

No. 18-1104

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mark Horton,
Plaintiff- Appellant,
v.
Midwest Geriatric Management, LLC,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of
Missouri, Case No. 4:17-CV-232417 (Hamilton, J.)

**Brief of *Amici Curiae* Anti-Defamation League, Bend the Arc: A
Jewish Partnership for Justice, Hindu American Foundation,
Interfaith Alliance Foundation, National Council of Jewish
Women, Central Conference of American Rabbis, and Women of
Reform Judaism in Support of Plaintiff-Appellant Mark Horton**

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Federal Rule of Appellate Procedure 26.1
Corporate Disclosure Statement

Eighth Circuit Case Number: 18-1104

Case Name: *Horton v. Midwest Geriatric Management, LLC*

Name of Counsel: Michael I Rothstein, Jacob B. Berger, Melody L. Gaal, Steven M. Freeman, David L. Barkey, Melissa Garlick, and Miriam L. Zeidman

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1, *amici curiae* Anti-Defamation League, Bend the Arc: A Jewish Partnership for Justice, Hindu American Foundation, Interfaith Alliance Foundation, National Council of Jewish Women, Central Conference of American Rabbis, and Women of Reform Judaism make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 14, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Michael I Rothstein _____

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Statement of Interest of the *Amici Curiae*

Amici are seven religious and civil rights organizations. *Amici* represent diverse denominations and faith traditions but share a common commitment to ensuring that there are robust statutory provisions to protect religious freedom. Likewise, *Amici* remain vitally interested in ensuring that an employee with a legitimate workplace discrimination claim is afforded the protections long established under Title VII of the Civil Rights Act of 1964. This Court granted the *Amici* leave to file this *amicus* brief.

The *Amici*, described in more detail below, include:

- Anti-Defamation League;
- Bend the Arc: A Jewish Partnership for Justice;
- Hindu American Foundation;
- Interfaith Alliance Foundation;
- National Council of Jewish Women;
- Central Conference of American Rabbis; and
- Women of Reform Judaism.

Anti-Defamation League

Amicus Curiae **Anti-Defamation League** (“ADL”) was organized in 1913 to combat anti-Semitism and other forms of hate, and to secure justice and fair treatment to all. Today, it is one of the world’s leading organizations

fighting hatred and bigotry and eradicating discrimination.

ADL has a substantial interest in this case. At issue are core questions about equality and discrimination. ADL is a steadfast supporter of anti-discrimination laws as well as constitutional and statutory safeguards for religious liberty. ADL believes that discrimination against individuals and infringements on individuals' religious freedom are corrosive elements in society that Congress and the states have sought to combat through the establishment of anti-discrimination laws. ADL advocates for the passage, strengthening, and enforcement of laws that aim to eradicate discrimination and laws that protect religious freedom. ADL worked closely with coalition partners to help pass the Civil Rights Act of 1964, and it maintains a strong interest in ensuring that its provisions, such as Title VII, are interpreted in accordance with the law's intent to protect individuals from discrimination.

Bend the Arc: A Jewish Partnership for Justice

Amicus Curiae **Bend the Arc: A Jewish Partnership for Justice** is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

Hindu American Foundation

Amicus Curiae **The Hindu American Foundation** (“HAF”) is a nonprofit advocacy organization for the Hindu American community. HAF educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Through its advocacy efforts, HAF promotes dignity, mutual respect, and pluralism in order to ensure the well-being of Hindus and for all people and the planet to thrive.

Since its inception, HAF has made church-state advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

Interfaith Alliance Foundation

Amicus Curiae **Interfaith Alliance Foundation** is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy,

and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

National Council of Jewish Women

Amicus Curiae **National Council of Jewish Women** (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for “Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition.” Consistent with our Principles and Resolutions, NCJW joins this brief.

Central Conference of American Rabbis and Women of Reform Judaism

Amicus Curiae **Central Conference of American Rabbis** (“CCAR”), whose membership includes more than 2,000 Reform rabbis, and **Women of Reform Judaism** that represents more than 65,000 women in nearly 500 women’s groups in North America and around the world, are committed to ensuring equality for all of God’s children, regardless of sexual orientation. We oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being.

**Statement Pursuant to
Federal Rule of Appellate Procedure 29(a)(4)(E)**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state as follows:

1. Counsel for the *amici curiae* authored this brief in full.
2. No *amicus* nor its counsel contributed money that was intended to fund preparing or submitting this brief.
3. No other person contributed money that was intended to fund preparing or submitting this brief.

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Argument

This *amicus* brief focuses on the District Court's dismissal of Horton's claims under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *et seq.*, for religious discrimination in the workplace.¹

In dismissing Horton's religious discrimination claim under Title VII, the District Court fundamentally misconstrued the elements of a *prima facie* religious discrimination claim in which the reason for an adverse employment action is the nonconformance of the applicant's or employee's religious beliefs with those of the employer. Specifically, the District Court improperly focused solely on Horton's sexual orientation and marriage to a man, rather than on his and his prospective employer's *religious beliefs* about marriage of same-sex couples and whether his failure to hold or follow Midwest Geriatric's *religious beliefs* motivated the adverse employment

¹ Although this *amicus* brief focuses on the merits of Horton's religious discrimination claim, *Amici* also urge the Court to reverse the District Court's dismissal of Horton's sex discrimination claim under Title VII. Both the Seventh Circuit and the Second Circuit Court of Appeals recently have held that workplace discrimination based on sexual orientation is motivated, at least in part, by sex and is a subset of sex discrimination. *Zarda v. Altitude Express*, ___ F.3d ___, 2018 WL 1040820, at *5 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Community College*, 853 F.3d 339, 343-52 (7th Cir. 2017) (en banc). *Amici* urge this Court to overrule *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (per curium), to the extent that it is inconsistent with *Zarda* and *Hively*, and to recognize that discrimination based on sexual orientation constitutes sex discrimination under Title VII.

action. See *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1037-38 (10th Cir. 1993).

Amici urge this Court to join the circuit and district courts that have explicitly followed *Shapolia* and, applying *Shapolia*, to reverse the District Court's dismissal of Horton's religious discrimination claim.

I. TITLE VII PROHIBITS EMPLOYMENT DECISIONS BASED ON THE NONCONFORMANCE OF AN APPLICANT'S RELIGIOUS BELIEFS WITH THOSE OF THE EMPLOYER.

Although a typical Title VII religious discrimination case involves an employer taking an adverse employment action because an applicant or employee adheres to a particular faith or religion, a compelling subset of cases encompass the circumstance presented in this appeal: an adverse employment action based on the failure of the employee/applicant to conform his religious beliefs to those of the employer.

In the seminal case of *Shapolia v. Los Alamos National Laboratory*, 992 F.2d at 1037-38, the 10th Circuit addressed religious nonconformance claims under Title VII. In *Shapolia*, an electrician claimed that his supervisor and others involved in the decision to terminate him were all members of the Mormon Church and that he was discriminated against merely because he was *not* a Mormon. *Id.* at 1035.

In *Shapolia*, as in the case on appeal, the employee claimed the employer took an adverse employment action, “not because [the employer] was unwilling to accommodate one of his religious practices, and not because [the employer] would not make an exception to a job requirement because of his religious beliefs, but simply because [the employee] did not hold the same religious beliefs as his supervisors.” *Id.* at 1037; *see also Noyes v. Kelly Serv.*, 488 F.3d 1163, 1168–69 (9th Cir. 2007) (same).

As discussed in detail below, the weight of authority among the circuits and districts that have considered religious nonconformance claims under Title VII require only that the employee allege the following:

(1) that he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee's job performance was satisfactory; and (3) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive ***based upon the employee's failure to hold or follow his or her employer's religious beliefs.***

Shapolia, 992 F.2d at 1038 (emphasis added). Courts have found *Shapolia* “well reasoned and expressive of the prevailing federal standard applicable to Title VII religious discrimination claims.” *Henegar v. Sears Roebuck & Co.*, 965 F. Supp. 833, 837 (N.D. W.Va. 1997) (addressing a West Virginia civil rights statute analogous to Title VII).

Following *Shapolia*, most courts have upheld Title VII religious discrimination claims wherever an employer takes an adverse employment action because the employee's religious beliefs failed to conform to the employer's religious beliefs.² Thus, Title VII, for example, bars employers with fundamentalist Christian beliefs from taking adverse employment actions against employees whose more secular religious beliefs fail to conform to the employer's. *See Venters v. City of Delphi*, 123 F.3d 956, 961-65, 972 (7th Cir. 1997).

Similarly, in following *Shapolia*, courts have held that Title VII bars employers with fundamentalist Christian beliefs who oppose adultery on religious grounds from taking adverse employment actions against employees whose religious beliefs allow such conduct. *See Sarenpa v. Express Images Inc.*, No. 04-1538 JRT/JSM, 2005 WL 3299455, at *3-4 (D. Minn. Sep. 8, 2005) (unreported); *cf. Henegar*, 965 F. Supp. at 834-35 (interpreting West Virginia analog to Title VII).

Directly relevant to the issue before the Court in this appeal, Title VII bars employers from taking an adverse employment action against an

² The E.E.O.C. Compliance Manual is in accord: “[A]n employer may not refuse to hire an applicant simply because he does not share the employer’s religious beliefs” E.E.O.C. Compliance Manual §§ 12-II.A.1, pp. 21 (2008).

employee based on the employee's failure to conform religious beliefs about sexual orientation to the employer's religious beliefs. See *Terveer v. Billington*, 34 F. Supp. 3d 100, 105-08, 115-18 (D.D.C. 2014).³

Although a district court in this circuit has cited *Shapolia* with approval, *Kaminsky v. Saint Louis University School of Medicine*, No. 4:05CV1112 CDP, 2006 WL 2376232, at *4 (E.D. Mo. Aug. 16, 2006) (unreported), this Court has not directly addressed *Shapolia* and the failure-to-conform line of cases.⁴ This Court's decision in *Campos v. City of Blue Springs, Missouri*, 289 F.3d 546, 548-51 (8th Cir. 2002), however, is consistent with the decision.

In *Campos*, this Court affirmed a Title VII jury verdict for an employee who was constructively discharged for failing to conform her Native

³ In *Terveer*, the court, *inter alia*, held that “employees who are targeted for religious harassment due to their status as a homosexual individual” state a claim for religious discrimination. The court in that case observed that, “Courts in other circuits have found that plaintiffs state a claim of religious discrimination in situations where employers have fired or otherwise punished an employee because the employee's personal activities or status—for example, divorcing or having an extramarital affair—failed to conform to the employer's religious beliefs.” *Id.* at 117-18. This Court need not address this issue because, as discussed below, Horton has sufficiently alleged that the adverse employment action was based on the nonconformance of his religious beliefs about marriage and relationships of same-sex couples with those of his prospective employer.

⁴ *Shapolia* was cited with approval in a dissent in *Winspear v. Cmty. Dev., Inc.*, 574 F.3d 604, 609, n.2 (8th Cir. 2009) (Smith, J., dissenting on other grounds).

American spiritual beliefs to her employer’s fundamentalist Christian beliefs. *Id.* at 549. The employee testified that her supervisor “told her she was not a good role model and that she needed to find a good Christian boyfriend to teach her to be submissive.” *Id.* at 549. Furthermore, the supervisor told the employee that “people ‘sometimes [have] to give up the things they need most in order to be a good Christian.’” *Id.* Based on this evidence, this Court agreed with the district court’s finding that “Campos presented sufficient evidence to allow the jury to find that she was forced to quit because she was not a Christian.” *Id.* at 551. Thus, the adverse employment action occurred not because of the employee’s Native American spiritual beliefs, *per se*, but because the plaintiff employee did not conform her religious beliefs to her supervisor’s Christian beliefs. Although this holding does not specifically cite to the *Shapolia* line of cases, it is consistent with that line of cases in recognizing that employees can assert Title VII religious discrimination claims based on nonconformance of their religious beliefs with those of their employers.

Given this Court’s implicit recognition of nonconformance claims and the explicit recognition of such claims by sister circuits, *Amici* urge this Court to follow *Shapolia* explicitly by holding that Title VII’s prohibitions on religious discrimination encompass claims where adverse employment

actions are taken because of the employee's failure to hold or follow the employer's religious beliefs.

II. HORTON PROPERLY STATED A TITLE VII RELIGIOUS NONCONFORMITY CLAIM.

The crux of this appeal on the religious discrimination claim is whether the complaint sufficiently alleged that Horton's prospective employer withdrew an offer of employment because his religious beliefs did not conform to those of the employer. The complaint plainly articulates sufficient facts to withstand Midwest Geriatric's motion to dismiss Horton's Title VII religious discrimination claim. In dismissing this claim, the District Court misconstrued the law.

It erroneously held that Horton's religious discrimination claim "is merely a repackaged claim for sexual orientation discrimination,' and as such, must be dismissed as not cognizable under Title VII." *Horton v. Midwest Geriatric Management, LLC*, No. 4:17-CV-02324, 2017 WL 6536576, at *5 (E.D. Mo. Dec. 21, 2017) (unreported). The District Court was wrong. Related facts can give rise to different—and independent—legal claims. *See, e.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348-49 (1988); *Flowers v. Rego*, 675 F. Supp. 1165, 1166-68 (E.D. Ark. 1987).

What matters is that Horton stated a claim for failure-to-conform religious discrimination under the *Shapolia* standards.

Regardless of whether discrimination based on Horton's sexual orientation and marriage to a man is independently actionable under Title VII, those characteristics are not properly considered in assessing the validity of Horton's religious discrimination claim. For purposes of the religious discrimination legal claim, Horton's sexual orientation itself is irrelevant. Rather, the issue for the religious discrimination claim is *religious beliefs* about sexual orientation or marriage of same-sex couples. The relevant inquiry here is whether Midwest Geriatric took the adverse employment action against Horton based on Horton's failure to hold or follow the employer's religious beliefs—here, religious beliefs about marriage of same-sex couples or sexual orientation.

Furthermore, at the pleading stage, courts have recognized that stating a religious nonconformity claim presents a low hurdle. *Terveer*, 34 F. Supp. 3d at 112. Merely stating that one's lack of adherence to the religious beliefs promoted by the employer was the "genesis of the discrimination" is sufficient to state a *prima facie* case. *Noyes*, 488 F.3d at 1168-69. Indeed, even at the summary judgment stage, an employee must establish only that

the adverse employment action occurred because the employee did not live up to the employer's religious expectations. *Venters*, 123 F.3d at 972.

Horton has sufficiently asserted each of the elements of a failure-to-conform claim as set forth in *Shapolia*, 992 F.2d at 1038. He alleged that Midwest Geriatric solicited him for an employment position, interviewed him, and offered him a position, subject to a background check. (Cmplt., ¶¶ 11, 13, 16 (JA-008-011, JA-026).) While the background check was pending, Horton disclosed to Midwest Geriatric that he was gay and had a male partner. (Cmplt., ¶ 35 (JA-010).) Shortly thereafter, Midwest Geriatric withdrew the offer. (Cmplt., ¶ 41 (JA-011).)

Critically, the complaint alleges that Horton was qualified for the position and selected for it before Midwest Geriatric's owners learned that he held religious beliefs regarding marriage and relationships of same-sex couples that could not be reconciled with their religious beliefs regarding marriage and relationships of same-sex couples. (See Cmplt., ¶¶ 63-64 (JA-008-11, JA-015-018).) Subsequently, the owners withdrew their employment offer to Horton because his religious beliefs differed from theirs. (Cmplt., ¶ 65 (JA-015-018).) These allegations more than meet the minimum required under the prevailing decisions.

Accordingly, the dismissal of Horton's Title VII claim on the basis that it is merely a repackaged claim for sexual orientation discrimination is erroneous. The District Court's dismissal of Horton's religious discrimination claim should therefore be reversed.

Conclusion

For all the above reasons, *Amici* urge this Court to reverse the judgment of the United States District Court for the Eastern District of Missouri.

DATED: March 14, 2018

Respectfully submitted,

Anti-Defamation League, Bend the Arc: A Jewish Partnership for Justice, Hindu American Foundation, Interfaith Alliance Foundation, National Council of Jewish Women, Central Conference of American Rabbis, and Women of Reform Judaism

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Certification of Service

I hereby certify that I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on March 14, 2018.

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