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Request Denied: Retaliation Under Title VII for a Request for Religious Accommodation

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NOTE

Request Denied: Retaliation Under Title VII for a Request for Religious Accommodation

Equal Employment Opportunity Commission v. North Memorial Health Care, 908 F.3d 1098 (8th Cir. 2018), reh'g and reh'g en banc denied (Jan. 22, 2019).

*Rhett Buchmiller**

I. INTRODUCTION

"Ask and you shall receive" may be helpful for many aspects of one's faith, but it is not sound legal advice when dealing with religious accommodations. The ability to request accommodations for a religious purpose under Title VII of the Civil Rights Act of 1964 ("Title VII")[1] has eliminated the need for followers of faith to choose between religion and work when the two conflict. It does this by requiring an employer to accommodate employees who have a religious conflict, so long as the accommodation does not create an undue hardship.[2] This is the proverbial sword employees can use to insist that their rights are respected by their employers. The shield comes in the form of the retaliation clause of Title VII, where employees can assert claims of adverse employment actions that arise from the utilization of rights under Title VII.[3]

These two tools – reasonable accommodations and protection from retaliatory actions – and more specifically their concurrent use, came into question when the U.S. Court of Appeals for the Eighth Circuit considered *Equal Employment Opportunity Commission v. North Memorial Health Care.*[4] That case addressed the question of whether a request for an accommodation was truly an action that opposed an unlawful practice by an employer.[5] A job applicant at North Memorial Health Care ("North Memorial") requested a religious accommodation shortly after getting an offer

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1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018).
2. § 2000e(j) (2018).
3. § 2000e-3(a).
4. EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 1099 (8th Cir. 2018).
5. *Id.* at 1102.

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of employment.[6] Shortly afterward, North Memorial rescinded the job offer, claiming it could not meet the applicant's request.[7] The Eighth Circuit ultimately concluded that an assertion of the right to an accommodation was not a protected activity under Title VII, even though the same type of activity is protected under other, similarly worded, statutes.[8] Therefore, the applicant's claim of retaliation, which only applies to protected activities, could not withstand summary judgment.[9]

This Note considers the reasoning of the majority panel in finding requests for religious accommodation are not protected activities. Particularly, it examines analogous caselaw from the Eighth Circuit under similarly worded provisions in other statutes, as well as from other Federal Circuits throughout the United States. This Note concludes by describing the possible repercussions of this ruling considering the reasoning of the Eighth Circuit.

II. FACTS AND HOLDING

Emily Sure-Ondara ("Appellant"), through an action initiated by the Equal Employment Opportunity Commission ("the EEOC"), filed for appeal with the U.S. Court of Appeals for the Eighth Circuit, asking the court to reconsider the lower court's ruling on her claim for retaliation on the basis of religious discrimination.[10] Appellant is a Seventh Day Adventist who alleged she was denied a position at North Memorial due to her request for religious accommodation.[11] As a Seventh Day Adventist, Appellant is required to take a day of rest on the Sabbath, which is generally recognized as falling on the seventh day of the week, Saturday.[12] In addition, a Seventh Day Adventist must prepare for the Sabbath the day before, meaning that the day of rest actually begins at sundown on Friday.[13] Respondent was North Memorial, a hospital system who rescinded Appellant's offer of employment.[14]

Appellant, a registered nurse, applied to a residency program at North Memorial known as the "Advanced Beginner" program.[15] After initial screening, Appellant visited a hiring event where she interviewed for, and was subsequently offered a job with, North Memorial's Robbinsdale hospital.[16]

6. *Id.* at 1099.
7. *Id.* at 1100.
8. *Id.* at 1103–04.
9. *Id.* at 1103.
10. *Id.* at 1099.
11. *Id.*
12. *Sabbath Observance*, SEVENTH-DAY ADVENTIST WORLD CHURCH (1990), https://www.adventist.org/en/information/official-statements/documents/article/go/-/sabbath-observance-1/ [perma.cc/BQC7-SACA].
13. *Id.*; *N. Mem'l Health Care*, 908 F.3d at 1099.
14. *N. Mem'l Health Care*, 908 F.3d at 1099.
15. *Id.*
16. *Id.*

During this interview, but before the offer, Appellant learned the unit she would work in required her to work eight-hour shifts every other weekend.[17] Appellant accepted a conditional job offer but later disclosed that she needed an accommodation in the form of not working Friday nights due to her religious beliefs.[18]

In follow-ups from a representative of North Memorial's Human Resources Department, North Memorial clarified with Appellant that working on weekends was a requirement.[19] This was because the work schedule was arranged via a collectively bargained union agreement.[20] Appellant assured the representative that she would "make it work," either by finding a substitute for the shifts at issue or being present for her shift in cases of emergency.[21]

North Memorial was less convinced; considerations were given to the difficulty of having other nurses consistently cover Appellant's shifts as well as the need for there to be an "emergency," as she said.[22] North Memorial subsequently informed Appellant of its inability to grant the accommodation, as it would be an undue hardship.[23] Appellant again stated that she would accept the position without accommodation but was told that North Memorial did not believe she would be able and willing to do so if given the position.[24]

Appellant never began work at North Memorial.[25] Her conditional offer was rescinded on November 20, 2013, and follow-up applications for other positions with North Memorial were unsuccessful.[26] Appellant filed a charge of discrimination claim with the EEOC on December 13, 2013, which then filed suit against North Memorial on September 16, 2015 on her behalf.[27] The EEOC alleged a violation of 42 U.S.C. § 2000e-3(a), claiming that North Memorial had unlawfully retaliated against Appellant's request for accommodation by rescinding the offer of employment.[28] The district court focused on whether a request for accommodation was a "protected activity" under § 2000e-3(a), finding that the plain meaning of the statute did not incorporate a request for accommodation as a protected activity.[29] As such, the court granted summary judgment for North Memorial.[30]

17. *Id.*
18. *Id.*
19. *Id.* at 1100.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. EEOC v. N. Mem'l Health Care, 262 F. Supp. 3d 863, 866 (D. Minn. 2017).
28. *N. Mem'l Health Care*, 908 F.3d at 1100.
29. *N. Mem'l Health Care*, 262 F. Supp. 3d at 868–69.
30. *Id.*

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On appeal, a divided Eighth Circuit panel agreed with the judgment of the district court and affirmed the ruling.[31] The court held that in instances where a request for religious accommodation is made by an applicant, the request is denied on the grounds of undue hardship, and the applicant is subsequently not hired despite evidence that the undue hardship would no longer be present, there is no cause of action under the retaliation provision of Title VII and summary judgment is appropriate.[32]

III. LEGAL BACKGROUND

Title VII of the Civil Rights Act is a federal law that prohibits employment discrimination based on race, color, religion, sex, and national origin.[33] Title VII does this in a variety of ways and creates multiple causes of action for plaintiffs. Commonly, these actions fall under the category of either (1) discriminatory conduct of the employer based on race, color, religion, sex, or national origin, or (2) retaliatory conduct for the employee's opposition to unlawful employment practices.[34] Discriminatory conduct of the employer can include claims for disparate impact[35] and disparate treatment.[36] These claims are enforced by the EEOC.[37] This Section will address the general nature of protected activities under Title VII, as well as similar provisions found in other substantially similar laws.

A. Burdens and Claims Under Title VII Generally

A fundamental case in the general context of employment law that sets out the burdens of proof parties bear at trial is *McDonnell Douglas Corp. v. Green*.[38] *McDonnell Douglas* involved a claim of racial discrimination and retaliation for civil protests.[39] In this context, the United States Supreme Court determined that a certain order of the burdens of proof needed to be established in Title VII claims to properly meet the goals of the statute –

31. *N. Mem'l Health Care*, 908 F.3d at 1104.

32. *Id.*

33. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/statutes/titlevii.cfm [perma.cc/FQQ9-49FK].

34. 42 U.S.C. § 2000e-2-3 (2018).

35. Lewis v. Chicago, 560 U.S. 205, 214–15 (2010) (holding that a policy absent discriminatory intent can still be unlawfully discriminatory if it disparately impacts a protected group).

36. Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (holding that disparate treatment occurs when an employer has "treated a particular person less favorably than others because of a protected trait.").

37. § 2000-e4.

38. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

39. *Id.* at 796.

known as the *McDonnell Douglas* Framework.[40] Under the *McDonnell Douglas* Framework, a plaintiff is required to make a prima facie case for its respective claims first and then, in response, the defendant has the burden to produce evidence of a nondiscriminatory reason for its adverse decision.[41] The analysis does not end there, however, since a mere burden to produce evidence would allow employers to evade litigation for thinly veiled discrimination.[42] Therefore, the plaintiff must have an opportunity to show that the stated reason of the employer was in fact pretextual.[43] It is within this analytical framework that the court in *North Memorial* considered the issue of Appellant's claim.[44] The Court of Appeals, while reviewing a ruling for summary judgment, has *de novo* jurisdiction and must draw all reasonable inferences in the non-moving party's favor.[45]

Title VII requires employers to reasonably accommodate religious practices of employees except in cases where doing so would cause an undue hardship to the employer's business.[46] The most common religious practice requiring accommodation is observance of the Sabbath.[47] The United States Supreme Court ruled previously on this specific issue, finding that a law giving observers of the Sabbath an absolute right to refuse to work on the Sabbath is not beyond accommodation.[48] While there is no freestanding "failure to accommodate" action under Title VII, the Supreme Court has ruled that it is incorporated within an analysis of disparate treatment.[49] In order to bring a claim for disparate treatment, an applicant must show that an employer failed to hire the applicant – or otherwise took adverse action against the applicant – because of the applicant's religion or religious practice.[50] Employers are exempt from this standard with a showing that adherence to one's religious practice would create an "undue hardship" on the operation of its business.[51] Accommodations that would force an employer to violate a

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40. *Id.* at 804; *see generally* Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment under Title VII*, 87 CALIF. L.R. 983 (1999).

41. *McDonnell Douglas Corp.*, 411 U.S. at 802–04.

42. *Id.* at 806.

43. *Id.* at 804 (finding that pretext could merely be a stated reason which thinly veils the actual, discriminatory reason).

44. *N. Mem'l Health Care*, 908 F.3d at 1098.

45. Kirkeberg v. Canadian Pac. Ry., 619 F.3d 898, 900–01 (8th Cir. 2010).

46. Thornton v. Caldor, Inc., 472 U.S. 703, 709–10 (1985); 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2018).

47. Clare Zerangue, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 LO. L. REV. 1265, 1277 (1986).

48. *See Thornton*, 472 U.S. at 712 (1985) (holding that although a statute requiring employers to respect Sabbath observers' rights of refusal is in violation of the Establishment Clause it is not beyond accommodation in all cases).

49. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015).

50. *Id.* at 2032.

51. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002).

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collectively bargained agreement are regularly found to cause undue hardship.[52]

The other category, prohibition of retaliatory conduct, creates liability for employers who take adverse employment actions against employees engaging in protected opposition to discrimination by an employer.[53] An employee engaging in a protected activity is safe from retaliation under Title VII.[54] The prima facie case of retaliation is (1) that the employee or applicant engaged in a protected activity, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action.[55] To be considered an adverse employment action, plaintiffs need only show that "a reasonable employee would have found the challenged action materially adverse."[56] Courts have consistently shown that actions such as termination and refusal to hire an applicant meet the standard of material adversity.[57] The causation link is also relaxed, at least in the prima facie stage, and can be satisfied by showing *subsequent* adverse action taken with knowledge of employee's protected conduct.[58]

The types of protected activities vary greatly. The classic example of a protected activity comes from *Payne v. McLemore's Wholesale and Retail Stores*, in which an employee engaged in a protest against her employer who she believed was unlawfully discriminating against black people in its employment practices.[59] The U.S. Court of Appeals for the Fifth Circuit noted in *Payne* that not all activity was protected, calling specific attention to acts that are illegal, unreasonably hostile, or that interfere with the performance of the employee's job rendering them ineffective for the position.[60] Other examples demonstrate that protected activities include passive participation in internal investigations for employment discrimination[61] and assistance to another in opposing an activity.[62]

52. *See id.* at 391 (holding that an employer was not required to violate an established seniority system in order to accommodate an employee's valid request, as the request posed an undue hardship).

53. Robbins v. Jefferson Cty. Sch. Dist. R-1, 186 F.3d 1253, 1258 (10th Cir. 1999).

54. 42 U.S.C. § 2000e-3 (2018) (the protected activities specified by statute are: opposition to practice made unlawful by the Act, making of a charge against an employer, or testifying, assisting, or participating in an investigation or other proceeding).

55. Ackel v. Nat'l Comm., Inc., 339 F.3d 376, 385 (5th Cir. 2003).

56. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

57. *See generally* § 2000e-3; *McDonnell Douglas Corp.*, 411 U.S. at 802.

58. *Ackel*, 339 F.3d at 385–86.

59. Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1134 (5th Cir. 1981).

60. *Id.* at 1142.

61. Crawford v. Metro. Gov't of Nashville and Davidson Cty., 555 U.S. 271, 277–78 (2009).

62. Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 49 (5th Cir. 2010).

One key aspect of the retaliation clause of Title VII is that the protected activity may be done in opposition to an employer's unlawful practice.[63] The Supreme Court has ruled that, as the statute leaves the term undefined, the word "oppose" carries its "ordinary meaning."[64] In *Crawford v. Metropolitan Government of Nashville and Davidson County*, the Supreme Court considered the situation of an employee who was sexually harassed and ultimately fired, allegedly in retaliation for reporting the harassment.[65] In its holding, the Court found that the employee's opposition – giving a disapproving statement of her supervisor's sexually harassing behavior – was sufficient opposition.[66] In doing so, the Supreme Court rejected an opinion of the U.S. Court of Appeals for the Sixth Circuit, which held that opposition, as defined by the statute, requires an active form of opposition instigated by the employee.[67] The Supreme Court disagreed with this reasoning, in part, because it did not align with the statute's primary objective of avoiding harm to employees.[68] In addition, the Supreme Court posited that adoption of any other rule would lead to a fear of retaliation, encouraging individuals to remain silent instead of voicing their concerns about discrimination.[69]

B. Similarly Worded Provisions in Context of the American with Disabilities Act

The Americans with Disabilities Act ("the ADA") contains identical language to Title VII regarding retaliation for protected activities and reasonable accommodations.[70] Courts commonly rely on Title VII decisions in interpreting the more recently enacted ADA because of the similarity of their provisions.[71] The Eighth Circuit has relied on this method of interpretation in the past, particularly with retaliation claims.[72] Specifically, the Eighth Circuit has analyzed similarly worded provisions regarding a request for accommodation in *Heisler v. Metropolitan Council*.[73] In *Heisler*, the plaintiff requested a schedule change to accommodate her depression.[74]

63. In the alternative, it can also be due to a claimant's participation in an investigation, proceeding, or hearing under Title VII, known as the "participation clause." *See* 42 U.S.C. § 2000e-3 (2018).

64. *Crawford*, 555 U.S. at 276.

65. *Id.* at 273–74.

66. *Id.* at 276.

67. *Id.*

68. *Id.* at 279 (quoting Faragher v. Boca Raton, 524 U.S. 775, 805–06 (1998)).

69. *Id.*

70. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a) (2018).

71. Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 Mo. L. Rev. 115, 119 (1998).

72. Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999).

73. Heisler v. Metro. Council, 339 F.3d 622 (8th Cir. 2003).

74. *Id.* at 625.

Her request was denied because her schedule was an essential function of the job.[75] The Eighth Circuit considered a retaliation claim, and because the plaintiff specifically claimed she was retaliated against when she requested, but was refused, accommodation, the *Heisler* court ruled that the request was a protected activity.[76] This is the background with which the Eighth Circuit was operating within when considering the instant case, *North Memorial*.

IV. INSTANT DECISION

This Section considers the specific rationale advanced by the Eighth Circuit panel in coming to its decision in *North Memorial*. It begins by providing an in-depth analysis of the rule articulated by the majority and the majority's reasoning for the rule. This Section concludes by discussing the detracting points raised by the dissent.

A. Majority Opinion

The Eighth Circuit decided that statutorily authorized requests for accommodation under Title VII were not also considered statutorily protected opposition activities under the same Title VII.[77] The Eighth Circuit panel began its analysis by discussing the basis on which a person can assert a need for a reasonable accommodation under Title VII.[78] The panel noted that a person's religion is entitled to protection from discriminatory employment practices under Title VII.[79] In particular, the panel stated that an employer cannot refuse to hire any individual because of such individual's "religious observance and practice."[80] The court reasoned from this that it was "clear that [Appellant] . . . was entitled to reasonable accommodation of her religious practice as a Seventh Day Adventist."[81]

The panel then moved on to the unlawful-opposition portion of Title VII, codified in § 2000e-3(a).[82] Referring to Supreme Court precedent set in *Crawford*, the panel noted that a communication to an employer that the employer has engaged in some form of employment discrimination "virtually always" constitutes opposition.[83] The panel squarely focused on the "obvious question," that is, what was the form of employment discrimination Appellant opposed?[84] The EEOC asserted that Appellant was opposing a conflict of

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75. *Id.*
76. *Id.* at 632.
77. *See N. Mem'l Health Care*, 908 F.3d at 1102.
78. *Id.* at 1100–01.
79. *Id.*
80. *Id.*
81. *Id.* at 1101.
82. *Id.*
83. *Id.* (quoting Crawford v. Metro. Gov't of Nashville and Davidson Cty, 555. U.S. 271, 276 (2009)).
84. *Id.* at 1102.

religious rights and employment requirements.[85] Specifically, the EEOC argued that Appellant's situation was similar to *Ollis v. HearthStone Homes, Inc.*,[86] where an employee was fired due to a refusal to participate in an activity that conflicted with his religious beliefs.[87] The court differentiated *North Memorial* from *Ollis* on two separate grounds: (1) the court required a showing that religious belief conflicts with an employment requirement; and (2) Appellant did not *complain* that she was refused an accommodation but rather was attempting to *make* an accommodation.[88] The panel agreed directly with the reasoning of the district court, finding that "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation."[89]

The panel also considered the EEOC's argument that, instead of using the plain meaning of the word "oppose," the court should consider the definition applied in related ADA cases using identical language – *Kirkeberg v. Canadian Pacific Railway* and *Heisler v. Metro. Council*.[90] In this sense, the court considered the factual bases of *Kirkeberg* as well as *Heisler* and imported their reasoning to the religious discrimination context.[91] The court reasoned that the cases were not illustrative because the facts were too different.[92] In those cases, the employers' denial of an existing qualifying condition – disability under the ADA – coupled with a termination or refusal to hire due to the request was at issue.[93] The court determined that a factual distinction existed between the *Kirkeberg* and *Heisler* cases and Appellant's case since Appellant was refused accommodation due to undue hardship, not a lack of qualification under the statute.[94] On this basis, the court found that a request for accommodation in related ADA cases was protected, yet a request for accommodation in a Title VII case was not protected.[95] Therefore, the panel ruled, there was no protected activity at issue in Appellant's case that North Memorial unlawfully retaliated against.[96]

The panel determined that as Title VII did not define the word "oppose," it must apply the plain meaning of the word in its analysis.[97] In the panel's view, Appellant's initial request for accommodation did not implicitly

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85. *Id.*
86. 495 F.3d 570 (8th Cir. 2007).
87. *Id.* at 574.
88. *N. Mem'l Health Care*, 908 F.3d at 1102.
89. *Id.* (quoting *N. Mem'l Health Care*, 262 F. Supp. 3d at 867).
90. *Id.*
91. *Id.* at 1102–03.
92. *Id.*
93. *Id.* (citing Kirkeberg v. Can. Pac. Ry., 619 F.3d 898, 907–08 (8th Cir. 2010); Heisler v. Metro. Council, 339 F.3d 622, 632 (8th Cir. 2003)).
94. *Id.* at 1103.
95. *Id.* at 1102–03.
96. *Id.* at 1103.
97. *Id.* at 1102.

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constitute an opposition to North Memorial's decision not to hire.[98] As such, Appellant's request for accommodation was not a protected, oppositional activity under Title VII.[99]

The majority last considered the argument that North Memorial's rescinding of Appellant's offer was an adverse employment action.[100] Proclaiming the argument as "sophistry," the majority reasoned that because some evidence showed Appellant was unwilling to perform the job's essential functions, summary judgment against her was still proper.[101]

B. The Dissent

Judge L. Steven Grasz dissented, citing related Supreme Court precedent, the Eighth Circuit's own precedent, as well as persuasive authority from other federal circuits.[102] The dissent agreed with the majority that the primary issue was whether requesting a religious accommodation constituted a "protected activity" that could be understood as opposition against an unlawful employment practice.[103]

However, the dissent argued it was improper for the majority to apply the plain and ordinary definition of the word "oppose," as the Supreme Court has adopted an "expansive view of the opposition clause, such that an individual does not need to directly or overtly communicate opposition to an unlawful employment practice."[104] The dissent also asserted the commonsense argument that "the request itself conveys opposition to the employer's failure to accommodate the applicant's . . . religion."[105] In a footnote, the dissent noted that only a "good faith, objectively reasonable belief" was needed for a request to be valid, and that, for the purposes of summary judgment, Appellant was opposed to the denial of what she believed was an accommodation to which she was entitled.[106]

Further, the dissent explained that the prevailing theory in other circuits dealing with similar issues is to harmonize interpretations of nearly identical ADA statutes by reading them the same way.[107] It explained that the principle of *in pari materia*[108] demanded identical interpretation of identical statutory

98. *Id.*

99. *Id.*

100. *Id.* at 1103.

101. *Id.* at 1103–04.

102. *Id.* at 1104 (Grasz, J. dissenting).

103. *Id.*

104. *Id.* (citing *Crawford*, 555 U.S. at 271).

105. *Id.* at 1105.

106. *Id.* at 1098 n.4 (quoting Pye v. Nu Aire, Inc. 641 F.3d 1011, 1020 (8th Cir. 2011)).

107. *Id.* at 1105.

108. In English: "in a like manner." THE FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/in+pari+materia [perma.cc/Y3TQ-ZF46].

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language "unless context dictates otherwise."[109] The dissent also cited past Eighth Circuit precedent that stated "retaliation claims under the ADA are analyzed identically to those brought under Title VII."[110] The dissent concluded that the other two elements of a retaliation claim were adequately met for purposes of summary judgment and argued that policy concerns about potentially meritless claims arising were unnecessary worries, as the causation element of retaliation claims would properly protect employers.[111] Specifically, the dissent found that an employer could show the legitimacy of the action by presenting evidence of an employee's "inability to perform the job," which would insulate the employer from liability.[112] The dissent differentiated Appellant's case from that rationale on the basis that Appellant showed she could perform the task.[113]

The EEOC petitioned the court for rehearing en banc, based on perceived conflicts with Supreme Court and Eighth Circuit precedent.[114] However, the petition for rehearing en banc was denied on February 11, 2019.[115]

V. COMMENT

The Eighth Circuit has taken an uncertain, unclear step against the current of precedent surrounding requests for religious accommodations under Title VII with its ruling in *North Memorial*. There are significant concerns about the grounding of the panel's decision when compared to precedent of the Eighth Circuit itself, general directives of the Supreme Court, and interpretation of identical language by other federal circuits. The Eighth Circuit's reasoning could have a significant impact on the viability of future retaliation claims, which are the most frequently alleged basis for suit under Title VII in the federal courts system.[116]

109. *N. Mem'l Health Care*, 908 F.3d at 1105 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)).

110. *Id.* (quoting Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999)).

111. *Id.* at 1106–07.

112. *Id.*

113. *Id.* (noting that Appellant stated she would be able to cover her shifts when necessary).

114. Brief of North Memorial Health Care in Opposition to the EEOC's Petition for Rehearing En Banc, at 1, EEOC v. N. Mem'l Health Care, 908 F.3d 1098 (8th Cir. 2018) (No. 17-2926), 2019 WL 328056.

115. *N. Mem'l Health Care*, 908 F.3d 1098.

116. *Facts About Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/retaliation.cfm [perma.cc/JL2J-KNJR] ("Retaliation is the most frequently alleged basis of discrimination in the federal sector.").

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A. The Panel's Strict Reading of Title VII is at Odds with Related Authority

1. The Eight Circuit's Own Precedent

The panel considered a prior case involving a retaliation claim based on an employee's request for a religious accommodation.[117] In *Ollis*, the defendant company, HearthStone Homes, implicitly required employees to attend "Mind Body Energy" sessions, which made use of Buddhist and Hindu teachings.[118] The plaintiff was uncomfortable with this because he perceived the sessions as a conflict with his religion, told a supervisor about this conflict, and requested permission to not participate.[119] The court determined that to establish a prima facie case of retaliation, a plaintiff must first show that "he engaged in statutorily protected activity."[120] The evidence relevant to this point was (1) that the sessions actually conflicted with the plaintiff's beliefs and (2) that he expressed this disagreement to his employer.[121] The court determined that the evidence, considered under summary judgment, showed a conflict.[122] It did not go into further detail about this conflict, however. In particular, the court did not explain whether the "expressed disagreement" arose from his actual explanation that the sessions conflicted with his beliefs or his request to be excused from the sessions because they conflicted with his beliefs.[123] Apparently, from a comparison of *North Memorial* and *Ollis*, it was the former – his explanation of a conflict between the sessions and his religion – that protected him, not the request.

The panel in *North Memorial* considered this context but differentiated, noting it was a "false equation" to say Appellant, by requesting an accommodation, was necessarily complaining that requiring her to work Friday shifts conflicted with her beliefs the same way the plaintiff in *Ollis* did.[124] The panel stated that Appellant did not complain that North Memorial refused to accommodate but was merely requesting accommodation instead.[125] However, when viewing the facts in *Ollis*, the plaintiff *there* was not complaining of a refusal to accommodate either.[126] Instead, the plaintiff stated a conflict between his religion and the employment practice and then requested to be excused from the practice.[127] In essence, the only possible

117. Ollis v. HearthStone Homes, Inc., 495 F.3d 570, 574–75 (8th Cir. 2007).

118. *Id.* at 573.

119. *Id.*

120. *Id.* at 576.

121. *Id.*

122. *Id.*

123. *Id.*

124. *N. Mem'l Health Care*, 908 F.3d at 1102.

125. *Id.*

126. *Ollis*, 495 F.3d at 576 (finding a prima facie case for retaliation based upon an interaction where employee complained and requested accommodation).

127. *Id.* at 573.

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distinction between these two cases is that requesting an accommodation and then stating the reason for the accommodation is not protected, but if you reverse the process by stating a reason why you need an accommodation and *then* request the accommodation, you are protected. This arbitrary distinction directly conflicts with the well-established rule followed by other courts that the language of Title VII should be interpreted broadly to help maintain employees' "unfettered access to statutory remedial mechanisms."[128]

The Eighth Circuit declared in 1999 that retaliation claims under the ADA were analyzed identically to retaliation claims under Title VII.[129] This is a reasonable proclamation, as it follows the familiar concept of statutory interpretation described by the Supreme Court, *pari passu*, where two different statutes with similar language are interpreted in the same way, as if they were "side by side."[130] There is a need to interpret statutes in this way to ensure "Congress [is] able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[131] This gives a "strong indication"[132] that the opposition clauses of the ADA and Title VII should be read in harmony with one another, as their language is nearly identical[133] and both have the goal of preventing persons from being interfered with when exercising their rights.[134]

Eighth Circuit precedent demonstrates how similar ADA retaliation claims have been read, particularly in the noted case *Heisler v. Metropolitan Council*.[135] Recall that *Heisler* involved a plaintiff who requested an accommodation for her depression – a change in scheduled working hours like the Appellant in *North Memorial* – was denied the request as it was an essential job function, and subsequently succeeded on a retaliation claim.[136] The panel in *North Memorial*, when distinguishing *Heisler*, stated that "if the

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128. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

129. Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999).

130. Northcross v. Bd. of Ed. of Memphis City Sch., 412 U.S. 427, 428 (1973) (finding two acts with similar language with the same goal to be a strong indication that the acts should read side by side). This is similar to the reasoning used by Judge Grasz in the dissent. *N. Mem'l Health Care*, 908 F.3d at 1105 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (finding the principal of *in pari materia* required the court to interpret identical statutory language consistently with one another).

131. Finley v. United States, 490 U.S. 545, 556 (1989), *superseded by statute on other grounds*.

132. *Northcross*, 412 U.S. at 428.

133. The only substantive differences between the two provisions are due to the extra language added by Title VII which specifies what parties are not allowed to discriminate. *Compare* 42 U.S.C. § 2000e-3(a) (2018) *with* 42 U.S.C. § 12203(a) (2018).

134. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (finding a primary purpose of antiretaliation provisions to be to maintain unfettered access to statutory remedial mechanisms).

135. Heisler v. Metro. Council, 339 F.3d 622, 624 (8th Cir. 2003).

136. *Id.* at 625.

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employer denied the accommodation on the ground that it was not in fact based on a religious practice and . . . refused to hire the . . . applicant because she made the request, the reasoning [of *Heisler*] would support an opposition-clause retaliation claim."[137] But because the plaintiff in *Heisler* specifically claimed she was retaliated against when she requested, but was refused, accommodation the *Heisler* court ruled that the request was a protected activity without any mention of the employer's reason for denying the accommodation.[138] Yet, in *North Memorial*, the panel held that a request does require the reasoning of the employer to be based on a disbelief of the presence of a religious practice instead of on the basis of the accommodation being an undue burden.[139] In *Heisler*, a retaliation claim existed, but in *North Memorial*, it did not. The only distinction between these two situations was the justification that the employer gave as to why the employer denied the accommodation. But such a justification must withstand Appellant's attempts to show the justification was a mere pretext for discrimination, which did not occur in *North Memorial*. It was most simply put in the dissent: "If the request is opposition in the one context, it cannot transform into something other than opposition simply because the legal justification for denying the request changes."[140]

2. The Supreme Court's and Other Federal Appellate Courts' Analyses

The Supreme Court has adopted an expansive view in interpreting the opposition-retaliation clause of Title VII.[141] In *Crawford*, the Supreme Court considered reports of inappropriate behavior in an internal investigation to be a protected activity.[142] This was significantly different from the prior Sixth Circuit opinion, which held only that an "active and consistent" opposition was protected against retaliation.[143] The Sixth Circuit's definition of protected opposition seems to stem from the classic form of opposition in *Payne*, where an employee protested outside the doors of his employer's business due to its unlawful behavior.[144]

The panel decision in *North Memorial* proposed that the word "oppose" did not incorporate an official, statutorily authorized act of requesting an accommodation.[145] In light of *Crawford*, the panel explicitly referenced that

137. EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 1103 (8th Cir. 2018).

138. *Heisler*, 339 F.3d at 632.

139. *N. Mem'l Health Care*, 908 F.3d at 1103.

140. *Id.* at 1098, n.7.

141. *See, e.g.*, Crawford v. Metro. Gov't of Nashville and Davidson Cty., 555 U.S. 271 (2009).

142. *Id.* at 275.

143. *Id.*

144. Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1134 (5th Cir. 1981).

145. *N. Mem'l Health Care*, 908 F.3d at 1102.

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this would "stretch[] the word 'oppose' well beyond its plain or ordinary meaning."[146] But the Supreme Court in *Crawford* referenced possible scenarios where opposition would be sufficient, stating that the biggest hurdle is not whether the action was an opposition but whether the employer had knowledge of the opposition.[147] The Supreme Court gave the following examples of instances where opposition was sufficient: expressing opposition while (1) informally chatting with a coworker at a water cooler; or (2) in a conversation after work in a restaurant.[148] Both of these scenarios were presumed by the Supreme Court to be opposition, yet the panel in *North Memorial* found a request for accommodation – which is explicitly provided for in Title VII[149] – to be an insufficient form of opposition not because of its broader character and meaning but because of its lack of an explicit "complaint."[150]

In addition to the Supreme Court's directive on retaliation, there are additional persuasive factors that the Eighth Circuit panel ignored. Most prominent among them was a denial of the EEOC's own interpretation of the statute its enforces.[151] It is well-established that an agency's interpretation of the statutory scheme the agency is entrusted to enforce should be given considerable weight by the courts.[152] Particularly, the interpretation is not to be disturbed so long as it is reasonable in light of the statute.[153] The EEOC Compliance Manual states the agency's interpretation of the retaliation provision as applied to requests for religious accommodation: "persons requesting religious accommodation under Title VII are protected against retaliation for making such requests."[154] A manual like this is one that the Supreme Court has, at the very least, determined reflects a body of experience and informed judgments that courts should consider with a "measure of respect."[155] In *North Memorial*, the panel seemed to justify its decision to circumvent the EEOC's position by explaining that in prior decisions, specifically *EEOC v. Abercrombie & Fitch*, the Supreme Court, too, has circumvented the agency's positions.[156]

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146. *Id.* at 1098, n.2.

147. *Crawford*, 555 U.S. at 282 (Alito, J. concurring).

148. *Id.*

149. 42 U.S.C. 2000e(j) (2018).

150. *N. Mem'l Health Care*, 908 F.3d at 1103.

151. *Id.* at 1102.

152. Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

153. *Id.* (citing United States v. Shimer, 367 U.S. 374, 383 (1961)).

154. PATRICIA A WISE, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION APPENDIX B: EEOC GUIDANCE (2004), 2004 WL 5046196.

155. Federal Exp. Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (quoting Alaska Dept. of Envtl. Conservation v. EPA, 540 U.S. 461, 488 (2004)) (noting that agencies may not be entitled to full *Chevron* deference where the position of the agency is not consistent, but still at the very least deserve some measure of deference).

156. *N. Mem'l Health Care*, 908 F.3d at 1102.

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When interpreting similar statutes in the ADA context, other federal circuits have applied similar rationales and reached similar holdings as those proposed by the dissent.[157] Federal circuits, in interpreting this specific issue, have looked to the statutory intent of Congress in passing Title VII.[158] The U.S. Court of Appeals for the Third Circuit found that the right to request an accommodation was a statutory guarantee, regardless of whether the individual meets the qualifications necessary for a typical discrimination claim.[159] The U.S. Court of Appeals for the First Circuit noted that "it would seem anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge."[160] The panel, in addressing this issue, claimed that "the fact that such a request is a 'protected activity' does not mean it is always 'oppositional' activity."[161] This is either incorrect or an accidental divergence in terminology, as it is well settled that a "protected activity" is only considered so *because* it is protected by the retaliation clause.[162] Even if not, the panel still acknowledged congressional intent to protect religious accommodations yet denied retaliation protection of that same right.[163] Although these decisions are merely persuasive authority, they are indicative of the Eighth Circuit's anomalous interpretation of "oppose" under Title VII; indeed, it cited no other circuit in reaching its decision.

B. The Panel's Decision is Unclear and Potentially Far-Reaching

In *North Memorial*, the panel raised several concerns regarding Appellant's claim, such as a fear that allowing such a cause of action would result in a "re-packaging" of rejected discrimination claims.[164] The panel based its reasoning on the Supreme Court's rejection of a free-standing religious accommodation claim that the EEOC supported, and thus rejected this retaliation claim as a "re-packaging" of the prior claim.[165] As such, the panel determined that the action of Appellant was proper under a disparate impact or treatment theory, rather than a retaliation theory.[166] This reasoning reveals two critical errors, however. First, it misunderstands the nature of an employment discrimination claim – which requires a showing that religion

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157. *Id.* at 1098, n.5 (8th Cir. 2018) (citing references to opinions in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

158. Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 190–91 (3d Cir. 2003).

159. *Id.*

160. Soileau v. Guilford of Me., Inc., 105 F.3d 12, 16 (1st Cir. 1997).

161. *N. Mem'l Health Care*, 908 F.3d at 1103.

162. Grimes v. Tx. Dept. of Mental Health & Mental Retardation, 102 F.3d 137, 140 (5th Cir. 1996).

163. *N. Mem'l Health Care*, 908 F.3d at 1103.

164. *Id.* at 1102.

165. *Id.*

166. *Id.* at 1103.

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was a motivating factor – and retaliation – which requires causation between the adverse employment action and the protected activity.[167] As there was no evidence on the record that reasonably supported a disparate treatment theory, this Section will only consider the disparate impact theory.[168] A claim for discrimination under a disparate impact theory turns to the widespread impact that a facially neutral policy would have on a group of people, whereas the retaliation claim would turn on whether the adverse action taken against Appellant was due to her own protected activity.[169] This gets at the heart of the panel's fundamental error: Appellant was not suing because a facially neutral policy adversely affected her. Appellant was suing because she, for all intents and purposes, received a job offer, requested accommodation, and was punished for that request by a rescission of the job offer.[170]

The error here was that the panel took North Memorial's stated reason for rejecting Appellant's request at face value, despite the need to view the facts in a light most favorable to Appellant. The panel stated it was "sophistry" to consider that retaliation occurred when North Memorial rescinded its job offer.[171] The panel said so because Appellant's "right to religious accommodation" was the "same," what mattered was that she was an unable or unwilling employee and therefore it was not feasible to hire her.[172] But as the non-moving party, Appellant was entitled to a viewing of that fact in a light most favorable to her, meaning the evidence on the record that she would "make it work" should preclude the notion that there was no feasibility in hiring her.[173] Regardless, once the prima facie case was made, and a defense was produced, it should have been Appellant's burden to prove the defense was pretextual under the *McDonnell Douglas* Framework – a chance she did not receive.[174]

VI. CONCLUSION

Despite a plethora of persuasive precedent, expansive interpretations from the Supreme Court, and precedent from the Eighth Circuit itself, the panel in *North Memorial* found Appellant's claim to be lacking an adequate

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167. *Compare* EEOC v. Abercrombie & Fitch Stores, Inc., 125 S. Ct. 2028, 2034 (2015) *with* Sieden v. Chipotle Mexican Grill, Inc., 846 F.3d 1013, 1016–17 (8th Cir. 2017).

168. This is because disparate treatment evidence requires, at least in part, intent to discriminate in addition to statistical data, making it far different from the instant case. *See* Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 336 (1977). Since a disparate treatment theory is so dissimilar, it is not analyzed here.

169. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986–87 (1988).

170. *N. Mem'l Health Care*, 908 F.3d at 1099.

171. *Id.* at 1103.

172. *Id.*

173. *Id.* at 1100, 1103.

174. Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1136 (5th Cir. 1981).

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opposition-retaliation claim. The effects of the ruling, in isolation, are not particularly devastating given the strong, conflicting precedent in this area, although there is evidence that some attorneys representing employers are taking this decision as a signal to relax their standards within the jurisdiction.[175] However, with retaliation claims currently making up nearly half of all employment discrimination claims[176] and continuing to increase[177] clarification is necessary since, on its face, the decision in *North Memorial* does not find an action sanctioned by Title VII to also be a protected activity under Title VII.

175. Dawn Reddy Solowey, *Court Rules Request for Religious Accommodation Is Not "Protected Activity" for Title VII Retaliation*, SEYFARTH SHAW, LLP (July 20, 2017) https://www.laborandemploymentlawcounsel.com/2017/07/court-rules-request-for-religious-accommodation-is-not-protected-activity-for-title-vii-retaliation/ [perma.cc/LR6T-M29K]; *Appeals Court Rejects Retaliation Claim Based On Religious Accommodation Request*, FISHER PHILLIPS (Nov. 14, 2018), https://www.fisherphillips.com/resources-alerts-appeals-court-rejects-retaliation-claim-based-on [perma.cc/UE84-2HVX].

176. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2017 Enforcement and Litigation Data (Jan. 1, 2018), https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm [perma.cc/9MSJ-AXNV].

177. *The State Of Play For Retaliation Claims*, FISHER PHILLIPS (Aug. 31, 2018) https://www.fisherphillips.com/resources-newsletters-article-the-state-of-play-for-retaliation-claims [perma.cc./FHD3-SWHB].