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

REPLY BRIEF OF INTERVENOR-APPELLANT

JAMES A. SONNE
ZEBA A. HUQ
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 NATHAN ABBOTT WAY
STANFORD, CA 94305
(650) 723-1422
jsonne@law.stanford.edu
zebahuq@law.stanford.edu

Attorneys for Intervenor-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This Court must reverse summary judgment for Appellee Center One because the record includes material evidence that it violated Title VII of the 1964 Civil Rights Act by constructively discharging Appellant Demetrius Ford based on his need for religious accommodation.

Title VII protects a religious believer's ability to pursue a livelihood while fulfilling those commitments that make his life worth living. Pertinently, it forbids employers from subjecting an employee to an adverse employment action based on a conflict between his sincere religious beliefs and a job requirement. In determining whether there was adverse action, Title VII recognizes constructive discharge and treats the matter as a fact-intensive one. Moreover, constructive discharge arises where conditions were so intolerable a reasonable employee would feel compelled to resign or where termination was inevitable—including where the employee faced a choice between following his faith and keeping his job.

The district court rightly found that Ford, as a Messianic Jew, has a sincere need to observe Jewish holidays and these holidays conflicted with his work schedule. The court erred, however, in ruling no jury could

find constructive discharge. For not only did Center One fail to resolve the conflict between Ford's religious and work obligations, the evidence shows myriad other mistreatment. Among other things, there is evidence that the Company: (1) charged Ford unexcused-absence points under its attendance policy for his holidays; (2) repeatedly demanded a clergy letter Ford could not obtain; (3) dismissed alternative proof of Ford's holidays; (4) summoned Ford to a corrective-action (ERC) meeting that its policies, witnesses, and brief describe as the final step before termination; (5) knowingly scheduled this last-step meeting on Ford's high holy day; (6) insisted Ford could avoid termination for any future holiday absences only with the clergy letter; (7) failed to correct Ford's reason for resigning that he had upcoming holidays but no clergy letter; and (8) would exempt employees of mainstream faiths from the letter requirement. In sum, a jury could well find constructive discharge based on intolerability or inevitable termination.

In its response brief, Center One makes both legal and factual arguments—all of which fall short. On the law, the Company essentially says two things. First, it claims constructive discharge requires a level of mistreatment absent here. This argument, however, misses the

intolerability of being forced into the Hobson's choice between one's faith and job that courts recognize under Title VII. Furthermore, Center One's position that, in its view, Ford did not have it so bad is a matter for the jury, not the court—particularly given the litany of mistreatment recited in the previous paragraph and detailed in the opening briefs. Second, Center One argues inevitable termination is not a recognized form of constructive discharge in this Circuit. But courts here and elsewhere have indeed recognized the theory, whether as an aspect of intolerability or as its own form of constructive discharge.[1]

On the facts, Center One's argument meanders. But it can fairly be distilled into three contentions: (1) Ford could have been accommodated by the Company's policy on temporary schedule changes (TSCs); (2) the clergy-letter requirement was reasonable in light of Ford's supposed confusion in testifying about holiday dates and based on the Company's contention that the letter was only for past absences; and (3) Ford resigned, and thereby cut off the process, based only on a subjective belief his firing was imminent. Again, each of Center One's arguments fails.

[1] As with our opening brief, the arguments offered in this reply brief are in supplement to those presented by the EEOC.

First, the viability of a TSC accommodation is, at a minimum, disputed. After all, Center One's written policies nowhere mention TSCs as an accommodation. Nor did anyone at the Company offer the option to Ford as an accommodation at the time—in the ERC meeting or otherwise.

Second, the reasonableness of the clergy-letter demand is also disputed. For starters, any alleged confusion by Ford about the dates of holidays took place only in his deposition more than four years later, and Center One employees stated multiple times that the letter was required for both past and future absences—evidence the Company ignores. What's more, Center One's purported need for a clergy letter is undermined by the district court's conclusion that Ford had a sincerely held religious belief in his need to observe Messianic Jewish holy days and that this belief conflicted with Center One's attendance requirements. Indeed, other courts in this Circuit have rejected similar letter demands as improper orthodoxy tests where, as here, there is no question as to the employee's sincerity and alternative proof was offered.

Third and finally, any conclusion that Ford's resignation was based only on his subjective fears is likewise at least disputed. Whether because of the repeated clergy-letter demand, contemporaneous evidence Ford

would be fired absent a letter, or Center One's unquestioned acceptance of Ford's reason for resigning, a court cannot find as a matter of law that Ford had no objective reason for thinking his work conditions were intolerable or his termination was inevitable.

This Court must reverse and remand for trial.

ARGUMENT

I. CONSTRUCTIVE DISCHARGE IS A FACT-INTENSIVE INQUIRY THAT CAN BE MET BY INTOLERABLE CONDITIONS OR INEVITABLE TERMINATION.

In its analysis, the district court rightly deemed it undisputed that Ford met the requirement of a sincerely held religious belief in his need to observe Jewish holidays. JA 2 [D. Ct. Op.]. The court also found Center One nowhere denied a known conflict between those beliefs and its attendance requirements. JA 15, 17 [D. Ct. Op.]. To affirm summary judgment for Center One, therefore, this Court must conclude on *de novo* review, and with all doubts in Ford's favor, that no reasonable jury could find that Ford suffered adverse action under the "heavily fact-driven" theory of constructive discharge. *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir. 2006); *Levendos v. Stern Ent., Inc.*, 860 F.2d 1227, 1230 (3d Cir. 1988).

Notably, this Court has declined to adopt an exhaustive set of factors for constructive discharge. *See Duffy v. Paper Magic Grp.*, 265 F.3d 163, 168 (3d Cir. 2001). That said, it has made clear that constructive discharge may be established where an employer makes the working conditions "so intolerable a reasonable employee would be forced to resign." *Levendos*, 860 F.2d at 1230 (quoting *Goss v. Exxon Off. Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984)). In support of such a showing or in the alternative, constructive discharge can also occur where a reasonable employee would think 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).

Regarding intolerability, the test "requires no more than a finding that the conduct complained of would have the foreseeable result of creating working conditions that would be so unpleasant or difficult that a reasonable person in the employee's position would resign." *Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh Pa.*, 903 F.2d 243, 249 (3d Cir. 1990).

For the employer's part, the inquiry focuses on its actions, or what the employer "knowingly permitted," and not what it intended. *Goss*, 747

F.2d at 888. As for the employee, reasonableness is "measured only by the particular facts of the instant case and from the perspective of a reasonable person in the position that [the employee] was in at the time of her discharge." *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 60 (6th Cir. 1985) (emphasis omitted); *see also Schafer*, 903 F.2d at 248 (quoting *Williams*). And when assessing a plaintiff's reasonableness under this objective test, the trier of fact considers the "totality of the circumstances." *Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2003), *rev'd on other grounds, Pa. State Police v. Suders*, 542 U.S. 129 (2004). In the religion context, these circumstances naturally include the plaintiff's particular religious beliefs. *See EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 145 (4th Cir. 2017) (affirming finding of constructive discharge in light of plaintiff's belief that he would be violating God's command by following employer's rule).

Regarding inevitable termination, the inquiry is whether an employer has "act[ed] in a manner so as to have communicated to a reasonable employee" he would be terminated. *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002); *see also Shepherd*, 2014 WL 7338714, at *15 (upholding a claim of constructive discharge based on

inevitable termination due to an unaccommodated conflict with religious beliefs). Or, to put it more colorfully, inevitable termination as constructive discharge arises "where, based on an employers' actions, 'the handwriting was on the wall and the axe was about to fall.'" *Laster*, 746 F.3d at 728 (quoting *Univ. of Chicago Hosps.*, 276 F.3d at 332).

Like the intolerability analysis, the inevitability inquiry "lies in the reasonableness of [the employee's] belief" he would be fired; it does not require that the employee would have in fact been fired. *Matos v. PNC Fin. Servs. Grp.*, No. 03-5320, 2005 WL 2656675, at *5 (D.N.J. Oct. 17, 2005). And although this Court has not appeared to have had occasion to invoke inevitable termination as an independent theory of constructive discharge, it has applied the concept in deciding whether a situation was intolerable. *See Schafer*, 903 F.2d at 249-50 (reversing summary judgment for employer on constructive discharge where evidence showed plaintiff acted reasonably in resigning after denial of leave necessary to avoid termination). Moreover, lower courts in this Circuit have embraced in unpublished cases intolerability as its own theory—including in the religious-accommodation context. *Shepherd*, 2014 WL 7338714, at *15 (applying inevitability in religious liberty context); *Matos*, 2005 WL

2656675, at *4-6 (same); *see also Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 335 (E.D. Pa. 2016).

II. CENTER ONE MISCONSTRUES THE LEGAL THEORIES FOR CONSTRUCTIVE DISCHARGE; A HOBSON'S CHOICE OR MESSAGES OF IMMINENT TERMINATION SUFFICE.

A. An oppressive choice between one's faith and job can be an intolerable condition for constructive discharge.

As detailed in Ford's opening brief, being forced to choose between one's faith and job can trigger a constructive discharge over intolerable conditions. In *Mathis v. Christian Heating & Air Conditioning*, the court found that the conditioning of a job on the wearing of a badge with a religious message to which the plaintiff objected was an actionable "Hobson's choice." 158 F. Supp. 3d at 335. Likewise, in *Young v. Southwestern Savings & Loan Association*, the Fifth Circuit backed an atheist employee's resignation in the face of having to attend prayer meetings at work. 509 F.2d 140, 144 (5th Cir. 1975). And in *EEOC v. Consol Energy, Inc.*, the Fourth Circuit affirmed judgment for an employee who quit rather than use a biometric device that violated his faith. 860 F.3d at 143. Contributing to the intolerability, the Court in *Consol Energy* added, was that the company made exceptions to its biometric-device requirement for other employees. *Id.*

In response, Center One argues Ford's choice between his faith and livelihood was not bad enough for constructive discharge. In so arguing, it first offers a comparative analysis. Brief of Appellees Center One, LLC and Capital Management Services, LP, Doc. No. 27 ("Appellees' Br.") at 30-34, 36-38 (distinguishing *Mathis*, *Young*, *Consol Energy*, *Univ. of Chicago Hosps.*, and *Honeycutt v. Safeway, Inc.*, 475 F. Supp. 2d 1063, 1076 (D. Colo. 2007)). Then, rather than engaging the objective test, Center One dismisses Ford's departure as "based on his subjective 'feeling' that he would be terminated" over his religious absences. Appellees' Br. 25. Both arguments misconstrue the law.

Contrary to what Center One suggests, a comparative fact analysis is of limited value at the summary-judgment stage—particularly where the matter is a "heavily fact-driven" inquiry. *Levendos*, 860 F.2d at 1230; *see also Mathis*, 158 F. Supp. 3d at 335 (insisting a jury must decide constructive discharge where employee was forced to choose between "work[ing] under conditions that offended [his] beliefs or ending his employment"). More directly, although the religious violation Ford faced might not resonate with Center One as intolerable mistreatment akin to that on other grounds, Title VII forbids it all the same. *See* Appellees' Br.

24, 25, 37; *Mathis*, 158 F. Supp. 3d at 328-29 (citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015) (emphasizing that Title VII treats non-accommodation of religion as a form of illegal employment discrimination).

As the Fourth Circuit put it in recognizing the central role religion plays in a believer's life, pressuring an employee to violate God's commands "goes well beyond the kind of run-of-the-mill dissatisfaction with work assignments, feeling of being unfairly criticized, or difficult or unpleasant working conditions." *Consol Energy*, 860 F.3d at 145 (citations omitted).

Further, Center One dismisses outright Ford's "feeling" about the pressure he was facing and, in so doing, distorts the legal test. Indeed, the objective analysis requires the trier of fact to determine whether the situation was intolerable from the perspective of a reasonable person in the same position as the plaintiff, with the same available information, and at the time of discharge. *Schafer*, 903 F.2d at 249. In other words, although it may not be dispositive, Ford's take on the situation is germane to framing the intolerability of the religious conflict.

B. Inevitable termination can constitute constructive discharge.

As detailed in our opening brief, whether as an alternative theory or as part of the intolerability calculus, a plaintiff can show constructive discharge where the employer acted in a manner as to communicate to a reasonable employee he would be fired. In *Matos v. PNC Financial Services Group*, the district court deemed as actionable under a theory of inevitable termination the plaintiff's fear she would be fired if she took off work for a religious event. 2005 WL 2656675, at *4-6. In *Shepherd v. Gannondale*, the court invoked the inevitability theory in denying summary judgment to an employer who conditioned the employee's job on prayer meetings that violated her religious beliefs. 2014 WL 7338714, at *15. And in *Schafer v. Board of Public Education of Pittsburgh*, this Court held as a reasonable response in the face of intolerable conditions the plaintiff's resignation after his employer denied him leave that he said he needed lest he resign. 903 F.2d at 249-50.

In response, Center One asserts as dispositive that this Court has not yet addressed inevitable termination as an independent theory of constructive discharge. Appellees' Br. 27-28. The Company also argues inevitable termination can occur in any event only where there is an

explicit threat. *Id*. at 36-41. Finally, Center One suggests that, as part of the inevitability analysis, Ford should not have assumed the worst but explored alternative avenues before concluding resignation was the only option. *Id*. at 29-30. Each of these arguments misapprehends the law.

As described above, courts in this Circuit and elsewhere have embraced inevitable termination in finding constructive discharge—whether as an independent matter or as part of the intolerability analysis. *See Schafer*, 903 F.2d at 249-50; *Matos*, 2005 WL 2656675, at *5; *Shepherd*, 2014 WL 7338714, at *15; *Univ. of Chi. Hosps*., 276 F.3d at 332; *Laster*, 746 F.3d at 728; *see also Mathis,* 158 F. Supp. 3d at 335 (blending intolerability and inevitability in religious-accommodation context); *Consol Energy*, 860 F.3d at 143 (same). The theory therefore rightly applies here.

Moreover, inevitable termination can arise in the absence of explicit or direct threats by the employer. *See*, *e.g.*, *Matos*, 2005 WL 2656675, at *5 (recognizing constructive discharge where plaintiff "was never threatened by anyone who had authority to terminate her employment"); *see also Schafer*, 903 F.2d at 249-50 (approving a constructive-discharge claim where no explicit threats were made). And

although Center One relies on *Laster* to argue a direct, explicit threat is necessary, the Sixth Circuit test applied there—requiring employer intent to discharge the employee for constructive discharge—has been rejected by this Court. *See* Appellees' Br. 34; *compare Laster*, 746 F.3d at 728 (requiring plaintiff to show "employer deliberately created intolerable working conditions . . . [and] did so with the intention of forcing the employee to quit") *with Goss*, 747 F.2d at 888 (rejecting employer-intention requirement).[2]

Finally, in arguing Ford prematurely resigned, Center One fails to acknowledge the employer's responsibility in the accommodation process. Appellees' Br. 29-30. The requirement of reasonableness goes both ways, imposing a duty of "bilateral cooperation." *Miller v. Port Auth. of N.Y. & N.J.*, 351 F. Supp. 3d 762, 779 (D.N.J. 2018). And, in any event, the matter of who bears responsibility for a contested breakdown of the interactive process is a jury question. *See Shepherd*, 2014 WL 7338714,

[2] This Circuit's insistence that employer intent is not required likewise renders inapt Center One's reliance on *Whidbee v. Garzarelli Food Specialties, Inc.* to suggest an employer's interest in retaining an employee is evidence against constructive discharge. 223 F.3d 62, 74 (2d Cir. 2000). Regardless, Center One's argument that it wanted to retain Ford is disputed in light of its continued enforcement of its attendance and letterhead policies, and its ready acceptance of Ford's resignation.

at *19, *20 (describing the matter of the parties' "concomitant duty to cooperate" as a "credibility issue . . . that the jury would have to resolve").

III. A JURY COULD FIND CONSTRUCTIVE DISCHARGE BASED ON EITHER THE INTOLERABLE OR INEVITABLE SITUATION FORD FACED.

A. A reasonable jury could find intolerable conditions.

There is sufficient evidence to support a finding that Center One created conditions where "the foreseeable result . . . would be so unpleasant or difficult that a reasonable person in [Ford's] position would resign." *Schafer*, 903 F.2d at 249.

In the face of Ford's religious observances, Center One continued to penalize him by enforcing its attendance policies rather than excuse his absences. This included charging Ford disciplinary points and ordering he attend a "final warning" meeting, all in accordance with the employee handbook that indicated Ford was "subject to disciplinary actions up to and including termination." JA 152 [Employee Handbook]; Appellees' Br. 7; JA 640 [Attendance Policy]; JA 230 [Brugos Dep.]; *see also Consol Energy*, 860 F.3d at 138, 143 (finding intolerability where the employer knew a sincere religious conflict existed yet reiterated its discipline policy requiring plaintiff's termination for repeated non-compliance).

Center One further created unbearable working conditions where multiple managers repeatedly demanded clergy verification for Ford's holidays, despite knowing that his former congregation leader was unreachable and that Ford could not otherwise obtain such verification. JA 431 [Brugos Summary Memo]; JA 784 [Brugos Email Chain]. Indeed, HR officials took the position that absent a clergy letter, Ford "would be terminated" for his next religious observance—which was upcoming. JA 231 [Brugos Dep.] (testifying that 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.]; JA 622-24 [Holiday Calendars]; *see Consol Energy*, 860 F.3d at 143 (finding intolerability in similar circumstances).

Furthermore, Center One demeaned Ford's religion when it knowingly scheduled the mandatory ERC meeting on Yom Kippur instead of respecting his holy day. Ford remembers a Company official asking him, "Well, this is a High Holy Day, why are you here?" JA 451 [Ford Dep.]. *See Mathis*, 158 F. Supp. 3d at 335 (concluding jury must

decide whether constructive discharge occurred where supervisor showed antagonism to the plaintiff's religious beliefs).

Finally, a Center One Vice President testified she would not enforce the letterhead policy on employees of other, more mainstream religions. JA 579 [O'Malley Dep.]; *see Consol Energy*, 860 F.3d at 138, 143 (finding intolerability where employer demanded pastor letter for religious exemption and emphasized to plaintiff that its discipline policy would require termination for non-compliance, all while providing accommodations to others for non-religious reasons).

In response, Center One argues that no intolerable conditions existed, claiming: (1) Ford could have been accommodated through the TSC process; (2) the clergy-letter demand was reasonable; and (3) Ford brought any Hobson's choice upon himself by prematurely resigning. Appellee's Br. 5, 11, 25-37, 42-49. But not only does each of these arguments rely on the exclusion or improper resolution of disputed facts, all fail in any event. We address them in turn.

Temporary Schedule Changes

Center One's argument that Ford could have used the TSC process to secure an accommodation is belied by the Company's policies and its communications to Ford about those policies.

For starters, the employee handbook's provision on "reasonable accommodations under the law"—which Center One ignores in its brief—instructs employees to "speak with the Human Resources Department" and makes no reference to TSCs. JA 99 [Employee Handbook]. Correspondingly, the TSC provision in the handbook states only that TSCs are for "personal appointments" and makes no reference to accommodation. JA 162 [Employee Handbook].

Moreover, and in accordance with the handbook, Ford spoke with Human Resources. Ford testified that in advance of his first holy day at Center One, he notified HR he could not work and followed their instructions on how to report his absence. JA 498-99 [Ford Dep.]. Yet on his return, Center One nonetheless assigned Ford attendance points and insisted he submit a letter from his rabbi verifying his religious beliefs. JA 444, 494 [Ford Dep.]; JA 213-14 [Brugos Dep.]; JA 631 [Attendance Log]. Consistent with the handbook, HR did not point Ford to TSCs as an

accommodation. *See* JA 430 [Brugos Summary memo]; JA 444 [Ford Dep.].

Indeed, Center One demanded the clergy letter at every turn as the sole method to excuse Ford's religious absences. This included when Brugos dismissed Jewish calendars from the internet as something "anyone could print;" when she rejected email correspondence between Ford and a potential congregation; and when Center One officials continued to press letterhead at the ERC meeting as the only way to excuse both past and future absences. JA 783-84 [Brugos Email Chain] (opining clergy letterhead is "the only acceptable documentation"); JA 430-31 [Brugos Summary Memo] ("Demetrius did mention his religion and was asked by Patti Sue [O'Malley] why he has not provided the proper documentation. . . . Demetrius was once again told that if we receive the documentation, we will relieve any applicable attendance points and be able to accommodate him going forward."); JA 647 [Termination Form] (indicating Ford resigned because he "could not provide proper documentation for his religion").

Ultimately, ample evidence from Center One HR officials confirms the reality that clergy letterhead, not a TSC, was the sole means for Ford

to obtain a religious accommodation. JA 740-41 [Defendants' UMF Response] (Center One admitting that lead HR officials Brugos and Altman "were under the impression that the letterhead would be the only acceptable form of documentation to support 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"); JA 433 [Altman Summary Memo] (accepting Ford's resignation because he could not get a letter from his rabbi, noting "if he could not provide the letter than [sic] we could not accommodate that religion"). Center One ignores this plethora of evidence in its brief.

In now pushing its TSC theory, Center One asserts it "reminded [Ford] of company procedures for submitting a TSC form" after his first religious absence so he could abide by its policies for the days off he needed. Appellees' Br. 32, 46. But the record reflects only that upon Ford asking if he could use TSCs to avoid termination, he was allowed to do so for a single, same-day shift change to cover a portion of his Yom Kippur observance; the record says nothing more on Ford's ability to use them. JA 476-77 [Ford Dep.]; JA 678 [Employee Evaluation Form]. Indeed, the

record suggests Center One allowed TSCs as only a limited option to move an employee's shift within a given day. JA 783 [Brugos Email Chain] (mentioning TSCs in contrast to "days off," because "some of the holidays require him to be off all day and others state that he needs to stop working by 'sun down'").

Finally, Center One's TSC argument is further undermined by the Company's limits on TSCs that would have prevented their use to resolve Ford's religious conflict. *See Groff v. DeJoy,* 35 F.4th 162, 169 (3d Cir. 2022), *cert. granted* 143 S. Ct. 646 (Jan. 13, 2023) ("[A] legally sufficient accommodation under Title VII's religious discrimination provision is one that eliminates the conflict between the religious practice and the job requirement."). Even if TSCs were presented as an accommodation option—they were not—Ford would have required five such changes in the month of October alone, which exceeds the two TSC per month limit described in the employee handbook. JA 162 [Employee Handbook]. To be sure, Ford's calendars indicated Rosh Hashanah on October 2-4, Yom Kippur on October 11-12, and Sukkot on October 16-23 (with work forbidden on its first and last days). JA 622-24.

At a minimum, the viability of TSCs for Ford's accommodation needs should go to a jury. *See Levendos*, 860 F.2d at 1230 (intolerability is a "heavily fact-driven determination").

The Clergy Letter

Center One's argument that its clergy-letter demand was reasonable likewise fails, where the Company relies on testimony years after the incident while ignoring contemporaneous evidence and legal authority.

As an initial matter, Center One contends that the letter was not a requirement but a request. Appellees' Br. 43. Next, it claims the letter was needed to supplement Ford's lack of specificity and confusion about the dates of his holidays. *Id*. at 43-48. Lastly, the Company says it was still considering at the time Ford resigned the Messianic Jewish calendars and email exchanges with a rabbi that he submitted as letterhead alternatives. *Id*. at 43. But Center One's arguments again ignore key parts of the record and rely on disputed facts.

As detailed above, Center One demanded the clergy letter from Ford at every turn, and multiple contemporaneous reports confirm that the letter requirement was company policy. JA 737, 740-41 [Defendants'

UMF Response]; JA 430-31 [Brugos Summary Memo]; JA 783 [Brugos Email Chain]; JA 452 [Ford Dep.]; JA 647 [Termination Form]; JA 433 [Altman Summary Memo]. In fact, Center One in its brief even calls the letterhead "required" on page 8. In short, the evidence supports what Center One admits: the letterhead was compulsory.

Moreover, any confusion over Ford's holy days arose only during his deposition, taken years after the events occurred. *See e.g.,* JA 459, 462 [Ford Dep.]. The record contains no contemporaneous evidence of such confusion. Indeed, Ford provided Center One a calendar that confirmed the dates of all holidays, and no Company official expressed confusion over which dates Ford needed time off. JA 783 [Brugos Email Chain]; JA 430 [Brugos Summary Memo]; JA 624 [Holiday Calendars] (noting Rosh Hashanah on October 2-4 and Yom Kippur on October 11-12); JA 631 [Attendance Log] (noting Ford was absent October 3-4 and October 12); JA 660 [TSC Form] (noting Ford's same-day shift change on October 11); JA 453 [Ford Dep.].

Finally, this Court has highlighted that mandating clergy letterhead from an employee as a prerequisite to accommodation can rise to the level of discrimination. *See Fallon v. Mercy Cath. Med. Ctr. of Se.*

Pa., 877 F.3d 487, 493 n.27 (3d Cir. 2017) ("A letter from a clergyperson is not the only way to demonstrate that one holds a religious belief. To the extent that Mercy Catholic may have believed that it could not be discriminating on the basis of religion if it fired an employee who could not produce a letter from a clergyperson, it was mistaken.").

If an employer desires verification of an employee's religious beliefs, a statement from the employee is sufficient. *See Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223, 225 (3d Cir. 2000) (holding employee's written statement was sufficient to establish sincere religious belief). Given the alternative proof Ford provided, together with the district court's conclusion that the conflict between Ford's holy-day observance and job schedule was sincere, the need for additional verification is at least disputed. JA 2 [D. Ct. Op.]; s*ee* EEOC Compliance Manual, §12-IV-A-2 (Jan. 15, 2021) ("Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case.").

Hobson's Choice

As a last-ditch argument against intolerability, Center One says that Ford's conclusion he was facing a choice between his job and religion

was nothing more than an "assumption," "conjecture," or "hunch." Appellees' Br. 24-25, 35, 37-38. But this minimizes the cumulative effect of actions Center One took against Ford and again ignores relevant disputes.

Indeed, Ford's understanding was reasonable given Center One's repeated insistence on the letterhead; rejection of alternative proof; continued assignment of attendance points and refusal to forgive them; admonitions during his corrective-action meeting that Center One scheduled on his holy day; and acceptance of Ford's resignation without dispelling his understanding he needed letterhead he could not get.

As evidence of the intolerability he faced, Ford recalls a Company official asking him why he was at the ERC meeting if it was a holiday, badgering him about his religious practice, and demanding verification of his congregation affiliation—to the point Ford asked if he needed a lawyer. JA 431 [Brugos Summary Memo]; JA 451 [Ford Dep.]. That there is evidence Center One would not apply its letterhead policy to adherents of more mainstream religions made the situation all the worse. JA 579 [O'Malley Dep.]. Surely, a jury could find these circumstances

intolerable. *See Mathis*, 158 F. Supp. 3d at 335-36 (concluding jury should decide whether choice between religion and job is intolerable).

Center One now claims it was "still gathering information to make a determination as to [Ford's] requested accommodation," despite never telling that to Ford. Appellees' Br. 49. In contrast, Ford continued to work with Center One, repeatedly offered alternative documentation, and attempted to comply with Company policy to avoid termination. JA 783-84 [Brugos Email Chain]. And when Ford announced his resignation because he could not get the necessary letterhead, Center One accepted the resignation rather than correct him. JA 647 [Termination Form]; JA 433 [Altman Summary Memo]. This is not a situation where the employer told the employee it was looking into alternatives and the employee quit without hearing back or bringing up the matter again. *See Gingold v. Bon Secours Charity Health Sys.*, 768 F. Supp. 2d 537, 544 (S.D.N.Y. 2011) (finding it unreasonable for employee to resign one day after submitting a complaint to supervisor who said company would investigate it); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1075, 1085-86 (3d Cir. 1992) (holding no constructive discharge where employee resigned after asking

once to change benefits, manager told her it would investigate, and employee never followed up).

To put a point on it, the record reflects Center One rejected Ford's offer to work until the end of the week and asked him to leave the same day after being informed of his inability to obtain the clergy letter. JA 453 [Ford Dep.]; JA 431 [Brugos Summary Memo]; *see also* JA 175 [Employee Handbook] (outlining general resignation rule of a "two-week advance notice period").

B. A reasonable jury could find inevitable termination.

In addition to or as part of the Hobson's choice Ford faced, evidence shows Center One communicated to Ford he would be fired when he missed another day without submitting the clergy letter he could not obtain. Center One argues it was not going to fire Ford if he took off his next holy day and it was unreasonable to think so because the Company had not yet fired him nor explicitly said it would. Appellees' Br. 26-27. But again, Center One ignores record evidence and relies on a disputed record.

Throughout Ford's time at the Company, Center One applied its policies on attendance, disciplinary points, corrective-action meetings,

and clergy verification with full force. For his first religious absence on Rosh Hashanah, Center One strictly followed its stated policy and assigned Ford three attendance points for what it deemed "unexcused" absences. JA 631 [Attendance Log]. Despite Ford's attempts to provide documentation to verify his holidays, Center One never rescinded those points. *Id*.

Based on Ford's accumulated points, Center One policy next requires an ERC meeting as the "final warning." JA 152 [Employee Handbook]; *see also* Appellees' Br. 7 ("Three points = a final warning with Employment Review Committee ("ERC") meeting"). Center One again enforced its policy and held an ERC meeting. JA 431 [Brugos Summary Memo]. At that meeting, the discussion centered on the letterhead and Ford's attendance points, with Center One emphasizing "if we receive the documentation, we will relieve any applicable attendance points and will be able to accommodate [you] going forward." *Id*.; *see*, *e.g.*, *Matos*, 2005 WL 2656675, at *5 (jury should decide whether employer comments and actions mean inevitable termination).

Under Center One's attendance policy, Ford was then 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]. And HR officials maintained that termination was the next step for an employee at that threshold if they incur an unexcused absence after the ERC meeting. JA 231 [Brugos Dep.] (testifying that if an employee with points at or above the termination threshold had no documentation to excuse them, "the employee would be terminated"); JA 575 [O'Malley Dep.] (testifying that an employee would be terminated after an ERC meeting if that employee earned another attendance infraction). Ford understood the same. JA 452-53 (testifying "that if I did take off, I would be getting fired . . . [b]ecause of the points I accumulated").

In tandem with its attendance, points, and ERC rules, Center One also strictly followed a policy to require a letter from a clergy member on official letterhead to excuse religious absences and accommodate Ford. *See* JA 430-31 [Brugos Summary Memo]; JA 214 [Brugos Dep.] (testifying Center One's "policy for time off for religious accommodations" requires "a letter on an official letterhead from the church, congregation, religious entity"). Knowing that Ford's former rabbi was unavailable, Center One continued to demand the letterhead to address Ford's religious absences

and it maintained this requirement up to and through his resignation. *See* JA 784 [Brugos Email Chain]; JA 431 [Brugos Summary Memo]; TA 433 [Altman Summary Memo]. In fact, Center One officials voted not to "separate employment" with Ford after the ERC meeting for the singular reason that they "wanted to give him additional time to get the documentation." JA 252 [Brugos Dep.]. A jury could thus find that without the letterhead the axe was about to fall. *See Univ. of Chicago Hosps.*, 276 F.3d at 332 (holding that the reasonableness of plaintiff's interpretation of supervisor directive is for jury to decide); *see also Mathis*, 158 F. Supp. 3d at 335 (same).

As previously discussed, the law on inevitability does not require an employer to have explicitly said "it's your job or your religion." *See supra* 13-14. Rather, the question is simply whether it would be reasonable for a person in the plaintiff's position to have left. *Schafer*, 903 F.2d at 249. Thus, a jury could determine that Center One's actions meant Ford's firing was imminent given his upcoming holiday and inability to get a clergy letter. *See Matos*, 2005 WL 2656675, at *6 (stating a jury could find it reasonable for a plaintiff who knew she was going to

soon miss work for unexcused religious conflicts to conclude she would be imminently fired).

CONCLUSION

Constructive discharge is a heavily fact-driven analysis and the material facts in dispute here are many. Because a jury considering the totality of the circumstances could find Ford suffered constructive discharge, this Court should reverse and remand for trial.[3]

Respectfully submitted,

Dated: June 1, 2023

/s/ James A. Sonne
James A. Sonne (CA 250759)
Zeba A. Huq (CA 261440)
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 NATHAN ABBOTT WAY
STANFORD, CA 94305
(650) 723-1422
jsonne@law.stanford.edu
Counsel for Demetrius Ford, Intervenor-Appellant

[3] Special thanks to A.G. Chancellor, IV, and Marni Morse, 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 **Reply Brief of Intervenor-Appellant** complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains no more than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief contains a total of **6,011** 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 reply 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: June 1, 2023

/s/ James A. Sonne
James A. Sonne
Counsel for Demetrius Ford, Intervenor-Appellant

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.

Dated: June 1, 2023

/s/ James A. Sonne
James A. Sonne
Counsel for Demetrius Ford, Intervenor-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document, **Reply Brief of Intervenor-Appellant**, 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).

Dated: June 1, 2023

/s/ James A. Sonne
James A. Sonne
Counsel for Demetrius Ford
Intervenor-Appellant