable to support a constructive discharge claim." But the jury disagreed after having been properly instructed that working conditions must be objectively intolerable. 2016 WL 538478, at *9. The court of appeals held that sufficient evidence supported the jury's verdict. That determination is correct and limited to the facts of this case.

Petitioners suggest (Br. 18) that it was possible that they might not have actually fired or otherwise disciplined Butcher if he had refused to participate. But the evidence showed that petitioners promised to discipline Butcher; that Butcher understood this as a threat that he would be fired; and that petitioners refused to budge when Butcher "practically just begged them to find a way to keep [his] job" rather than being forced to retire. Pet. App. 8a (citation omitted). The jury thus could reasonably conclude that petitioners had threatened to terminate Butcher and that they would have followed through on that threat if he had remained steadfast in

his refusal to participate in the hand-scanning system. And in any event, the jury could reasonably determine that, regardless of what petitioners ultimately would have done, the prospect of termination was sufficiently certain that a reasonable person in Butcher's position would have resigned.

Petitioners contend (Pet. 14-15) that, under the court of appeals' decision, "the mere possibility of a future verbal warning or a written reprimand—both of which might later be expunged from the employee's record—would be sufficient to sustain a constructive discharge claim." But the court did not adopt that legal rule and instead simply affirmed the jury's verdict here. The district court instructed the jury that "[a]n employee is not guaranteed a working environment free from stress"; that "[i]t is the obligation of an employee not to assume the worst and not to jump to conclusions too quickly"; and that "[a]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." 2016 WL 538478, at *9 (citation omitted). The court of appeals thus correctly held that "the substance of [petitioners'] instruction was included in the instructions given the jury, at least to the extent it was consistent with governing law," and that petitioners "had failed to show any prejudice arising from any of the instructions at issue." Pet. App. 25a.

b. Petitioners primarily argue (Pet. 14, 19-20) that, as a matter of law, working conditions can never be objectively intolerable so long as the employee's union has a grievance process for challenging adverse employment actions. But this Court's cases about the timing of a Title VII violation demonstrate that petitioners are incorrect. In *Green* v. *Brennan*, 136 S. Ct. 1769 (2016),

this Court reaffirmed that a Title VII claim accrues and becomes final at the time of the discharge itself, whether through firing (in a case of actual discharge) or resignation (in a case of constructive discharge). *Id.* at 1774. It contains no suggestion that a different accrual rule would apply if the employer had a grievance procedure to challenge that discharge after it had occurred.

To the contrary, this Court has held that a Title VII violation is complete *before* an employee seeks a remedy through a post-discharge grievance procedure. In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), a professor who was denied tenure alleged that a Title VII violation was not complete until after he completed a post-denial grievance process. This Court rejected that argument: "[T]he only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. "[E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative," the Court explained. *Id.* at 261. Rather, "[t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Ibid.*; see *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976) (rejecting the argument that allegedly discriminatory discharge was "'tentative' and 'nonfinal'" until the conclusion of a "grievance-arbitration" in which the plaintiff challenged the discharge).

To be sure, if the decision to deny an accommodation is not yet final and an internal review process exists wherein the employer can consider whether to provide an accommodation, then a constructive-discharge claim

may be premature. *E.g.*, *Bozé* v. *Branstetter*, 912 F.2d 801, 803-804 (5th Cir. 1990) (per curiam) (employer indicated it would resolve the plaintiff's discrimination complaint through the internal complaint mechanisms set out in its policy manual, but the plaintiff resigned anyway). Here, however, the evidence demonstrated that petitioners' decision to deny the accommodation was final before Butcher resigned, and Smith and Fazio stood firm when Butcher begged to be accommodated rather than being forced to resign. Pet. App. 7a. The grievance procedure in this case thus at most would have provided "a *remedy* for a prior decision, not an opportunity to *influence* that decision before it [was] made." *Ricks*, 449 U.S. at 261. In any event, the union itself determined that "its collective bargaining agreement did not cover religious accommodation claims," so it is unclear that the grievance process could have "provide[d] Butcher even with after-the-fact relief." Pet. App. 22a.

Petitioners' categorical rule is also inconsistent with the text of Title VII and this Court's cases interpreting it. Title VII provides that liability is trigged by "discharge"; there is no additional requirement that, after a person is discharged, he must pursue an employer's post-discharge procedures for seeking a remedy for that discharge. 42 U.S.C. 2000e-2(a)(1). And as this Court has repeatedly held, a person is constructively discharged when he resigns in the face of circumstances that are "so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Green*, 136 S. Ct. at 1776 (quoting *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141 (2004)). As petitioners elsewhere recognize (Pet. 4), that objective

standard requires a jury to "view the totality of the circumstances in assessing the employee's decision." Petitioners' categorical rule, by contrast, improperly focuses on only a single factor.

Petitioners also contend (Pet. 16-17) that the district court committed reversible error in excluding evidence of its grievance procedures. But that evidentiary ruling is not fairly encompassed within any question that petitioners identify as being presented by the case. See Sup. Ct. R. 14.1(a). In any event, that decision is correct for several reasons and limited to the facts of the case. The court of appeals correctly held that the union grievance procedure was not relevant because, as set forth above, that procedure at most could only provide an after-the-fact remedy once the violation was already complete. See Pet. App. 22a ("'Title VII requires an employer to provide a reasonable accommodation when *requested* by the employee,' not only after—and if—a successful grievance process leads to an order by an arbitrator."). Petitioners also did not dispute (*id.* at 22a n.5) that the evidence was properly excluded on other grounds, namely, that the prejudicial value of the evidence substantially outweighed its probative value on the facts here. See *ibid.* ("That determination alone is sufficient to sustain the district court's ruling on this point."). And the union determined that its own grievance procedure did not "cover religious accommodation claims," *id.* at 22a, further confirming that the district court did not abuse its discretion in excluding those procedures from evidence. In any event, the court of appeals' resolution of that evidentiary question is limited to the facts and posture of this case and does not warrant further review.

c. Petitioners identify no court of appeals to hold that a constructive-discharge claim is not cognizable until the employee challenges the employer's discriminatory final decision via an adversarial process and seeks to have a third party compel the employer's compliance with Title VII. The cases upon which petitioner relies (Pet. 16-17) are readily distinguishable, because in those cases the employee quit before the employer had made the relevant final decision. See, *e.g.*, *Yearous* v. *Niobrara Cnty. Mem'l Hosp.*, 128 F.3d 1351, 1355, 1357 (10th Cir. 1997) (plaintiffs resigned before the employer "could complete [its] investigation" into their complaints and even though they could have "continu[ed] to work and attempt[ ] in good faith to resolve their problems with [their supervisor] through internal procedures"), cert. denied, 523 U.S. 1074 (1998); *Bozé*, 912 F.2d at 803-804.

For example, in *Premratananont* v. *South Suburban Park & Recreation District*, No. 97-1090, 1998 WL 211543 (10th Cir. Apr. 30, 1998), cert. denied, 525 U.S. 877 (1998), an employee complained that he had been denied an interview for a promotion because of his race. His manager declined to interview him; he then appealed his manager's initial decision to the employer's personnel office "but resigned before the appeal process could be completed." *Id.* at *1. In an unpublished opinion, the Tenth Circuit affirmed the grant of summary judgment to the employer. The court concluded that "the record contain[ed] no evidence that plaintiff was treated differently or denied the promotion because of his race"; that there was no "evidence of aggravating factors which made conditions intolerable"; and that the employee had "a reasonable alternative to resignation," namely, finishing the internal appeal process he had

started. *Id.* at *3. Here, by contrast, petitioners had already made a final decision to deny an accommodation (and thus the Title VII violation was complete), and the union grievance process was a post-decisional procedure rather than a mechanism for reviewing a non-final decision.

2. Petitioners also contend (Pet. 30) that the district court abused its discretion in refusing to set off Butcher's pension benefits on the ground that they came from a "collateral source." The court of appeals correctly rejected that contention, and its narrow ruling does not conflict with any decision of this Court or any other court of appeals.

Under Title VII, a victim is presumptively entitled to full back pay, offset by "[i]nterim earnings or amounts earnable with reasonable diligence." 42 U.S.C. 2000e-5(g); see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). As the court of appeals explained, in calculating those amounts, "a defendant may offset damages with payments already received by a plaintiff as compensation for the injury in question," but may not offset payments received from a collateral source. Pet. App. 28a. The determination of whether a source is collateral depends on whether the payments are "made by the employer in order to indemnify itself against liability." *Sloas* v. *CSX Transp., Inc.*, 616 F.3d 380, 390 (4th Cir. 2010) (quoting *Phillips* v. *The W. Co. of N. Am.*, 953 F.2d 923, 932 (5th Cir. 1992)); cf. Restatement (Second) of Torts § 920A (1979) (distinguishing "[a] payment made by a tortfeasor or by a person acting for him to a person whom he has injured," which "is credited against his tort liability," from "[p]ayments made to or benefits conferred on the injured party from other sources,"

which are not, "although they cover all or a part of the harm for which the tortfeasor is liable").

For example, in *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361 (1951), the Court upheld a decision by the NLRB not to offset unemployment benefits from a back pay award. The Court explained that "[p]ayments of unemployment compensation were not made to the employees by [the employer] but by the state out of state funds." *Id.* at 364. "True," the Court recognized, "these taxes were paid by employers, and thus to some extent [the employer] helped to create the fund." *Ibid.* But "the payments to the employees were not made to discharge any liability or obligation of [the employer], but to carry out a policy of social betterment for the benefit of the entire state." *Ibid.* "Since no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings," the Court reasoned, "manifestly no consideration need be given to collateral benefits which employees may have received." *Ibid.*; cf. *Eichel* v. *New York Cent. R.R.*, 375 U.S. 253, 254 (1963) (per curiam) (when benefits "are not directly attributable to the contributions of the employer," they "cannot be considered in the mitigation of the damages caused by the employer") (citation omitted).

Consistent with those principles, the court of appeals correctly affirmed the district court's decision to treat Butcher's pension benefits here as coming from a collateral source. The pension payments to Butcher were not made by petitioners or anybody acting for them; the payments were made by a pension fund managed by Butcher's union. Petitioners were not the exclusive source of the funding; the union's pension was funded collectively with "other coal mine employers" that were

subject to the same collective bargaining agreement. And participation in the union's pension was a "standard term of Butcher's employment, rather than compensation for or indemnification against a Title VII violation." Pet. App. 29a. That is, Butcher obtained pension benefits from his union's commingled retirement fund not to compensate him for petitioners' violation of Title VII, but because he earned those benefits through his union as deferred compensation through decades of work as a coal miner at petitioners' mine. Those benefits came from a collateral source.

b. Petitioners contend (Pet. 23) that "[t]here is a clear and long-standing split of authority on whether retirement benefits" from a plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "are a collateral source of income." Pet. 23. But the court of appeals here did not adopt a bright-line rule that retirement benefits from an ERISA plan are always to be treated as coming from a collateral source. It held more narrowly that a setoff is not required when, as here, the payments are not made by or on behalf of the employer, but instead come from an independent third party (the union); the third party manages the fund; the employer is not the exclusive contributor to the fund, but instead its contributions are commingled with contributions from other employers; and the fund is a form of deferred compensation for past service rather than a means of compensation for the underlying claim. Pet. App. 30a. Petitioners do not point to any court of appeals that has required a setoff in those circumstances.

Petitioners contend (Pet. 23-25) that the Second, Fifth, and Tenth Circuits have adopted a rule that pension benefits must always be set off from a back pay

award. See *Hagelthorn* v. *Kennecott Corp.*, 710 F.2d 76, 86-87 (2d Cir. 1983); *Lubke* v. *City of Arlington*, 455 F.3d 489, 499-500 (5th Cir. 2006); *Guthrie* v. *J.C. Penney Co.*, 803 F.2d 202, 209-210 (5th Cir. 1986); *EEOC* v. *Sandia Corp.*, 639 F.2d 600, 626-627 (10th Cir. 1980). But none of those cases involved pension benefits paid by a third party from a commingled fund. In *Hagelthorn*, *Guthrie*, and *Sandia*, the payments were paid directly and exclusively by the defendant (the employer) to the plaintiff (the employee). See *Hagelthorn*, 710 F.2d at 86 (detailing payments from the employer to the employee); *Guthrie*, 803 F.2d at 210 ("coming from the employer"; *Sandia*, 639 F.2d at 626 ("it is a payment made wholly by the employer"); see also *Smith* v. *Office of Pers. Mgmt.*, 778 F.2d 258, 263 (5th Cir. 1985) ("The benefit he is receiving is not from a third party but is from the same party whom he is seeking damages from."), cert. denied, 476 U.S. 1105 (1986). Furthermore, other decisions from the Second and Fifth Circuits suggest that those courts would view payments by the employee's union as materially different for these purposes from payments by the employer itself. See *Promisel* v. *First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 258 (2d Cir. 1991) ("In this case these benefits come not from the employer, but from a collateral public source."), cert. denied, 502 U.S. 1060 (1992); *Haughton* v. *Blackships, Inc.*, 462 F.2d 788, 790 (5th Cir. 1972) ("The mere fact that the employer-tortfeasor has contributed money * * * to the fund from which the benefits derive does not establish that such fund may not be a collateral source.").

Petitioners also assert (Pet. 26-27) that intra-circuit conflicts exist within the Fourth and Eighth Circuits on this issue. But intra-circuit conflicts do not provide a

basis for this Court's review. See Sup. Ct. R. 10; see also *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, neither circuit has reached conflicting decisions as to whether all pension payments from a third-party commingled fund must be set off from a back pay award. The Fourth Circuit itself here distinguished its circuit precedent in *Fariss* v. *Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985), where pension benefits were paid "entirely by the employer directly to the employee." *Id.* at 966 n.10. The court of appeals here explained that it "need not resolve any tension" between this case and *Sloas*, on one hand, and *Fariss*, on the other, because the facts were materially different: Unlike in *Fariss*, the employers here and in *Sloas* made contributions to a commingled pension fund managed by an independent third party. Pet. App. 30a. "At least under these circumstances," the court concluded, the district court did not abuse its discretion in treating the funds as coming from a collateral source. *Ibid.*

The Eighth Circuit also has held that "payments made from a pension plan that is separate from and independent of the employer's business need not be deducted from plaintiff's backpay award because those payments are from a source other than the employer (i.e., a collateral source)," and has "reject[ed]" the position that "all pension payments made after an unlawful discharge must be deducted from subsequent backpay awards." *Smith* v. *World Ins. Co.*, 38 F.3d 1456, 1465-1466 (1994). In sum, the court of appeals' decision is limited to the narrow facts of this case, involving retirement benefits paid by the employee's union from a commingled fund, and petitioners cannot show that they would prevail in any other circuit.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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