Nos. 22-2943 & 22-2944

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

DEMETRIUS FORD,
Intervenor-Appellant,

v.

CENTER ONE, LLC & CAPITAL MANAGEMENT SERVICES, LP,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
HON. CHRISTY CRISWELL WIEGAND, DISTRICT JUDGE
CASE NO. 2:19-CV-01242-CCW

INTERVENOR-APPELLANT'S OPENING BRIEF

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SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The district court therefore had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1345.

Appellants filed timely notices of appeal from final judgment. JA 31-34. This court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In supplement to the issues presented by Appellant EEOC, Intervenor-Appellant Demetrius Ford presents the following issue: Whether the district court erred in granting summary judgment to Center One by finding that Ford did not suffer constructive discharge under Title VII when he resigned from the Company.[1]

Plaintiffs raised this issue in the summary-judgment motions and their attendant briefs, and the lower court's opinion addressed it. Dist. Ct. Case No. 2:19-cv-01242, Dkt. Nos. 98, 99, 110, 121; JA 1-27.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Ford is not aware of any related cases or proceedings.

[1] In its grant of summary judgment, the district court deemed moot the question of whether Capital Management Services, LP was a joint employer. Ford reserves on remand his argument that it was.

INTRODUCTION

This case concerns the untenable choice Appellant Demetrius Ford faced while working as a call-center employee for Appellee Center One: his faith or his livelihood. Specifically, Ford was forced to resign from Center One (or "the Company") because of its refusal to accommodate his need to observe religious holidays central to his faith as an observant Messianic Jew. And although the district court granted summary judgment to Center One in this lawsuit that the EEOC and Ford thereafter brought under Title VII of the Civil Rights Act of 1964, it did so only after ignoring a series of material fact disputes concerning Ford's claim that he was constructively discharged based on an intolerable and inevitable choice to violate his faith or quit. This Court must reverse.

Absent a showing of undue hardship to the employer's business—an affirmative defense not at issue here—Title VII protects employees from adverse employment actions because of their need for religious accommodation. Notably, adverse action triggering this protection includes constructive discharge; i.e., where the employee has resigned, but under conditions that effectively make the resignation involuntary and no different from being fired. And according to this Court, a plaintiff

can prove constructive discharge by showing that the employer created conditions so intolerable a reasonable employee would feel the need to resign. In support, or alternatively, courts have further observed that constructive discharge can arise where the employer made clear that termination was inevitable. Either or both of these theories apply here.

As a Messianic Jew, Ford cannot work on select days of the year in accordance with his faith's observance of holidays typically associated with conventional Judaism. Aware that these commitments might at times conflict with his work, Ford testified that he shared his need for accommodation in his interview with Center One and upon joining the Company. Ford likewise testified that Center One indicated this would not be a problem as it makes religious accommodations for others.

It indeed turned out to be a problem. So much so that Ford found himself resigning from Center One in the face of a wave of undisputed conflicts between his job and faith. These included: (1) a rising number of attendance points for "unexcused" absences exceeding Center One's written threshold for termination that the Company charged Ford for observing religious holidays, including his faith's equivalent of Rosh Hashanah and Yom Kippur; (2) Center One's insistence that Ford obtain

approval from a religious leader on official letterhead of his need to observe his holidays, an approval Center One did not require for employees of other religions and one Ford could not secure due to the recent dissolution of his local faith community and its leader's inaccessibility; and (3) Center One's position in a corrective-action meeting that Ford would be fired for any further religious absences without this proof of orthodoxy. In other words, Ford had no choice but to resign.

For his part, Ford shared on the day of his resignation that he understood he would be fired for what Center One had described as "unexcused" absences without the clergy approval it repeatedly and unequivocally demanded. And at no point on that day or any other did Center One try to dissuade Ford from thinking he did not need the "required" letter, as the Company had put it. No one told Ford that the attendance points he received would not trigger termination, as Center One's written attendance policy presages. No one tried to stop Ford from concluding his firing was imminent. Instead, the Company asked him to leave immediately.

In short, the case for constructive discharge is plain. And although in granting summary judgment to Center One the lower court disagreed, it ignored facts that are at a minimum disputed. Most notably, the court believed that, at the time of Ford's resignation, Center One had dropped the clergy-letter requirement going forward. The court also thought that any termination for attendance points was wholly discretionary, and that Ford's corrective-action meeting did not foretell the end of the road.

But at least two Center One human-resources officials agreed in writing or testified that, absent the clergy letter, Ford would be fired for any future absence for a religious observance. Moreover, not only does the Center One employee handbook undercut the Company's discretion not to terminate Ford for such an absence, the repeated clergy-letter demand likewise shows that no such grace was forthcoming. Finally, it is at least disputed that any further process would have made a difference, given Ford's inability to meet the letter requirement and Center One's showing Ford the door on sharing his need to resign with another holy day approaching.

This Court should reverse.

CONCISE STATEMENT OF THE CASE

A. Demetrius Ford is an observant Messianic Jew who must abstain from work on religious holy days.

Demetrius Ford has been a practitioner of Messianic Judaism since 2006. JA 456 [Ford Dep.]. Messianic Jews are required to abstain from work on certain religious holy days, including but not limited to Rosh Hashanah and Yom Kippur. *Id.*; *accord* JA 789 [Rock of Ages Email].[2]

Before joining Center One, Ford had been practicing his faith with a Messianic Jewish congregation in Darlington, Pennsylvania. JA 448-49 [Ford Dep.]. With this congregation, Ford celebrated festivals and holy days by observing a sabbath, which includes abstaining from work and sharing meals together. JA 448 [Ford Dep.]; *see also* JA 605 [Guy 2013 Email]; JA 607 [Guy 2014 Email]; JA 609 [Guy 2016 Email]. In mid-2016, however, the congregation dissolved when their leader left. JA 464 [Ford Dep.]. Despite the loss of this formal community, Ford continued to practice his religion. JA 455, 465 [Ford Dep.].

[2] Some Messianic Jews refer to these holy days by different names. For example, Rosh Hashanah is also called the "Feast of Trumpets" and Yom Kippur is also referred to as "The Day of Atonement." *See* JA 789 [Rock of Ages Email].

B. Ford starts work for Center One and shares with the Company his faith commitments.

Center One operates a credit-card company call center in Beaver Falls, Pennsylvania. JA 2 [Dist. Ct. Op.]. In August 2016, Ford interviewed to work at this call center with Human Resources Assistant Heather Altman. JA 430 [Brugos Summary Memo]. As Ford testified, he informed Altman during the interview process that Messianic Jews are prohibited from working on several days throughout the year. JA 438-39. Ford further recalled that Altman indicated Center One could accommodate his religious needs because it does so for other religious practitioners. JA 439 (testifying Altman "said it wouldn't be [a] problem").

Soon after the interview process concluded, Center One hired Ford as a Customer Care Specialist, and he began a 90-day Probationary Period in September 2016. JA 730 [Defendants' UMF Response]. Among other things, new hires in this period receive attendance points for "unexcused" absences. JA 640 [Attendance Policy] (explaining "all employees with a total point value equal to or exceeding 4 points in their

Probationary period are subject to disciplinary actions up to and including termination").[3]

C. Center One refuses to excuse Ford's observance of Rosh Hashanah and demands a clergy letter to prove his faith.

Ford recounted that in advance of Rosh Hashanah, he reiterated to Altman that he would soon have to miss work to observe this religious holiday. JA 498-99 (Ford testifying he spoke with Altman "one or two days before" Rosh Hashanah about the dates of his upcoming absence). Ford further testified Altman told him how to report this absence using Center One's hotline system, and he did so on her guidance. JA 499.

Following his observance of Rosh Hashanah, Ford returned to work only to learn from Altman that Center One deemed his absences "unexcused" and had assigned him "attendance points." JA 493 [Ford Dep.]; JA 631 [Attendance Log]. Under Center One's attendance policy, Ford was now at the four-point threshold that subjects an employee "to disciplinary actions up to and including termination." JA 640 [Attendance Policy]; JA 631 [Attendance Log]. Altman then referred Ford

[3] The 90-day Probationary Period includes both Ford's "Training Period" (from September 12 to 25, 2016) and his "Transition Period" (from September 26 to October 9, 2016). JA 730 [Defendants' UMF Response].

to her supervisor, Human Resources Generalist Andrea Brugos, née Robel, to discuss his points. JA 389 [Lewis Dep.]; JA 493 (Ford testifying that Altman explained, "since those were unexcused absences, [he] probably had to go talk to Andrea").

Brugos informed Ford that Center One "would be able to adjust his schedule accordingly if he were to provide documentation with the letterhead from his congregation." JA 430 [Brugos Summary Memo]; *accord* JA 444 (Ford testifying that Brugos said, "You have to come up with a letterhead to show what your religion is").

D. Due to the recent dissolution of his local congregation, Ford explains he cannot meet Center One's demand for a clergy letter but offers alternative documentation.

Ford tried to contact the leader who had left his congregation to get the clergy letter Center One demanded. JA 430 [Brugos Summary Memo]; JA 445-46 [Ford Dep.]. But he never received a response. JA 430 [Brugos Summary Memo]; JA 447 [Ford Dep.].

Because Ford "could not get a hold of his former Rabbi," he instead presented Brugos with emails and calendars showing the dates of holy days from another congregation he was considering joining (Rock of Ages) and from his own research. JA 430 [Brugos Summary Memo]; JA 621-29

[Rock of Ages Email]. Brugos rejected the documents, stating she "could not accept this because anyone could print this out, and [she] needed something with an official letterhead." JA 784 [Brugos Email Chain].

E. Center One refuses to budge on its letterhead policy.

After telling Ford that only affirmation of his religious beliefs on official clergy letterhead would excuse his absences, Brugos then emailed her human resources colleagues to confirm Center One's policy. JA 783-84. Specifically, she asked whether Ford's emails and calendars would suffice to accommodate him and remove his attendance points from Rosh Hashanah. JA 784.

In response, Human Resources Manager Paula Hurtgam replied, "Is he able to get something from his new congregation saying he joined and needs the Jewish holidays off?" JA 783; JA 390 [Lewis Dep.]. Brugos responded, explaining Ford "seemed discouraged and said he could try" when she had asked him the same question. JA 783.

Brugos again sought clarification on her enforcement of Center One's letterhead policy, writing "it seems like the letter with the letter head is the only acceptable documentation?" *Id.* There is nothing in the record to indicate a reply to Brugos's question. *Id.* Regardless, Brugos

maintained that Center One "had to remain consistent with [its] policy and needed the documentation with an official letterhead before accommodating Demetrius' needs." JA 430-31 [Brugos Summary Memo].

F. Center One requires Ford to attend a corrective-action meeting—and on Yom Kippur.

Because of Ford's four attendance points, and his inability to satisfy the Company's letterhead requirement, Center One "decided that [Ford] should meet with our Employment Review Committee (ERC) to discuss his attendance and lack of documentation." JA 431 [Brugos Summary Memo]; JA 504 [Ford Dep.]; JA 152 [Employee Handbook] (indicating that getting three points triggers a "final warning/Employment Review Committee (ERC)"). Typically, Center One hosts ERC meetings to discuss "the issues that have brought an Associate to a critical point in their employment with the Company." JA 145 [Employee Handbook]; JA 230 (Brugos testifying an ERC meeting "corresponded with one of the final steps of discipline").[4]

[4] Although there is occasional confusion in the record, the parties agree the total number of attendance points Ford had accrued at the time of his termination was 5.5. JA 745-46. [Defendants' UMF Response].

Center One scheduled this meeting on Yom Kippur. JA 504 [Ford Dep.]; JA 624 [Rock of Ages Email]. In anticipation of the ERC meeting, Ford turned to Rock of Ages again to ask if they might provide him with the letterhead Center One demanded, writing that the "company [he] work[s] for is threatening to terminate [his] employment" because of his religious absences. JA 786 [Rock of Ages Email]. Rock of Ages refused to help because Ford was not a member of their congregation. *Id.*

The ERC meeting participants included Ford, Brugos, and Human Resources VP Patti Sue O'Malley. JA 431 [Brugos Summary Memo]. Ford testified that at the start of their discussion, someone asked, "Well, this is a High Holy Day, why are you here?" JA 451. Ford expressed concern that those who scheduled the ERC meeting "knew this was going to happen," yet they proceeded to schedule it on a known holy day. *Id.* At the meeting, O'Malley further questioned Ford on his religious practice, how he worships, and why he has not joined a new congregation. JA 430 [Brugos Summary Memo]. At one point Ford interjected, "Do I need a lawyer?" JA 431 [Brugos Summary Memo].

The rest of the ERC meeting involved discussion about the letterhead and Ford's attendance points. JA 9 [Dist. Ct. Op.]; JA 431

[Brugos Summary Memo]. At the end of the meeting, Center One told Ford, "if we receive the documentation, we will relieve any applicable attendance points and will be able to accommodate [you] going forward." JA 431 [Brugos Summary Memo].

G. After the corrective-action meeting, Ford has no choice but to obtain the clergy letter or be terminated for his next religious observance.

Following the ERC meeting, Ford testified that "everyone wanted to get this letterhead." JA 452. Ford also further testified he knew he had more holy days coming up. JA 453; *accord* JA 624. Because he could not supply the clergy letter, however, Ford understood that another religious absence would mean termination. JA 452-53 (testifying "that if I did take off, I would be getting fired. Because of the points I accumulated"); JA 519 (testifying "if you get over four points, you lose your job").

Likewise, Brugos testified that if an employee had enough points to be at or above the termination threshold, and had no documentation to excuse those attendance points, "the employee would be terminated." JA 231. Furthermore, O'Malley testified that an employee would be terminated after an ERC meeting if that employee earned another attendance infraction following the meeting. JA 575.

H. Unable to obtain a clergy letter, Ford resigns.

Just over a week after his ERC meeting, and with additional holy days coming up, Ford informed Altman that he intended to resign. JA 430 [Brugos Summary Memo]; JA 433 [Altman Summary Memo]; JA 453 [Ford Dep.]. Ford explained he could not provide the required clergy letterhead and would rather resign than wait to be fired. JA 431 [Brugos Summary Memo]; JA 453 [Ford Dep.]. In a termination form, Altman wrote "Demetrius voluntarily resigned from his position. Demetrius could not provide proper documentation for his religion needed for Human Resources." JA 647.

Upon hearing Ford's reason for resigning, Altman did not excuse his inability to get the clergy letter or offer alternative means of accommodation. JA 433 [Altman Summary Memo]. Instead, Altman reiterated the letterhead policy and accepted Ford's resignation: "[W]e needed a letter from his Rabbi stating that you practice that religion and if he could not provide the letter than we could not accommodate that religion." *Id.*

Despite Ford's offer to work through the end of the week, Center One insisted he depart immediately. JA 453 [Ford Dep.]; JA 431 [Brugos

Summary Memo]. And there is record support that the Company then gave Ford a one-half point for leaving early. JA 631 [Attendance Log] (showing one-half point on October 19, 2016); JA 616 [Center One's Responses to Requests for Admission]; Dist. Ct. Dkt. No. 76 ¶ 44 [Center One's Answer to Amended Complaint] ("It is admitted that Ford notified Answering Defendant of his voluntary resignation on October 19, 2016."); *accord* Dkt. No. 86 ¶ 44 [CMS's Answer to Amended Complaint].

I. Ford files a charge with the EEOC, which files suit.

Ford filed a charge with the EEOC, which found reasonable cause to believe Center One violated his rights under Title VII. JA 661; JA 725-26 [EEOC Charge Determination]. The agency thereafter filed this suit, and Ford intervened. JA 40, 53-54 [Docket Entries].

J. The district court grants summary judgment to Center One.

On cross motions, the district court granted summary judgment to Center One. JA 30 [Judgment Order]. In its written opinion, the court found it was undisputed that "Ford practices Messianic Judaism, which requires him to abstain from work on certain religious holidays, such as Rosh Hashanah (also known in Messianic Judaism as 'Feast of Trumpets'), Yom Kippur, and others." JA 2 [Dist. Ct. Op.]. The court

further found that Center One had notice of Ford's need for accommodation. JA 15.

The district court, however, determined Ford suffered no adverse employment action. JA 17. Specifically, it reasoned that Center One's requirement of a clergy letter applied only to future absences; that the Company's attendance-point system was flexible; and that Ford made the "unilateral decision to cut [the] process off" when he resigned. JA 25-26.

This appeal follows.

SUMMARY OF ARGUMENT

Absent undue hardship to the employer's business—which Center One does not argue here—Title VII protects the right of workers to observe religious holidays without suffering adverse action, including constructive discharge. But when Demetrius Ford needed time off from Center One to observe the holidays of his faith, the Company refused. Instead, Center One assigned Ford disciplinary-triggering points for his absences and forced him to attend a corrective-action meeting—on Yom Kippur, no less. Before, during, and after that meeting, moreover, the parties understood Ford could not observe religious holidays and keep his job without an endorsement from the leader of a religious congregation.

But because he had no such community or leader, Ford faced a choice between his faith and job. As is his right, Ford chose his faith.

According to this Court, an employee who resigns can show his resignation was a constructive discharge under Title VII where the employer created conditions so intolerable a reasonable employee would have felt compelled to resign. *Levendos v. Stern Ent., Inc.*, 860 F.2d 1227, 1230 (3d Cir. 1988). In particular, being forced to choose between one's faith and livelihood has been recognized in this Circuit as a form of constructive discharge. *See Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 335 (E.D. Pa. 2016) (describing "Hobson's choice" of being forced to choose between one's faith and job).

Additionally, courts here and elsewhere have noted or held that constructive discharge can arise where a reasonable employee would have understood that his termination was inevitable. *Laster v. City of Kalamazoo*, 746 F.3d 714, 728 (6th Cir. 2014); *Shepherd v. Gannondale*, No. 1:14-cv-0008, 2014 WL 7338714, at *15 (W.D. Pa. Dec. 22, 2014). And although the district court observed that this Court has not yet expressly adopted inevitable termination as an independent theory, JA 23, it has, at a minimum, recognized the specter of inevitable termination as a

consideration when deciding if a situation was intolerable. *See Schafer v. Bd. of Pub. Educ. of Pittsburgh*, 903 F.2d 243, 249-50 (3d Cir. 1990) (considering a resignation following the denial of leave to be an actionable constructive discharge).

Here, the record supports a finding that Ford suffered constructive discharge in either or both of the foregoing ways. Regarding intolerable conditions, Center One refused to accommodate Ford's need to observe his holidays, insisting that Ford provide a clergy letter he could not obtain or be fired for his next religious absence. This forced Ford to choose between his job and faith—and in a manner Center One would not require for employees of other religions. Moreover, Ford reasonably concluded that his termination was inevitable based on Center One's points policy for unexcused absences and his inability to provide the Company's required clergy letter.

In finding otherwise, the district court ignored record evidence that showed the matter of constructive discharge was at least disputed. For starters, the court discounted the clergy-letter requirement because some Center One witnesses testified at their depositions that they may not have required the letter for future absences. But not only was this

supposed position unknown to Ford at the time, other evidence from Center One—including an internal memo and testimony from two human-resources officials—supports a finding that the Company repeatedly insisted on the letterhead for any future religious-holiday absence, or Ford would be fired.

The district court also found that neither the attendance points Ford accrued nor the ERC meeting he was forced to attend created an intolerable workplace or meant inevitable termination. But Ford reasonably understood from Center One that he would receive further attendance points for observing religious holidays without a clergy letter and be fired. Indeed, the court's conclusion to the contrary discounts the plain text of Center One's attendance policy and testimony from its officials on the unmet requirement of a clergy letter as a condition for avoiding being fired.

Finally, in ruling against Ford the district court characterized his resignation as a "preemptive" one that "cut off" Center One's supposed efforts to accommodate him. JA 26. But this read of the situation is at least drawn into question by an internal memo from Center One that accepts that Ford told the Company he "would like to resign at this time

since he will not be able to provide us with the documentation we need." JA 431 [Brugos Summary Memo]. Worse yet, rather than engaging in a dialogue or adjusting the clergy-letter requirement in any way, Center One responded to Ford's resignation request by telling him to leave immediately. If anything, it was Center One that cut off the process.

ARGUMENT

I. THIS COURT REVIEWS THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT AGAINST FORD *DE NOVO*, MINDFUL THAT HIS ABILITY TO PROVE CONSTRUCTIVE DISCHARGE IS A FACT-INTENSIVE INQUIRY.

This Court reviews summary-judgment orders *de novo*, using the same requirements as in the district court. *Bray v. Marriott Hotels*, 110 F.3d 986, 989 (3d Cir. 1997). Namely, this Court determines not only whether the district court correctly applied the relevant substantive law but also whether there are genuine issues of material fact that might affect the outcome under that law. *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir. 2006). Moreover, any doubts must be resolved in favor of the opposing party. *Id.*

Applying these standards to the district court's entry of summary judgment against Ford based on his supposed inability to establish an adverse action under Title VII through constructive discharge, this Court

must agree on *de novo* review that no jury could find that Ford faced intolerable working conditions or inevitable termination—with all doubts in his favor. *Levendos*, 860 F.2d at 1229-30. And in conducting this inquiry, it must be kept in mind that whether a constructive discharge occurred is "a heavily fact-driven determination." *Id.* at 1230.

II. TITLE VII FORBIDS EMPLOYERS FROM FORCING THEIR EMPLOYEES TO CHOOSE BETWEEN THEIR FAITH AND THEIR JOB—WHETHER AS A FORM OF INTOLERABLE WORKING CONDITIONS OR INEVITABLE TERMINATION.

Title VII forbids employers from discharging an employee because of his religion. 42 U.S.C. § 2000e-2(a)(1). What's more, 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 . . . without undue hardship." 42 U.S.C. § 2000e(j). Consequently, and as the Supreme Court made clear in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773-74 (2015), an employee has a Title VII claim for religious discrimination where he suffers an adverse employment action because of a conflict between his need for religious accommodation and a job requirement.

A plaintiff establishes a prima facie case of such discrimination based on the failure to accommodate religious practice where he shows:

(1) a sincerely held religious belief; (2) a known conflict between that belief and a job requirement; and (3) an adverse employment action he suffered because of the conflict. *Webb v. City of Philadelphia*, 562 F.3d 256, 259 (3d Cir. 2009).

The district court deemed it undisputed that Ford met the requirement of a sincerely held religious belief in his need to observe his Messianic Jewish holidays. JA 2. It also found that Center One nowhere denied a known conflict between those beliefs and its attendance requirements. JA 15, 17. Rightly so. After all, at the time of his employment with Center One, Ford had been an observant Messianic Jew for more than a decade. JA 456 [Ford Dep.]. And the conflict between Ford's attendant need to abstain from work on his religious holidays and Center One's work schedule was front and center in the course of his employment and resignation. JA 438-39, 453 [Ford Dep.]; 647 [Termination Form]. The only remaining issue therefore is whether a reasonable jury could find Ford suffered an adverse employment action.[5]

[5] Center One does not assert on summary judgment the defense that it would have suffered undue hardship on its business were it to have accommodated Ford. *See* 42 U.S.C. § 2000e(j) (reciting defense).

As noted above, an employee has suffered adverse action under Title VII where he resigns in circumstances constituting a constructive discharge. *Green v. Brennan*, 578 U.S. 547, 555 (2016) ("Title VII treats that resignation as tantamount to an actual discharge."); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984) (stressing "universal recognition" of Title VII constructive-discharge liability in circuits that have addressed the issue). And in determining a constructive discharge, this Court has declined to adopt an exhaustive set of factors. *See Duffy v. Paper Magic Grp.*, 265 F.3d 163, 168 (3d Cir. 2001).[6]

In any event, the overarching inquiry is whether the employee's resignation "was reasonable given the totality of the circumstances." *Suders v. Easton,* 325 F.3d 432, 445-46 (3d Cir. 2003), *rev'd on other grounds by Pa. State Police v. Suders,* 542 U.S. 129 (2004).

Pertinently, a plaintiff can show a constructive discharge where he demonstrates that his situation was so intolerable "a reasonable person in his position would have felt compelled to resign." *Green*, 578 U.S. at

[6] Factors can include whether there was a (1) threatened discharge; (2) demotion; (3) reduction in pay; (4) position change; (5) change in job responsibilities; or (6) poor job evaluations. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 503 (3d Cir. 2010) (citing *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir. 1993)).

555 (internal citations omitted). In this analysis, the plaintiff need not show the employer specifically meant to discharge him; only that the employer "knowingly permitted" the situation. *Goss*, 747 F.2d at 888.

Perhaps most notably, courts in this Circuit and elsewhere have found that intolerable conditions can include facing the "Hobson's choice" of adhering to one's religious beliefs or making a living. In *Mathis*, for example, the court found constructive discharge could be shown where the employee's job was conditioned on wearing an identification badge with a religious message to which he objected. 158 F. Supp. 3d at 335. Likewise, in *Young v. Southwestern Savings & Loan Association*, the Fifth Circuit held as a matter of law that a plaintiff's resignation in the face of having to attend mandatory prayer meetings was a constructive discharge. 509 F.2d 140, 144 (5th Cir. 1975). And in *EEOC v. Consolidated Energy, Inc.*, the Fourth Circuit affirmed judgment for an employee who quit rather than face the prospect of being fired for not wearing a biometric tracking device that violated his religious beliefs about the "Mark of the Beast." 860 F.3d 131, 142-43 (4th Cir. 2017). Contributing to the intolerability, the Fourth Circuit added, was that the

company made exceptions to its tracking-device rule for employees with hand injuries. *Id.* at 143.

Furthermore, and whether as an alternative theory or part of the calculus in deciding whether an employment situation was intolerable, a plaintiff can also support a showing of constructive discharge where the employer acted in a manner as to communicate to a reasonable employee he would be fired. *See Laster*, 746 F.3d at 728 (describing adoption of inevitable-termination theory in the circuit courts); *Schafer*, 903 F.2d at 249-50 (considering resignation after denied leave in the intolerability analysis). As the Seventh Circuit has held, constructive discharge occurs where the employer's actions indicate "the handwriting was on the wall and the axe was about to fall." *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002) (internal citations omitted). Or, as the Tenth Circuit put it, "[a]n employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired." *Burks v. Okla. Publ'g Co.*, 81 F.3d 975, 978 (10th Cir. 1996).

And in at least two cases, albeit in unpublished opinions, district courts in this Circuit have applied inevitability as a distinct theory of liability in the context of employees who faced termination for not

violating their religious beliefs. In *Shepherd*, the court denied summary judgment to an employer who conditioned the employee's job on attending meetings that violated her religious beliefs. 2014 WL 7338714, at *15. While in *Matos v. PNC Financial Services Group*, the court denied summary judgment to the employer based on the plaintiff's reasonable fear she would be terminated for missing work to attend a religious meeting. No. 03-5320, 2005 WL 2656675, at **4-6 (D.N.J. Oct. 17, 2005).

Finally, and again, the matter of whether a constructive discharge occurred is a fact-intensive inquiry. *Levendos*, 860 F.2d at 1230.

III. AT A MINIMUM, A REASONABLE JURY COULD FIND THAT FORD SUFFERED CONSTRUCTIVE DISCHARGE BASED ON EITHER THE INTOLERABLE OR INEVITABLE CHOICE HE FACED BETWEEN HIS FAITH AND JOB.

A. A reasonable jury could find that Ford resigned in the face of intolerable conditions.

In accordance with the authority described above, Ford can establish constructive discharge based on intolerable conditions because he can show he had to choose between violating his religious beliefs or losing his job. *Consol. Energy*, 860 F.3d at 138-39, 142-43; *Young*, 509 F.2d at 144. Specifically, Center One's attendance policy, coupled with its repeated demand for a clergy letter Ford could not obtain to excuse any

future religious observance, presented just the sort of "Hobson's choice" the law recognizes as a form of constructive discharge. *Mathis*, 158 F. Supp. 3d at 335. The situation was only exacerbated where Center One admitted it would not make similar demands depending on the religion involved. *Consol. Energy*, 860 F.3d at 143.

As an observant Messianic Jew, Ford must abstain from work on the holy days of his faith as a matter of religious command. JA 455-56 [Ford Dep.]; *see also* JA 789 [Rock of Ages Email]. Accordingly, Ford testified that he told Center One of this need to observe his religious holidays at the time he was hired and on each occasion thereafter when conflicts arose with his work schedule. JA 438-39, 498-99 [Ford Dep.].

But rather than excusing Ford from work on these days, Center One charged him points for each absence as "unexcused" under its attendance policy. JA 493 [Ford Dep.]; JA 152 [Employee Handbook]. And in further accordance with that policy, after having been taxed four points in that period, Ford was "subject to disciplinary actions up to and including termination" and summoned to a corrective-action meeting. JA 640 [Attendance Policy]; JA 504 [Ford Dep.]. That meeting was a "critical point in [Ford's] employment with the Company," and, based on the

testimony of a central HR official, "one of the final steps of discipline." JA 145 [Employee Handbook]; JA 230 [Brugos Dep.].

Making the situation all the more a pressure cooker, Center One's decision to command Ford to appear at the ERC meeting was based not only on his attendance points for observing religious holidays but also on his "lack of documentation" from a religious leader—the letterhead Ford could not obtain. JA 431 [Brugos Summary Memo]. And if for some reason the message of a "corrective action" meeting for observing his faith wasn't clear enough, HR officials Brugos and O'Malley confirmed that, absent the clergy letter, Ford "would be terminated" for his next religious observance—which Ford testified was approaching. JA 231 [Brugos Dep.] (With Ford's number of points and no documentation, "[t]he employee would be terminated."); JA 575 [O'Malley Dep.] ("[I]f [an] employee had another attendance infraction after [an] ERC meeting," he would be fired.); JA 453 [Ford Dep.].

Adding insult to injury, Center One set the mandatory ERC meeting on Yom Kippur. JA 504 [Ford Dep.]. And rather than signaling respect for Ford's religious obligations, he recalls one of the Company officials telling him, "Well, this is a High Holy Day, why are you here?"

JA 451. Worse yet, Center One VP O'Malley testified that no clergy letter would be required for an employee who wanted "time off for religious holidays with which [she was] familiar," such as Good Friday. JA 579.

In sum, there is ample evidence to support a finding of intolerable conditions. Ford was put to the "Hobson's choice" of violating his faith or losing his job, by way of the attendance points, the repeated clergy-letter requirement he could not meet, and the decisive import of it all. *See Mathis*, 158 F. Supp. 3d at 335 (describing "Hobson's choice" of choosing one's faith or job as a form of constructive discharge); *accord Consol. Energy*, 860 F.3d at 138-39, 142-43; *Young*, 509 F.2d at 144.

Moreover, this choice was forced on Ford in a discriminatory way, given that Center One would make exceptions to the letterhead requirement for those of other faiths and its setting of the corrective-action meeting on Yom Kippur. *See Consol. Energy*, 860 F.3d at 143 (considering exceptions for others in intolerability analysis); *Abramson v. William Paterson Coll.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring) (observing that setting important meetings on religious holidays "delivers the message that the religious observer is not welcome at the place of employment").

In granting summary judgment to Center One, the district court concluded that the Company's demand for a clergy letter "was reasonable under the circumstances" because some witnesses testified they were not aware of the nature of Ford's first two absences—for Rosh Hashanah—until later and that there was confusion about the dates of other holidays. JA 15-16. But in so finding, the court hedged, in observing that Center One "may not ultimately have been able to insist on clergy verification." JA 16; *see also Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 225 (3d Cir. 2000) (accepting an employee's written statement as sufficient to establish sincere religious need while rejecting employer's demand for clergy letter).

Furthermore, Center One repeatedly insisted on the letterhead even after the Company was aware of the religious nature of Ford's absences; after it had received alternative documentation from Ford; and after it knew Ford could not reach his congregation leader. JA 431 [Brugos Summary Memo]. At a minimum, the matter of Center One's reasonableness is one for the jury—particularly where the district court deemed undisputed Ford's sincere religious need to observe his religious holidays. *See* JA 2; *see also Tagore v. United States*, 735 F.3d 324, 328

(5th Cir. 2013) (stressing that assessing religious sincerity requires a "light touch," and that courts have accepted "claims of sincere religious belief in a particular practice . . . on little more than the plaintiff's credible assertions") (internal quotation marks omitted).

Elsewhere in its order, the district court also concluded that Center One's attendance-points policy was discretionary; that the Company's clergy-letter demand was only for future absences; and that the ERC meeting included no explicit threats of termination for not securing the clergy letter. JA 20, 25-26. But Center One acknowledged on summary judgment that the handbook's policy on points "speaks for itself." JA 743 [Defendants' UMF Response]. Moreover, at no time did the Company remove from Ford's record the points it previously assigned for absences on his religious holidays. *See* JA 615-16 [Center One's Response to Requests for Admission] (Center One admitting that Ford's points were never "revoked, rescinded, or otherwise removed by [the Company]"). And again, Brugos and O'Malley confirmed that, absent the clergy letter, an employee in Ford's position "would be terminated." JA 231 [Brugos Dep.]; JA 575 [O'Malley Dep.].

At a minimum, therefore, there are genuine and material disputes of fact regarding the intolerability of conditions Ford faced at Center One. *See Levendos*, 860 F.2d at 1230 (observing that "courts generally agree that 'constructive discharge' is a heavily fact-driven determination").

B. A reasonable jury could find that Ford resigned in the face of inevitable termination.

Beyond the case for constructive discharge based on the intolerable conditions just described, summary judgment was also improper for the further or alternative reason that Ford's firing was inevitable. *See Laster*, 746 F.3d at 728 (on inevitable-termination theory); *Schafer*, 903 F.2d at 249-50 (including an inevitable termination in its intolerability analysis).

Specifically, Center One's demand of a clergy letter Ford could not obtain for his next religious absence meant he "was faced with a choice between resigning or being fired." *Burks*, 81 F.3d at 978. Moreover, the fact that Center One refused to dissuade Ford from resigning based on his stated inability to obtain the letter, but instead showed him the door, only confirmed the inevitability. All that Ford's leaving did was alleviate the need for Center One to transcribe the "handwriting . . . on the wall" into a termination notice on his next religious observance. *Univ. of Chi. Hosps.*, 276 F.3d at 332.

Indeed, there is ample evidence on which a jury could find that Center One "act[ed] in a manner so as to have communicated to a reasonable employee that [Ford] will be terminated" for an additional absence for religious observance. *Id.* For starters, at the time of his resignation Ford had been assigned termination-triggering points for his absences on religious holidays and those points were never rescinded. JA 615-16 [Center One's Responses to Requests for Admission]; JA 452 [Ford Dep.]. What's more, Center One officials acknowledged their insistence that Ford provide the clergy letter or be fired for any further religious absence. JA 231 [Brugos Dep.]; JA 575 [O'Malley Dep]. Because Ford could not obtain the letter and had upcoming holy days to observe, "the reasonableness of [his] belief that [he] would be fired" is apparent. *Matos*, 2005 WL 2656675, at *5; JA 453 [Ford Dep.] ("I knew for sure I had two more days that I couldn't work, that is when I decided to go in and talk to Heather.").

In finding to the contrary, the district court rejected Ford's view of things at the time of his resignation as no more than "subjective fears of possible future dismissal." JA 22 (internal quotation marks omitted). In support, the court made three assertions: (1) Center One did not

explicitly threaten termination; (2) Ford unreasonably assumed he needed a clergy letter for future absences; and (3) Ford should have continued to engage with the Company after being unable to obtain the clergy letter. JA 8, 24, 26. The full record, however, paints an entirely different picture that, at a minimum, presents a triable issue.

To begin with, the case law does not require explicit threats, but only that the employer "act[ed] in a manner so as to have communicated to a reasonable employee" he would be terminated. *Univ. of Chi. Hosps.*, 276 F.3d at 332; *see also Honeycutt v. Safeway, Inc.*, 475 F. Supp. 2d 1063, 1076 (D. Colo. 2007) (rejecting summary judgment for employer where the next step in its disciplinary scheme "would likely have been termination"). And Center One's message in its attendance policy and demand for a clergy letter on pain of termination make it at least disputed that Ford and any other reasonable person would have received the message of inevitable termination. *See* JA 231 [Brugos Dep.]; JA 575 [O'Malley Dep.]; JA 431 [Brugos Summary Memo]; JA 452 [Ford Dep.].

Additionally, in finding Center One did not demand the clergy letter for future absences, the district court says it was undisputed that Ford's calendars and emails would have sufficed. JA 8-9, 25. Not so. Rather,

three central players in the case—Brugos, Altman, and Ford—agreed a letter was required for all absences. JA 737, 740-41 [Defendants' UMF Response] (Center One admitting lead HR officials Brugos and Altman "were under the impression that the letterhead would be the only acceptable form of documentation to support Mr. Ford's request for religious observance"); JA 431 (Brugos summary memo recounting that Center One "needed the documentation with an official letterhead before accommodating Demetrius' needs" and "if we receive the documentation, . . . we will be able to accommodate him going forward"); JA 783 (Brugos email exchange about a clergy letter being "the only acceptable documentation"); JA 452 (Ford's testimony that he understood the letter was required).

And although Center One official Julie Fulciniti testified she "would have granted" Ford an accommodation for future religious observances based on his calendars, there is no evidence Center One shared any such position with Ford at the time. JA 275, 318 [Fulciniti Dep.]. Plus, Fulciniti's testimony was given more than four years later and, in light of the contrary evidence on the letter requirement, there is at least a triable issue of fact. *See Matos*, 2005 WL 2656675, at *6

("Ultimately, the question of whether it was reasonable for Matos to resign under the circumstances is a question of fact.").

Finally, the record similarly belies the district court's conclusion that Ford prematurely cut off any supposed process such that his termination was not inevitable. For starters, Center One did not dispute below that Ford's stated reason for resigning was that "he could not provide the clergy or religious-group certification that Center One, LLC, had requested." JA 760 [Defendants' UMF Response]. Brugos likewise wrote in her summary memo that Ford "advised [Altman] that he would like to resign at this time since he will not be able to provide us with the documentation we need." JA 431. And in the termination paperwork, Altman indicated in the "reason" box for Ford's resignation that "Demetrius could not provide the proper documentation for his religion needed for Human Resources." JA 647.

If anyone cut things off, it was Center One. After all, rather than trying to disabuse Ford of what it now argues is his mistaken read of the situation, Center One told him to depart immediately—and appears to have then charged him an additional one-half attendance point for leaving early. JA 433 [Altman Summary Memo]; JA 631 [Attendance

Log]. In fact, in agreement with Ford, Altman says she shared with him that "we are more than willing to help accommodate his religious beliefs; it is just that we needed a letter from his Rabbi stating that [he] practice[s] that religion and if he could not provide the letter than we could not accommodate that religion." JA 433.

At a minimum, a jury could find that Ford's waiting until his upcoming holy day without a clergy letter would have yielded the same fate. *See Bragg v. Navistar Int'l Transp. Corp.*, 164 F.3d 373, 377 (7th Cir. 1998) ("Constructive discharge exists to give Title VII protection to a plaintiff who decides to quit rather than wait around to be fired."); *Young*, 509 F.2d at 144 ("[I]t would be too nice a distinction to say that Mrs. Young should have borne the considerable emotional discomfort of waiting to be fired instead of immediately terminating her association with Southwestern."). Once again, constructive discharge is a "heavily fact-driven determination." *Levendos*, 860 F.2d at 1230.

CONCLUSION

Because a jury could find that Ford suffered constructive discharge, this Court should reverse the lower court's entry of summary judgment for Center One and remand for trial.[7]

Respectfully submitted,

Dated: February 28, 2023

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[7] Special thanks to Mary Margaret Chalk and Mitchell Perry, California bar-certified law students in the Stanford Law School Religious Liberty Clinic, for their assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

The foregoing **Intervenor-Appellant's Opening Brief** complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains no more than 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief contains a total of 7529 words. This 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 was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word.

The opening brief also complies with Third Circuit Local Appellate Rule 31.1(c), in that the text of the electronic document is identical to the text of any paper copies to be filed with the Court. Finally, the electronic brief was subject to a virus scan and no virus was detected.

Dated: February 28, 2023

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THIRD CIRCUIT RULE 28.3(d) CERTIFICATION

Pursuant to Third Circuit Local Appellate Rule 28.3(d), the undersigned counsel for Appellant-Intervenor certifies that he is a member of the bar of this Court.

Respectfully submitted,

Dated: February 28, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document, **Intervenor-Appellant's Opening Brief**, with the United States Court of Appeals for the Third Circuit, using the CM/ECF system. I further certify that all parties, through their counsel of record, are registered as ECF filers and that they will be simultaneously served via Notice of Docketing Activity (NDA).

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