No. 24-1044

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PETERSEN, ET AL.,

Plaintiffs-Appellants,

v.

SNOHOMISH REGIONAL FIRE AND RESCUE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:22-cv-01674
Hon. Thomas S. Zilly

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INTRODUCTION

Eight firefighters faithfully served Snohomish Regional Fire and Rescue (SRFR), a fire department in western Washington State, for many years before and during the Covid pandemic. After working safely for more than a year and a half while complying with rigorous PPE protocols—which SRFR's expert had stated "provides excellent protection"—SRFR enacted a Covid vaccination mandate for all its firefighters. When the Firefighters' sincerely held religious beliefs prevented them from receiving Covid vaccination, SRFR granted their requests for accommodation but placed all eight men on indefinite unpaid leave. SRFR claimed that allowing the Firefighters to continue working while unvaccinated would pose undue hardship to SRFR from the possible health and safety risk of spreading the Covid virus, despite acknowledging that vaccinated firefighters could still contract and spread it, and despite the fact that this same risk existed for the year and a half before SRFR's mandate.

Faced with indefinite unpaid leave, the Firefighters sought and found work with neighboring fire departments within Snohomish County and districts outside the county, which accommodated them. Paradoxically, because of SRFR's mutual-aid contracts with neighboring departments, unvaccinated firefighters from those departments worked directly with SRFR's vaccinated crews during the time the eight unvaccinated Firefighters were forced into unpaid leave.

Firefighter Dave Petersen found work with the Snohomish County Fire Marshal's Office as a fire investigator, tasked with investigating fires throughout the county, including in SRFR's district. Despite being unvaccinated, Petersen had full access to SRFR's facilities, which he would routinely use, and would interact with his vaccinated former co-workers.

Eight months after pulling the Firefighters off the line, SRFR's fire chief decided to bring the firefighters back to work, still unvaccinated. Their job duties were identical, the safety protocols were identical, and no restrictions were placed on them. Governor Jay Inslee's statewide Proclamation requiring vaccination of health care providers was still in effect. The Firefighters resumed their jobs and continued to work unvaccinated, without causing any operational difficulties or added expense.

After the Firefighters filed suit for religious discrimination under Title VII and WLAD, the parties filed cross-motions for summary judgment/adjudication. The district court granted summary judgment to SRFR on the basis of speculative or hypothetical hardships, since SRFR identified none during the many months when the Firefighters had worked unvaccinated. By ruling for SRFR, the court viewed the facts in the light most favorable to SRFR, not the Firefighters, ignoring considerable evidence that unvaccinated firefighters had worked successfully both

neighboring departments, outside the county, and beyond. The district court did not identify any *actual* cost or hardship suffered by SRFR.

Counsel is not aware of any case, to date, in which the Ninth Circuit has applied the Supreme Court's holding in *Groff v. DeJoy*, 600 U.S. 447 (2023) at the summary judgment stage. *Groff* requires a court to make a "fact specific" inquiry into the circumstances that an employer contends justifies its failure to provide religious accommodation. Longstanding Ninth Circuit precedent, discussed below, requires employers to produce evidence of actual hardships it would have suffered, not merely hypothetical ones it might have suffered had it implemented an accommodation.

In the present case, no speculation is needed since the Firefighters all worked for many months unvaccinated both before and after they were on unpaid leave. SRFR introduced no evidence of any actual hardships it suffered while Firefighters – and before the vaccination, all firefighters – worked unvaccinated. The record is clear that there simply was no hardship. Of course, *Groff* clarified the standard of hardship – that "undue hardship" really means what it says, something more than a mere hardship, something "excessive" or "unjustifiable." *Id.* at 469.

This Court "zealously guard[s] an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the

evidence and an opportunity to evaluate the credibility of the witnesses." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004).

These faithful Firefighters deserve the opportunity to fully present their claims at trial. But even more, this court should dismiss SRFR's undue hardship defense—not only has SRFR failed to sustain its burden to prove undue hardship—it has failed to introduce sufficient evidence to even create a triable issue of fact. There simply was no hardship, at all. None.

JURISDICTIONAL STATEMENT

The Washington Western District Court had jurisdiction of this matter under 28 U.S.C. §§ 1331, 1343, and 1367, because Plaintiffs-Appellants claim deprivation of civil rights under the Title VII of the U.S. Constitution and under the Washington Law Against Discrimination (WLAD, RCW 49.60 et seq.) (9-ER-2053-2197) This appeal was timely noticed on February 23, 2024 (9-ER-2200), from the final judgment dated January 25, 2024 (1-ER-2), entering the district court's orders (1) granting Appellee's motion for summary judgment, (2) denying Appellants' motion for partial summary judgment, and (3) disposing of the action by dismissing all claims of Appellants. (1-ER-3) The appeal is timely under FRCP Rule 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the facts taken in the light most favorable to the Plaintiff-Appellant-Firefighters, were sufficient to defeat summary judgment on their religious accommodation claims brought under Title VII and the WLAD?

2. Whether the district court erred in denying the Plaintiff-Appellant Firefighters' cross-motion for partial summary judgment since SRFR failed to submit evidence of "excessive" or "unjustifiable" hardship that would result in "substantial increased costs in relation to the conduct of its particular business"?

3. Whether the district court erred in failing to find that the Plaintiff-Appellant Firefighters had bona fide religious beliefs that prevented each of them from receiving a Covid-19 vaccine?

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1)

(a) Employer practices

It shall be an unlawful employment practice for an employer--

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … religion ….

42 U.S.C. § 2000e- (j)

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

RCW § 49.60.180

Washington State Law Against Discrimination (WLAD)

It is an unfair practice for any employer: …

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed … ,

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed … .

Rev. Code Wash. (ARCW) § 49.60.180

STATEMENT OF THE CASE

I. These eight Firefighters safely served Snohomish County.

The eight Plaintiffs-Appellants are career firefighters who have faithfully served Snohomish Regional Fire and Rescue, Snohomish County District #7 (hereinafter "SRFR"[1]) for many years, both before and during the Covid-19 pandemic, and to this day. Appellant Evan Merritt was a firefighter who was assigned to Station 82. At the time he and the other Firefighters were removed from their job duties in October 2021, Merritt had 8 years on wiSth SRFR. (3-ER-385) Merritt was also, and remains, an elected fire commissioner for Snohomish County Fire District #4. (3-ER-386 ¶ 2) As a Commissioner, he accommodated all of the firefighters employed under him in District #4 that requested an accommodation to the vaccine mandate. Id. District #4 includes the City of Snohomish and its immediate rural surroundings, encompassing approximately 60 square miles and a population of around 32,000 residents. Id. District #4 borders SRFR on three of its boundary lines and its firefighters respond to mutual aid calls with the SRFR firefighters. Id. Thus, the accommodated unvaccinated firefighters in Merritt's district worked with the SRFR firefighters after SRFR enacted its vaccine mandate, without posing a health and safety risk. Ironically, although as a

[1] The locals refer to their fire department's name phonetically: "Surfer."

Fire Commissioner, Merritt was able to accommodate his district's firefighters, as a SRFR Firefighter, he himself was not accommodated, ostensibly due to the same alleged health and safety risks facing both districts.

Appellant David Petersen is a Driver/Operator/EMT, who was assigned to Station 77. Petersen had nearly 12 years on with SRFR. (2-ER-253)

Appellant Beau Watson is a Driver/ Operator/EMT, who was assigned to Station 72. Watson had 9 years on at SRFR. (4-ER-792)

Appellant Jay Stickney is a Lieutenant II, who was assigned to Station 81. Stickney had 13 years on with SRFR. (2-CR-Dkt. 47)

Riley Korf is a Firefighter III/EMT and Tillerman, who was assigned to Station 71. Korf had more than 7 years on with SRFR. (3-ER-392).

Ryan Stupey is a Firefighter III/EMT, who was assigned to Station 33. Stupey began his career with SRFR and at the time and at the time of his removal, he had 18 years on. 4-ER-797.

Kevin Gleason is a Driver/Operator and Tillerman, who was assigned to Station 83. Gleason had 16 years on with SRFR. 3-ER-398.

Norm Alan Peterson II has been a firefighter since 1997, with over 10 years on at SRFR before being needlessly put out on unpaid leave. 2-ER-247. Peterson II did not return to SRFR in 2022 and to this day remains on unpaid leave. (ER)

Each Firefighter performed his full job duties throughout the pandemic until the day SRFR took him off the line. Petersen at 2-ER-254 et seq.; Watson at 4-ER-793 et seq.; Stickney at CR Dkt. 47; Merritt at 3-ER-384 et seq.; Gleason, 3-ER-399 et seq.; Korf at 3-ER-393 et seq.; Stupey at 4-ER-800 et seq.; Peterson, 2-ER-248 et seq. They risked their lives every day they were on the job.

The Firefighters' "work is performed in widely diverse environments depending on the situational demands. The Firefighter may be exposed to a wide variety of health and safety hazards in these environments, including potentially deadly hazards, ranging from infected needles and booby traps to toxic by-products of combustion and traffic hazards." (5-ER-1035, "Working Environment."

II. SRFR safely responds to the Covid-19 pandemic.

When the Covid-19 pandemic began, Snohomish County fire professionals, including SRFR leadership, created a countywide "Force Protection Team." (3-ER-554-555) The "sole focus of the Force Protection Group [was] to be on the cutting edge of collaboratively protecting the workforce so that we can effectively accomplish our mission of saving lives and protecting property." 5-ER-871, ¶ 1. The goal was "to develop what would be best – what they believe the best protection for our people and our citizens would be." 5-ER-1126, line 12 to p. 1127, line 2.

"SRFR looked to county, state, and national public health authorities for guidance regarding how to best protect its employees and the public." 7-ER-1432, ¶9. The Force Protection Group created a Covid-19 Playbook, to develop COVID-19 policies and procedures to be followed by firefighters when responding to EMS calls. 5-ER-996-1013 [July 2021 version]; 5-ER-1016-1026 [Oct. 2021 version]; 5-ER-1028-1031 [April 2022 revisions]. The Playbook was updated at times during the pandemic to incorporate new guidance. Id. In determining COVID-19 policies, SRFR "needed to balance protecting employees and the public they serve from COVID-19 as much as possible, while still providing vital emergency medical and fire suppression services." *Id*.

The Playbook was considered "dynamic," 8-ER-1942, lines 13-25, and as the "disease would progress and change, so would the playbook." 3-ER-554, line 18 – 555, line 3. In late 2020, almost an entire year before its vaccine mandate, SRFR firefighters were among the first categories of people eligible to receive Covid vaccines. 7-ER-1432, ¶10. Despite this, the Playbook did not require or even recommend Covid-19 vaccination. 5-ER-996-1013 [July 2021 version]; 5-ER-1016-1026 [Oct. 2021 version].

SRFR's primary protective measures for Covid-19 were testing, masking, social distancing, and PPE such as gowns, gloves, and masks. 8-ER-1966, line 2 -

1967, line 4. Covid-specific adaptations were introduced for patient-contact "aerosol-generating procedures" (AGPs) such as cardiopulmonary resuscitation (CPR) and airway placements. (5-ER-862, ¶1; 5-ER-1008-1022). SRFR vehicles were adapted for patient isolation and were constantly cleaned and decontaminated. (5-ER-862, ¶1, 7). Exposure to a person even possibly infected with the Covid virus triggered an extensive response of washing of uniforms and clothing and defogging the transport vehicle. Id. SRFR also barred visitors, family, or the public from entering its stations. 5-ER-1001.

The Playbook anticipated inevitable infection with the Covid virus. (5-ER-1001, see box 3; 5-ER-1029, ¶¶ 3, 5) It set forth exhaustive protocols and procedures to mitigate the risk of infection or transmission in multiple categories, such as "Station/Crew Protective Measures," "Aerosol Safety," "Decontamination," "PPE Preservation," and "Station Safety & Sick Personnel." 5-ER-996-1013 [July 2021 version]; 5-ER-1016-1026 [Oct. 2021 version] SRFR required the tracking of employees' Covid symptoms beginning in March 2020, using a spreadsheet with minute detail about symptom onset and illness progression. 3-ER-591-595 (CR at Dkt. 41, pp. 187-189.) This tracking was designed to enable the safe return to work of employees after they recovered from Covid. 3-ER-429 **Return to Work Guidance for COVID Related Absences**. The commonsense understanding at SRFR was: "When folks got Covid, they

stayed home," and SRFR "didn't allow folks that were positive to be at work." 3-ER-556 line 20 – 557 lines 4-12) The Playbook instructed that if a firefighter tested positive at work, the required response was to alert a command officer and depart the station. 5-ER-1001, 1018, 1029. The Playbook never recommended that a firefighter be separated from employment due to a health or safety risk of possible infection with the Covid virus.

The Playbook never even recommended Covid vaccination until the revised version issued in April 2022, long after the Firefighters had been removed from duty, and just shortly before they were brought back from unpaid leave, still unvaccinated. 5-ER-1029, ¶ 6. Every responder was required to follow the Playbook rules without regard to vaccination status. 3-ER-552, lines 1-7.

III. The Playbook is revised in July 2021 due to the Delta variant, but does not require vaccination.

SRFR's Force Protection Team revised the Playbook in July 2021 in response to the rise of the Delta variant. 5-ER-997, 1000. Despite the vaccine being available for months, SRFR did not mandate it for the health and safety of others during the "Delta wave." *Id.* Instead, SRFR merely required everyone to wear masks indoors. *Id.* SRFR's Scott Dorsey, Deputy Chief of Health and Safety, and a member of the Force Protection Team, wrote in his memo accompanying distribution of the new Playbook: The Force Protection Group made this change based on "current research, CDC recommendations, and local factors, such as

hospitalizations as a result…. None of these decisions are taken lightly and much thought has gone into these changes. Please know at the core of these changes is our mission to protect the workforce." *Id*. at ¶ 5. Dorsey elaborated:

"A quick synopsis of the Delta variant reveals that the seeming magic bullet of the vaccine was not all that we had hoped it would be. … Thus what we understand at the moment is that those who are vaccinated experience strong protection, and a lower chance of infecting others. However, countries like Israel, Singapore, and the United States are finding that those who are fully vaccinated are becoming symptomatic and transmitting the virus to the unvaccinated. The result is hospital admission for some vaccinated populations. It is indeed disappointing to realize that the vaccine alone was not the magic bullet we had hoped for. But pandemics are apparently like that." 5-ER-1000 at ¶ 2.

IV. The Firefighters strictly follow the safety protocols of the Playbook.

From the beginning of the pandemic, through their last shift on October 18, 2021, each of the Firefighters strictly observed SRFR's Covid-19 safety protocols, which included the following: wearing an N-95 face mask; daily temperature checks, SPO2 monitoring; social distancing except when alone, sleeping, or eating; placement of surgical masks on all patients; during aerosol-generating procedures (AGP) on a patient, donning full PPE including goggles, N-95 mask, face shield, gown, gloves, and booties; as well as the routine cleaning, disinfecting, and

decontamination of equipment, vehicles, the station and all living areas; decontamination procedures for fire engines and aid cars; and the required use of Personal Protective Equipment including masks, gloves, gowns, goggles, and face shields, all of which were to be used following the Playbook's detailed procedures for donning and doffing. Petersen, 2-ER-256 ¶ 1; Watson, 4-ER-795 at ¶ 6; Stickney, CR Dkt. 47, ¶6; Merritt, 3-ER-387 at ¶ 6; Gleason, 3-ER-401 at ¶ 7; Korf, 3-ER-395 at ¶ 6; Stupey, 4-ER-800 at ¶ 5; Peterson, 2-ER-251 at ¶ 15.

V. Gov. Inslee issues Proclamation 21-14, requiring Covid-19 vaccination for Health Care Providers and allowing for medical and religious accommodations.

In August 2021, Gov. Jay Inslee issued Proclamation 21–14, which required all healthcare providers in the state to be fully vaccinated by October 18, 2021. 9-ER-2046, ¶ 1; 7-ER-1433, ¶ 11. Because firefighters are paramedics and EMTs, they were included as healthcare providers under the Proclamation. 9-ER-2046, ¶ 1; 7-ER-1433, ¶ 11. The Proclamation acknowledged that employees could be accommodated for medical or religious reasons. 9-ER-2057, ¶ 11.

In response to the Proclamation, SRFR adopted a policy that mirrored its terms. SRFR's Policy 921 required Covid-19 vaccination of firefighters by October 18, 2021, 5-ER-1036-1039, and allowed for medical exemptions and religious accommodations. 5-ER-1038, ¶ 3.4.

VI. The Firefighters timely request an accommodation based on their sincerely held religious beliefs.

After SRFR's mandate was enacted, each of the eight Firefighters submitted a request for religious accommodation. 9-ER-2083-2094. SRFR Human Resources director Pamella Holtgeerts and HR specialist Kendra Johnson conducted meetings with the Firefighters, which each lasted about 15 minutes. Petersen, 2-ER-455 lines 4-14; Watson, 4-ER-794 lines 3-12; Stickney, CR Dkt. 47; Merritt, 3-ER-385, lines 6-15; Gleason, 3-ER-398, lines 4-13; Korf, 3-ER-394 at lines 7-16; Stupey, 4-ER-799, lines 3-11; Peterson, 2-ER-249, lines 7-16.

There was no discussion of religion, or alternative assignments, or even the idea that an alternative position might be required. *Id.* Instead, O'Brien assured the Firefighters they would be accommodated. *Id.*;7-ER-1434, ¶ 13. The Firefighters' religious beliefs are as follows:

> David Petersen: My belief in God granted me free will, and in return, my obedience to the father, and the son, and the Holy Spirit. … Prayer connects me to God through the Holy Spirit [and] is a vital and personal relationship with the living and true God. I prayed about the mandated vaccines in order to keep my job and I prayed to God for the guidance in faith. In every major decision, such as my livelihood, I sought direction from my creator through the Holy

Spirit. … I was guided and led by the Holy Spirit to not take the mandated vaccine. … Going against my sincerely held belief would've disconnected me from the father, the son, and the Holy Spirit. 2-ER-261

Jay Stickney: I am a Christian and a follower of Jesus who believes he died so that our sins can be washed clean and we can all have reconciliation with God. I consulted God through prayer and was led by the Holy Spirit that taking the COVID-19 vaccine would go against my sincerely held belief and convictions given to me by God. … In Hebrews 10:38 it instructs "[B]ut my righteous one shall live by faith, and if he shrinks back, my soul has no pleasure in him." I am to live faithfully by the instruction of the Holy Spirit, and to insult Jesus is sacrifice and heavenly counsel is regarded as sin, deserving punishment, and separation from God and his spirit. Stickney, CR Dkt. 47.

Evan Merritt: Every major decision I make in my life, I pray. When I pray, I am guided by the Holy Spirit. As a Christian, my conscience is led by the Holy Spirit in all acts of my life. … Not

taking the Covid vaccine was a big decision, I was going to be without work and without a paycheck to provide for my family. So just like I do with every major decision in my life, I prayed. I was led by the Holy Spirit. It was not a conscious decision; I was led by the Holy Spirit not to take this vaccine. Merritt, 3-ER-38

Kevin Gleason: I have been born and raised as a Christian. … I follow the path of Jesus Christ. My conscience and everything I do is led by the Holy Spirit. I pray to God about every major life decision, especially those that affect my family and career. When the vaccine came out. I prayed and was led by the Holy Spirit not to take the vaccine. When the mandate came down from SRFR, I prayed and was led by the Holy Spirit not to betray my sincerely held religious belief. All aspects of my life are led by the Holy Spirit through conscience … My life is dedicated to my savior, and I will never surrender and allow anything to compromise my vow to God. Gleason, 3-ER-403.

Riley Korf: I attest that I'm a follower of Jesus Christ. I believe that Jesus is who he said that he is. That he lived a perfect life and

died for the sins of man on the cross. This affects every aspect of my life. I go to church regularly, pray, and read my Bible, which affects how I make decisions in my life. This is how the Holy Spirit leads us. The Bible communicates that we should test and discern what is good. This means when the Covid vaccine mandate came I handled it the same way that I handled other decisions I spent time with other Christians, I prayed, and I read my Bible. After all of that, I felt the Holy Spirit was leading me to not take the COVID-19 vaccine, and to go against that conviction, that the Lord put in my heart, would be wrong. Korf, 3-ER-394.

Norm Peterson: It is a violation of my religious convictions to [take] the COVID-19 vaccine. When there is a big decision I make in my life, I pray for guidance from God and the Holy Spirit. Going against that is sin. Therefore, taking the vaccine would have been a sin against the most Holy God, and going against my sincerely held beliefs. I pray often for guidance from the most Holy God. And it would be a sin not to follow that guidance. Peterson, 2-ER-251.

VII. Fear of lawsuits, not health and safety concerns, cause Chief O'Brien to deny accommodations to the Firefighters.

Days before SRFR's vaccination deadline of October 18, Chief Kevin O'Brien changed course from his assurances that the Firefighters would be accommodated. 6-ER-1191 ¶ 1. He stated in an internal email that his assessment of SRFR's potential legal liability was "the straw that broke the camel's back." *Id.* at ¶ 5. In a message dated October 14, 2021, and addressed to the "Commissioners," O'Brien explained "our change in direction regarding the vaccination mandate… ." *Id.* at ¶ 1. His email repeatedly refers to the "risk to the district" of lawsuits from the public. Id. at ¶ 5. O'Brien writes that even though it would be "rare and difficult" for a lawsuit to win, the "possibility exists" of legal liability stemming from the presence of unvaccinated firefighters. *Id.* "As I know you are aware, the board and the chief can be prosecuted and personally sued for this. **I don't want that to happen and neither does my family.**" Id. at ¶ 6 (emphasis added).

On October 18, 2021, SRFR's Board of Commissioners conducted a public meeting. 7-ER-1550. First, the Board approved a new Memorandum of Understanding with the firefighters' Union, which modified its Collective Bargaining Agreement. 7-ER-1553. The new MOU created a new employee right to request a year's unpaid leave as a religious accommodation. *Id.* The CBA had

always offered unpaid leave for personal reasons. 3-ER-475 at Article 13 (CBA); 7-ER-1436, lines 20-21 (O'Brien). This change simply inserted language specifically characterizing unpaid leave as a religious accommodation.. Second, the Board passed a motion "authoriz[ing] [O'Brien"] to "deny reasonable accommodation requests when addressing individual request for accommodations if the fire chief determines that such accommodations create an undue liability, operational or financial burden on the district." 7-ER-1436, lines 4-9.

On October 21, 2021, SRFR issued letters to the Firefighters, stating that "[t]he District has determined that your request for a religious exemption is based on a "sincerely held religious belief that prevents you from being vaccinated against COVID-19." 7-ER-1557-1573. However, SRFR determined it "is unable to identify a reasonable accommodation that would allow you to continue to perform all of the essential functions of your job without it being an undue hardship on the District." The letter stated that they could request "an unpaid leave of absence for up to one year" as an accommodation. *Id*.

VIII. Neighboring fire departments accommodated their firefighters without undue hardship.

SRFR maintains inter-local contracts with neighboring departments that allow each other's first responders to respond to calls within the other's service area. (ER). SRFR itself is the hole in a doughnut, surrounded on all sides by other Snohomish fire districts. 3-ER-386, ¶ 2 (Fire District #4); 2-ER-259-260 (Getchell

Fire). Many of these other Snohomish County departments accommodated their firefighters and allowed them to continue working using the existing Playbook protocols. 4-ER-636, 637 line 25-638, lines 1-5; 6-ER-1191, last line. After mandating the vaccine and denying accommodations, SRFR did not amend any of its mutual-aid contracts with the neighboring fire districts, and allowed its vaccinated SRFR firefighters to work with the unvaccinated firefighters of those districts to respond to mutual-aid calls. 2-ER-259-260; CR Dkt. 47, p.5 at ¶ 14, 15.

Appellant Dave Petersen, after being placed on unpaid leave by SRFR for being unvaccinated, found work with the County itself, as a fire investigator. 2-ER-260, ¶ 2, 3. His duties and responsibilities were to respond to all fires within Snohomish County and investigate fires to determine the cause. *Id.* This required him to respond to fires within SRFR's boundaries. He also had to use SRFR's stations to carry out his duties. *Id.* Thus, even though SRFR put him on unpaid leave due to health and safety risks, his new job actually required him to work with SRFR employees unvaccinated. *Id.* Petersen also worked for Getchell Fire, who accommodated him as a Firefighter, during which he would interact on mutual-aid calls with SRFR firefighters. Id. at 259-260.

Appellant Firefighter Jay Stickney also found work with a neighboring fire district where he a received a religious accommodation and was able to work unvaccinated. CR Dkt. 47, p. 5 at ¶ 15.

During this time, Chief O'Brien, who had placed Petersen on unpaid leave, knew that Petersen was responding to fires within SRFR's boundaries and knew he was interacting with SRFR's firefighters unvaccinated. 2-ER-260, ¶ 2, 3. Indeed, in February 2022, Petersen had to go to SRFR's station 81. *Id.* While there, and while unvaccinated and unmasked, he saw Chief O'Brien. *Id.* The Chief came over chatted with Petersen. *Id.* At no time did Chief O'Brien require Petersen to be masked, or to show a negative Covid test in order to be on the premises. *Id.* Nor was Petersen ever told he was not allowed on the premises due to being unvaccinated. *Id.* During Petersen's entire eight months working for Snohomish County while on unpaid leave with SRFR, he was never told by SRFR that he could not work side-by-side with SRFR firefighters, could not be on SRFR property, nor use SRFR facilities. *Id.* Petersen always had full access to SRFR's stations, including the exercise room, bathrooms, day rooms, and the bays. *Id.*

Even fire districts outside of Snohomish County granted religious and medical accommodations to their firefighters. See *Bacon v. Woodward*, 104 F.4th 744 (9th Cir. 2024) (noting accommodations in King County). In addition, private medical groups in the city of Spokane, such as American Medical Response, a private medical transportation service that "provides emergency transport services within Spokane, including in conjunction with the Spokane Fire Department" accommodated its healthcare providers. (See *Bacon v. Woodward*, 104 F.4th 744,

748 (9th Cir. 2024). Although it "responds to tens of thousands of calls per year in the City of Spokane," it did not implement "a strict requirement that all ambulance operators be vaccinated." *Id.* at 748.

IX. SRFR's retained expert, John Lynch, confirms the success of Playbook-style protocols for local firefighters/EMS personnel.

In September 2021, the CDC published a study co-authored by SRFR's retained expert, John Lynch, specifically regarding the Covid risk management of EMS providers during patient-care aerosol-generating-procedures (AGPs) such as CPR and airway placement. 2-ER-284-292; 6-ER-1317 at ¶ 61 with weblink). Lynch's study stated that it "found a low overall risk of EMS provider infection from patient care." 2-ER-290, col. 1, ¶ 3. "The low incidence occurred under circumstances in which ample PPEs were available for EMS providers and public health management provided active oversight to support guideline-directed PPE field practices." The study further found: "The overarching inference is that **PPE provides excellent protection under these pre-hospital circumstances**. The findings should reassure first responders that emergency care in general and specifically when using AGP's can be delivered safely to treat patients as long as PPE are properly deployed, and that, in general, **EMS personnel and management should not change evidence-based practice solely to mitigate transmission risk.**" 2-ER-290, col. 2 at ¶ 1.

The study concluded that "[c]ollectively, the results suggest that PPE provides protection against acquiring COVID-19 during prehospital emergency patient care, which supports maintenance of established practices." *Id*. at col. 1, "Discussion."

Despite his prior findings that PPE and safety protocols specifically created and implemented by fire industry professionals had worked successfully worked to reduce the risk of infection with the Covid virus, Dr. Lynch changed his tune after being hired by SRFR to give an expert opinion in this case. In his expert opinion, Lynch concluded that "it is my opinion that from August 2021 through April 2022, the risk of being exposed to individuals (co-workers and members of the public) with COVID and transmitting COVID (if infected) was greater in the population of individuals who were not vaccinated." 6-ER-1299. This conclusion begs the question as to what happened after April 2022 when SRFR brought the firefighters back: Did the risk suddenly vanish? Or was Dr. Lynch just saying what SRFR had paid him to say?

X. SRFR brings the firefighters back eight months later, while the Proclamation is still in effect.

On May 9, 2022, just over six months after being placed on unpaid leave, SRFR informed the Firefighters they could begin a process to request to return to work, subject to "all Covid-19 guidelines." 9-ER-2146-2147 (e.g., Gleason). At this time, Governor Inslee's Proclamation was still in effect, the MOU was still in

effect, and there was no change in their insurance coverage. Chief O'Brien stated that the union wanted to bring them back and that he had "seen other agencies do it." And also: "We needed their help." 8-ER-1980, line 15 to 8-ER-1982, line 156.

The Firefighters were all brought back to their jobs without any change[2] to their duties, no change to safety protocols, nor any additional restrictions for being unvaccinated. Each man was required to sign a new "Reasonable Accommodation Form," which included an optional "release of liability," the signing of which meant he would not have to wear a mask. 9-ER-2176. SRFR characterized this return to work as a "modification" of its earlier "accommodation" of unpaid leave. 9-ER-2174-2175.

PROCEDURAL HISTORY

On November 22, 2022, the Firefighters filed their complaint in United States District Court, Western District of Washington, against SRFR and SRFR Chief Kevin O'Brien for religious discrimination and failure to accommodate

[2] They were not returned to the original stationhouses from which they had been banished. Stationhouses are chosen based on seniority rules under the CBA. 3-ER-462, 491 at Section 21.3.2.

under Title VII and WLAD. 9-ER-2053-2197. The case was assigned to District Judge Thomas S. Zilly. *Id.* On March 21, 2023, the district court ordered the dismissal with prejudice of Chief O'Brien, pursuant to a stipulated motion grounded on "failure to effect service." 9-ER-2036-37.

On Dec. 7, 2023, SRFR filed its motion for summary judgment. 9-ER-2007. On Dec. 21, 2023, the Firefighters filed their cross-motion for partial summary judgment. 6-ER-1245. In both SRFR's reply brief to the Firefighters' opposition to summary judgment, and its opposition to the Firefighters' motion for partial summary judgment, SRFR also included motions to strike certain "statements and evidence in the Firefighters' supporting declarations." 2-ER-197, 2-ER-117, respectively. Despite a request for oral argument, there was none.

Judge Zilly's Order, dated January 25, 2024, recited the background facts and legal standards and concluded with this statement: "Because unvaccinated firefighters are at a greater risk of contracting and spreading COVID-19, regardless of masking, PPE, testing, and social distancing, the court concludes that Snohomish Fire could not reasonably accommodate Firefighters' vaccine exemption requests without undue hardship." 1-ER-22

The Order, responding to SRFR's motions to strike, stated: "The court declines to individually address each statement Snohomish Fire seeks to strike but has considered only admissible evidence in reaching its decision." 1-ER-13

The Order (1) granted summary judgment to SRFR and dismissed the entire action; (2) denied the Firefighters' motion for partial summary judgment; and (3) entered final Judgment as of January 25, 2024. 1-ER-22.

On February 23, 2024, Firefighters timely filed their Notice of Appeal of the final order of judgment. 9-ER-2200. On February 26, 2024, Firefighters filed an Amended Notice of Appeal to strike the name of Chief O'Brien, inadvertently included as a Defendant-Appellee. 9-ER-2198-99.

SUMMARY OF ARGUMENT

A plaintiff's burden to defeat summary judgment on a discrimination claim is low. The court below assumed that Firefighters established their prima facie case. While summary adjudication on this point should have been granted, the key issue on appeal is regarding undue hardship. Did the court below err in finding for SRFRon its undue hardship defense, when it should have found for Plaintiff dismissing the undue hardship defense?

Firefighters presented abundant evidence that there was no actual hardship, whereas the court below relied on hypothetical hardships. Both before and after Firefighters were placed on unpaid leave, they worked unvaccinated for many months providing services to the community. SRFR produced no evidence that unvaccinated firefighters spread viral load, infected anyone with COVID-19, or

that their unvaccinated status in any way disrupted operations or caused substantial increased costs either before or after their unpaid leave. In the face of such abundant real world experience of no *actual* hardship, the court instead chose to speculate as to potential, or hypothetical hardships arising from the *potential* of unvaccinated firefighters to become infected and possibly spread covid, rather than rely on what actually took place. But as will be shown below, hypothetical hardships do not satisfy Defendant's burden of proof.

Moreover, there is considerably more evidence that unvaccinated firefighters caused no hardship whatsoever: 1) neighboring fire departments accommodated their firefighters without suffering any undue hardship; 2) one of the Plaintiff's actually worked with SRFR firefighters and in Defendants facilities unvaccinated while on unpaid leave; 3) SRFR never determined that their prior protocols and PPE did not work to lower the risk of spreading Covid-19; 3) a September 2021 contemporaneous study by Respondent's expert found that there was a very low risk of transmission by firefighters and PPE provides excellent protection; and 4) SRFR admits it knew at the time that the vaccine was "not the magic bullet" and that vaccinated firefighters could still become infected with, and transmit, Covid-19.

Finally, and most importantly, SRFR produced no evidence of "substantial increased costs in relation to the conduct of its particular business" that it would

have incurred had it accommodated these firefighters during those few months it placed them on unpaid leave. *See Groff v. DeJoy*, 600 U.S. 447, 470 (2023).

STANDARD OF REVIEW

A district court's decision to grant or deny a motion for summary judgment or summary adjudication is reviewed de novo. *See, e.g.*, *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir.) (grant), *cert. denied*, 142 S. Ct. 343 (2021); *2-Bar Ranch Ltd. P'ship v. United States Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021) (partial summary judgment); *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 606 (9th Cir. 2019) (denial). A district court's decision on cross motions for summary judgment is also reviewed de novo. *See Innova Sols., Inc. v. Baran*, 983 F.3d 428, 431 (9th Cir. 2020).

In reviewing a grant of summary judgment, the Court must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied substantive law." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) (citing *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006) (citation and internal quotation marks omitted)). "We draw all reasonable inferences supported by the evidence in the nonmoving party's favor." *Id*.

ARGUMENT

I. Summary judgment in favor of SRFR was improper.

a. A plaintiff's burden to defeat summary judgment on a Title VII discrimination claim is low.

This Court "ha[s] repeatedly held that it should not take much for a plaintiff in a discrimination case to overcome a summary judgment motion." *France v. Johnson*, 795 F.3d 1170, 1175 (9th Cir. 2015) (collecting cases), *as amended on reh'g* (Oct. 14, 2015). "[B]ecause of the inherently factual nature of the inquiry, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact." *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991). In explaining the plaintiff's low burden on summary judgment, this Court has "emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." *McGinest*, 360 F.3d at 1112.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, (1986). The moving party has the initial burden of establishing that there are no disputed material facts. Id. at 256. Circumstantial evidence alone may create a genuine issue, sufficient to defeat summary judgment. Cornwell v Electra Credit Union, 9th Cir 2006, 439 F3d 1018; Desert Palace Inc v Costa, 2003, 539 US 90

(circumstantial evidence may also be more "certain, satisfying, and persuasive than direct evidence.")

b. The Court erroneously failed to find that the Firefighters were entitled to partial summary judgment as to their prima facie case of religious discrimination.

Title VII declares it unlawful, *inter alia*, "for an employer ... 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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). As the Supreme Court recognized nearly 50 years ago, "[t] he intent and effect of this definition was to 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 ...." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977); *see also Groff v. DeJoy*, 600 U.S. 447, 453-54 (2023) ("Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an undue hardship on the conduct of the employer's business.") (internal quotation marks and citation omitted).

Under Title VII's statutory scheme, defining the term "religion" broadly to require employers to accommodate the religious beliefs and observances of their employees, the Supreme Court has clarified that this definition, added in 1972, did not add a new cause of action, but clarified the existing claim for disparate treatment. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015). An employee bringing a Title VII claim for an employer's failure to accommodate makes his prima facie case by showing that:

(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty;

(2) he informed his employer of the belief and conflict; and

(3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement. *Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606 (9th Cir. 2004)*.

Once the plaintiff has made a prima facie case, the burden shifts to the employer to show that it " 'negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs.'" *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir.1993) (quoting *EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1513 (9th Cir.1989)). *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1467 (C.A.9 1996). "Where the negotiations do not produce a proposal by the employer that would

eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." *Id. citing EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610, 615 (9th Cir.1988), *cert. denied,* 489 U.S. 1077 (1989). "Only if the employer can show that no accommodation would be possible without undue hardship is it excused from taking the necessary steps to accommodate the employee's religious beliefs. *See Heller,* 8 F.3d at 1440; *Townley Eng'g,* 859 F.2d at 615." *Id.*

Elements 2 and 3 of the prima facie case were not in dispute. Element 1 was only contested by SRFR as to 6 of the 8 Firefighters. Since SRFR did not contest element 1 as to Plaintiff Watson and Plaintiff Stupey, the district court erred in refusing to grant partial summary judgment to them as to their prima facie case.

Regarding the other 6 firefighters, the uncontested facts show not that they did not have a religious belief, but merely that they had a religious belief that SRFR does not believe is legally protected. However, Title VII contains no such exceptions. The federal statute does not exclude certain religious beliefs while favoring others for protection. Instead, Title VII has a "broad and intentionally hands-off definition of religion." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452 (7th Cir. 2013). It defines religion to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or

practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

Just because an employer does not think the religious beliefs are rational—e.g., that praying to God for direction should not be protected—such argument is inapposite to clear Ninth Circuit caselaw. "A religious belief need not be consistent or rational to be protected under Title VII, and an assertion of a sincere religious belief is generally accepted." *Keene v. City and Cnty. of San Francisco*, 2023 WL 3451687, at *2 (C.A.9 (Cal.), 2023) (*citing* *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("[T]he resolution of [whether a belief is religious] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176 n.3 (9th Cir. 2021) ("We may not ... question the legitimacy of [Appellants'] religious beliefs regarding COVID-19 vaccinations." (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018))), *recons. en banc denied*, 22 F.4th 1099 (9th Cir. 2022).)

The EEOC has long observed in its guidelines that "[i]n most cases whether or not a practice or belief is religious is not at issue." 29 C.F.R. § 1605.1. Those guidelines flow from the deference with which the Supreme Court has assessed religious beliefs for many decades. "In such an intensely personal area ... , the

claim of the [individual] that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger*, 380 U.S. 163, 184 (1965); *see also EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002) (Title VII "thus leaves little room for a party to challenge the religious nature of an employee's professed beliefs.").

What matters is whether the beliefs are, in a plaintiff's "own scheme of things, religious." *U.S. v. Stock*, 460 F.2d 480, 483 (9th Cir., 1972), quoting *Welsh v. United States*, 398 U.S. 333, 339, (1970); *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965).

Thus, whether a belief is religious is not hard to prove. "The claim of the adherent 'that his belief is an essential part of a religious faith must be given great weight.'" *Patrick, supra*, 745 F.2d at 158, *citing Seeger, supra,* 380 U.S. at 184, 85 S.Ct. at 863. "Both the Supreme Court and Ninth Circuit have cautioned against second-guessing the reasonableness of an individual's asserted religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *Bolden- Hardge v. Off. of California State Controller*, 63 F.4th 1215, 1223 (9th Cir. 2023). "It is not [the employer's] place . . . , nor [theirs] as a court, to question the correctness or even the plausibility of [the plaintiff's] religious understandings." *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 142 (4th Cir. 2017). Even "[i]mpulses prompted by dictates of conscience as well as those engendered by divine commands are ...

safeguarded against secular intervention, so long as the claimant conceives of the beliefs as religious in nature." Patrick v. LeFevre, 745 F.2d 153, 158 (C.A.2 (N.Y.), 1984).

Here, each of the other six Firefighters was unable to receive Covid vaccination solely because of his religious beliefs. Each one conceived that his conviction to not get vaccinated was directly from God. SRFR offered no other competing reason as to why they could not get vaccinated. Such beliefs are protected under Title VII, and must be accommodated short of undue hardship, even if SRFR thinks they are not rational, or reasonable, or that they are "more akin to personal preference."

Furthermore, SRFR already told the Firefighters, in its October 21, 2021, letters when it denied an accommodation, that "[t]he District has determined that your request for a religious exemption is based on a sincerely held religious belief that prevents you from being vaccinated against COVID-19." Then, during the vaccine mandate, SRFR brought the firefighters back early from leave and granted their requests for religious accommodation. Thus, to now argue that their convictions were not religious is completely disingenuous and unsubstantiated by any fact.

The district court rightly followed this circuit's precedent in assuming that all the Firefighters had sincerely held religious beliefs and had each made out his

prima facie case, yet the court wrongly refused to explicitly order that the Firefighters had established each element of their prima facie case, including that they had a sincerely held religious belief. The firefighters are entitled to summary adjudication of their prima facie case.

c. The district court erroneously concluded that SRFR's offer of unpaid leave was a reasonable accommodation.

To the extent the district court held that indefinite unpaid leave is a reasonable accommodation, such conclusion is a gross violation of this Circuits case law and must be reversed. There is nothing "reasonable" about an accommodation that is a year without pay. Indefinite unpaid leave is a harm, not an accommodation. *Sambrano v. United Airlines, Incorporated*, 2022 WL 486610, at *7 (C.A.5 (Tex.), 2022) (reversing trial courts finding that unvaccinated airline workers had not alleged an irreparable harm).

The Ninth Circuit recognizes "that an adverse employment action exists where an employer's action negatively affects its employee's compensation." Fonseca v. Sysco Food Servs. of Arizona, Inc., 374 F.3d 840, 847 (9th Cir. 2004). Citing Little v. Windermere Relocation, Inc., 301 F.3d 958, 970 (9th Cir.2002) (holding that a reduction in base monthly pay was an adverse employment action even though with commission and bonuses it might have equaled the same net pay); cf. University of Hawai'i Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1105–06 (9th Cir.1999) (holding that receiving pay even a couple of days late can

seriously affect an employee's financial situation and constitutes substantial impairment under the Contracts Clause).

Clearly, unpaid leave is an adverse action, not an accommodation. This alleged accommodation did not eliminate the conflict between the Firefighters' religious beliefs and the job requirement, it eliminated the Firefighters.

d. The district court erroneously ruled that hypothetical hardships satisfied SRFR's burden to prove actual undue hardship.

The District Court made two fundamental errors in its analysis of undue hardship; first, while it paid lip service to the heightened standard in *Groff v DeJoy,* it relied on pre-*Groff* cases, effectively incorporating the flawed reasoning of those pre-*Groff* cases. Second, the district court relied on hypothetical hardships, because it had no actual hardships it could reference.

This court has long recognized that even under the *de minimis* standard of undue hardship, only actual hardships would suffice to meet a Defendant's burden. *Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1474 [holding "mere possibility" of harm does not constitute excusable hardship]; *EEOC v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal. 2013) 966 F.Supp.2d 949, 962 ["Hypothetical or merely conceivable hardships cannot support a claim of undue hardship."].) Thus, courts are generally "skeptical of hypothetical hardships that an

employer thinks might be caused by an accommodation that has never been put into practice." (*Burns v. Southern Pac. Transp. Co.* (9th Cir. 1978) 589 F.2d 403, 406 [internal quotation marks omitted].)

The problem SRFR faces here, a problem the district court failed to address, is that the very "accommodation" Firefighters sought – to utilize protective measures other than vaccination – was implemented by SRFR both before and after the period when Firefighters were placed on unpaid leave and denied any accommodation. The question of undue hardship, then, is not left to speculation, or even to reliance on expert witness testimony about the COVID-19 virus. As the Firefighters requested accommodation was actually put into practice, both before and after the unpaid leave, without any evidence of undue hardship.

SRFR claims Firefighters posed an increased risk to health and safety. Why then did SRFR offer to bring the Firefighters back to work in May 2022, unvaccinated? Why then did SRFR not mandate the vaccine earlier, like in July 2021 when the reinstated masking due to the contagious Delta variant? But more to the point, Firefighters worked unvaccinated for a year and half before this unpaid leave and there is no evidence of excessive risk to the health and safety of others. The Firefighters also came back to work after their unpaid leave, still during the pandemic and while the Governor's vaccine mandate was still in effect, and there is no evidence that this caused increased risk to the health and safety of others.

If indeed, Firefighters working unvaccinated was so much of a problem as to constitute an "undue hardship" on the conduct of Defendant's operations, where is the evidence in the record to document the negative or fiscal impact on SRFR of having unvaccinated firefighters in the workforce? There is none.

The district court failed to apply the undue hardship "test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." *Groff v. DeJoy*, 600 U.S. 447, 470–71 (U.S., 2023). The court could not find undue hardship, as there was no evidence whatsoever that unvaccinated firefighters actually caused anyone to become sick, resulted in any disruption to the services SRFR provided, or costs SRFR any amount of money. Defendant's entire "undue hardship" defense is built on "what ifs" and potential hardships—potential hardships that clearly were not based in reality as numerous other fire stations accommodated their firefighters.

"Undue hardship requires proof of actual imposition or disruption." (*E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 2013 WL 1435290, at *14 (N.D.Cal.,2013) citing to *Anderson v. General Dynamics Convair Aerospace Division* (9th Cir. 1978) 589 F.2d 397, 400, cert. denied 442 U.S. 921 (1979). Here, there was none.

The District Court relied on cases that do not help the Defendant. For example, the district court relied on the district court's opinion in *Beuca*, which granted a 12(b)6 motion to dismiss based on the premise that to provide a religious accommodation to an unvaccinated health care worker was, per se, an undue hardship. The Ninth Circuit reversed. Beuca v. Washington State Univ., No. 23-35395, 2024 WL 3450989, at *1 (9th Cir. July 18, 2024). Proof of undue hardship requires evidence, not speculation. There is no per se undue hardship. It is an affirmative defense that must be proven.

The court cherry-picked a district court case on the other side of the continent, in Bushra v. Main Line Health, Inc., No. CV 23-1031, 2024 WL 1219962, at *5 (E.D. Pa. Mar. 21, 2024), finding it to be an undue hardship to accommodate an unvaccinated doctor. *Bushra* is factually distinguishable, as the employer there did not have the successful experience with having unvaccinated employees on the job as in the present case, nor having evidence that the surrounding related employers accommodated their employees without undue hardship.

The district court's reliance on *Bordeaux v. Lions Gate Entertainment, Inc.*, 703 F.Supp.3d 1117, 1137 (C.D.Cal. 2023) was also a mistake. *Bordeaux* is easily distinguishable, since summary judgment there was not granted based on increased risk of Covid alone, as the court found here, but because the

undisputed evidence showed that an accommodation would have cost the defendant $300,000.00, or potentially up to $3,000,000.00. *Id.* This is completely inapposite from the case at bar, where the undisputed evidence shows no actual cost to SRFR if it had accommodated the firefighters.

Furthermore, SRFR's Playbook anticipated Covid infection and provided protocols in place to mitigate it. Plus, employees were routinely infected and then returned to work, and there is no evidence that this presented an actual cost or any other type of hardship.

Contrary to what the district court did, numerous other courts have denied summary judgment to employers in COVID-19 religious accommodation cases. For example, in Floyd v. Trinity Cent. Home Health, LLC, 2024 WL 3653055, at *7 (W.D. Ark. Aug. 5, 2024), the court denied summary judgment to a physician working with "critical pediatric patients" based on the lack of actual evidence either of substantial increased costs, or that safety measures such as masking and testing would not be effective. The court noted the type of fact intensive inquiry required by *Groff v DeJoy*.

Closer to home, an Oregon district court denied summary judgment where the plaintiff was a respiratory therapist in a hospital trauma unit, actually treating patients infected with COVID-19. Malone v. Legacy Health, 2024 WL 3316167, at *4 (D. Or. July 5, 2024). Citing to Groff's requirement of a "fact-specific inquiry,"

the *Malone* court held it was not enough to establish the dangers of COVID-19, and despite considerable evidence about the threat posed by the virus, found the record inadequate with respect to whether SRFR had made an "individualized inquiry" into possible accommodations for Plaintiff, and why they would pose an undue hardship.

In Hayslett v. Tyson Foods, Inc., No. 1:22-CV-1123-STA-JAY, 2023 WL 11897503, at *12 (W.D. Tenn. Sept. 20, 2023), the court denied summary judgment to SRFR under very similar circumstances to the present case: the employer placed unvaccinated workers who requested religious accommodation on unpaid leave. The court reasoned that:

> "Defendants have not shown why it remained reasonable to keep Plaintiff off the job six months after the Delta surge and when experience showed the vaccine did not completely eliminate the spread of infection at the plant. A jury will need to decide the reasonableness of Defendants' policy under all of these circumstances."

As the Oregon court did in *Malone, supra,* the Tennessee court looked to the "fact-specific," context-driven nature of the undue burden inquiry. *Groff*, 143 S.Ct. at 2294 ("This fact-specific inquiry comports with both *Hardison* and the meaning of 'undue hardship' in ordinary speech."); *id.* at 2297 ("Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context- specific application of that clarified standard to the lower courts in the first instance."). This includes "all relevant factors in the case at hand, including the particular

accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Id.* at 2295 (citation omitted)."

Id. at *13.

Groff's requirement of a "fact specific" context driven inquiry with respect to undue hardship means that summary judgment for the employer will only be appropriate in the exceptional case – this is not such a case. Indeed, Firefighters contend that Defendants have failed to produce sufficient evidence of undue hardship as to constitute a triable issue of fact, given that they worked for numerous months both before and after being put on unpaid leave, without any evidence of disruption to the Defendant's operations or services to the public, or increased cost. Furthermore, that some of them even worked with Defendant's employees unvaccinated while on the unpaid leave, while working for other fire related employers. Clearly, if the lower court had viewed the facts in the light most favorable to the Firefighters, it shows that they could have been accommodated for the few months they were on unpaid leave, just like they were accommodated both after they were brought back.

II. The Court Should Have Granted Summary Adjudication in Favor of Firefighters as to SRFR's Undue Hardship Defense.

An undue hardship defense requires "an employer [to] show that the burden of granting an accommodation would result in substantial increased costs in

relation to the conduct of its particular business." *Groff v. DeJoy*, 600 U.S. 447, 470 (U.S., 2023)

Here, even when taking the facts in the light most favorable to Defendant, still warrants dismissing SRFR's undue hardship defense. That is because there are no facts in the record of any "increased costs" SRFR would have suffered had it accommodated the firefighters for those few months of unpaid leave.

SRFR also failed to establish that the firefighters using PPE before or after the unpaid leave had any increased costs on its business, or affected its business in any way.

SRFR's entire motion for summary judgment is premised on the opinion of its hired gun, infectious diseases expert John Lynch, M.D, MPH. However, Dr. Lynch is not an expert on undue hardship, nor is he an expert on the operations of a fire department. His only expertise is in infection risk and transmission of the Covid virus. But such risk of infection and transmission of the Covid virus did not miraculously increase on October 18, 2021, nor did it suddenly decrease on May 9, 2022.

Even assuming arguendo that there was a heightened risk during this small timeframe, SRFR still was obligated to go the next step and produce evidence of how such increase in risk would have actually "result[ed] in substantial increased costs in relation to the conduct of its particular business." *Id.* Because SRFR

produced no such evidence of how a potential risk to the health and safety of others would result in increased costs to its business, or impact its operations in any way, and because the Firefighters actually working before and after the unpaid leave failed to result in any increased costs to Defendants business, the district court should have granted summary adjudication to Firefighters as to Defendants' undue hardship defense.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants Firefighters request that this Court issue an order: vacating the district court's Order entered January 25, 2024; reversing the grant of summary judgment to Defendant-Appellee Snohomish Regional Fire and Rescue; reversing the denial of the Firefighters' motion for partial summary judgment on the issues of reasonable accommodation and undue hardship and granting partial summary judgment to the Firefighters; finding that the Firefighters had sincerely held religious beliefs; and remanding for further proceedings, including trial on the issue of the Firefighters' xhe Firefighters also respectfully request that the Court award them the attorney's fees and costs of this appeal.

Dated: August 28, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENT

This brief complies with the word-count limitation of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rules because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 10,110 words.

This opening brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and Ninth Circuit Rules because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

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