05-1069

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRADLEY BAKER,
Plaintiff-Appellant,
v.

THE HOME DEPOT,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND THE UNITED STATES AS AMICI CURIAE

ERIC S. DREIBAND
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

PAUL D. RAMSHAW
Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 L Street, N.W., Room 7040
Washington, DC 20507
202-663-4737

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

DAVID K. FLYNN
ERIC W. TREENE
DAVID WHITE
Attorneys

U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
950 Pennsylvania Ave., NW
Room 5531
Washington, DC 20530
202-616-9405

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

STATEMENT OF INTEREST

Pursuant to §§ 703(a) and 701(j) of Title VII of the Civil Rights Act of 1964, employers covered by Title VII are prohibited from discriminating on the basis of religion. 42 U.S.C. §§ 2000e-2(a), 2000e(j). They also have an obligation to offer a reasonable accommodation if an employee or prospective employee has a religious obligation that conflicts with the employment requirements to which she would normally be subject, unless there is no reasonable accommodation the employer can offer without incurring undue hardship. The initial step in determining most failure-to-accommodate claims is determining whether the accommodation the employer offered was a reasonable accommodation. That issue is at the core of this appeal.

The Equal Employment Opportunity Commission is the agency established by Congress to interpret, administer and enforce Title VII, including the duty of reasonable accommodation that the act imposes on employers. The Civil Rights Division of the United States Department of Justice is charged with litigating Title VII claims against public defendants. The Commission and the Department of Justice therefore offers the Court their views.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Baker's claims of religious discrimination pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343(a)(4) (statutory civil rights claim). The district court entered a final judgment disposing of all claims as to all parties on February 4, 2005. R-41. Baker filed a

timely notice of appeal on March 2, 2005. R-42. This Court accordingly has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in holding that Home Depot reasonably accommodated plaintiff's religious belief that he should not work at all on Sunday by offering him a schedule that required him to work on Sunday afternoons or evenings.

STATEMENT OF THE CASE

1. Proceedings

This is an appeal from a final judgment of the United States District Court for the Western District of New York (Telesca, J.) dismissing this Title VII action. The plaintiff filed a pro se complaint in May 2003 alleging that Home Depot violated Title VII by failing to reasonably accommodate his religious beliefs. R-1. Home Depot filed an answer, R-4, and the parties engaged in discovery. Home Depot filed a motion for summary judgment in April 2004, R-20-26, and the district court granted that motion in late January 2005.

2. Statement of Facts

In March 2001, Bradley Baker was hired by Home Depot to work in its store in Auburn, Massachusetts. R-34: ¶ 1. During the five months Baker worked in Auburn, he came to believe that he had a religious duty to honor the Sabbath day as "the day that all Work ceases, a day of rest and meditation of [sic] what [G]od has created." Id.: ¶ 4. In August 2001, Baker moved to western New York to be near his fiancée. R-23, X-A: 16, 53. He interviewed at the Home Depot store

in Henrietta, New York. He told the Henrietta manager, Michael Poss, that his religious beliefs prevented him from working on Sundays. Poss responded that Baker would have to work it out with Shawn Forness, his department supervisor. R-34: ¶ 5. Baker spoke with Forness, and Forness scheduled Baker so that he never had to work on a Sunday. R-34, ¶ 6. In March 2002, Michael Woodman replaced Forness as supervisor of Baker's department. R-23, X-A: 64. Like Forness, Woodman and his assistant Jim Ford scheduled Baker so that he did not have to work on Sundays. R-34: ¶ 8. It is undisputed that Baker and his family belong to a Full Gospel Fellowship church and that they regularly attend Sunday services there. R-23, X-A: 19, 22-24; R-35.

In September 2002, Colleen Vorndran became the manager of the Henrietta store. R-24: ¶ 2. The store had 120 employees. It was open seven days a week, and Vorndran stated that Saturdays and Sundays were the store's busiest days. R-24: ¶ 4. Vorndran stated in her affidavit (R-24: ¶ 8):

> It is essential to the business needs of the store to have all full-time associates fully available to work flexible schedules on any day of the week. Allowing one associate to consistently have Saturday or Sunday off would simply not meet the needs of the store, nor would it be fair to the other full-time associates.

Vorndran learned from one of her assistant managers that the store had been scheduling Baker so that he did not have to work on Sundays. R-24: ¶ 7. In late September Vorndran summoned Baker to her office. When Baker told her, "You know I don't work Sundays," Vorndran responded, "You will work Sundays or you will not work here." R-23, X-A: 77-78; R-34: ¶ 12. Home Depot then scheduled Baker to work on Sunday, October 13. On the 13th, Baker called the

store and told the manager on duty that he would not be coming in to work that day because he "[did]n't work on Sundays" and he would be "attending church and spending time with my family." R-23, X-A: 80-81; R-34: ¶ 13.

Two days later Baker was again summoned to Vorndran's office to meet with her and Human Resources Manager Patti O'Leary. R-24: ¶ 10; R-34: ¶ 14. Vorndran noted that he had "called in" (i.e., not reported for work) on the previous Sunday, and gave him a verbal last-chance warning: "You've got one more chance, and you're done. Call in on another Sunday, and I'll have to let you go." Baker responded: "You know where I stand on my beliefs, and . . . I will not move on my beliefs. I will not change my ways." R-23, X-A: 82.

Vorndran suggested that Baker could work "the closing shift" on Sundays, but Baker explained that "Sundays are my religious day. It's not a morning[;] it's not anything else; it's my religious day, time for my family, time for my church, my beliefs." R-23, X-A: 84-85. Vorndran also discussed the possibility of Baker's becoming a part-time employee, but Baker interpreted her discussion of this option as a threat rather than an offer of accommodation. R-23, X-A: 86. Vorndran knew that Baker had a 14-month-old daughter and that his wife was pregnant again. Id. According to Baker, she stated: "Your other option is to go part time, and at that point you have no guarantee of hours. I don't have to give you any hours at all if I don't want to, . . . [but y]ou can't afford to do that. I know your situation. . . . You need the insurance and everything else, so you need to work the Sundays." Id.[1]

[1] Vorndran claims she also suggested that Baker try to find a co-worker to swap shifts with, but Baker did not recall her making that suggestion. R-24: ¶ 13; R-23, X-A: 87-88. Vorndran further testified that Baker was disrespectful during

Home Depot scheduled Baker to work again the following Sunday, October 20. R-34: ¶ 15. When Baker did not report to work that day, he was terminated. R-24: ¶¶ 15-16. Baker filed suit against Home Depot in May 2003. R-1. Home Depot moved for summary judgment in April 2004. R-20. The district court granted that motion in January 2005. R-40. Final judgment was entered February 4, R-41, and Baker filed a timely notice of appeal. R-42.

3. District Court Decision

In its motion for summary judgment, Home Depot argued that: (a) Baker does not have a bona fide religious belief requiring him to abstain from working on Sundays; (b) the company offered one or more reasonable accommodations; and (c) agreeing to Baker's demand never to work on Sundays would cause the company undue hardship. The court rejected the company's first argument, ruling that Baker's "affidavit explaining the genesis of his belief about the sacredness of the Sabbath is sufficient evidence to create a jury question as to the validity of that belief." Decision & Order ("Dec.") at 6. In addition, the court noted, it was undisputed that Baker had "informed [Home Depot] that his religious beliefs prohibited him from working on Sundays." Id. at 6. Moreover, since the company fired Baker "as a result of his refusal to work on Sundays, there is no question that he was disciplined for his religious belief." Id. Therefore, the court concluded, Baker had "established a prima facie case of religious discrimination in violation of Title VII." Id.

---

this meeting, and that she advised him that "his failure to report to work on his scheduled days would constitute a flagrant disrespect for managerial policy." R-24: ¶ 14. Baker did not recall her saying this either. R-23, X-A: 88.

The district court did not reach Home Depot's third argument (on undue hardship), because it agreed with the company's second argument (on reasonable accommodation). The court quoted the Commission's regulation that encourages employers and unions to consider flexible scheduling as a means of accommodating an employee's religious practices (29 C.F.R. § 1605.2(d)(1)(ii)), and then stated: "I find as a matter of law that defendant's offer to schedule plaintiff to work in the afternoon or evenings on Sundays, thus allowing him an opportunity to attend his religious services, is a reasonable accommodation as contemplated by 42 U.S.C. § 2000e(j)." Id. at 8.

SUMMARY OF ARGUMENT

The district court granted Home Depot summary judgment because its offer to schedule Baker to work later on Sundays accommodated his need to attend church services on Sundays. This was error, because the company's offer to schedule Baker to work later on Sundays was not a reasonable accommodation of his religious beliefs. A company's offer is not a reasonable accommodation unless it removes the conflicts between the employee's work duties and his religious beliefs. Home Depot's offer accommodated Baker's need to attend religious services on Sundays, but it did not accommodate his religious duty to refrain from working on the Sabbath. It therefore was error to grant summary judgment in favor of Home Depot.

ARGUMENT

THE DISTRICT COURT ERRED IN RULING THAT HOME DEPOT'S OFFER TO SCHEDULE BAKER TO WORK LATER ON SUNDAYS WAS A REASONABLE ACCOMMODATION.

Title VII forbids employment discrimination on the basis of religion, and provides that "[t]he 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." 42 U.S.C. § 2000e(j). This provision "make[s] it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).

The district court first held that Baker had established a prima facie case. The court ruled there was sufficient evidence to support a finding that Baker had a sincere religious belief that he should not work at all on Sunday, his Sabbath. As the court noted, this belief was based in part on Baker's belief that he must attend church services on Sunday mornings, but also on his belief that he should refrain from all work on the Sabbath and spend the day with his family. Dec. at 8 ("Neither party disputes that plaintiff informed each person in charge of scheduling that his religious beliefs prohibited him from working on Sundays.") Nonetheless, the court went on to conclude that Home Depot reasonably accommodated Baker's religious belief by offering him a schedule which would

have required him to work on Sunday afternoons or evenings. This was error. Home Depot's proposal did not resolve the conflict between Baker's religious beliefs and his job responsibilities. It was therefore not a reasonable accommodation. Cosme v. Henderson, 287 F.3d 152, 159 (2d Cir. 2002) ("For any of [defendant's] offers to have been reasonable within the meaning of § 701(j), the proposed accommodation had to have eliminated the conflict between the employment requirement, working on Saturdays, and the employee's religious practice of not working on the Saturday Sabbath."); see also Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986) (stating that a reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices").

Cooper v. Oak Rubber Co., 15 F.3d 1375, 1377-79 (6th Cir. 1994) is precisely on point. Cooper was a Seventh Day Adventist, and her church prohibited its members from working between sundown Friday and sundown Saturday, and required them to attend worship services Saturday mornings. Cooper worked the day shift, and the company sometimes required all its day-shift employees to work on Saturday. Her supervisor suggested that she switch to the Monday-through-Friday night shift. The court held that this was not a reasonable accommodation, because, just as in the case at bar, it "accommodated only one of [the plaintiff's] concerns, that of missing church service on Saturday, but failed to address her principal objection to working on [her Sabbath]," because she would have to work Fridays after sundown. Id. at 1379. "An employer," the court ruled, "does not fulfill its obligation to reasonably accommodate a religious belief when

it is confronted with two religious objections and offers an accommodation which completely ignores one." Id. See also EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1576 (7th Cir. 1997) (when Jewish employees asked for the day off on Yom Kippur, the employer's offer to give them a different day off "cannot be considered reasonable . . . because it does not eliminate the conflict between the employment requirement and the religious practice"); EEOC v. Universal Manufacturing Corp., 914 F.2d 71, 73 (5th Cir. 1990) (when World Church of God adherent requested seven days of unpaid leave to attend the Feast of Tabernacles, the employer's offers of either five days off or seven days off if she worked one shift during that time were not reasonable; when an employee has two religious duties, accommodating one and ignoring the other "would be patently unreasonable"); EEOC v. AFSCME, 937 F. Supp. 166, 168 (N.D.N.Y. 1996) (where union member objects *both* to the union's lobbying activities for abortion and against capital punishment *and* to supporting an organization that advances those positions, union's proposal that he pay his shop fee reduced by a small amount proportional to the cost of the lobbying activities is not a reasonable accommodation because it "would not address [plaintiff's] objection to supporting the organization itself"); compare Cosme, 287 F.3d at 159-60 (holding that the defendant's offers to accommodate plaintiff's religious beliefs constituted reasonable accommodations because they eliminated the conflict between his work schedule and his religious duty to refrain from working on the Sabbath).

Home Depot may argue that the Cosme definition of "reasonable accommodation" does not govern here because before Cosme was decided, this

Court defined "reasonable accommodation" less strictly in Knight v. Connecticut Department of Public Health, 275 F.3d 156 (2d Cir. 2001). Knight was primarily a case about free-speech rights under the First Amendment. The plaintiffs, a nurse consultant and a sign-language interpreter working for state agencies, were born-again Christians who sometimes "felt called . . . to discuss their religious beliefs with clients while performing their duties," and did so in a manner that upset the clients. Id. at 160-63. Their employers accordingly forbade the plaintiffs from discussing their religious beliefs with their clients, although they allowed the plaintiffs to discuss those beliefs with their co-workers at their workplaces. The plaintiffs' principal claim was that their state employers were violating their free-speech rights under the First Amendment. The court of appeals affirmed the district court's dismissal of that claim, holding that, under Pickering v. Board of Education, 391 U.S. 563 (1968), the plaintiffs' free-speech rights were outweighed by their employers' interest in "providing effective and efficient public services," and by their employers' constitutional duty to avoid "appear[ing] to take a position on questions of religious belief." Knight, 275 F.3d at 164-65 (punctuation and citations omitted).

The Knight panel then addressed the plaintiffs' claims under Title VII that their state employers had failed to provide reasonable accommodations for their religious beliefs. In affirming the district court's judgment dismissing the plaintiffs' Title VII claims, Knight's primary holding was that the plaintiffs had each failed to make out a prima facie case of religious discrimination, because neither plaintiff had told her employer that she believed she had a religious duty to

share her religious beliefs with her clients. Id. at 167-68. In the alternative, the panel ruled that, even assuming that the plaintiffs had established prima facie cases, "the accommodation they now seek is not reasonable" because it would cause their employers undue hardship: it would "jeopardize the state's ability to provide services in a religion-neutral matter." Id. at 168. Third, the court declared that "the state reasonably accommodated plaintiffs' beliefs [because t]he restrictions on their religious speech applied only while working with clients on state business." Id.

The last-quoted statement should be considered dictum rather than a binding alternative holding because the Knight panel did not parse the specific nature of the plaintiffs' professed need to evangelize and what might fulfill that need. The panel's statement that the state defendant reasonably accommodated the plaintiffs' beliefs should not be read to implicitly adopt a definition of reasonable accommodation that departs from the clear statements in Cosme and Ansonia that an employer's suggestion is not a reasonable accommodation unless it eliminates the conflicts between the employee's work requirements and his religious practices. Indeed, the Knight panel did not make any general statement about the nature of reasonable accommodation, nor did it cite any authority on the issue.

Home Depot also suggested that Baker could fulfill his religious duties if he became a part-time employee. Home Depot may argue that this Court should affirm the district court on the alternative ground that this suggestion constituted a reasonable accommodation, but it was not a reasonable accommodation either. Baker testified that Vorndran threatened to schedule him for far fewer than 40

hours a week if he took this option, and that she told Baker, who had a young daughter and expected another baby soon, that she realized that he "can't afford to do that." R-23, X-A: 86. Moreover, in their meeting the previous week Vorndran had stated, "You will work Sundays or you will not work here." Id. at 77-78.

This suggestion that Baker become a part-time employee was not a reasonable accommodation, because it would have imposed a significant financial burden on Baker. See Cosme, 287 F.3d at 160 ("an accommodation might be unreasonable if it imposes a significant work-related burden on the employee without justification"); Cooper, 15 F.3d at 1379 (employer's suggestion that plaintiff use all her accrued vacation time to avoid working on her Sabbath was not a reasonable accommodation because it deprived her of a benefit enjoyed by all her co-workers).

CONCLUSION

For the reasons stated above, the Commission and the Department urge this Court to reverse the district court's order and remand this case for further proceedings under the appropriate legal standards.

Respectfully submitted,

ERIC S. DREIBAND
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

PAUL D. RAMSHAW
Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 L Street, NW, Room 7040
Washington, DC 20507
202-663-4737

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

DAVID K. FLYNN
ERIC W. TREENE
DAVID WHITE
Attorneys

U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
950 Pennsylvania Ave., NW
Room 5531
Washington, DC 20530
202-616-9405

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief was prepared using Times New Roman font, 14 point, and contains 3,191 words from the Statement of Interest through the Conclusion, as determined by the Corel WordPerfect 9 word-counting program.

Paul D. Ramshaw

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief were served by mailing them on this date first class, postage prepaid, to the following party and counsel:

Debra Morway, Esq.
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178

Bradley Baker
P.O. Box 114
Fillmore, NY 14735

Paul D. Ramshaw

Equal Employment
Opportunity Commission
1801 L Street, N.W., Room 7018
Washington, DC 20507
(202) 663-4737

June 15, 2005