IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN H. ABELES

Plaintiff- Appellant

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, JULIA HODGE and VALERIE O'HARA

No. 16-1330

Defendants-Appellees

APPELLANT'S PETITION FOR (1) PANEL REHEARING AND (2) REHEARING EN BANC

INTRODUCTION

In undersigned counsel's judgment the panel decision in this case (i) overlooked material factual and legal matters, (ii) made findings on factual issues that were controverted in the record, (iii) conflicted with Section 701(j) of the Civil Rights Act (42 U.S.C. § 2000e(j)) and with judicial decisions applying that provision, (iv) conflicted with the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), and (v) determined questions of exceptional importance to minority-faith employees in the enforcement of Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e -2000e-16).

QUESTIONS PRESENTED

1. Whether an employer has made the statutorily prescribed "reasonable accommodation" to the religious observance of an Orthodox Jewish employee by suspending the employee without pay for being away from work on Passover after the employee has (a) followed her 26-year practice of being absent on religious holidays with no prior formal approval process beyond listing for her supervisors the dates of all Jewish holidays on which she would take annual leave, (b) placed the dates of Jewish holidays, as requested by her current supervisors, on their "Outlook" calendars, (c) sent an e-mail on the last workday before the religious holiday, when her immediate supervisor was absent on leave, to both her supervisor and her supervisor's supervisor noting that she would be absent on the following Monday and Tuesday to observe Passover and receiving a return e-mail saying "Thanks. Please see my note about providing us a status update before you leave today."

2. Whether the Metropolitan Washington Airports Authority ("MWAA") is subject to the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*) so that the above-described suspension of the appellant was an unlawful substantial burden on appellant's exercise of Orthodox Jewish observance in violation of the Act.

3. Whether factual findings recited by the District Court and by this Court improperly resolved contested issues of fact that appellant was legally entitled to present to a jury.

ARGUMENT

I.

MS. ABELES WAS PUNISHED BY MWAA FOR TAKING ANNUAL LEAVE ON PASSOVER AFTER REPEATEDLY NOTIFYING HER SUPERVISORS OF THE HOLIDAY AND REASONABLY BELIEVING THAT ANNUAL LEAVE WAS APPROVED IN ADVANCE FOR HER ABSENCE

Some facts recited by the District Court and by the Panel are vigorously contested by the appellant. But the undisputed facts establish that Ms. Abeles did **everything an employee could possibly do** to satisfy any reasonable requirement that she notify her supervisors in advance of her absence to observe a well – recognized Jewish holiday. Indeed, she even satisfied the language of MWAA's "Annual Leave Policy" – language that the Panel opinion does not quote or construe.

(1) Ms. Abeles Satisfied MWAA's Published "Policy" for "Granting Annual Leave."

The Panel Opinion fails to quote or construe the text of the "Annual Leave Policy" that MWAA claims Ms. Abeles ignored in taking annual leave for the concluding days of Passover. That text appears at page 239 of the Joint Appendix.

It provides that "use of annual leave will be requested and approved in advance of the absence . . . by an exchange of e-mails between the employee and supervisor." MWAA's "Policy" does **not** say that the exchange of e-mails must be between the employee and his or her **immediate** supervisor. The language of the "Policy" includes an "exchange of e-mails" with anyone who qualifies as a "supervisor."

Ms. Abeles sent an e-mail to her two supervisors at 11:59 am on Friday, March 29, 2013, advising them again that she would be on annual leave on Monday, April 1, 2013, and on Tuesday, April 2, 2013. Although her immediate supervisor (Valerie O'Hara) was away on leave, that supervisor's supervisor (Julia Hodge) responded with an e-mail at 12:05 pm asking, "What is the nature of this **leave request**?" (Emphasis added.) A reasonable understanding of this e-mail is that Ms. Hodge viewed it as a "request" for leave. Ms. Abeles replied promptly at 12:11 pm to her supervisor, "This is a reminder of my schedule leave for Passover." Ms. Hodge, who was also Ms. Abeles' "supervisor," then responded at 12:16 pm, "Thanks. Please see my note about providing us a status update before you leave today."

The "exchange of e-mails between the employee and supervisor" – the condition specified in MWAA's "Leave Policy" – was completed **in advance of the absence.** Indeed, Ms. Hodge's request for a "status update before you leave today" plainly manifests consent to Ms. Abeles' absence at the beginning of the

following week. Consequently, the Panel Opinion is wrong when it says (p. 4) that "[t]he instant dispute arises from Plaintiff's failure to follow MWAA's formal procedure for requesting leave" and finds (p. 14) that Ms. Abeles "failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013." The record establishes that Ms. Abeles did not fail to follow the "formal procedure for requesting leave" and did obtain advance approval for her absence for religious observance from Ms. Hodge, her "supervisor."

(2) Ms. Abeles Properly Relied on Her 26 Years' Experience With Various Supervisors at MWAA.

Ms. Abeles' affidavit in response to MWAA's motion for summary judgment declared under oath with respect to her experience of taking annual leave for Jewish holidays while employed at MWAA under different supervisors (JA 448): "I routinely and invariably advised my supervisors well in advance in each calendar year of the dates when Jewish holidays were to be celebrated. My supervisors uniformly accepted this notification as the equivalent of a request for annual leave, and I was absent from work on these specified dates. I would frequently remind supervisors of these dates as they approached, but I was never told that annual leave would be denied if I did not make a formal 'request' for such leave in advance. Before April 2013, my advance notification of the Jewish

holidays was always accepted by my supervisors as the equivalent of a request." The Panel Opinion erroneously found (p. 15), contrary to Ms. Abeles' sworn statement, that Ms. Abeles' failure to "comply" with the published "Leave Policy" was "the sole differentiating factor from every occasion on which leave was granted." In fact, "leave was granted" on every occasion for 26 years when Ms. Abeles followed the same procedure she followed in 2013.

Ms. Abeles was never told by her supervisors that they would condition approval of annual leave for observance of Passover or any other Jewish holiday in 2013 on a formal request for leave and an oral or e-mailed advance consent by Ms. O'Hara or by any supervisor. The Panel Opinion contains a finding (p. 4) that Ms. Abeles was told by O'Hara, Hodge, and Labor Relations Specialist Ramos that she had to "[u]se leave according to the Airports' Authority's Absence and Leave Policy." This is a disputed fact that could not lawfully be decided on summary judgment. In response to MWAA's motion for summary judgment and Paragraph 20 of MWAA's Statement of Undisputed Material Facts (JA 127-128), Ms. Abeles responded that her meetings with O'Hara, Hodge, and Ramos "were designed to discuss the 2013 Work Goals and Performance Factors. The discussion was about the 9 a.m. arrival time and early departure on Friday. **There was no discussion of MWAA's leave policy**." (JA 428; emphasis added.)

It is a well-established proposition of law that "[p]ast practices rise to the level of an implied agreement when they have 'ripened into an established custom between the parties.'" *Brotherhood Railway Carmen of the United States and Canada v. Missouri Pacific Railroad Co.*, 944 F.2d 1422, 1429 (8th Cir. 1991), cited by *Bonnell/Tredegar Industries, Inc. v. National Labor Relations Board,* 46 F.3d 339, 344 (4th Cir. 1995) ("any well established practices that constitute a 'course of dealing' between the carrier and employees"). In the present circumstances, the consistent 26-year practice under which Ms. Abeles took annual leave on the Jewish holidays that she listed at the beginning of each calendar year was "established custom" and a "course of dealing" that effectively became part of her employment contract.

II.

THE PANEL'S HIGHLY RESTRICTIVE APPLICATION OF THE PROTECTION FOR RELIGIOUS OBSERVANCE IN TITLE VII OF THE CIVIL RIGHTS ACT AND IN THE RELIGIOUS FREEDOM RESTORATION ACT WARRANT REVIEW AND CORRECTION BY THE FULL COURT

(1) The Panel's Ruling Facilitates Evasion of an Employer's Title VII Obligation To Make a Reasonable Accommodation for an Employee's Religious Observance.

The Panel Opinion acknowledges (p. 3) that "MWAA knew Plaintiff's religious beliefs prohibited her from working on Jewish holidays." Her Orthodox

Jewish faith was so well-known at MWAA that, as the Opinion notes (pp. 3-4), she was permitted to leave early on Fridays and she was provided kosher food at staff events. MWAA has never claimed that her absence on such holidays created any hardship whatever, much less the "undue hardship" that Section 701(j) of the Civil Rights Act, as amended, contemplates as a permissible exception to the statutorily mandated obligation of reasonable accommodation. Nor is there any claim that Ms. Abeles' absence on April 1 and 2, 2013, was a surprise to anyone at MWAA or caught personnel of MWAA unaware.

If the steps Ms. Abeles took before her absence on the last two days of Passover had not, in MWAA's view, fallen short of the letter of its "Leave Policy," MWAA would have been obliged by Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e-2000e-16) (and, in our understanding of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), by that law as well) to allow Ms. Abeles to be absent on April 1 and 2, 2013, to observe Passover. MWAA's legal claim – sustained by the Panel – is that Ms. Abeles alleged omission of the technicality of receiving an "OK" from Ms. O'Hara (an "OK" that Ms. O'Hara could not lawfully withhold) justified imposing an unpaid suspension on Ms. Abeles.

This reasoning effectively makes vindication of a federally guaranteed right dependent on miniscule technicalities with which an employer may ambush a religiously observant employee. A hypothetical growing out of *Equal Employment*

Opportunity Commission v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015), may illustrate this point. If Abercrombie & Fitch hired Ms. Elauf, the practicing Muslim who wears a headscarf for religious observance, as a salesgirl, could it suddenly impose a requirement that, before she goes on the sales floor each day, Ms. Elauf must request and obtain the oral consent of the chief salesperson – even though the chief salesperson could not lawfully deny her request? In the unlikely event that such daily prior oral consent could be required, could Abercrombie & Fitch suddenly penalize Ms. Elauf by suspending her without pay for failure to make the required request, if it had never, in the preceding year, imposed a rule requiring such a request?

These hypothetical facts parallel the situation in this case. Ms. Abeles was penalized by MWAA for failing to have her supervisor approve a request that her supervisor could not lawfully refuse.

In an *amicus curiae* brief (whose filing was opposed by the MWAA) the National Jewish Commission on Law and Public Affairs ("COLPA"), an organization of volunteer attorneys that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States, enumerated reasons why employers frequently try to avoid the "reasonable accommodation to religious observance" requirement of Title VII. COLPA noted that the ruling of the District Court "will significantly hamper the

ability of many religious Jews to find and maintain gainful employment." COLPA Br. 2. The full Court should rehear and review the Panel's decision and weigh these consequences.

(2) <u>Whether MWAA Is Exempt from the Religious Freedom Restoration Act and From Virginia's Comparable Law Is an Important Federal Question That This Court Should Decide.</u>

In footnote 4 of its Opinion (p. 8), the Panel declined to consider an important question of federal law – *i.e.*, whether MWAA may claim that it is exempt from the federal Religious Freedom Restoration Act (42 U.S.C. § 2000bb, *et seq.*) and Virginia's equivalent – Va. Code Ann. § 57-2.02(B). MWAA is recognized in 49 U.S.C. § 49106(a)(1) as "a public body corporate and politic." It was assigned authority over two airports by the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500. Its 17-member Board of Directors is appointed by the President of the United States, the Governors of Virginia and Maryland, and the Mayor of the District of Columbia.

No reported decision has exempted MWAA from either RFRA or its Virginia counterpart. The broad remedial policy of RFRA and its language bring within the law's scope discriminatory conduct by any "person acting under color of law." Following the Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress amended RFRA to withdraw "a State, or a subdivision of a

State" from RFRA's reach. It did not, however, remove a "public body corporate and politic" over which Congress had exercised its legislative authority in enacting the Metropolitan Washington Airports Act of 1986. This Court should hold that this archetype of a federal quasi-governmental body is subject to RFRA (and/or its Virginia equivalent) and may be sued under that law when its conduct substantially burdens an employee's exercise of religion and does not further a compelling governmental interest.

In addition to supporting Ms. Abeles' position regarding MWAA's failure to provide reasonable accommodation, the Becket Fund for Religious Liberty and the American Jewish Committee, in a 27-page *amicus curiae* brief, argued persuasively that the MWAA "is a federal instrumentality under *Lebron* [*v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995)]." The legal position urged by the Becket Fund and the American Jewish Committee deserve consideration by the full Court.

III.

THE PANEL'S AFFIRMANCE OF SUMMARY JUDGMENT RESTED ON IMPERMISSIBLE RESOLUTION OF DISPUTED FACTS

Disputed factual issues may not be resolved at the summary judgment stage by either a District Court or this Court. *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015); see *Tolan v. Cotton*, 134 S. Ct. 1861,

1868 (2014); *Fountain v. Filson*, 336 U.S. 681, 683 (1948). The Panel Opinion, however, adopted Judge Hilton's findings on contested factual issues and erroneously characterized other findings as undisputed.

(1) The Panel Opinion Erroneously Sustained Judge Hilton's Finding That Ms. Abeles Had Been "Insubordinate."

Ms. Abeles has consistently denied the allegations made against her by Mss. O'Hara and Hodge that she was "insubordinate." The Statement of Undisputed Material Facts submitted in opposition to MWAA's motion for summary judgment stated: "Beginning in late 2012, Ms. O'Hara and Ms. Hodge began making **unjustified criticisms** of plaintiff's performance." JA 342 (emphasis added). In her deposition testimony Ms. Abeles disputed the allegation that her performance had "deteriorated." JA 292-294. She also disputed MWAA's Statement of Undisputed Material Facts in which MWAA had alleged that her performance had "deteriorated." JA 127, 427 (para. 17). The contested nature of this pejorative allegation was made clear in the District Court. See JA 425-426 ("A chain of e-mails that began even before December 2012 demonstrates the supervisors' and HR staffs' pettiness and hostility to Susan, and the e-mails of April 2 through April 4, 2013, prove how expeditiously they pounced on her absence for religious observance to discipline her in a most ignominious and unlawful manner. We deny that Susan's performance 'deteriorated' suddenly 'at the end of 2012,' as MWAA

alleges in paragraph 17 of its 'Statement of Undisputed Material Facts.' Susan defended herself in e-mails and orally against unjustified attacks by Julia Hodge and Valerie O'Hara.")

If this case had proceeded to trial and MWAA had sought to justify its suspension without pay of Ms. Abeles on the ground that she had been insubordinate, MWAA would have had the burden of satisfying a jury that this allegation by her superiors was valid. How does an employee rebut a claim of "insubordination" other than by denying the allegation and asking the individual who has made the allegation to prove it? In this case Judge Hilton and the Panel convicted Ms. Abeles of "insubordination" not because of affirmative proof that she had been "insubordinate," but because she had failed to prove herself innocent. This cast the burden of proof on the wrong party.

(2) Exhibits From MWAA's Files That Were Marked As Trial Exhibits Were Disregarded by the Panel.

Ms. Abeles asserted that she had contested the allegation of "insubordination" with a letter from an attorney that MWAA refused to accept because her lawyer was one hour late in requesting an extension of one day in which to respond to the allegation. The Panel Opinion refused to credit this assertion because "the letter is not included in the record on appeal." Panel Opinion, p. 12, n. 7.

The attorney's letter was marked as Plaintiff's Exhibit 166 in preparation for trial. Paragraphs 36-39 of Ms. Abeles' Statement of Undisputed Material Facts state: "The plaintiff retained counsel to respond to Ms. Hodges' suspension letter. Plaintiff's retained counsel requested an extension of time to respond to the suspension letter. Because the request for an extension of time arrived after close of business on the last day of a 7-day period to respond, the extension was denied. Plaintiff's counsel delivered a letter on the following business day responding to the allegations in Ms. Hodges' suspension letter." JA 434.

MWAA responded to each of these four Statements of Undisputed Material Facts with the same response: "Not in dispute." JA 469. By this response MWAA conceded that Ms. Abeles had retained a lawyer and had responded to the "insubordination" charges in Ms. Hodge's notice of suspension. The Panel Opinion could not, therefore, truthfully state that Ms. Abeles did not contest the allegation of insubordination made by her superiors. The letter from her lawyer – even if not in the appellate record or the Joint Appendix – is admissible at a trial.

Another document produced by MWAA in discovery and marked as Trial Exhibit 97 is a memorandum from Mr. Ramos to Ms. O'Hara dated April 1, 2013 (which was the first of the two days on which Ms. Abeles was observing the end of Passover). Mr. Ramos provided a proposed "reprimand" letter to be signed by Ms. O'Hara and to be served on Ms. Abeles because of her alleged "insubordination."

This memorandum was the subject of testimony during the depositions of Ms. Hodge and Mr. Ramos. Plaintiff can introduce it at trial to prove the proposition that the Panel Opinion refused to credit – *i.e.*, that "absent Plaintiff's failure to request leave properly, MWAA would only have 'reprimanded' Plaintiff for insubordination." (Panel Opinion, p. 11) The Panel Opinion narrowly construes the portion of Ms. Hodge's deposition that appears in the appellate record as not "conceding" this assertion of fact. But the exhibit marked for trial proves that until Ms. Abeles was absent to observe Passover, MWAA's HR Department (*i.e.*, Mr. Ramos) and Ms. Abeles' supervisors were not going to suspend Ms. Abeles but were only intending to "reprimand" her. The five-day suspension without pay was added only **after** Ms. Abeles was out of the office observing Passover.

CONCLUSION

For the foregoing reasons, the Panel should grant rehearing in this case or the appeal should be reheard en banc.

Respectfully submitted,

s/Nathan Lewin

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Nathan Lewin, Esq.
LEWIN & LEWIN, LLP
888 17th Street, NW, 4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Attorney for Appellant