No. 09-709

IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I. THE COURTS OF APPEALS ARE TRULY DIVIDED.

A. The "No Court" Challenge.

The United Auto Workers ("UAW") paints the different language used by the various circuits to describe "adverse action" as nothing more than a conflict in nomenclature, not reality. To prove this, the UAW asserts:

> No court has ever held that an employee failed to establish a prima facie case of religious discrimi-

> nation because he showed only that he suffered the kind of material harm courts characterize as an 'adverse employment action' but did not show 'discharge or discipline.'

UAW's Brief in Opposition to Petition for Writ of Certiorari ("UAW Opp."), p. 4.

The answer to the UAW's "no court" challenge is this very case. Both lower courts held that Mr. Reed failed to prove adverse action because he was not discharged or disciplined. App. 63a-64a (trial court); App. 7a, 12a (appeals court). The dissenting circuit judge below evaluated the majority opinion and concluded: "The majority opinion affirms based on Reed's failure to demonstrate either discharge or discipline as part of his prima facie case against his union." App. 14a.

The UAW's "no court" challenge is not just factually wrong, it is logically weak. The UAW challenges Mr. Reed to cite decisions from "discharge or discipline" circuits that *agree* with the Sixth Circuit, whereas conflict is more logically shown through cases that *disagree* with the decision below. The more relevant question is whether other circuits would consider the UAW's decision to charge Mr. Reed 22% more to keep his job an adverse action?

The answer is "yes." Although no other circuit has passed on the amount of the charity-substitution payment, the practical result of charging Reed more is to reduce his take-home pay. Those circuits that do not require proof of discharge or discipline in a religious accommodation case have all indicated in other Title VII contexts that a reduction in pay is an adverse action. *Nichols v. So. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007) ("employee's

compensation … diminished"); *Noviella v. City of Boston*, 398 F.3d 76, 88 (1st Cir. 2005) ("reduction in pay"); *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) ("adverse employment action [includes] decreased … pay"); *Kerns v. Capital Graphics*, 178 F.3d 1011, 1016 (8th Cir. 1999) ("cuts in pay").

The UAW states that two judges on the court below found that Mr. Reed failed to show "any adverse employment action." UAW Opp., pp. 4-5. From this the UAW argues that there is no circuit conflict. The logical conclusion is just the opposite. If the Sixth Circuit believes that reducing an employee's take home pay because he has requested a religious accommodation is not "adverse action," this position highlights the huge disparity between the circuits as to what constitutes adequate proof of adverse action in a religious accommodation case.

The conflict among the circuits in the religious accommodation context is part of the greater conflict over what constitutes "adverse action" in other Title VII contexts. This Court has noted, "without endorsing the specific results," that the circuits took different positions on something this Court labeled "tangible employment action." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). "[T]angible employment action" is simply another way to describe "adverse action."

Among those circuits holding that a reduction in pay is an adverse action is the Second Circuit. Its decision in *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *aff'd & remanded on other grounds*, 479 U.S. 60, 67 (1986), is of particular importance, and is discussed next.

B. This Court Previously Determined That Resolution of the Elements of a Prima Facie Case Is Worthy of This Court's Time, but Failed to Resolve the Elements.

The Second Circuit in *Ansonia* ruled that a choice "between giving up a portion of [the employee's] salary and his religious beliefs" is sufficient to meet the adverse action element. 757 F.2d at 482-83. By granting certiorari on that issue years ago, this Court determined that settling the question of what proof is required in a religious accommodation case is worthy of this Court's time. Unfortunately, after granting review, this Court did not reach the issue. The UAW attempts to blunt the obvious force of this argument in favor of review, by claiming that the petitioners in *Ansonia* did not challenge the Second Circuit's articulation of the elements of a prima facie case. UAW Opp., p. 6, n.3.

However the UAW may choose to interpret the petitioner's goals in *Ansonia*, this Court understood that it was being "asked to address whether the Court of Appeals erred in finding that Philbrook established a prima facie case of religious discrimination." 479 U.S. at 66. This Court noted that "Petitioner asks us to establish for religious accommodation claims a proof scheme … delineating the plaintiff's prima facie case." This Court granted certiorari to establish the proof scheme for religious accommodation claims.

However, upon further examination of the record, this Court decided that "this case [*Ansonia*] raises no such issue" because the trial court had not dismissed the plaintiff's case for "want of a prima facie case." *Id.* at 67. This Court did not change its mind about the

worthiness of the issue. Instead, it found that it had been failed by the facts in the record. In contrast, Mr. Reed's case was dismissed by the trial court for want of a prima facie case. App. 66a.

C. Conflicting Statements of the Rule by the Circuit Courts Is Reason to Review.

The UAW points to the circuits cited by Mr. Reed as requiring something less than discharge or discipline, and argues that even those courts sometimes use the term "discipline," although proof of something substantially less is actually required. The UAW even quotes an admission by the Ninth Circuit that it sometimes uses the term "discharge," although it never requires proof of discharge. UAW Opp., pp. 6-7.

What conclusion follows from the fact that the circuit courts are not only treating the proof of these cases inconsistently, but also using inconsistent language – even within the same circuit? Since this Court has already decided that establishing the nature of the proof required in a religious accommodation case is an important federal question, highlighting the lower courts' confusion in both word and deed is reason to grant review, not deny it.

The most telling flaw in the UAW's "no conflict" argument is that it never attempts to show that charging Mr. Reed 22% more (and thereby reducing his take-home pay) falls short of adequate proof of "adverse action" in any of the five circuits that have disclaimed the "discharge or discipline" standard. The conflict between the judgments of those circuits and the Sixth Circuit as to the proof required is palpable.

II. CHARGING REED MORE THAN ALL OTHERS IS AN UNREASONABLE RELIGIOUS ACCOMMODATION.

To defend charging Mr. Reed 22% more than any other employee is required to pay to keep his or her job, the UAW cites to Section 19 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 169, and this Court's prior statement in *Ansonia* that an employee of faith does not get to choose his preferred accommodation.

Neither source helps the UAW. Although Section 19 uses the term "dues" to describe the amount of the religious objector's payment to charity, this Court determined that "dues" under the NLRA is a term of art that has been "whittled down to its financial core." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988) (citing *NLRB v. General Motors*, 373 U.S. 734, 742 (1963)). This maximum required payment, this "financial core" of the membership dues, does *not* include the amount spent on politics. *Beck*, 487 U.S. at 745-47, 762-63. For that reason, it is an unreasonable accommodation under Title VII for the UAW to ignore this Court's definition of "dues" and charge Mr. Reed more than financial core dues, simply because he has requested a religious accommodation.

Making an exception to the standard definition of dues to require employees of faith to pay more is not a question of employee preference, it is a matter of reasonableness. Mr. Reed already lost his preference when the UAW rejected his charity, the Disabled American Veterans, as an appropriate charity for his alternative payment. App. 3a. This Court in *Ansonia* declared that if the religious accommodation offered to an employee results in the employee being charged

more than his co-workers, it is not a "reasonable" accommodation, and therefore is unlawful under Title VII. 479 U.S. at 71. The amount Mr. Reed is required to pay is not about his preferences, but about a discriminatory and, therefore, unreasonable religious accommodation.

III. REED CORRECTLY IDENTIFIED HIS CLAIM.

According to the UAW, Mr. Reed's failure to plead his claim as one of disparate treatment precludes full consideration of the claims he now makes. UAW Opp., p. 14. *Ansonia* fully supports Reed's approach. *Ansonia* was an accommodation case, not a disparate treatment case. It ruled that a "reasonable accommodation" cannot be a discriminatory accommodation, because discrimination is the "antithesis of reasonableness." 479 U.S. at 70.

That holding forecloses the UAW's argument. An employee, pursuant to the "reasonable accommodation" provision of Section 701(j) of Title VII, 42 U.S.C. § 2000e(j), may challenge a discriminatory accommodation as being "unreasonable." Whatever else Reed might have pled, he claimed a reasonable accommodation right recognized by this Court. No one schooled in Title VII law would consider a union fee objection case (a request for an exception from the uniform dues requirement) to be a disparate treatment case. These are religious accommodation cases, and *Ansonia* teaches that religious accommodations are only reasonable (and therefore lawful) if the accommodation does not create some other type of discrimination against the employee of faith.

The UAW disputes the conflict with *Ansonia* by quoting that portion of the decision stating that

discrimination (in religious accommodation) exists "when paid leave is provided for all purposes *except* religion." UAW Opp., p. 15 (quoting *Ansonia*, 479 U.S. at 71). The UAW claims that nothing in the record shows that the UAW is providing accommodation "for all purposes except religion." UAW Opp., p. 15. A simple paraphrase of the quote from *Ansonia* to match the facts of this case unmasks the UAW's error: "when financial core dues are provided for all purposes *except* religion," unlawful discrimination exists. Financial core dues (dues reflecting only the UAW's collective bargaining costs and not its political expenses), are available ("provided") to every member of the bargaining unit except the religious objector, Mr. Reed. App. 2a. While others may voluntarily pay full dues, only Mr. Reed is coerced into paying that amount to retain his job – which is 22% higher than financial core dues.

The issue *Ansonia* did not reach is the very issue raised by Mr. Reed: What are the elements of a reasonable accommodation claim?

CONCLUSION

Resolving the elements of a prima facie case of religious accommodation will determine whether the Sixth Circuit has rightly held that employees of faith can be forced to make the cruel choice between supporting their family and obeying God. No employee should have to suffer discharge or discipline as a prerequisite to being heard in court. It is an important matter for employee faith and freedom.

The petition for writ of certiorari should be granted to eliminate the conflict among the circuits as to what an employee of faith must prove to claim a religious accommodation, to bring to an end the turmoil in the

lower courts, and to protect employees from having to choose between their God and their job. This Court should also determine whether it is a reasonable accommodation for a union to require that a religious objector pay more than any other employee is forced to pay to retain employment.

Respectfully submitted,

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