IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

JAMES MORELAND	)	
	)	**Civil Action No. 1:12-cv-100-DAS**
Plaintiff	)	
	)	
v.	)	
	)	
MARIETTA WOOD SUPPLY, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

The matter before this Court is a textbook example of unlawful retaliation and religious discrimination. The undisputed facts will show that Plaintiff, a valued employee of four (4) years, was fired from his job with Defendant **days after** he objected to driving a truck with a jumbo sized "Jesus Saves" decal.[1] The undisputed facts will show Defendant considered Plaintiff's refusal to drive a truck with "Jesus Saves" prominently displayed to be **insubordination**.[2] The undisputed facts will show that Defendant, speaking through its owners, repeatedly admitted Plaintiff was fired because he contacted the American Civil Liberties Union about the "Jesus Saves" decal.[3] Finally, the undisputed facts will show that the "Jesus Saves" decal had nothing to do with Defendant's business or Plaintiff's job performance and, due to such fact, Defendant could have easily accommodated Plaintiff by removing the decal from the truck or assigning him a new truck.[4]

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[1] *See* Defendant's Statement to the Equal Employment Opportunity Commission (hereinafter "EEOC Statement"), attached to Plaintiff's Motion as Exhibit "A."
[2] *See* Deposition of Craig Pharr (hereinafter "C. Pharr Depo.), pp. 57-58, attached to Plaintiff's Motion as Exhibit "B."
[3] *See* Deposition of Felicia Pharr (hereinafter F. Pharr Depo."), pp. 29-31, 39, attached to Plaintiff's Motion as Exhibit "C." *See also* Defendant's Answers to Plaintiff's First Set of Interrogatories, Requests for production of Documents and requests for Admission (hereinafter "Defendant's Discovery Responses"), Interrogatory No. 5, attached to Plaintiff's Motion as Exhibit "D"; C. Pharr Depo., p. 43; and EEOC Statement.
[4] *See* Defendant's Discovery responses, Interrogatory No. 12, Request for Admission No. 4, and Request for Admission No. 5. *See also* C. Pharr Depo, p. 33 and F. Pharr Depo., p. 47.

STATEMENT OF UNDISPUTED FACTS

Marietta Wood Supply, Inc. (hereinafter "Defendant"), is a saw mill employing fifty-nine (59) workers that is jointly owned by husband and wife team Craig and Lisa Pharr.[5] Though a secular business, the Pharrs' used their company "**to be a witness for Jesus Christ**."[6]

James Harold Moreland (hereinafter "Plaintiff") was employed by Defendant for four (4) years as a truck driver.[7] Plaintiff's primary responsibility was "making local hauls within a 50 mile radius of Defendant's business."[8] Plaintiff performed his job duties without incident and Defendant admits he was: (i) qualified for his position,[9] (ii) meeting his performance expectations,[10] and (iii) a good employee.[11] Craig Pharr (hereinafter "Mr. Pharr"), Defendant's president, claimed Plaintiff was a "decent guy"[12] and Felicia Pharr (hereinafter "Mrs. Pharr"), Defendant's vice president, claimed she had a good working relationship with Plaintiff.[13]

On or about January 18, 2012, Mr. Pharr contacted Plaintiff and told him to move his gear into a new truck.[14] In order to manage its employees, Defendant assigned each driver a specific truck.[15] Defendant's drivers, like Plaintiff, were not free to choose the truck they wished to drive.[16] Their truck was assigned to them by Mr. Pharr and once that assignment was made, drivers rarely changed their trucks.[17] After Mr. Pharr assigned him a new truck, Plaintiff did as instructed and moved his gear into the new truck. This occurred late afternoon on January 18, 2012 (Wednesday).

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[5] *See* F. Pharr Depo., pp. 4-5. *See also* C. Pharr Depo., p. 4.
[6] *See* F. Pharr Depo., p. 24.
[7] *See* Deposition of James Moreland, p. 10, attached to Plaintiff's Motion as Exhibit "E."
[8] *See* Defendant's Discovery Responses, Interrogatory No. 14.
[9] *Id.*, Request for Admission No. 6.
[10] *Id.*, Interrogatory No. 15.
[11] *See* C. Pharr Depo., p. 13.
[12] *Id.*, p. 46.
[13] *See* F. Pharr Depo., p. 10.
[14] *See* C. Pharr Depo., p. 32, 62. *See also* EEOC Statement.
[15] *See* C. Pharr Depo., p. 60. *See also* EEOC Statement.
[16] *Id.*
[17] *Id.*, pp. 60-61.

It was at this time Plaintiff realized his newly assigned truck had a jumbo-sized "Jesus Saves" decal affixed to the cab.[18]

The Jesus decal was placed on Defendant's truck at the request of its former driver.[19] The Pharr's approved the sticker because they, like the driver, wanted "to be a witness for Christ."[20] The decal's sole purpose, thus, was to advance the Pharrs' religious motivations.[21] It was further admitted the decal was meant to encourage people to follow Christ and bring more individuals into the Christian faith.[22] More telling, both Pharrs maintained that a Christian would not object to the decal.[23] When asked if she could understand how the decal may make a driver uncomfortable, Mrs. Pharr responded, "**Not if they are a Christian, I wouldn't**." Mr. Pharr testified that he never even considered the impact the decal would have on non-Christians.[24]

Defendant admitted the Jesus decal does not serve a business purpose and is not necessary for a driver to perform his/her duties.[25] Defendant also admitted that it does not have a formal policy concerning the placement of non-business related messages/decals on business trucks.[26] Mr. Pharr testified that "the drivers ask me what they can put on the trucks" and he and/or Mrs. Pharr approve or reject the decal.[27] Mr. Pharr further testified that he has never approved a message he did not personally like.[28] Mrs. Pharr also testified that she was unsure whether she would approve an

[18] *See* Moreland Depo., p. 23. *See also* Pictures of the Jesus Saves decal, attached to Plaintiff's Motion as Exhibit "F."
[19] *See* C. Pharr Depo., p. 22. *See also*, F. Pharr Depo., p. 17; Defendant's Discovery Responses, Interrogatory No. 11.
[20] *Id.*
[21] *Id.*
[22] *Id.*, pp. 24-25. *See also* F. Pharr Depo., p. 53.
[23] *See* F. Pharr Depo., p. 17. *See also*, C. Pharr Depo., p. 26.
[24] *See* C. Pharr Depo., p. 26.
[25] *See* Defendant's Discovery Responses, Interrogatory No. 12, Request for Admission No. 4, and Request for Admission No. 5.
[26] *See* Defendant's Discovery Responses, Interrogatory No. 7.
[27] *See* C. Pharr Depo., p. 19-20.
[28] *Id.*, p. 21.

Islamic crescent moon on one of Defendant's trucks.[29] She did, however, state her faith would cause her to reject the placement of a Darwin fish on one of Defendant's trucks.[30]

Upset about the decal, Plaintiff immediately contacted Mrs. Pharr and requested that the Jesus decal be removed from his newly assigned truck.[31] Mrs. Pharr testified that, in making his request, Plaintiff told her that "he had nothing against Christians, but that he did not believe the way we did."[32] Mrs. Pharr told Plaintiff that she would discuss the request with Mr. Pharr and get back with Plaintiff.[33]

Plaintiff's objection to the decal was based upon his Christian faith. Plaintiff explained:

> I love the Lord; I hope He loves me. But to put something up like that, just like, well, look here at me. I'm advertising like on a Vegas strip or something.[34]

After receiving the request, which was admittedly religious in nature,[35] Mrs. Pharr informed Mr. Pharr that same day.[36] The Pharrs did nothing to address Plaintiff's complaint that day (Wednesday, January 18, 2012).[37]

Defendant admitted that Plaintiff was assigned hauls in the Jesus truck **after** he requested the decal be removed.[38] Understanding he had to drive the truck, Plaintiff, with his own funds, purchased duct tape to temporarily cover the decal while the Pharrs decided if they would grant his request.[39] Plaintiff did not drive the truck until he placed the duct tape over the decal.[40] Plaintiff covered the decal on the morning of January 19, 2012 (Thursday), and completed his hauls as

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[29] *See* F. Pharr Depo., pp. 21.
[30] *Id.,* p. 23.
[31] *Id.*, p. 17. *See also* L. Pharr Depo., p. 16; Defendant's Discovery Responses, Interrogatory No. 6; and EEOC Statement.
[32] *See* F. Pharr Depo., p. 16.
[33] *Id. See also* EEOC Statement.
[34] *See* Moreland Depo., p. 25.
[35] In describing the complaint, Mrs. Pharr admitted that Plaintiff stated that "he did not believe like we did."
[36] *See* C. Pharr Depo., p. 28. Moreover, Plaintiff was well within his rights to complain to Mrs. Pharr instead of Mr. Pharr because they are both owners of the company. *Id.*, pp. 64-65.
[37] *See* EEOC Complaint.
[38] *See* Defendant's Answer to Plaintiff's First Amendment Complaint (**Doc 15**), ¶ 21.
[39] *See* Moreland Depo., pp. 18-19; *See also* EEOC Statement.
[40] *Id.*, p. 18-19, 22.

scheduled.[41] At the close of business Thursday, Defendant had not responded to Plaintiff's request.[42] Plaintiff, thus, reported for work Friday morning (January 20, 2012) and began to deliver hauls in the truck with the Jesus decal covered.

While delivering a haul Friday morning, an employee informed Mrs. Pharr that Plaintiff had covered the Jesus decal.[43] Mrs. Pharr testified that she was upset that Plaintiff covered the decal.[44] Mrs. Pharr called Plaintiff to ask why he covered decal.[45] Responding to the question, Plaintiff informed Mrs. Pharr that that he felt as if the Pharrs, acting through their business, were attempting **to push religion on him**.[46] He further stated he would not drive the truck if the duct tape was removed.[47] Defendant, specifically Mr. Pharr, testified that **refusal to drive the truck with the Jesus decal displayed was insubordination**.[48] Mrs. Pharr told Plaintiff that he either drives the truck without the duct tape, thus exposing the Jesus decal, or he could go home.[49] In response, Plaintiff informed Mrs. Pharr that he had contacted the American Civil Liberties Union (hereinafter "ALCU") because he felt Defendant was **forcing religion on him**.[50] Mrs. Pharr took the news that Plaintiff had contact the ACLU as **a threat of a lawsuit**.[51]

Mrs. Pharr quickly informed Mr. Pharr of her ACLU conversation with Plaintiff and Mr. Pharr ordered Plaintiff to meet with him Friday afternoon.[52] During this meeting, Plaintiff informed Mr. Pharr that he had contacted the ACLU.[53] Mr. Pharr had still not responded to Plaintiff's request

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[41] *Id.*
[42] *See* C. Pharr Depo., p. 44.
[43] *See* F. Pharr Depo., p. 24. *See also* EEOC Statement.
[44] *See* F. Pharr Depo., p. 26.
[45] *Id.*, p. 24. *See also* EEOC Statement.
[46] *Id.*, pp. 25-26. *See also* EEOC Statement.
[47] *Id.*, p. 26. *See also* Moreland Depo., p. 32.
[48] *See* C. Pharr Depo., pp. 57-58. *See also* Moreland Depo., pp. 67-68.
[49] *See* Moreland Depo., pp. 24-25, 28, 67-68.
[50] *See* F. Pharr Depo., p. 26. Plaintiff told Mrs. Pharr that Defendant "**was violating my rights, I felt likle, that I called the American Civil Liberty [sic] Union, and I got advice that it wasn't legal**." *See* Moreland Depo., p. 25.
[51] *See* F. Pharr Depo., p. 26.
[52] *See* C. Pharr Depo., p. 35.
[53] *Id.*, pp. 37-38. *See also* EEOC Statement.

to remove the Jesus decal, but merely told Plaintiff he would think about it over the weekend. Plaintiff's duct tape, however, was removed by Defendant on January 21, 2012 (Saturday).[54]

Mr. Pharr terminated Plaintiff on January 23, 2012 (Monday) and informed him it was best to put someone else in the Jesus truck.[55] When asked why Plaintiff was terminated, Defendant stated: "**When Plaintiff, James Harold Moreland, told Defendant that he had called the ACLU, and with the previous issues Defendant had with Plaintiff, the decision was made to let him go**."[56] Mr. and Mrs. Pharr admitted that Plaintiff's decision to contact the ACLU motivated them to terminate Plaintiff.[57]

Mr. Pharr told the EEOC that Plaintiff "has no respect for authority", "does what he wishes", and "set out a plan to report us to the ACLU and to cause trouble".[58] Mrs. Pharr was very clear as to what Defendant's position statement to the EEOC meant. Mrs. Pharr testified that Plaintiff's decision to call the ACLU demonstrated he did not have respect for authority.[59] She further explained the only reason he called the ACLU was to try and "**find a way to sue us**."[60] In addition, she testified it was not fair for Plaintiff to contact the ACLU to ask about his rights as a worker.[61] She further testified that she "**didn't want [Plaintiff] working for us if he had filed a lawsuit against us**."[62] She considered Plaintiff a trouble-maker because "**calling and reporting us would be causing trouble for us**."[63]

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[54] *Id.*
[55] *See* F. Pharr Depo., p. 39. *See also* Moreland Depo., p. 35 and EEOC Statement.
[56] *See* Defendant's Discovery Responses, Interrogatory No. 5.
[57] *See.* F. Pharr Depo., pp. 28. 39. *See also* C. Pharr Depo., p. 43. Both of the Pharr's attempted to back pedal from this reason for termination, but eventually **conceded** Plaintiff's decision to contact the ACLU over the Jesus decal played a role in the decision terminating his employment. *See* F. Pharr Depo., p. 41 and C. Pharr Depo., p. 42.
[58] *See* EEOC Statement.
[59] *See* F. Pharr Depo., p. 48.
[60] *Id.*, p. 49.
[61] *Id.*
[62] *Id.*, p. 40.
[63] *Id.*, p. 32.

The Pharrs claimed that part of the irritation with Plaintiff was he did not give them enough time to consider his request.[64] Mr. Pharr, however, testified that he would only need three (3) days to reach a decision.[65] Mr. Pharr was informed of Plaintiff's request on January 18, 2012 (Wednesday) and, according to his own testimony, had not reached a decision about the Jesus decal on January 23, 2012 (Monday) – some five (5) days later.[66] Instead, Mr. Pharr terminated Plaintiff and the Jesus decal remained on the truck.[67]

Moreover, throughout the five (5) day ordeal, the Pharrs never once attempted to accommodate Plaintiff. They stated they needed time to discuss whether decal they admitted connection to their business remained on a truck. More telling, when asked why Plaintiff was not re-assigned to his former truck while the request to remove the decal was being considered, Mr. Pharr responded it "never dawned" on him to make such an accommodation.[68] **It did, however, dawn on Mr. Pharr to terminate Plaintiff after he learned Plaintiff had contacted the ACLU**.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact. A fact is material if it is essential to the plaintiff's cause of action under the applicable theory of recovery, and without which the plaintiff cannot prevail.[69]

The party that moves for summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes

[64] *See* F. Pharr Depo., pp. 44-45.
[65] *See* C. Pharr Depo., p. 44.
[66] *See* EEOC Statement. *See also* C. Pharr Depo., p. 28.
[67] *See* F. Pharr Depo., p. 31.
[68] *See* C. Pharr Depo., p. 33.
[69] *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

demonstrates the absence of a genuine issue of material fact.[70] If the moving party fails to meet this burden, the motion must be denied, regardless of the nonmovant's response.[71] If the movant does meet this burden, however, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.[72] If the nonmovant fails to meet this burden, then summary judgment is appropriate.[73]

As demonstrated *supra.*, Plaintiff has demonstrated the following undisputed facts: (i) the Jesus decal was not consistent with his sincerely held religious beliefs,[74] (ii) he informed Mrs. Pharr of the conflict between the decal and his religious faith,[75] (iii) he requested that the Jesus decal be removed,[76] (iv) Defendant never responded to his request to remove the Jesus decal,[77] (v) he informed Ms. Pharr that he had contacted the ACLU because he felt the Pharrs were forcing religion on him,[78] (vi) Defendant admitted that Plaintiff was fired because he complained to the ACLU about the decal,[79] (vii) Defendant admitted Plaintiff was fired because they believed he was going to sue them over the Jesus decal,[80] (viii) Defendant could have easily accommodated Plaintiff by simply removing the Jesus decal or re-assigning him to his previous truck.[81]

To defeat Plaintiff's motion, Defendant **must** offer "significant probative evidence" from which a reasonable jury could find in his favor on every element of Plaintiff's claim.[82] Neither conclusory allegations nor unsubstantiated assertions will satisfy this burden.[83]

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[70] *Id.*
[71] *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)
[72] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, (1986).
[73] *Tubacex*, 45 F.3d at 954.
[74] *See* F. Pharr Depo., p. 16. *See also* Moreland Depo., p. 25.
[75] *Id. See also* EEOC Statement and Defendant's Discovery Responses, Interrogatory No. 6.
[76] *Id.*
[77] *See* EEOC Statement. *See also* C. Pharr Depo., p. 28.
[78] *See* F. Pharr Depo., p. 24, 25-26. *See also* EEOC Statement.
[79] *See* F. Pharr Depo., pp. 29-32, 40, 48-49. *See also* C. Pharr Depo., p. 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.
[80] *See* F. Pharr Depo., pp. 32, 40, 48-49.
[81] *See* C. Pharr Depo., p. 33.
[82] *Anderson*, 477 U.S. at 249 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).
[83] *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

ARGUMENT

Plaintiff has filed a Title VII lawsuit claiming unlawful retaliation and discrimination based upon religious belief. Defendant, due to its own admissions and corroborating evidence, cannot contradict or dispute Plaintiff's statement of undisputed facts. Because there are no issues of material facts as to Defendant's liability, Plaintiff is entitled to an order of summary judgment.

I. RETALIATION

To establish a *prima facie* case for retaliation, an employee must show: (i) that he engaged in a protected activity, (ii) that an adverse employment action occurred, and (iii) that a causal link existed between the protected activity and the adverse action."[84]

Once a plaintiff has established a *prima facie* case, the courts consider "how" the plaintiff is proving his case of retaliation. A plaintiff claiming retaliation under Title VII may prove his case in one of two ways: (i) direct evidence of retaliation or (ii) circumstantial evidence creating a rebuttable presumption of retaliation.[85] If a plaintiff proves his claim with direct evidence, then he bypasses the *McDonnell-Douglas* framework and the "burden of proof shifts to the employer to establish by preponderance of evidence that the same decision would have been made regardless of the forbidden factor."[86]

If a plaintiff uses circumstantial evidence, the burden shifts to the employer to "state a legitimate non-retaliatory reason for its action."[87] After the employer states the reason, "any presumption of retaliation drops from the case" and the burden shifts back to the employee to show

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[84] *See Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001); *See also Septimus v. Univ. of Houston*, 399 F.3d 601, 610 (5th Cir. 2005); *Pineda v. United Parcel Service, Inc.*, 360 F.3d 483, 487 (5th Cir. 2004); and *Hockman v. Westward Commc 'ns, LLC*, 407 F.3d 317, 330 (5th Cir. 2004).

[85] *Fierros v. Texas Department of Health*, 274 F.3d 187, 192 (5th Cir. 2001); *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988).

[86] *Fierros* at 192 (*quoting, Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993)(internal quotation marks omitted).

[87] *Septimus*, 399F.3d at 610.

that the "stated reason is actually a pretext for retaliation."[88] Under the pretext framework, the burden falls to the employee to establish that the permissible reason is a pretext for retaliation.[89]

In this case, Plaintiff contends that he proves retaliation through the use of direct evidence. Assuming arguendo the Court disagrees, Plaintiff also contends that he proves retaliation through the use of circumstantial evidence.

A. *Prima Facie* Case

1. Protected Activity.

An employee has engaged in a "protected activity" when he "opposed any . . . unlawful employment practice" within the definition of 42 U.S.C. § 2000e, or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" involving 42 U.S.C. § 2000e.[90] The purpose of this anti-retaliation provision is to "prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms ...."[91]

Title VII's anti-retaliation statute is triggered by a formal filing of a charge of discrimination, "as well [as] informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support for co-workers who have filed formal charges."[92] According to the EEOC, protected "opposition" includes: (i) complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices, (ii) refusing to obey an order because the worker thinks it is unlawful under Title VII, and (iii) **requesting a religious accommodation**.[93]

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[88] *Id.* at 610-11 (*citing Pineda*, 360 F.3d at 487).
[89] *Id.* at 607 (*citations omitted*).
[90] 42 U.S.C. § 2000e-3. *See also Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-28 (5th Cir. 2000).
[91] *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)(*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)).
[92] *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990); *see also Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995)
[93] EEOC Compliance Manual, (CCH) P 8006.

In this case, Plaintiff alleges two instances of protected activity. On January 18, 2012 (Wednesday), after he realized he was assigned the Jesus truck, Plaintiff immediately requested that Defendant remove the decal from the truck.[94] Mrs. Pharr admits Plaintiff made the request because **he did not believe like the Pharrs did**.[95] Plaintiff's request, thus, clearly referenced his rights to be free from religious discrimination in the workplace.[96]

Then on January 20, 2012 (Friday), Plaintiff informed Mrs. Pharr that he had contacted the ACLU about the Jesus decal.[97] Plaintiff specifically told Mrs. Pharr he had contacted the ACLU to ask whether Defendant could force him to drive the Jesus truck.[98] He also stated that he contacted the ACLU because he felt as if Defendant was **forcing religion on him**.[99] He also stated that he would have to file a lawsuit if Defendant forced him to drive the said truck.[100] In response to Plaintiff's contact with the ACLU, Mrs. Pharr considered Plaintiff to be a troublemaker who was trying to **"find a way to sue us**."[101] She also testified that she "**didn't want Plaintiff working for us if he had filed a lawsuit against us**."[102]

In both instances, Plaintiff was protesting and/or opposing an unlawful employment practice – the requirement that he drive a truck with a "Jesus Saves" decal. Plaintiff engaged in an informal protest of Defendant's unlawful employment practice when he made the request that the Jesus decal be removed. Plaintiff's request and complaint were not generalized; they were specifically related to Defendant's decision to assign him the Jesus truck and Defendant's unwillingness to reasonably accommodate Plaintiff by removing the decal or assigning him a new truck. The

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[94] *See* F. Pharr Depo., p. 16. *See also* EEOC Statement.
[95] *Id. See also* Moreland Depo., p. 25 and Defendant's Discovery Responses, Interrogatory No. 6.
[96] *See* EEOC Statement. *See also* Defendant's Discovery Responses, Interrogatory No. 6.
[97] *See* F. Pharr Depo., p. 26. *See also*, Defendant's Discovery Responses, Interrogatory No. 5; EEOC Statement, Moreland Depo., pp. 25, 33; and C. Pharr Depo., p. 35.
[98] *See* F. Pharr Depo., p. 26. *See also* EEOC Statement and Moreland Depo., p. 25.
[99] *Id.* **It is pivotal to note that this is Defendant's recitation of the facts, not Plaintiff's**.
[100] *See* F. Pharr Depo., pp. 32, 40, 48-49. *See also* EEOC Statement.
[101] *See* F. Pharr Depo., pp. 32, 40, 48-49.
[102] *Id.*, p. 40.

discrimination was real because Defendant admitted that Plaintiff was assigned hauls to deliver in the Jesus Saves truck.[103] Plaintiff, therefore, has satisfied the first prong of his *prima facie* case.

2. Adverse Employment Action.

"[A] plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII."[104] Termination of employment falls within the definition of a materially adverse employment action.[105]

Plaintiff was relieved of his duties and is no longer employed by Defendant. For this very reason, Plaintiff can satisfy the second prong of his *prima facie* case.

3. Causal Connection.

"[A] plaintiff need not prove that [his] protected activity was the sole factor motivating the employer's challenged decision in order to establish the 'causal link' element of a *prima facie* case."[106] The Fifth Circuit has held that "the 'causal link' required in prong three of the prima facie case for retaliation is not as stringent as the 'but for' standard."[107] In fact, "A plaintiff merely needs to show some connection between the protected activity and the adverse employment action in order to establish a *prima facie* case of retaliation."[108]

In establishing a causal connection, timing is key. The Fifth Circuit has held that an inference of causation may be drawn if the plaintiff puts forth evidence of the employer's knowledge of the protected activity, plus shows a temporal proximity of that knowledge and the adverse employment action.[109] The Fifth Circuit has also held that close timing between the protected activity and the

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[103] (**Doc. 15**, ¶ 21).
[104] *Hollins v. A. Co.*, 188 F.3d 652, 658 (6th Cir. 1998).
[105] *See Brown v. M & M/Mars*, 883 F.2d 505 (7th Cir.1989)(employee terminated as a result of age discrimination); *see also Weihaupt v. American Medical Ass'n*, 874 F.2d 419, 427 (7th Cir.1989).
[106] *Yerby v. University of Houston,* 230 F.Supp.2d 753, 768 (S.D. Tex. 2002)(*citing Long v. Eastfield Coll.,* 88 F.3d 300, 305 n.4 (5th Cir. 1996)).
[107] *Raggs v. Mississippi Power & Light Co.,* 278 F.3d 463 (5th Cir. 2002).
[108] *Yerby, supra,* at 770.
[109] *See Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 435, n. 23 (5th Cir.1995)(*citing Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1141 (5th Cir.1981)).

adverse employment action "may provide the 'causal connection' required to make out a *prima facie* case of retaliation."[110]

Just as in the *Evans* case, only five (5) days passed from the time Defendant was aware of Plaintiff's protected activity (opposition to driving the Jesus truck) and his termination.[111] On January 18, 2012 (Tuesday), Plaintiff was assigned a new truck with a Jesus saves decal and he promptly requested that the decal be removed.[112] Defendants admitted, on multiple occasions, that Plaintiff based his complaints on religious reasons.[113]

On January 20, 2012 (Friday), Mrs. Pharr discovered Plaintiff had covered the Jesus decal with black duct tape and called to confront him.[114] During the conversation, Plaintiff informed Mrs. Pharr that he had contacted the ACLU about the decal and stated that he felt as if she was **forcing religion on him**.[115] Plaintiff told Mrs. Pharr that he discussed his rights with the ACLU about the decal.[116] Mrs. Pharr testified that she believed that Plaintiff would file a lawsuit against Defendant over the decal and, for that reason, she did not want him working for Defendant.[117] Defendant also admitted Plaintiff's decision to seek assistance from the ACLU prompted his termination.[118]

Mr. and Mrs. Pharr discussed Plaintiff's employment over the weekend.[119] On January 23, 2012 (Monday), just five (5) days after he engaged in his protected activity, Defendant terminated

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[110] *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir.2001).
[111] *See* EEOC Statement.
[112] *See* F. Pharr Depo., p. 16. *See also* Defendant's Discovery Responses, Interrogatory No. 6; Moreland Depo., p. 25; EEOC Statement
[113] In its position statement to the EEOC Defendant, through owner Craig Pharr, admitted that Plaintiff specifically asked that the Jesus Saves decal be removed from his truck. *See* EEOC Statement. The statement also stated that Plaintiff complained that Defendant was "forcing religion" on him. *Id.* Furthermore, Defendant admitted that Plaintiff told Felecia (Lisa) Pharr he objected to the Jesus decal because he did not believe like they did. *See* Defendant's Discovery responses Interrogatory No. 6 and F. Pharr Depo., p. 16.
[114] *Id.*
[115] *See* F. Pharr Depo., p. 26. *See also* EEOC Statement.
[116] *Id.*
[117] *See* F. Phar Depo., pp. 32, 40, 48-49.
[118] *See* F. Pharr Depo., pp. 29-32, 40, 48-49. *See also* C. Pharr Depo., p. 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.
[119] *See* EEOC Statement.

Plaintiff's employment.[120] Because he can show a connection between his protected activity and his termination, Plaintiff satisfied the third prong of his *prima facie* case.

B. Burden Shifting Analysis.

At this point, the Courts usually partake in a burden-shifting analysis in which the employer must provide facts to defeat the claim. If the Court is presented with direct evidence, it by-passes the *McDonnell-Douglas* test and requires the employer to present proof it would have reached the same decision without use of the discriminatory criterion. If the Court is presented with circumstantial evidence, the Court utilizes *McDonnell-Douglas*. Plaintiff contends that Defendant's admissions as to why he was fired constitute direct evidence of retaliation. Even if such evidence is no direct evidence, which it is, Plaintiff still demonstrates retaliation with circumstantial evidence.

1. Direct Evidence.

When it is possible for a plaintiff to prove his claim of retaliation through the use of direct evidence the famed *McDonnell-Douglas* test does not apply.[121] Instead, once the plaintiff has submitted evidence that retaliation was among the motives which prompted the adverse action, the "burden of proof shifts to the employer to establish by preponderance of evidence that the same decision would have been made regardless of the forbidden factor."[122]

As explained by the *Fabela* court direct evidence is defined as:

> [E]vidence which, "if believed, proves the fact [in question] without inference or presumption." *Portis*, 34 F.3d at 328-29 (*quoting Brown*, 989 F.2d at 861). In a Title VII context, **direct evidence includes any statement or document which shows on its face that an improper criterion served as a basis—not necessarily the sole**

[120] *Id.*

[121] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984)(*stating*, "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *Fierros v. Texas Dept. of Health*, 274 F.3d 187,192 (5th Cir. 2001) (finding that if a "plaintiff presents direct evidence that the employer's motivation for the adverse action was at least in part retaliatory, then the *McDonnell Douglas* framework does not apply.")(*citing Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 995 (5th Cir. 1995)).

[122] *Fierros* at 192 (*quoting, Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993)(internal quotation marks omitted).

> **basis, but a basis—for the adverse employment action**. *Fierros*, 274 F.3d at 192; *see also Portis*,34 F.3d at 328-29.[123]

The question before the Court in this case is simple – was Defendant's decision to terminate Plaintiff motivated, in whole or in part, by the fact that Plaintiff complained about the Jesus decal and notified the ACLU of his situation? The answer is yes.

In *Fabela,* the Fifth Circuit was faced with evidence similar to this case. The wronged employee had presented evidence that her employer referred to her as a "problem employee" during a review session.[124] In order to demonstrate that the employee was a problem, the employer pointed to the fact the employee had filed an "unsubstantiated" EEOC complaint.[125]

In the case at bar, Defendant admitted that it knew Plaintiff had contacted the ACLU because of the Jesus decal and because he felt Defendant "**was forcing religion on him**."[126] Despite this knowledge, Defendant viewed Plaintiff's decision to engage in protected activity as a terminable offense. When asked why Plaintiff was terminated, Defendant stated: "**When Plaintiff, James Harold Moreland, told Defendant that he had called the ACLU, and with the previous issues Defendant had with Plaintiff, the decision was made to let him go**."[127] Plaintiff was fired because he contacted the ACLU.[128]

Mr. Pharr told the EEOC that Plaintiff "has no respect for authority", "does what he wishes", and "set out a plan to report us to the ACLU and to cause trouble".[129] Mrs. Pharr testified that Plaintiff's decision to call the ACLU demonstrated that he did not have respect for authority.[130]

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123 *Fabela v. Socorro Independent School Dist.*, 329 F.3d 409, 415 (5th Cir. 2003). (**emphasis added**).
124 *Fabela*, 329 F.3d at 416.
125 *Id.*
126 *See* EEOC Statement. *See also* F. Pharr Depo., p. 26.
127 *See* Defendant's Discovery Responses, Interrogatory No. 5.
128 *See.* F. Pharr Depo., pp. 28. 39. *See also* C. Pharr Depo., p. 43. Both of the Pharr's attempted to back pedal from this reason for termination, but eventually **conceded** Plaintiff's decision to contact the ACLU over the Jesus decal played a role in the decision terminating his employment. *See* F. Pharr Depo., p. 41 and C. Pharr Depo., p. 42.
129 *See* EEOC Statement.
130 *See* F. Pharr Depo., p. 48.

She further explained the only reason he called the ACLU was to try and "**find a way to sue us**."[131] She further testified that she "**didn't want [Plaintiff] working for us if he had filed a lawsuit against us**."[132] She considered Plaintiff to be a trouble-maker because "**calling and reporting us would be causing trouble for us**."[133] Such facts are similar to the facts the *Fabela* court found were direct evidence of retaliation.

Understanding that Plaintiff has provided direct evidence of retaliation, the "burden of proof shifts to the employer to establish by preponderance of evidence that the same decision would have been made regardless of the forbidden factor." Defendant cannot present such evidence.

First, Defendant has stated that Plaintiff's protected activity, i.e. his complaint and contact with the ACLU, spurred his termination.[134] The Defendant made such an admission in Mr. Pharr's letter to the EEOC, its response to Plaintiff's interrogatories, and throughout the Pharr's deposition testimony. There is no walking back from this glaring admission.

Second, Defendant attempts to mitigate the damage caused by its admission by stating it also considered its "previous issues" with Plaintiff when the decision was made to terminate Plaintiff's employment. This position is untenable.

When asked what the "previous" issues were that Defendant allegedly considered in terminating Plaintiff, Mr. Pharr testified that one issue involved an alleged fight and the other involved Plaintiff allegedly bad-mouthing Mrs. Pharr in the community.[135] **These were the only examples provided by Defendant and both occurred months before Plaintiff's termination**.[136] Such examples are not enough to defeat Plaintiff's motion.

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131 *Id.*, p. 49.
132 *Id.*, p. 40.
133 *Id.*, p. 32.
134 *See* F. Pharr Depo., pp. 29-32, 40, 48-49. *See also* C. Pharr Depo., p. 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.
135 *See* C. Pharr Depo., pp. 7, 14.
136 *Id. See also* F. Pharr Depo., p. 28.

Plaintiff did not receive a written reprimand concerning either of the two instances.[137] While Mr. Pharr initially testified that Plaintiff received a verbal reprimand concerning both issues, he later admitted that no such reprimands existed.[138] Instead, he stated that he was merely having a conversation with Plaintiff and Plaintiff was not punished for either alleged incident.[139] More telling, Mr. Pharr testified that after he had the conversation with Plaintiff, no similar instances occurred.[140]

In a nutshell, Defendant is asking this Court to believe that when it terminated Plaintiff, it took into consideration two alleged incidents that happened months before Plaintiff's termination, neither of which rose to the level of a verbal reprimand or saw a reoccurrence. Moreover, Defendant is asking the Court to turn a blind eye to the more likely culprit – **that Plaintiff was fired days after he told Defendant he had contacted the ACLU because it was forcing religion on him**.

Defendant's story further unravels when the Court actually looks at the two alleged incidents. The alleged fighting happened once and **no fighting actually occurred**.[141] Mrs. Pharr did not even remember the date the alleged fighting incident took place.[142]

As for the "bad-mouthing" allegation, Defendant provided **zero evidence** that any such bad-mouthing occurred. Both Mr. and Mrs. Pharr testified they did not have direct knowledge of any such "bad-mouthing" and that its proof was merely rumors and hearsay.[143] **The Pharrs also testified that they could not even remember what Plaintiff allegedly said, never tried to verify the comments, and did not take the comments seriously**.[144]

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[137] *See* Defendant's Discovery Responses, Interrogatory No. 13.
[138] *See* C. Pharr Depo., p. 17.
[139] *Id.*
[140] *See* F. Pharr Depo., p. 37. *See also* C. Pharr Depo., pp. 10, 12.
[141] *See* C. Pharr Depo., p. 14.
[142] *See* F. Pharr Depo., p. 37.
[143] *See* F. Pharr Depo., pp. 11, 12-13, 43-44. *See also* C. Pharr Depo., p. 11. Plaintiff did admit to making one comment concerning Mrs. Pharr. After his son was terminated from Defendant's business, he stated that Mrs. Pharr "was sorry, sorry to people." **This is the only evidence of "Bad-mouthing" that Defendant has produced and it stems from Plaintiff being an honest man**. Such a comment is hardly "bad-mouthing."
[144] *See* F. Pharr Depo., pp. 14, 15, 38. *See also* C. Pharr Depo., p. 8.

At the end of the day, the Court knows why Defendant terminated Plaintiff – because he complained about the Jesus decal, **thus preventing the Pharrs from being witnesses for Christ**, and subsequently contacted the ACLU. Talks of incidents that are so far in the distant past that Defendant could not remember the dates or substance of the violations cannot erase the fact that Defendant **admitted** Plaintiff's protected activity triggered his termination.[145]

2. Indirect Evidence

When using circumstantial evidence to prove a retaliation claim, the burden shifts to the employer to put forth a non-discriminatory reason for Plaintiff's termination. Defendant has stated that it fired Plaintiff because: (i) he contacted the ACLU and (ii) "previous issues" that include an alleged fighting incident and an alleged bad-mouthing incident.[146]

Once a non-discriminatory reason is proffered, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).'"[147]

The Fifth Circuit held in *Smith*:

> [I]f the district court has before it substantial evidence supporting a conclusion that both a legitimate and an illegitimate (i.e., more than one) motive may have played a role in the challenged employment action, the court may give a mixed-motive instruction.[148]

[145] *See* F. Pharr Depo., pp. 29-32, 40, 48-49. *See also* C. Pharr Depo., p. 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.
[146] *See* Defendant's Discovery Responses, Interrogatory No. 5.
[147] *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).
[148] *Smith v. Xerox Corp.*, 602 F.3d 320, 333 (5th Cir. 2010)

Separate and apart from the traditional "pretext analysis," the Fifth Circuit, thus, has ruled that a plaintiff may also use circumstantial evidence in showing his protected conduct was a motivating factor in its decision to terminate employment.[149] Plaintiff can succeed on both theories.

a. Traditional Pretext Theory.

"When the employee sues and complains that this prohibition has been violated, the employee must prove that there was a causal connection between the protected activity and the adverse employment decision."[150] In addition, "The connection required is causation-in-fact or 'but for' causation. Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that 'but for' the protected activity she would not have been subjected to the action of which she claims."[151]

To demonstrate pretext, thus demonstrating the "but for" standard, Plaintiff must "identify such weaknesses, implausibilities, inconsistencies, or contradictions" in Defendants' asserted reason "that a reasonable person could find [it] unworthy of credence."[152] More importantly, "[I]f the stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action, it was a pretext."[153] "Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's *prima facie* case, is likely to support an inference of discrimination [or retaliation] even without further evidence of the defendant's true motive."[154]

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[149] *Id.* at 330.
[150] *Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984).
[151] *Id. See also Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S.Ct. 2343 (2009).
[152] *Boumehdi v. Plasttag Holdings, LLC.*, 489 F.3d 781, 792 (7th Cir. 2007).
[153] *Forrester v. Raulant–Borg Corp.*, 453 F.3d 416, 418 (7th Cir.2006).
[154] *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) (*citing Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001), cert. denied, 535 U.S. 1078 (2002)) (*quoting Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)).

Taking the Pharrs at their word, it is undisputed that the decision to terminate Plaintiff was based on Plaintiff's decision to contact the ACLU.[155] Defendant tried to reduce the impact of such glaring admissions by stating it had "previous issues" with Plaintiff that also led to Plaintiff's termination. This involved one incident of alleged fighting and one incident of alleged bad-mouthing. As discussed *supra.,* these alleged incidents happened months before Plaintiff's termination, did not even result in a reprimand, and never saw a re-occurrence. Instead, Plaintiff was fired just **days** after he complained of the Jesus decal and contacted the ACLU. **It is, therefore, implausible that Defendant would terminate Plaintiff for "violations it could not fully remember at deposition**.

When the undisputed evidence is examined by the Court, it is clear that Plaintiff's termination would not have occurred but for his decision to complain and contact the ACLU. The alleged fight in which no reprimand was issued and the alleged bad-mouthing of which there is no proof, are not dispositive; they are distractions.

b. Mixed-Motive.

Again, **Defendant admitted that its decision to terminate Plaintiff was based, in part, on his complaints about the Jesus decal and his decision to contact the ACLU**.[156] Moreover, as stated *supra*., Defendant's claim that it also considered "previous issues" was refuted by the deposition testimony of Mr. and Mrs. Pharr. The result is a fatal blow to the Defendant. And even if those phantom issues were considered, the fact that retaliatory criteria were also considered strips Defendant of any immunity the law may have offered under the traditional pretext theory.

[155] *See* F. Pharr Depo., 29-32, 40, 48-49. *See also* C. Pharr Depo., p, 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.
[156] *See* F. Pharr Depo., 29-32, 40, 48-49. *See also* C. Pharr Depo., p, 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.

II. UNLAWFUL DISCRIMINATION BASED UPON RELIGIOUS BELIEF

Title VII prohibits employers from discharging or disciplining an employee based on his or her religion.[157] "Religion" is defined as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business."[158]

To establish a *prima facie* case of religious discrimination, the employee must show: (1) he holds a sincere religious belief that conflicts with a job requirement; (2) he informed his employer of the conflict; and (3) he was disciplined for failing to comply with the conflicting requirement.[159] Once all factors are established, the burden shifts to the employer to show either it made a good-faith effort to reasonably accommodate the religious belief or such an accommodation would work an undue hardship upon the employer and its business.[160]

Title VII also requires an employer to "make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship."[161] An accommodation constitutes an "undue hardship" if it would impose more than a *de minimis* cost on the employer.[162] Both economic and non-economic costs can pose an undue hardship upon employers; the latter category includes, for example, violations of the seniority provision of a collective bargaining agreement and the threat of possible criminal sanctions.[163]

Plaintiff established his *prima face* case and Defendant has failed to present factual evidence demonstrating that Plaintiff's requested accommodation would result in an undue burden.

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[157] 42 U.S.C. § 2000e-2(a)(1).
[158] 42 U.S.C. § 2000e(j).
[159] *See Jenkins v. State of La., Through Dept. of Corrections*, 874 F.2d 992, 995 (5th Cir.1989); *see also Shelton v. Univ. of Med. and Dentistry of N.J.,* 223 F.3d 220, 224 (3d Cir.2000).
[160] *Id.*
[161] *Lake v. B.F. Goodrich Co.*, 837 F.2d 449, 450 (11th Cir. 1988) (*citation and quotation omitted*).
[162] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).
[163] *Id.* at 83.

A. *Prima Facie* Case

1. Sincere Religious Belief.

To qualify as a "bona fide" religious belief, the belief must be "sincerely held" and, "in the [believer's] own scheme of things, religious."[164] Once a plaintiff has stated that he holds a sincerely held religious belief the courts need not engage in a theological debate as to whether such a belief is both sincere and sound.[165]

It is undisputed that the Jesus decal at the center of this lawsuit serves only a religious purpose – to help promote Christianity.[166] Defendant admitted that the decal **had nothing to do with its business operation**.[167] More compelling, the Pharrs admitted they used the decal to be a witness for Christ and to proselytize.[168]

It is undisputed that Plaintiff's opposition to driving a truck with a jumbo "Jesus Saves" decal is rooted in a sincerely held religious belief.[169] Defendants Pharr testified that they understood that Plaintiff was objecting on religious grounds. Mr. and Mrs. Pharr viewed Plaintiff's objection to the decal as religious because they admitted Plaintiff told them he **did not believe like them** and

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[164] *United States v. Seeger,* 380 U.S. 163 (1965); *see also Hager v. Sec. of Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991)(noting similar test for determining whether applicant is entitled to exemption from military service as a conscientious objector).

[165] *See Reyes v. New York State Office of Children and Family Services*, 2003 WL 21709407 *6 (S. D. N.Y. 2003)("In Title VII cases concerning religious discrimination, as in questions regarding the free exercise of religion, it is only appropriate for a court to engage in an analysis of the sincerity of a plaintiff's religious beliefs, and not the verity of those beliefs"), aff'd 109 Fed.Appx. 466 (2d Cir. 2004)(unpub); *see also Redmond v. GAF Corp*, 574 F.2d 897, 900 (7th Cir. 1978)(*quoting Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953)("[I]t is no business of courts to say... what is a religious practice or activity..."); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs. Mindful of this profound limitation, our competence properly extends to determining whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.").

[166] *See* C. Pharr Depo., p. 22, 24-25. *See also*, F. Pharr Depo., p. 17, 53; and Defendant's Discovery Responses, Interrogatory No. 11.

[167] *See* Defendant's Discovery Responses, Interrogatory No. 12, Request for Admission No. 4, and Request for Admission No. 5.

[168] *See* Rog 11. *See also* C. Pharr Depo., p. 22, 24-25. *See also*, F. Pharr Depo., p. 17, 53.

[169] *See* EEOC Statement (Defendant admits his objection was based on religion). *See also* F. Pharr Depo. p. 26.

that he felt they were **forcing religion on him**.[170] Moreover, during his deposition testimony Plaintiff explained he thought the decal distracted from his faith by showboating Christianity.[171]

There is no denying that driving the Jesus truck was a work requirement for Plaintiff. Mr. Pharr assigned Plaintiff to the Jesus truck,[172] ordered him to move his belongings into the truck,[173] and **testified Plaintiff's refusal to drive the truck with the Jesus decal prominently displayed was insubordination**.[174] This is further supported by the fact Mrs. Pharr told Plaintiff that he either drive the truck without the duct tape concealing the Jesus decal or go home.[175]

Because Defendants did not put forth any evidence suggesting Plaintiff did not hold a sincerely held religious belief and because they admitted driving the truck was a work requirement, Plaintiff satisfies this prong of the *prima facie* test.

2. Notification.

It is undisputed that Plaintiff notified Defendant of his religious objections to the Jesus Saves decal. Defendant admitted that Plaintiff, in complaining about the decal, stated that he was uncomfortable driving the Jesus truck because "he had nothing against Christians but that he didn't believe like [the Pharrs] did."[176] Mr. and Mrs. Pharr also **admitted** Plaintiff told them that he felt as if the Pharrs were **forcing religion on him**.[177] The conflict was so great that Plaintiff reached out to the ACLU.[178] This demonstrates Defendant was put on notice of Plaintiff's conflict.

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[170] *Id.*
[171] *See* Moreland Depo., p. 25. Furthermore, Plaintiff's belief is rooted in Biblical tradition. In Matthew's Gospel Christians are warned to "[b]e careful not to practice your righteousness in front of others to be seen by them. If you do, you will have no reward from your Father in heaven." Matthew 6:1.
[172] *See* C. Pharr Depo., pp. 32, 60, 62. *See also* EEOC Statement (Plaintiff "was to change trucks") and Moreland Depo., pp. 15-16, 18, 22.
[173] *See* C. Pharr Depo., p. 32.
[174] *See* Craig Pharr depo, pp. 57-58.
[175] *See* Moreland Depo., pp. 67-68.
[176] *See* Defendant's Discovery Responses, Interrogatory No. 6.
[177] *See* EEOC Statement (Plaintiff "reported the company for forcing religion on him").
[178] *See* EEOC Statement. *See also* Defendant's Discovery Responses, Interrogatory No. 5.

3. Disciplinary Action.

To establish the third prong of the *prima facie* case a plaintiff must demonstrate that he was disciplined for not complying with the conflicting employment requirement.[179]

Establishing that an employee was "disciplined" merely involves a showing that the employee underwent a material change in a term, condition, or privilege of his employment.[180] Plaintiff testified that Mr. Pharr assigned him the Jesus truck and ordered him to move his work belongings into the Jesus truck.[181] Mr. Pharr did not contradict such facts.[182] Plaintiff also testified that Mrs. Pharr, after learning he had covered the decal with black duct tape, ordered him to drive the truck without the duct tape concealing the decal or to go home.[183] Plaintiff refused to drive the truck without the decal covered.[184] Mr. Pharr testified that the refusal to drive the truck without the duct tape was insubordination.[185] On January 23, 2012 (Monday), five (5) days after he made his request for accommodation, Plaintiff was fired.[186] Evidence is undisputed that Plaintiff was fired because Defendant viewed his request to remove the decal and his communication with the ACLU as Plaintiff's desire to "cause trouble."[187] Such a termination is a material change in his employment.

B. Reasonable Accommodation.

Once an employee satisfies his *prima facie* case, the burden shifts to an employer to come forward with evidence that it offered a reasonable accommodation, or that accommodating the employee would cause undue hardship.[188] Defendant has done neither.

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[179] *Lubetsky v. Applied Card Systems, Inc.*, 296 F.3d 1301, 1306 n. 2 (11th Cir.2002) (collecting cases from other circuits).
[180] Employment Coordinator, 5 Emp. Coord. Employment Practices § 4:14 (2011).
[181] *See* Moreland Depo., pp. 15-16, 18, 22.
[182] *See* C. Pharr Depo., pp. 32, 60-62. *See also* EEOC Statement (Plaintiff" was to change out trucks").
[183] *See* Moreland Depo., pp. 24-25, 28.
[184] *Id.*, pp. 32, 67-68. *See also* F. Pharr Depo., p. 26.
[185] *See* C. Pharr Depo., pp. 57-58.
[186] *See* EEOC Statement. *See also* Defendant's Discovery Responses, Interrogatory No. 5.
[187] *See* F. Pharr Depo., pp. 29-32, 40, 48-49. *See also* C. Pharr Depo., pp. 43; EEOC Statement; and Defendant's Discovery Responses, Interrogatory No. 5.
[188] *Finnie v. Lee County, Miss.*, 2012 WL 124587, *1 (N.D. Miss. Jan. 17, 2012).

An accommodation under Title VII is reasonable as a matter of law, if it in fact eliminates a religious conflict in the workplace; accordingly, if the conflict is eliminated the employee has no right to insist upon a different accommodation that he prefers.[189] On the other hand, an accommodation is not unreasonable as a matter of law simply because it fails to eliminate all possible conflicts between employment requirement and the employee's religion.[190] Thus, "Title VII does not require an employer to give an employee a choice among several accommodations... [r]ather, the inquiry ends when an employer shows that a reasonable accommodation was afforded the employee, regardless of whether that accommodation is one which the employee suggested."[191]

Plaintiff contends that Defendant **never** made an attempt to accommodate his religious belief. Plaintiff also contends that any reasonable accommodation did not create an **undue burden**.

1. Defendants Never Attempted to Accommodate Plaintiff.

In this case, it is undisputed that Defendant failed to afford Plaintiff any form of accommodation. Plaintiff complained about the religious conflict and received a pink slip.

Throughout the discovery process, Defendant claimed that it did not need to accommodate Plaintiff because Plaintiff was not required to drive the Jesus truck. This argument is conclusory and devoid of any corroborating facts.

Mr. Pharr testified that drivers are assigned trucks that they must drive.[192] It is undisputed that Mr. Pharr told Plaintiff to move his belongings out of his old truck and into a new truck – the Jesus truck.[193] Due to his new assignment, Plaintiff promptly and politely requested that the Jesus decal be removed.[194] Such a request was never fully considered and Plaintiff was terminated.[195]

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189 *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1031-1032 (8th Cir. 2008)
190 *Id.*
191 *Beadle v. Hillsborough County Sheriff's Dept.*, 29 F.3d 589, 5912 (11th Cir. 1994)(*citing Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60, 68 (1986)).
192 *See* C. Pharr Depo., p. 32, 60-62.
193 *Id.*
194 *See* F. Pharr Depo., pp. 16, 26.
195 *See* C. Pharr Depo., p. 44.

Defendant had two ways of accommodating Plaintiff: (i) remove the sticker and/or (ii) re-assign him to his old truck. Defendant claims it did not have time to accommodate Plaintiff. This is not true. Mr. Pharr testified that three (3) days was plenty of time to decide whether the decal was removed. Mr. Pharr had five (5) days, never decided about the decal, and terminated Plaintiff.[196]

Defendant could have also re-assigned Plaintiff to his old truck while it decided the fate of the Jesus decal. Mr. Pharr testified that he **never considered** allowing Plaintiff to drive his old truck while considering Plaintiff's request. Here is Mr. Pharr in his own words:

> **Q.** Well, I guess my question is this: When Mr. Moreland complains about the Jesus Saves truck, why not just tell him, "Okay. Go back to your black and white truck, and let us figure out what we are going to do, but you keep doing business in the black and white truck"?
>
> **A.** Never dawned on me to do that.[197]

Mrs. Pharr also testified that she does not recall offering Plaintiff the opportunity to return to his old truck.[198] Instead, the Pharrs argue Plaintiff should have just known that he could return to his own truck. This "assumption" contradicts Mr. Pharr's testimony that drivers are assigned trucks and assumes Plaintiff had the ability to refuse driving his assigned truck. Such an argument is undercut by the admission Plaintiff was assigned hauls to be completed in the Jesus truck and Mr. Pharr's testimony that Plaintiff's refusing to drive the Jesus truck amounted to insubordination.[199]

Put simply, Defendant is trying to place the burden to accommodate on the Plaintiff. Mr. Pharr was the boss and only he could assign Plaintiff to a new truck. It is nonsensical to think that a subordinate employee would have the authority to drive an unassigned truck when the boss did not even consider such an option.

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[196] *Id.*, p. 44.
[197] *See* C. Pharr Depo, p. 33.
[198] *See* F. Pharr Depo., p. 47.
[199] (**Doc. 15**, ¶ 21). *See also* C. Pharr Depo., pp. 57-58.

2. No Evidence Accommodation Created an Undue Burden.

In determining whether an adequate accommodation would impose an undue hardship on an employer, a court must focus on the "specific context" of the case at issue, accounting for both the fact and the magnitude of the alleged undue hardship.[200] Defendant **never claimed** such accommodations would create an undue burden.

As explained *supra.*, Defendant could have easily assigned Plaintiff to his old truck while they considered Plaintiff's request.[201] The evidence shows that this truck was ready and able to be utilized but **it never dawned on Defendant** to put Plaintiff in his old truck without the decal.[202] Moreover, Defendant could have just placed Plaintiff in his old truck indefinitely because Plaintiff was not demanding that all the Jesus decals be removed, but merely that he not be forced to drive a truck with such a decal. There is no evidence to suggest such an accommodation was unduly burdensome.

As for removal of the decal, Defendant claims it would have to repaint the truck even if the decal was removed because it would leave an imprint.[203] It is claimed such a re-paint would cost money, though Defendant never stated how much money it would cost.[204] This, still, is not an unreasonable accommodation. Defendant admitted the Jesus decal did not serve a business purpose, was not necessary for a driver's work performance, and only had a purpose of proselytizing.[205] Defendant, thus, deliberately injected a religious element into a secular work place. This, therefore, is not the same as a Christian challenging a police department's "no skirts policy." It involves a plaintiff challenging a religious issue that has no work purpose and was of Defendant's own creation. The fact it may cost Defendant to repaint, therefore, is a risk it assumed when it opted to mix the owner's personal faith with a secular business.

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[200] *Webb v. Phila.*, 562 F.3d 256, 259, 260 (3d Cir. 2009)
[201] *See* C. Pharr Depo., p. 33.
[202] *Id.*
[203] *See* F. Pharr Depo., p. 19.
[204] *See* C. Pharr Depo., p. 55
[205] *See* Defendant's Discovery Responses, Interrogatory No. 12, Request for Admission No. 4, and Request for Admission No. 5. *See also* C. Pharr Depo., pp. 22, 24-25 and F. Pharr Depo., pp. 17, 53.

CONCLUSION

For all the reasons stated herein, Plaintiff requests that his Motion for Summary Judgment be GRANTED as to Defendant's liability and the Court hold a hearing to establish the amount of damages Plaintiff is entitled to receive as a result of the injuries sustained.

Respectfully Submitted,

/s/ Joseph R. Murray, II

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CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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Respectfully submitted this the 15th day of May, 2013,

/s/ Joseph R. Murray, II

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